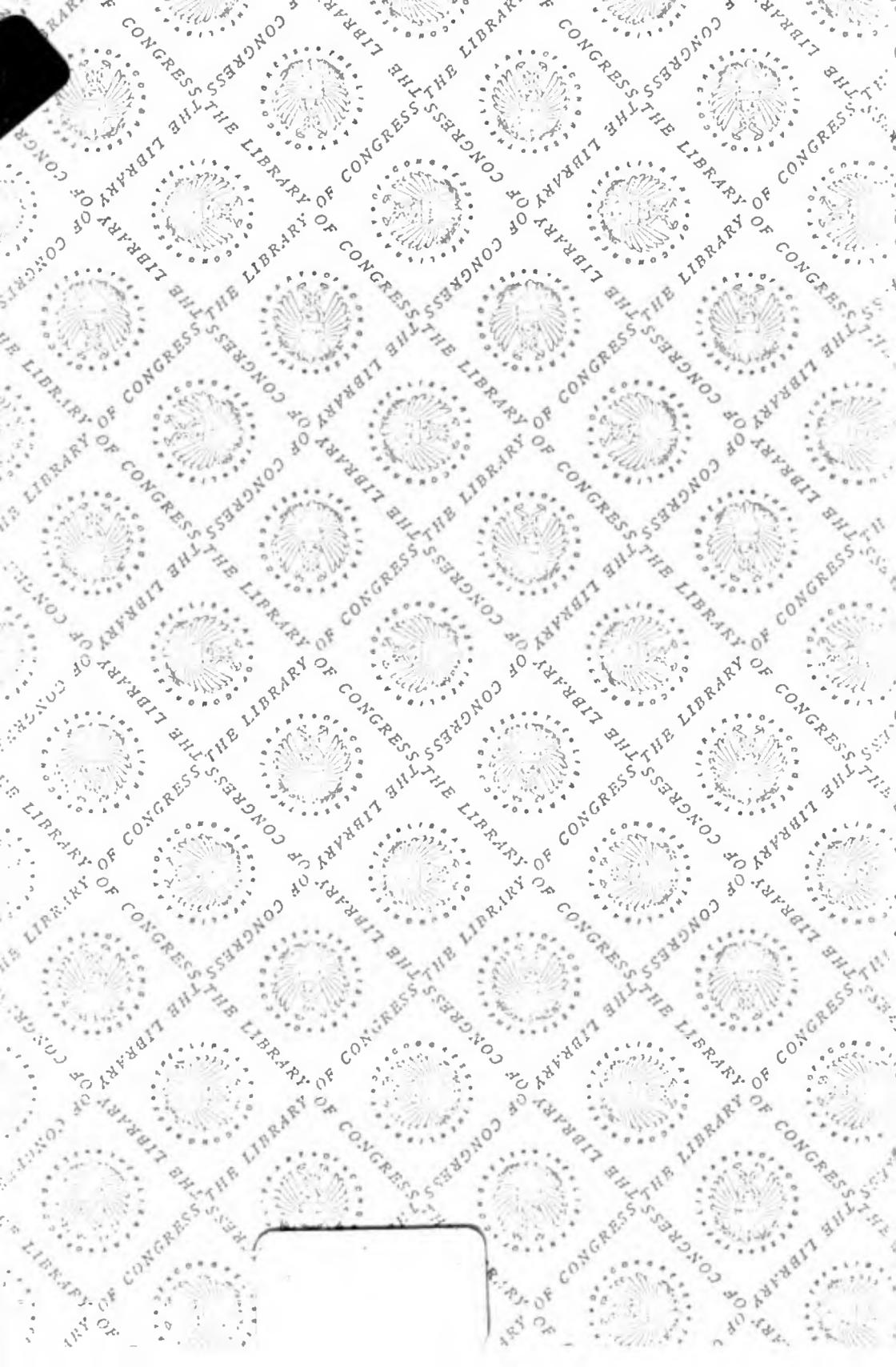
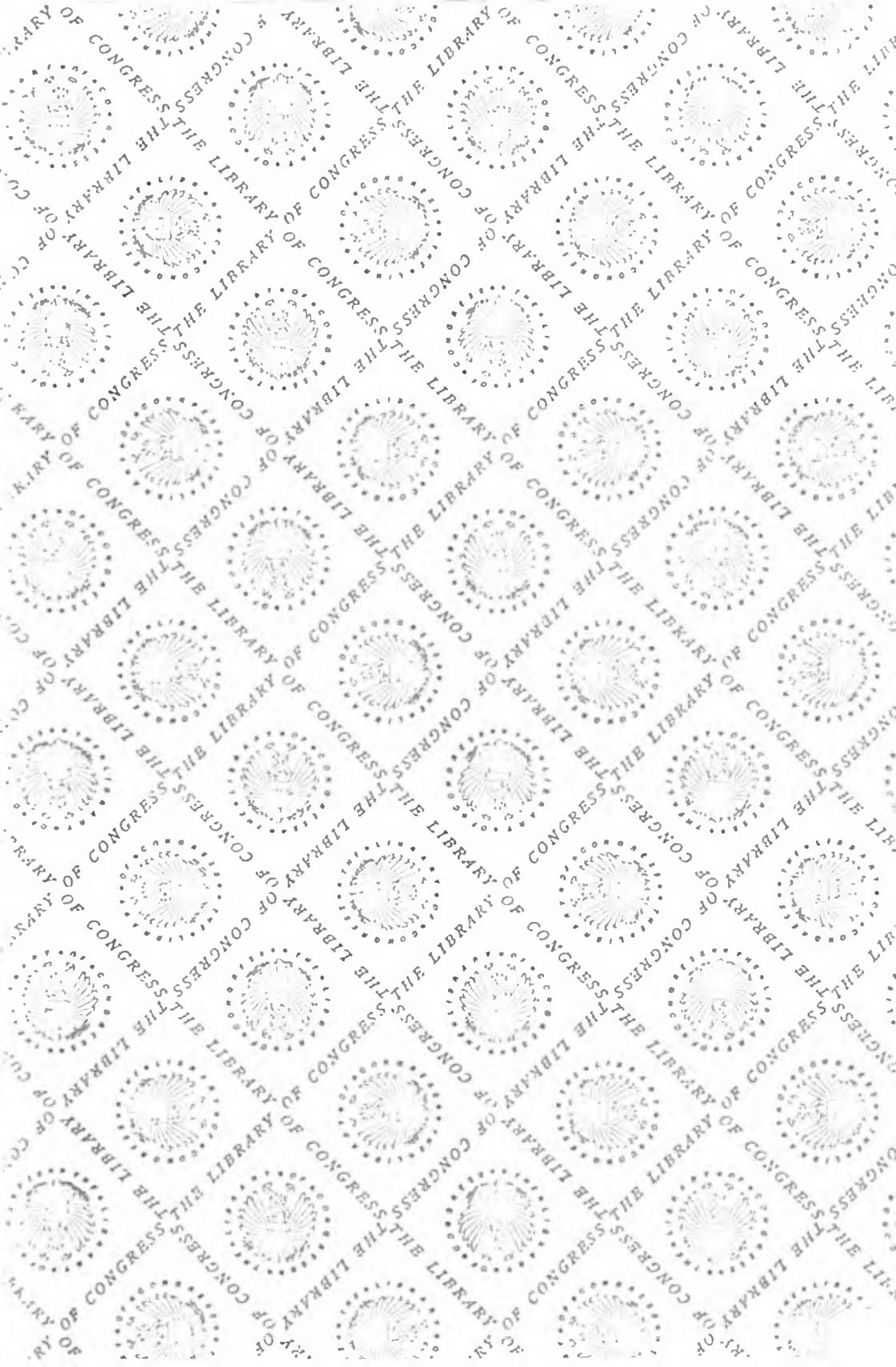


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*United States, Congress, House, Committee on the Judiciary - Subcommittee
on Courts, Civil Liberties, and the Administration of Justice.*

**GENERAL OVERSIGHT ON PATENT, TRADEMARK,
AND COPYRIGHT SYSTEMS**

HEARING

BEFORE THE

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

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

GENERAL OVERSIGHT

APRIL 9, 1979

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GENERAL OVERSIGHT ON PATENT, TRADEMARK, AND COPYRIGHT SYSTEMS

MONDAY, APRIL 9, 1979

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 2:30 p.m. in room 2237 of the Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Gudger, Mazzoli, and Railsback.

Staff present: Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This afternoon, the subcommittee will continue with its general oversight hearings with respect to agencies for which we have legislative authority.

We have already heard from the heads of the Legal Services Corporation and the Bureau of Prisons, the two largest agencies within our oversight.

We now turn to agencies which, while not mammoth in size, nevertheless represent a jurisdictional interest on the part of the Judiciary Committee, going back to the first Congress in 1789.

These are agencies which deal with the patent, trademark, and copyright systems.

Our first presentation this afternoon will consist of a panel of two, representing the Department of Commerce. I would like to greet Dr. Jordan Baruch, Assistant Secretary of Commerce for Science and Technology, and also the distinguished Commissioner of Patents and Trademarks, Donald Banner.

TESTIMONY OF JORDAN BARUCH, ASSISTANT SECRETARY FOR SCIENCE AND TECHNOLOGY, AND DONALD BANNER, COMMISSIONER OF PATENTS AND TRADEMARKS

Mr. KASTENMEIER. We greet you, and would you come forward and proceed with your statements, as you may, or if you desire, we will put them in the record and you can summarize them.

Dr. Baruch?

Dr. BARUCH. Thank you, Mr. Chairman.

If you don't mind, I would like to submit my prepared statement for the record and take a few moments and summarize what I think is the important part of it.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be incorporated in the record.

[The complete statement follows:]

JORDAN J. BARUCH, ASSISTANT SECRETARY FOR SCIENCE AND TECHNOLOGY,
U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and members of the Committee, I welcome the opportunity to appear before you today to discuss the role of the Patent and Trademark Office in the context of current national problems.

As you know, we face a world inflation today which appears to have somewhat different characteristics than previous periods of inflation. Due to external shocks such as large increases in the costs of energy, normal macroeconomic actions, which are always important to our efforts to stem inflation, have had less effect than in the past.

This fact should not really surprise us since there has been an enormous growth of world demand for the limited products and services that our world industrial system can supply. This growth has been occasioned in no small measure by the movement of funds from the industrialized countries to those countries that have sizeable natural resources. This flow of money coupled with growing expectations among the world's people for a higher standard of life, has led to increased world competition for the goods and services created by the industrial community.

The industrialized nations recognize that they must act to stem world inflation. Inaction is, I believe, politically unacceptable because it would mean that their own citizens, who must compete with others for the limited supply of goods and services, would have to spend more and more of their hours earning fewer and fewer of the necessities of life and the amenities to which they have grown accustomed or have come to expect. The problem is exacerbated for the people of the less developed countries.

While the industrialized nations must continue to act to reduce inflation by pursuing the limited range of macroeconomic options available to us to reduce demand and dampen expectations of an ever improving standard of living, we must place increased emphasis upon improving the production function—increased emphasis upon producing "more with less" and upon conserving and recycling the resources now available to us. The alternative to improving the production function, the alternative to an emphasis on increasing the supply of goods and services, is, I believe, world instability.

How can we increase supplies under the constraint of limited resources? The expansion of supply traditionally has rested almost entirely on increasing labor and capital inputs. We must now recognize that continued expansion depends critically upon improving the technology of production, that combination of skill and art—of science and craft—which allows us to increase production beyond what is attributable solely to increased capital and labor inputs. It is this recognition which has caused the Administration to place increased emphasis upon the status of industrial innovation in the United States, an emphasis which is also reflected in the current policy deliberations of other industrialized nations.

In sum, I believe that the present world situation no longer permits dependence upon traditional methods of increasing supplies. If the industrialized nations of the world are to meet the world's expectations and demands and if this country is to support its domestic population and indeed continue the historical improvement in its standard of living, we will have to find new ways to create existing goods and services and we will have to create new kinds of goods and services. I have not differentiated between improvements in how we make our goods or in the characteristics of the goods themselves. A process that manufactures lightbulbs at a lower cost of a lightbulb that delivers illumination at a lower cost because of longer life or energy efficiency are both equivalent means of producing the final amenity—illumination—at a lower cost to society. Changing the character of our processes and products is the activity called industrial innovation. For it to benefit our domestic population as well as the peoples of the world, we must ensure that it takes place in a fashion that improves this country's balance of trade.

Mr. Chairman and members of the Committee, I have tried to set the context for industrial innovation in my opening remarks because discussions of patents and patent law are often considered to be esoterica of interest to a small body of specialists without significant import to the greater tides of human affairs. I believe that day has passed. Industrial innovation over the next decade will play a vital role in world peace, in the way we live, and, for countless millions, survival itself. Because patents and industrial innovation are inextricably inter-related in our economic system the same importance can be attached to patents themselves and to the way we manage their creation and their enforcement.

For industrial innovation to take place, someone must take the risk of trying to convert the vision of a new product or process into a working commercial reality. In managed economies such as the Soviet Union where the rewards for success at such risk taking are small and where the penalties for failure may be large, industrial innovation proceeds at a glacial pace. In Japan, Germany and, for many years, the United States, where the rewards for success are high—even though the penalties for failure often mean bankruptcy—the contrary is true. Many policies of the Federal Government affect our country's ratio of reward to penalty for undertaking the risky but critical venture of innovation; of them all, none is more important than our patent system. An entrepreneur armed with rights under a valid patent, has an improved likelihood of being able to capture the rewards of the risky innovation process in which he invests. It is, however, only an improved probability. The optimism of an entrepreneur—the crucial characteristic of such a risk taker—may be unfounded and years of effort and large amounts of money may come to naught if others invent and produce products or processes that do the job cheaper and/or better or expected demand does not materialize because the product is too expensive. Innovation is a fragile process but the thing that drives it in the free world is the expectation of a monetary reward greater than could be gained by other less risky activities.

Clearly then if we want industrial innovation to progress in our country without changing our economic system and without a Skinnerian approach to changing the thinking of our innovators, our patent system must result in patents that are as nearly as unassailable as possible. Indeed analysis shows that as the level of investment in the innovation process increases the degree of unassailability of a patent should increase. The commitment of resources to build a first prototype is very different from the larger commitment required to build a commercial scale-up, the still larger commitment to build a pilot plant and the frequently enormous commitment required for full scale production and marketing. At present, however, the opposite is frequently true. As one gets closer and closer to a final commercializable product or useful process, as one invests more and more, imitators who would capitalize on the entrepreneur's progress without sharing his risks are more and more motivated to litigate the validity of the patent—a process which increasingly assails and destroys its value.

Donald Banner, the Commissioner of Patents and Trademarks, and I have made a conscious policy decision to increase the validity of the patents issued by the Patent Trademark Office as opposed to increasing the quantity of patents issued. The strategy is imperative if we are to foster real innovation in pursuit of our country's solution to our problems of inflation, unemployment and our share of world markets. We have not, however, stopped there. We are diligently searching for internal strategies that can increasingly enhance the validity of an issued patent, that can reduce the cost of defending and enforcing it and that can warrant the investment made on its strength.

With your permission Mr. Chairman I would like to make one last point. It is frequently believed that patents are the tool of monopoly—the tool of big business. Nothing could be further from the truth. The largest of our businesses have many ways of protecting their position—through distribution channels, name and advertising budget to name only a few. The smaller businesses, those on which more than half of our country's innovation depends and those on which almost all our country's radical innovation depends have no such alternative tools. To them the patent may be the primary corporate asset. To them patents are not a luxury but an absolute necessity. To them the strength of the patent system is the strength of their business.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that you or members of the Committee may have.

Dr. BARUCH. I welcome the opportunity to appear before you today to discuss the role of the Patent and Trademark Office, not by itself, but in the context of our current national problems.

The importance of the Patent and Trademark Office is belied by its size. As you know, we face a world inflation today that stems in large measure from the enormous growth of world demand for the limited products and services that our world industry can supply.

The industrial nations recognize that they must act to stem world inflation. While they must continue to pursue the limited range of macroeconomics options available, they must place increased emphasis on producing more with less and upon conserving and recycling the resources now available to them. A greater emphasis on increasing the supply of goods and services is, I believe, critical to maintaining world stability.

How can we increase supply under the restraint of limited resources? The expansion of supply traditionally has rested almost entirely on increasing capital and labor inputs.

We must now recognize that continued expansion depends critically upon improving the technology of production, that combination of skill, art, science, and craft which allows an increase in production beyond that which is attributable solely to increased capital and labor inputs.

It is this recognition that has caused the administration to place increased emphasis upon the status of industrial innovation in the United States, an emphasis which is also reflected in the current policy deliberations of many other nations.

If this country is to support its domestic population and, indeed, continue the historic improvement in its standard of living, we will have to find new ways to create existing goods and services, and we will have to create new kinds of goods and services.

Changing the character of our processes and products is the activity called "industrial innovation." For it to benefit our domestic population as well as the other peoples of the world, we must insure that it takes place in a fashion that improves this country's balance of trade.

Patents are central to that task. As you can see from the audience, Mr. Chairman, discussions of patents and patent law are usually considered pretty esoteric stuff, without significant import to the greater tides of human affairs.

Today, that just is no longer true. Industrial innovation over the next 10 or more years will play a vital role in world peace, in the way we live, and, for countless millions of people over the Earth, in survival itself. Because patents and industrial innovation are inextricably interrelated, the same importance can be attached to patents.

Mr. Chairman, many policies of the Federal Government affect the risky but critical venture of innovation. None of them is more important than our patent system. Innovation is a risky fragile process, but the thing that drives it in the free world is the expectation of a monetary reward greater than that which could be gained by other less risky activities.

The rights to a valid patent is often central to that monetary reward, and, hence, that risk taking. Thus, if we want innovation to proceed, our patent system must result in patents that are nearly unassailable as possible.

The Commissioner of Patents and Trademarks and I have made a conscious policy decision to increase the presumptive validity of the patents issued by the Patent and Trademark Office, as opposed merely to increasing the quantity of patents issued or the speed with which they are issued.

We are diligently searching for ways to enhance the validity of issued patents and to reduce the costs of defending and enforcing them. Thus, we seek to encourage investment made on the strength of issued patents.

With your permission, Mr. Chairman, I would like to make one last point.

It is frequently believed that patents are the tools of monopoly, the tools of big business. In fact, nothing could be further from the truth.

Our large businesses have many ways besides patents of protecting their position—from distribution channels, through their name, and their advertising budgets—just to name a few.

Our small businesses, on which more than half of our country's innovation depends and on which almost all of our country's radical innovation depends, have no such alternate tools.

To them, a patent may be their primary corporate asset. To them, patents are not a luxury, but an absolute necessity. To them, the strength of their patent is indeed the strength of their business.

Mr. Chairman, that concludes my summary. I would be pleased to answer any questions that you or members of your committee may have.

Mr. KASTENMEIER. Thank you.

I think at this point we might profit from hearing the Commissioner, and then several of us will pursue questions with you.

Mr. BANNER. Thank you, Mr. Chairman.

Like Dr. Baruch, I will submit my formal statement and hit the highlights for you, if I may.

Mr. KASTENMEIER. Without objection, your statement will be received.

[The complete statement follows:]

**STATEMENT BY DONALD W. BANNER, COMMISSIONER OF PATENTS AND TRADEMARKS,
U.S. DEPARTMENT OF COMMERCE**

Mr. Chairman: I appreciate very much having the opportunity to discuss the patent and trademark system and the operation of the Patent and Trademark Office with the subcommittee today. I will attempt to cover our current operations, our problems and our thoughts regarding the future of industrial property protection both at home and abroad.

First, however, I would like to place the patent system in its proper historical perspective. The patent system is founded in the Constitution of the United States. Article 1, section 8 gives the Congress the power to promote the progress of the useful arts by giving inventors the exclusive right to their respective discoveries for a limited period of time. The first patent law was enacted in 1790 by the First Congress.

The patent system has served our Nation well in the ensuing 189 years. It has provided the Nation with a voluntary incentive system which has resulted in the investment of time, energy and money in new technology at the cutting edge of science. Coming from Illinois, I have always thought President Lincoln captured the essence of this stimulus to our Nation's economy when he said, "The patent system added the fuel of interest to the fire of genius".

As Dr. Baruch has stated, furthermore, the patent system is extremely relevant to the problems of today. Our balance of payments problem is not so much the result of our increased oil bill as it is our inability to pay for it with ex-

ports of manufactured goods. And the decline in the level of our exports of manufactured goods is at least partially due to the erosion of our technological lead.

According to some estimates, forty-five percent of the Nation's growth from 1929 to 1969 resulted from technological innovation. American jobs, increased productivity, and stable prices are all dependent on enhanced innovation. I consider the patent system to be an indispensable part of the solution to this urgent national problem. I therefore consider it especially timely to discuss with you today our efforts to insure that the patent system is equal to the task.

The Patent and Trademark Office is located in the Crystal City complex in Arlington, Virginia, adjacent to National Airport. At present we have about 2,800 employees.

During the current fiscal year, we expect to spend over \$96 million in appropriated funds. About 30 percent of that amount will be returned to the Treasury in fees collected from patent and trademark applicants and users of our services.

The Patent and Trademark Office can be viewed as having responsibilities in three general areas: (1) the examination and issuance of patents pursuant to the statutory criteria contained in title 35 of the United States Code; (2) collection and dissemination of the technology disclosed in patents as also mandated by that Code; and (3) examination and registration of trademarks in accordance with the requirements of the Trademark Act of 1946.

PATENT EXAMINATION

The largest of our activities is involved with examining the approximately 100,000 patent applications that are filed each year. The patent law is designed to promote technological progress by providing incentives to make inventions, to invest in research and development, to commercialize new, improved, or less expensive products and processes, and to disclose new inventions to the public instead of keeping them secret.

The law defines a patent grant as the right to exclude others from making, using or selling an invention for a period of 17 years. A patent may be granted only after an examination by the Patent and Trademark Office to determine whether the invention meets the statutory criteria for patentability.

Our examination prevents the issuance of any patent on about one-third of the applications filed and results in narrowing the scope of protection defined in the claims in most of those which are issued. Examination also enables patent owners and their competitors to better gauge the strength of patent rights. If patents were granted by a simple registration system as in some countries, without examination, each interested member of the public would have to make his own examination. From an overall cost-benefit standpoint, it is far more efficient to have this done centrally.

The examining is done by a corps of about 900 professional examiners. Patent examiners must have scientific or technical education and many of them are lawyers as well.

Before an examiner can allow an application he must conclude that the disclosure of the invention is complete, and that the invention is new, useful, and nonobvious in the light of the closest known prior art. The most difficult part of the examination is determining with a degree of certainty whether the invention is new and nonobvious. To investigate this the examiner makes a search of the Office's files of prior U.S. and foreign patents and technical literature.

Last year we received 101,000 applications and disposed of 103,000. Of the 70,000 patents issued last year, only some 40,000 were issued to U.S. nationals which is the lowest number for U.S. nationals in the past 15 years. Conversely, the number of patents issued to foreign nationals has risen over the past 15 years, both in percentage from 20 to 37 and in number from 9,000 to 26,000.

During the last decade one of the most pressing problems for the Office was a large and growing backlog of unexamined patent applications and the resulting long pendency time between filing of an application and issuance of a patent. The average pendency of patent applications in 1964 was 37 months. However, average pendency has dropped steadily in recent years. This has occurred because of new examining and processing techniques and because of some increase in the examining staff. The goal has been to achieve an average pendency of 18 months. We are close to that goal. The current figure is around 20 months, having risen from a recent low of approximately 19 months. Consequently,

backlogs and patent pendency continue to be pressing Office problems and we carefully monitor receipts and disposals with a view to achieving the 18-month goal.

It should be recognized that the current 20-month pendency includes the times when we are waiting for applicants to respond to our correspondence and to pay the final fees, as well as for printing the patent and for other processing.

The Office has been paying a great deal of attention to how we can make the best examination possible within the limits of our resources. Since 1974 we have had a Quality Review Program. A 4 percent sample of applications allowed by examiners is checked by a group of experienced examiners before patents are granted. When errors are found by the reviewers, these applications are turned back for reopening of examination.

Currently, examiners now complete the examination of an application in approximately 15 hours. Since the difficulty of examining varies quite a bit in different technologies, we have a formal system for taking into account the relative complexities of the various technologies when evaluating the productivity of examiners.

In the past several years, we have made several changes in our Rules of Practice governing patent examining and appeal procedures that are intended to improve the quality and reliability of issued patents. The rules now afford patent owners a relatively inexpensive way to have their patents reexamined in the light of prior art that was not considered by the examiner before. Previously a patent owner learning of prior art that may cast a cloud on his patent had no way to have this tested except through litigation. The rule now allows him to obtain a reexamination from the Office by making application for the reissuance of his patent. The Office determination of patentability of the reissue application is no more binding on a court that later considers the patent than is our initial determination on any application, but courts are given the benefit of the examiner's thinking in regard to prior art not previously considered.

A notice of each reissue application is published in our weekly Official Gazette. Reexamination starts two months after publication, to permit interested members of the public to send the examiner other references that he may consider during the examination of the reissue application. The new procedure has resulted in a substantial increase in the number of reissue applications being filed and because of the public involvement, an increase in the number of allegations of applicant fraud.

INFORMATION DISSEMINATION

The second major responsibility of the Office is the collection, classification and dissemination of technology disclosed in patents. This is a bigger part of our operations than is generally realized. Every patent application must contain a written description of the invention sufficient to enable a person skilled in the art to make and use the invention. The application must also set forth the best mode of carrying out the invention. When the patent is issued, this technical disclosure is printed and widely disseminated by the Office.

The disclosure of technical information that otherwise might be kept as a trade secret is one of the major benefits of the patent system. It has been shown that more than 8 out of every 10 patents contain technical information that is not reported in the non-patent literature. The disclosure serves as a valuable teaching aid, allowing researchers to build on the research of others and to avoid the needless duplication of research effort.

We disseminate over 8 million copies of patents each year. Many of these are sold to the public at the statutory fee of 50 cents apiece. We fill over 15,000 orders for copies of patents each day. Copies of all issuing patents are supplied to 30 libraries throughout the United States. Copies are sent to all the major foreign patent offices in return for copies of their patents. About half a million copies a year go into the search files used by examiners and the public at Crystal Plaza. Another half million are cited by examiners as relevant to pending applications and are mailed to the applicants.

Our search file contains about 23 million prior art documents. These are divided according to subject matter into over 300 classes that are further divided into about 100,000 subclasses. It is a major effort to keep the search files complete and current but a necessary one because, for one thing, the examiners use these files to determine patentability of applications being considered by them. More than 300 people are involved in patent documentation programs. Because subclasses grow in size and technology develops along new lines, the classification system must be updated continuously to maintain it as an effective search

tool. In addition to the 70,000 new U.S. patents, plus cross references, that are added to the search files each year, we are adding foreign patents at the rate of about a quarter million a year, and a considerable volume of non-patent technical literature.

TRADEMARK EXAMINING

Our Office has the responsibility for administration of the federal trademark registration statute—the Trademark Act of 1946. A trademark is a name or symbol used to identify the source or origin of goods and distinguish them from the goods of others.

Although examination of trademarks accounts for only 5 percent of our budget, the economic value of certain registered trademarks far exceeds the economic value of many patents. Trademark registration is quite important in helping to protect business investments and to avoid deception or confusion of consumers. By allowing a person to register his mark in our Office, we confirm common law rights in the mark that he has obtained by using the mark in commerce. Unlike patents, trademark registrations can be renewed indefinitely so long as the mark remains in use. Last year we received about 50,000 trademark applications which represents a 50 percent increase in the last three years. About two-thirds of these are finally registered.

The procedure for examining a trademark application is roughly analogous to that followed in examining a patent application. Our more than 50 trademark examiners check applications for compliance with formal requirements and to see whether there is a likelihood of confusion with other marks.

It currently takes approximately six months after filing a trademark application for it to be taken up for consideration by the Office. Unfortunately, because of recent increased filing levels and budgetary constraints, this period will increase to more than twelve months by the end of this fiscal year.

Under the trademark law, unlike the patent law, there is a procedure by which interested parties may oppose the registration of a mark or may petition for cancellation of a mark already registered. These proceedings are handled by our Trademark Trial and Appeal Board.

LEGISLATIVE AND INTERNATIONAL ACTIVITIES

There are a number of legislative proposals for improving the operation of the Patent and Trademark Office which we are currently considering. In addition, there are several international industrial property initiatives in which we are involved, many of which have already generated, or soon will generate, additional proposals for legislative changes in our patent and trademark laws.

An area of legislative consideration within the Patent and Trademark Office at this time involves the question of patent fees. Since the last increase in patent fees was enacted in 1965, the overall recovery from fees of the cost of operation has fallen from nearly 70 percent to less than 30 percent. A report by the General Accounting Office last year noted this decrease and recommended legislation to provide a more equitable sharing of the cost of operation of the Patent and Trademark Office between patentees and the tax-paying public. We have been studying a number of possibilities, including the institution of a system of fees after patent issuance to maintain the patent in force similar to the patent systems in other countries around the world. Of course, we are mindful that unduly loading the front-end of the fee structure would place a harsh burden on small business and the independent inventor which in the past have been the source of a disproportionately large share of the pioneer inventions in this country.

Another legislative initiative with which we are currently concerned involves the Trademark Registration Treaty (TRT) which was negotiated and signed by the United States in Vienna in 1973. The TRT is an international filing arrangement under which a single international registration can be used to secure national trademark registration effects in a number of member countries.

Although the Treaty was transmitted to the Senate with a view to receiving its advice and consent to ratification in the fall of 1975, consideration of the TRT is being held pending the submission to the Congress by the Department of Commerce of implementing legislation.

The General Accounting Office has reviewed our draft bill and has recommended that we conduct a survey of trademark owners which would have a direct interest in the TRT to obtain information which would permit it to more accurately estimate the costs and benefits of the TRT and its proposed implementing legislation.

In order to provide the interested public with the information on which the sampled companies will base their responses, the draft bill was published in the Official Gazette of the Patent and Trademark Office last year and we have been endeavoring to develop a survey questionnaire to obtain the needed information. We are facing a number of problems in this regard, not the least of which is the cost of the survey. The Bureau of Census, which is charged with approving any survey questionnaire for the Department, has estimated that the probable cost of an acceptable survey which meets reasonable standards as to rate of response is in the range of several hundred thousand dollars.

Now in effect since last year is the Patent Cooperation Treaty (PCT) which permits a U.S. applicant to file a single English language application in a standard format in the Patent and Trademark Office and have that application mature into separate national applications in as many of the present 21 member countries as the applicant has designated. The Patent and Trademark Office has several roles under the Treaty, that of a Receiving Office to receive PCT International applications filed by U.S. nationals or residents and that of an International Searching Authority wherein the Office searches the prior art and establishes search reports for PCT International application filed either in the United States or in Brazil.

The Patent and Trademark Office also participates with the Department of State in deliberations involving industrial property matters in other contexts. Perhaps the most significant of these activities involves the Paris Convention for the Protection of Industrial Property. The Paris Convention is a multinational treaty which has been in effect since 1883 and now has 88 member States. The United States has been a member since 1887. This Treaty is administered by the World Intellectual Property Organization, a specialized agency of the United Nations headquartered in Geneva, Switzerland.

The Paris Convention establishes the fundamental principle of national treatment according to which member States treat foreign nationals at least as well as they treat their own nationals in regard to industrial property. In addition, the Convention makes available valuable property rights in the filing of patent and trademark applications and establishes certain minimum levels of protection for all adherents.

In recent years, however, third world nations have perceived the Paris Convention as favoring developed nations and have been demanding its revision in several respects. These include providing preferential treatment for developing countries, more stringent obligations on patentees to work their patents, and new rules favoring their geographical names over trademarks previously registered elsewhere. This last mentioned proposal has split the developed countries, with the European Economic Community tending to support the proposals of the developing nations. In addition, the socialist countries are also seeking to obtain greater recognition for inventor's certificates, a form of protection for inventions essentially limited to countries with centrally planned economies. These are among the issues which will be resolved at a diplomatic conference scheduled for February of next year in Geneva, Switzerland.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that you or the members of your committee might have.

Mr. BANNER. Thank you.

I very much appreciate the opportunity to discuss the patent and trademark system and the operation of the Patent and Trademark Office with you and other members of the subcommittee today.

As you know, the patent system has its foundation in the Constitution of the United States, and tomorrow will be its 189th anniversary, so it has served our Nation for a very long time by providing a voluntary incentive system resulting in the investment of time, energy, and money in new technology, investments which have put our country at the cutting edge of technology.

This requires, as Dr. Baruch said, some risks. Abraham Lincoln was known for his famous statement that the patent system added the fuel of interest to the fire of genius.

American jobs, increased productivity, stable prices, all depend on this enhanced innovation in our country. I am happy to discuss with

you today some of the efforts we are exerting to try to keep the patent system doing the job that it has been designed to serve.

As you know, sir, the Patent and Trademark Office is located in Arlington, Va. We have about 2,800 employees and a budget of approximately \$96 million, and we get about 30 percent of that in fees from users of the patent and trademark system.

Basically there are three things we do. Carrying out the instructions provided by title 35 of the United States Code, we examine and issue patents. Under that same title, we also collect and disseminate technological information. Under the Trademark Act of 1946, we examine and register trademarks.

We receive about 100,000 patent applications every year, and each one is examined carefully to see if it provides something new, something useful, and something nonobvious. If an invention satisfies these statutory criteria, a patent is granted which excludes others from making use of or selling the subject matter for 17 years.

It is important that this examination system be done properly, because about one-third of all patent applications that are filed never result in issuance of a patent because they do not meet those high statutory standards.

The other two-thirds, in almost all cases, result in a grant more restricted than requested so that only the proper subject matter is covered.

We have about 900 men and women engaged in this process of examining patent applications. It is a difficult task. Of the 70,000 patents issued last year in the United States, only some 44,000 went to U.S. nationals, which is the lowest number for U.S. nationals in the past 15 years.

At the same time, patents issued to foreign nationals have risen over the past 15 years, both in percentage, from 20 to 37 percent, and in number, from 9,000 to 26,000.

Mr. KASTENMEIER. Do you attribute that to the prosperity and growth of new technology in this country, compared to countries abroad, or the international cooperation, or what do you attribute this particular statistical development to?

Mr. BANNER. I think it shows that we are in a much more competitive world than we used to be. We do not have a monopoly on brains. As one can observe from consumer products in the shops and on the streets of the cities in America, there are a great many people in other countries who can and do provide products and services that are very, very good indeed.

Mr. KASTENMEIER. That would have been true 10 years ago, or 15 years ago.

To what do you attribute the growth in the issuance of patents to foreign nationals compared to U.S. nationals, other than the fact that they are competitive?

Mr. BANNER. Foreign nationals are able to compete much more easily than previously. For example, after World War II there were other countries in the world that were not in very good shape. There was a long time when we used to talk about the brain drain, the American challenge, and how a lot of the good foreign people were going to come to the United States. We thought we would have a monopoly on all of the brains in the world.

That, of course, did not happen. There were those in Europe and in Japan who constantly dedicated a portion of their activity to get a larger share of the world's commerce. These are people who are now operating in the United States and in our patent system.

Going back to our examination process and the sifting out of unpatentable inventions that is accomplished by it, we try very hard to do a quality job, as Dr. Baruch indicated.

We are interested in seeing that a quality product results so people can depend on it. We have a quality review program and statistical samples taken to see that issued patents are up to standard.

In recent years, we have adopted a new way to test the validity of patents without the expense of going to court. We instituted a reissue system by which patent owners can take a patent back to the Patent and Trademark Office after it is issued, if they have some newly discovered prior art, and have the office reexamine it to see whether the newly discovered prior art either makes the patent invalid or restricts its scope.

The second major phase of our activity has to do with dissemination of technological information. This phase stems from the fact that title 35 requires every patent to teach those who are skilled in the art how to practice the invention. The statute requires the patent application to contain a written description of the invention which is of such clarity as to enable those who are familiar with that particular subject matter to practice the invention. This requirement is made so that the technology will be available to people in the United States and can be used freely after the patent expires.

Furthermore, we are one of the only countries in the world that goes beyond that. We require not only an explanation of how to do it, but we require that the inventor teach the best mode he knows of how to practice that invention. That is a statutory requirement. If he doesn't do that, a patent would not be issued.

We have found, therefore, that 8 out of 10 patents issued in the United States contain technical subject matter that is not disclosed in other technical literature. We disseminate about 8 million copies of patents every year and every day fill orders for 15,000.

Our search file contains about 23 million documents that are divided into 300 major classes, and about 100,000 subclasses.

It is the best technologically categorized library in the world. That is important because the examiners use these files to determine the patentability of patent applications.

In our trademark operation we administer the Trademark Act of 1946. Examination of trademarks accounts for 5 percent of our budget. The economic value of trademarks far exceeds the economic value of patents. Trademark registration, as you know, is quite important in helping to protect business investments and to avoid deception or confusion of consumers.

Last year we received some 50,000 trademark applications, which interestingly enough, was a 50-percent increase in the last 3-year period. About two-thirds of those filed are actually registered. The examination of the trademark application is very similar to that of a patent application where examiners compare to see if it is in fact registerable.

Unlike patents, trademarks can be challenged by members of the public to see that they meet the statutory standards.

In the area of legislative and international activities, Mr. Chairman, we have several things I think you might be interested in. One is the matter of fees. Since the last increase in patent fees, which was in 1965, the overall recovery of our office through fees has gone from nearly 70 percent of costs, to less than 30 percent of costs.

We are studying several possibilities of how to handle this and what to do about it, including a system of fees after patent issuance to maintain the patent in force similar to what exists in almost all of the other patent issuing countries around the world.

This is done this way so that the fees for obtaining a patent can be relatively low, which is important to small businesses and individual inventors.

The Trademark Registration Treaty, with which you are familiar, sir, was negotiated in Vienna in 1973. We have recently been working on the design of a survey of trademark owners, which was recommended by the General Accounting Office. They have asked that this survey be conducted so that we can tell the cost benefit ratios of implementing the Trademark Registration Treaty. At the moment we are having some difficulties in designing the survey, because of the very high cost of conducting a survey of that type. The Bureau of Census of the Department of Commerce has estimated that the cost of the survey will run into several hundred thousand dollars.

The Patent Cooperation Treaty, an agreement to simplify the obtaining of protection for an invention in more than one country, came into force just last year. It permits an applicant in the United States to file a single English language application, and to have that application, in effect, to be filed in as many of the more than 20 member countries now party to the Treaty as the applicant desires. We are now operating under that treaty as well as are most of the major European countries and Japan who are also members.

We are also at the present time negotiating changes in the basic convention for protecting industrial property internationally, the Paris Convention for the Protection of Industrial Property. There is a diplomatic conference to revise that convention scheduled for February of next year.

If you have any other questions, I would be very pleased to answer them.

Mr. KASTENMEIER. Thank you very much for a concise, informative presentation.

I do have several questions.

Dr. Baruch, I understand the President directed the Secretary of Commerce to set up a series of citizen task forces to study how to improve industrial innovations in this country.

One of these task force panels related to inventions and the patent system. Can you give us briefly a status report on the work of this task force, and what we might expect from them in the way of new legislation?

Dr. BARUCH. Yes, sir.

The advisory panel you are referring to on patents and information policy, was set up as part of the President's domestic policy review on industrial innovation which covers a very wide range of things.

One of the central issues, however, is patent policy. We had about 30 people from private industry who worked with patents and used patents, who generated patents, working with us to analyze areas of existing Federal policy and potential changes in Federal policies, directed toward the patent system to improve the innovation process.

In January that panel finished its work, and we had a symposium at the Department of Commerce among members of the panel, representatives of labor, academe, and public interest groups and Government task forces, to clarify the views of what was needed in our patent system.

The results of that symposium and the report of the advisory panel have gone to a Government task force on patent policy. That Government task force has been generating a set of recommendations which will go through the domestic policy review process, and then to the President for his consideration.

There are a significant number of them. They involve all of the parts of the Patent and Trademark Office examination, reexamination, collection of information, dissemination of information, forecasting, among many others.

So it is a rather extensive review, and we expect to see the recommendations on the President's desk some time next month.

Mr. KASTENMEIER. When do you think that might be available to the public and the Congress?

Dr. BARUCH. The reports of the advisory committee, the public portion of this process that terminated at the symposium, are available now in draft form from the National Technical Information Service. We would be happy to get you and the subcommittee a copy if you would like.

Mr. KASTENMEIER. Your statement briefly compares the patent component of the industrial innovation system in the United States with the system in other countries, notably Europe and Japan. Do you think our system could benefit by adopting some aspects of these foreign systems?

Dr. BARUCH. That is not the comparison I meant to make in my written statement. I am sorry if my statement was not clear.

I was looking at the reward structure in the planned economies, such as the Soviet Union where the rewards for innovation are low, therefore, success is low, and the penalties for failure are high, and contrasting them with this country.

I don't know enough about the foreign patent systems. I know that we are moving in areas away from the Belgium system, for example, which is largely a registration system, more towards the Dutch, where invalidity is not acceptable as a defense against infringement.

We are trying to do that so that we can increase the unassailability of a patent. The Commissioner and I have had long hard discussions about how we might best do this.

Mr. KASTENMEIER. There has long been pending a public debate, both concerning general reform of U.S. patent law, and changes, or let's say, statutory expression, for a uniform patent policy.

Of course, only yesterday in the Washington Post appeared an article, "Patent Bill Seeks Shift To Bolster Innovation."

I take it that the Department of Commerce and the Patent and Trademark Office do not, at this time, have a bill of their own, an

Administration bill, pursuing either general patent form or patent policy, unification or some statutory vehicle pending in the Congress; is that correct?

Dr. BARUCH. Not pending in the Congress at this time, Mr. Chairman.

Mr. KASTENMEIER. Is there any likelihood that you would be developing an alternative?

Dr. BARUCH. Yes, sir, in both areas.

The recommendations that will go to the President on the domestic policy review covering the Patent and Trademark Office may in fact require legislation. We have little doubt that they will.

In the area of uniform Government patent policy for patents owned by the Government, or patents covering inventions created by Government-sponsored research and development, there is a Committee on Intellectual Property and Information, which has been meeting and has been struggling with the development of a unified Government patent policy for some 30 years.

We think that, by the end of this week, we will have a set of options to go to the President for a unified patent policy.

Mr. KASTENMEIER. Commissioner Banner, you said in your statement there has been substantial progress in reducing the backlog on patent applications and the time required to process them.

I understand that the Office of Management and Budget has reduced your appropriation request significantly. Can you comment on whether or not this reduction would have any impact of this reduction, will it reflect on your ability to reach your goals of a more timely patent examination?

Mr. BANNER. Mr. Chairman, as indicated in my testimony, the problem of the backlog was a very substantial problem back a few years ago. And at that time it was determined that we would try to achieve a goal of 18 months, from 37 months, which as I pointed out in my testimony, was the average pendency back in 1964.

The progress toward reaching that 18-month goal has been rather dramatic. We are down to about 19 months at the present time. Last year we were at about 20 months. So there has been some problem with the backlog, but it has been very substantially improved over what it used to be.

Mr. KASTENMEIER. You described new reexamination procedures developed by your office. As you foresee further development in these procedures, do you see any necessity for legislation during this Congress relating to these procedures?

Are you able to, in your view, implement these procedures without benefit of statutory changes?

Mr. BANNER. The present procedures now operative, of course, do not require statutory change. The domestic policy review Dr. Baruch mentioned, is considering how to go about extending these procedures.

And presumably we will hear more about that when the domestic policy review is concluded. It is a matter which is now under very active consideration.

Mr. KASTENMEIER. You mentioned you are trying to rectify the disparity in the costs of operation and the fee structure adopted some years ago and you are presently considering new options, such as a

maintenance fee. That was at one time considered by the Congress, and that was of European origin.

Mr. BANNER. You are right.

Mr. KASTENMEIER. I understand that you are presently reviewing it and may indeed ask the Congress for change in fee structure?

Mr. BANNER. Yes; that is a possibility.

The maintenance fee aspect, sir, is an attempt to try to keep the initial fees at some reasonable level so that they don't become an undue burden and thereby exclude from the operation of the patent system people with limited funds—for instance, small businesses and independent inventors.

It puts the burden on the successful patents.

Mr. KASTENMEIER. Thank you.

I will yield to my colleagues.

Mr. Danielson?

Mr. DANIELSON. Thank you, Mr. Chairman.

I have a couple of questions here that I hope you can help me on. You are currently receiving, about 100,000 applications per year, which would translate into something like 400 per working day. And you are down to between 19 and 20 months delay time or pending time.

What would be an optimum time? You have a goal of 18 months, but I presume under optimum circumstances, that could be reduced. What would be optimum, do you imagine?

Mr. BANNER. Mr. Danielson, we have been thinking about that very question.

Eighteen months, incidentally, is a period of time that many patent offices around the world have chose as the time period between the filing and the time that they will publish the application and make it available to the public.

We wanted to have a system years ago that would at least make up comparable to European systems and other foreign systems so that our technology could become available at least as early as theirs did.

Our independent study indicated that 18 months was probably about as good as one could reasonably do. You see, a lot of time in this 18-month period involves our waiting for applicants to respond to our questions and objections. You recall in my statement I said that one of the jobs that the examiners do is to look at a patent application to see whether the application should issue as a patent, or whether it should issue as a patent covering narrower and more restricted subject matter.

Each time an examiner makes such a determination, he gives the applicant an opportunity to respond or reply. This takes time. Thus, the applicant has in his hands a great deal of the 18 months' time.

Probably 18 months is about the best that you can do in a reasonable system.

Mr. DANIELSON. That is because then, in at least substantial part, of the necessity to exchange communication back and forth to more sharply define the issues that are presented?

Mr. BANNER. Exactly.

Mr. DANIELSON. Just suppose—this may never happen—but suppose you get an application that is full and complete in every detail, and you have the appropriate fees. You don't have to write for anything. Everything is complete. How long would that take you to handle that?

Mr. BANNER. And if the application contains claims, which the examiner feels are not too broad?

Mr. DANIELSON. Forget all of your qualifications and accept my postulate: This is a perfect application and it is accompanied by enough money. Now, go on from there.

Mr. BANNER. The patent application would be approved in the first action, which would result in a patent being issued about 8 months after the application is received.

Mr. DANIELSON. That is what I am getting at: What happens during that 8 months?

Mr. BANNER. The application, when it comes in, is first checked for completeness.

Mr. DANIELSON. We stipulated to completeness.

Now go on.

Mr. BANNER. It nonetheless takes time to determine that it is complete.

It is then sent for review by people who check to determine whether it contains classified subject matter.

Mr. DANIELSON. All right; I understand classified subject matter.

Mr. BANNER. That is another problem. Then it gets sent to the proper examining group. Each group handles a particular technology. It then goes into their processing where it is assigned to an examiner for examination.

Mr. DANIELSON. And these various sortings, screenings as to classified material, determining the proper subclass, class, and subclass, and I presume sub-subclass within those categories; that is what consumes most of the 8 months; is that correct?

Mr. BANNER. Yes, sir, that and the clerical processing after the application is approved, waiting for the applicant to pay the issue fee once the applicant is told his application will mature into a patent, and the time it takes to print the patent.

Mr. DANIELSON. Part of that is due to the fact that it has to wait in line with other documents. There is no work being performed on it during that entire 8-month period?

Mr. BANNER. That's correct; other than for work which we previously discussed.

Mr. DANIELSON. How much time are we losing in there? That is what I am interested in.

I can't imagine it taking more than 3 or 4 days of examination to determine whether it contains classified material and another 3 or 4 days to determine which class: Is it green paint or blue paint? You have to put it in another category.

How much time is lost in the shuffling between these different functions?

Dr. BARUCH. Mr. Danielson, if I may; you are asking one of the first questions I asked when I became Assistant Secretary. I used to be a production professor, and I wanted to know, where was the holdup in the line.

The Patent and Trademark Office operates pretty much as a job shop. In order to keep the patent examiners fully loaded, you develop queues in the process.

In the process system that we have, since there are many stations that the application goes through, we are probably utilizing 70 percent of the time the application is with us and we are not waiting for a response from the applicant for queuing.

Mr. DANIELSON. That is what I wanted to know.

Dr. BARUCH. The time that the application is just standing there waiting, is not, however, time that can be easily eliminated.

Mr. DANIELSON. That isn't part of my question. I just wanted to know about how much time.

Dr. BARUCH. About 70 percent of the time.

Mr. DANIELSON. The optimum application, you figure 8 months. Seventy percent of that is queuing and so forth.

Dr. BARUCH. Of the total 18 months to issue a patent, an average of about 11 months is spent for responses from the applicant. Of the 7 or 8 months we are not waiting for a response, about 5 months is used for queuing.

Mr. DANIELSON. Thank you.

Now, you have 900 examiners and I saw something about 300—what do you call them?

Mr. BANNER. Classes.

Mr. DANIELSON. They contain prior art documents. What are those? Is that another patent?

Mr. BANNER. It could be a patent. It could be a piece of technical literature of some kind like an article in a magazine or a book. In some cases it could be a speech by somebody.

Mr. DANIELSON. What do these people do then? Are they filing them? Is that the idea?

Mr. BANNER. There is a procedure by which these documents are put into the proper slot. There are 300 major classes and those are divided up into some 97,000 subclasses. It is important that the right technology gets into the right spot.

Mr. DANIELSON. I've got you. It is a very expert technical form of file clerking. You put the right thing in the right place.

Mr. BANNER. Exactly; it certainly is.

Mr. DANIELSON. What do you charge for issuing these patents. There is probably some data here and I can't find it right now.

Mr. BANNER. The fees for a patent depend upon several things. There is the initial filing fee of \$65 with an additional amount charged for claims beyond a certain number included in the application.

After the case is allowed, an issue fee is due which is also dependent upon the size of the case; how many drawings and how many pages of specification.

Mr. DANIELSON. Let me interrupt. You disseminate 8 million copies of patents each year, many sold to the public at a statutory fee of 50 cents apiece. My point is: Does that pay for them?

Mr. BANNER. Probably not.

Mr. DANIELSON. What would be a realistic figure?

Mr. BANNER. I don't have that figure.

Mr. DANIELSON. Would it more than \$1?

Dr. BARUCH. We would be happy to develop that figure for you.

Mr. DANIELSON. I wish you would. I don't know of any reason why this information, if we can cause it to do so effectively, why the selling of patents shouldn't at least pay for the cost of them. It is a matter that concerns me and many of my colleagues.

So if you can get us that information, I would appreciate it.

When was the statutory fee enacted?

Mr. BANNER. 1965.

Mr. DANIELSON. 1965; 14 years ago. I would say it ought to be at least doubled. Maybe we can lift that a little bit higher.

You see over 15,000 copies a day. You have got a tremendous overhead on sending out those copies.

I would like to have you find out.

You say you are a production man, sir?

Dr. BARUCH. I think we can develop those costs for you.

[The information follows:]

The Patent and Trademark Office patent copy service last year sold approximately 3,500,000 copies of patents on an individual copy basis directly to the public at the statutory fee of 50 cents each. It cost the Patent and Trademark Office an average of 90.4 cents exclusive of mailing costs to furnish each of these copies. This cost is based on the average cost of new production as well as of storage and retrieval of pre-printed copies, including all overhead, for an average-length copy (eight pages). In addition, some patent copies were sold for the statutory fee on a multiple copy subscription or advance order basis for distribution by the printing contractor as they were printed. The cost of furnishing these copies is significantly less than the per copy cost of the patent copy service because the distribution takes place as the patents are printed and most of the storage, retrieval and overhead costs of the patent copy service are avoided.

Mr. DANIELSON. I saw the statement that it takes 15 hours to complete the examination of an application. That would be the optimum one.

Mr. BANNER. That is the average search and examination time we spend right now.

Mr. DANIELSON. When you get to the end of all the queue; that is, the work?

Mr. BANNER. Yes; the time spent by the patent examiner.

Mr. DANIELSON. Thank you very much.

I would like to have the data on cost. I appreciate your cooperation.

Mr. BANNER. Thank you.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Gudger?

Mr. GUDGER. No questions.

Mr. MAZZOLI. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. I thank you both.

I don't know that there are any other questions other than looking at the story.

Do you consider yourself, Dr. Baruch, a titlist, or a licenser, in terms of patent policy.

Dr. BARUCH. I consider myself a utilizationist.

My concern is to make sure that the patents that involve from Government-sponsored research and development be used for the benefit of the public. Where title will accomplish that as the best instrument, let's use title. Where license will accomplish it as the best instrument, let's use that.

But let's concentrate on where the public secures its benefits from the patent, and that is by the art in it being reduced to commercial practice so that they benefit from better products and better processes.

Mr. KASTENMEIER. There was a comment made by one of you to the effect that, contrary to public belief, the fact that the system does benefit small businesses.

Dr. BARUCH. Yes; that was my testimony.

Mr. KASTENMEIER. I note here the bill people are introducing, to give universities and other nonprofit groups and small businesses the rights of inventions made under Federal research and development contracts.

Mr. Banner, do you have any reaction to that? Is that a desirable direction to go, a division between large and small?

Mr. BANNER. As that article points out, Mr. Chairman, the reason that people are introducing that bill—the reason they feel that such a division is necessary—is that it is a political necessity. I think it states in the article that they feel that they could never get the bill passed if it didn't draw such a line.

In the final analysis, the important thing, as Dr. Baruch said, and one of the things that we have been struggling about for 25 years is: How do you get these inventions used by America? How do you get the jobs based on that technology? How do you get the products that are based on that technology produced in this country?

That is the key issue.

Dr. BARUCH. Needless to say, Mr. Chairman, the bill you refer to is not the administration's bill.

Mr. KASTENMEIER. I realize that. It is very early in this Congress and there are lots of things that can happen between now and some later point in time.

Perhaps you will be able to speak on behalf of a given bill initiative and respond more thoughtfully to some other propositions directly.

Dr. BARUCH. I hope so.

Mr. DANIELSON. Mr. Chairman, your questions have reminded me of something. If this was covered before I arrived, please let me know.

Last December I was in West Germany and visited with the patent people over there. They had evolved a system for protecting, or at least rewarding, the inventors who are employees of the Government or who are otherwise not working wholly on their own, in a participatory way in the fruits of the patent.

I think you are more familiar than I with those procedures.

Have you people generated any worthwhile thoughts along that line? It seemed to me like, of all the subjects that we touched on in Europe, this was one in which there was unanimity, that the system that had been worked out is a good one. No one quarrels with it.

Have you got any ideas along those lines?

Dr. BARUCH. Yes, Mr. Danielson. There is no such unanimity here, and it is rather easy to see why. For example, one might offer to inventors in one of our mission agencies a bonus, or a part of the licensee fee, if an invention developed by that inventor in that mission agency were used for commercial purposes.

That very incentive might work at cross-purposes with the mission of the agency.

If we start getting people in a military laboratory concerned more about commercial use of their thinking than about military use of their thinking, we may subvert the actual task of the mission agency.

It is no way a clear-cut case here. As someone who was an inventor and got rewarded well for it, I personally am very much in favor of seeing some sort of reward structure that gets the inventor himself involved.

But there isn't a simple answer that we can bring to the surface that looks like it would solve everybody's problem.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. On behalf of the committee, I would like to thank you both for your testimony today relating to oversight of the Office of Patents and Trademarks.

I appreciate your appearance. I trust during the Congress we will have other occasions to more specifically address legislation affecting your mission.

Thank you.

Mr. BANNER. Thank you, Mr. Chairman.

Dr. BARUCH. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Next I would like to call the representative of the Copyright Office, Library of Congress, the General Counsel, Jon Baumgarten.

He is an old friend of this committee and has been before us several times and will be speaking for the Register of Copyrights, Barbara Ringer, who unfortunately could not be here today. We will have an opportunity to hear from Ms. Ringer on future occasions. She is a splendid public servant who serves us in the Federal system.

Mr. Baumgarten, you may proceed.

**TESTIMONY OF JON A. BAUMGARTEN, GENERAL COUNSEL,
COPYRIGHT OFFICE, LIBRARY OF CONGRESS**

Mr. BAUMGARTEN. Thank you.

It is good to be home.

I would like to adhere somewhat closely to the prepared statement, although not literally. We took some pains to try to answer a number of questions that counsel suggested would be of interest to the members of the subcommittee.

Mr. Chairman and members of the subcommittee, my name is Jon Baumgarten. I am General Counsel of the U.S. Copyright Office.

The Register of Copyrights, Barbara Ringer, asked me to convey to you her regrets at being unable to appear personally before you this morning.

The Register does look forward, as do I, to the continued benefit of your subcommittee's advice and counsel, in the exercise of its oversight.

On January 1, 1978, an entirely new copyright law came into effect in the United States. This law marked the first general revision of our copyright statutes since 1909. The changes, in both the theory and practical application of copyright, effected by this new law were most fundamental and substantial.

Some of the major changes are highlighted on pages 1 and 2 of my statement. I will not read them in detail.

Briefly, we now have a single Federal system of copyright, where under the law in effect before 1978, we had concurrent Federal and common law systems.

Second, copyright is now automatic. You create a work and you have the copyright.

Third, the copyright system of duration has changed. Under the old statute there were two terms. The first term was 28 years and the second renewal term was 28 years.

Under the new statute, there is a single basic term consisting of the life of the author and 50 years after the author's death.

Finally, the new law governs both the rights and, in very considerable detail, the limitations upon the rights of copyright owners. Among those limitations are compulsory licensing systems for jukebox operators, cable systems, and public broadcasting and detailed provi-

sions governing the extent to which libraries may make photocopies of copyrighted material.

Together with these, and a number of other sweeping changes in the U.S. copyright system, and the accommodation of that system to new and rapidly changing technologies of information creation, dissemination, and use, copyright revision was not an easy task, nor was it accomplished quickly.

The new law was the product of over 20 years of administrative and legislative effort. Again, this history is summarized at pages 3 through 4 of the statement, and to summarize it even further: The program started in 1955; between 1955 and 1969, a series of 35 comprehensive studies were prepared by the Copyright Office with consultants; between 1960 and 1964, there were a series of very in-depth analyses and panel discussions held in the Copyright Office; and between 1964 and 1976, the bill to revise the copyright law resided in Congress.

This capsule summary, no more than the summary in the prepared statement, of 20 years' effort is hardly a just recognition of the many Members of Congress, the Copyright Office, and representatives of the diverse interest groups who labored very long and very hard in the best traditions of representative government.

Without in any way minimizing the efforts of any of those individuals, I do want to take note of a fact that is recognized by anyone who has had any connection whatsoever with copyright revision, and that is this:

This long-awaited milestone in the U.S. copyright law is a very particular and fitting tribute to the outstanding wisdom, perservance, tireless efforts of the chairman and present and former members of the subcommittee and staff.

When I last appeared before your subcommittee in February 1977, I described the substantive and organizational steps that the Copyright Office was taking to implement the new statute.

The period since that date has been an extraordinary one for the Copyright Office. The revisions of the new law were so fundamental that everything the office had been doing, every policy, every practice, every procedure, every regulation, every form, and every information circular, had to be reviewed and changed, the changes reviewed, and in some cases, revisions made again, both substantively and organizationally.

We had to absorb and effectuate substantial enlargement of old responsibilities and the creation of entirely new duties and services.

I would like to quote a recent statement by the Register and I would like to quote it in full, since I can't think of a better way to put it.

The new law presented the Copyright Office with an enormous challenge. And in meeting it, the entire staff of the office demonstrated a truly remarkable devotion to duty. Their resiliency and courage in the face of horrendous pressures, their initiative and imagination in solving one unprecedented problem after another, their good-humored willingness to pitch in and do incredible amounts of sustained hard work, all this and more approached heroic proportions.

One can hope that the Copyright Office never again has to face the transitional problems and growing pains it met and surmounted and encountered in 1978.

But if it ever does, the achievements of that year will be an inspiring example to follow.

I would like to turn now to a brief review of the functions of the Copyright Office under the new statute.

We are one of the several departments in the Library of Congress, and are in the legislative branch of government. A principal function of the office is our examination and registration of claims to original and renewal copyrights filed by authors and their successor copyright owners.

The office also records assignments and other transfers of copyright and related documents, and a variety of notices, including those pertaining to the recording of musical works, and termination of rights granted by authors.

In our examination and registration function, we, unlike the Patent and Trademark Office, do not grant copyrights. As noted earlier, under the new statute, copyright attaches automatically upon the creation of the work.

The Copyright Office registers claims to the copyright that the proprietor has automatically acquired. Registration of claims is not a condition to copyright under the new statute, although the law does provide a number of incentives to registration.

Mr. DANIELSON. May I interrupt?

I understand what you mean. You don't issue copyrights. You acknowledge, I guess you might say, recognize them.

Mr. BAUMGARTEN. I think that is too strong, Mr. Danielson. We put on the record that someone claims copyright.

Mr. DANIELSON. What do you call the thing you send out to the person?

Mr. BAUMGARTEN. Certificate of registration of claim to copyright.

Mr. DANIELSON. That is the official document that proves that you registered the document.

Mr. BAUMGARTEN. In commercial life it is treated as something more substantial, but it is a public record that somebody is claiming.

Mr. DANIELSON. I understand.

Mr. KASTENMEIER. As a matter of fact, this is a good point to interrupt the testimony, since that is the second bell for reporting a vote on the floor.

It is clear that we will have to return and hear the balance of what Mr. Baumgarten has to say, and also to hear the representatives of the Copyright Royalty Tribunal as well.

If you will bear with us, the committee will recess for approximately 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

When the committee recessed we were in the process of hearing from Mr. Baumgarten, his testimony in terms of the operation of the U.S. Copyright Office.

Mr. Baumgarten, you may continue.

Mr. BAUMGARTEN. Thank you, Mr. Chairman.

One of the areas in which our office has most strongly felt the impact of the new law has been in our examining operation.

Under the old statute, we were able to make registration for about 85 percent of all applications in the form in which they were first received, and without any correspondence. Only the remaining 15 percent required correspondence.

Beginning in January 1978, this ratio was almost exactly reversed. Only about 15 percent of the applications could be registered on the

first action, and 85 percent had to be the subject of Copyright Office letters to help their applicants put their claims in registerable order, or to clarify uncertainties.

The problem was essentially that the people who deal with the Copyright Office—authors, publishers, and others—were not familiar with some of the concepts of the new statute and with the new Copyright Office application forms, which themselves necessarily reflected the new act.

Although the situation has improved considerably, we are now registering more than half the claims based upon the application, as first submitted, we have now accumulated a backlog of correspondence cases.

These consist mainly of cases where we have written to the applicant and are awaiting a reply, and to a lesser degree, cases for which our correspondence is still in the course of being prepared.

However, steady progress toward bringing the office back to full currency is clearly being made.

Mr. KASTENMEIER. You attribute this problem, Mr. Baumgarten, to the new law?

Mr. BAUMGARTEN. To the application forms, to a lack of familiarity with the application forms, and to some questions about underlying concepts in the act. For example, Mr. Chairman, under the old law, periodical publishers were required to fill out a very simple application with very little information required.

Under the new law periodical publishers have to fill out the same information as required of every other applicant.

During the first months of 1978, there were masses of periodical applications in the office, and not a single one of them could be passed through.

We tried to reduce the backlog in various ways, one of which has been to reduce our examining standards, to let things slip through which we would otherwise question.

However, we are now in the process of going back to our normal standards. We didn't let anything through which had a major defect, but I think the best way to characterize it is, we were making an adequate record rather than the best record possible.

We are now revising our procedures so we can go back to our ultimate goal of the best record.

Mr. DANIELSON. Mr. Baumgarten, you have 15 percent that could be registered as received, January of 1978, after the new law.

Mr. BAUMGARTEN. Yes, sir.

Mr. DANIELSON. How is it now?

Mr. BAUMGARTEN. About 50 percent.

Mr. DANIELSON. Thank you.

Mr. BAUMGARTEN. The Copyright Office performs several other functions related to, or resulting from its registration and recordation duties.

Our cataloging division prepares and distributes bibliographic descriptions of all registered works.

During fiscal 1978, this division absorbed and implemented its greatest changes since its organization in the 1940's.

The first reason for this was the adoption of the new law.

The second reason was a decision made within the office to make our cataloging division's product more compatible with the cataloging practices of the Library of Congress processing department.

We hope that in the future, this decision will pave the way for eventually adding hundreds of thousands of copyright entries to a wide variety of national and international data bases.

Our information and reference division searches and reports upon the request the facts contained in our records, provides certified copies and assists the public in using our files.

This division also maintains a public information office for answering mail, telephones, and personal visit inquiries about the law, and has an active program for distribution free of charge, of circulars and similar materials on copyright.

Since January 1, 1978, the information and reference division has faced and handled an enormous influx of letters, visitors and telephone calls pertaining to the new statute.

We also cooperate with the U.S. Customs Service in that agency's enforcement of certain importation exclusions.

And we assist the Department of State in matters relating to the protection of American copyright interests in foreign countries, and the development of international copyright treaties and studies.

One major issue now attracting particular attention in domestic and international copyright circles is the extent to which our law comports with or may require additional revision to meet the conditions for accession of the United States to the Berne Union, for the protection of literary and artistic works.

This is one of two major multilateral copyright conventions in effect. The United States has not now, and has never been a party to the Berne, because certain provisions of our law in the past precluded it.

For example, the Berne Union required protection for term of life of the author and 50 years. Until recently, we did not have that duration.

The Berne Union prohibits formalities. We had notice of copyright and registration. We still have notice and registration to a lesser degree.

And there are a number of other questions, including retroactive effect.

Mr. DANIELSON. What benefit would be obtained by acceding to the Berne Union.

Mr. BAUMGARTEN. I don't think they are strictly legal. We belong to another major copyright convention and many of members of both conventions are the same, and because those countries have brought their degree of protection up to the level of the Berne Convention, which is higher than the UCC, we in effect get the same protection if they are a member of the Universal Copyright Convention, as well.

However, there are a number of countries that are members of Berne and not members of UCC. They may not be important market countries, but as book and motion picture publishers have found out rather quickly, the question of whether you are protected in a country is not always important only if that country is an important market.

If that country is a possible source of unauthorized duplication and exportation, this is important for protection, as if they were in the important markets. Some of these countries may fall in that category.

Second, for historical and related reasons, the Berne Convention has been the area where the action has been. Many of the problems this committee faced and are still facing in copyright in this country, video recording, audio recording, cable television, are also being examined at the international level.

And one of the focal points for that examination is and will be the Berne Convention.

You don't have the same voice in international circles when you participate as an observer, as when you participate as a full member.

Third, Berne would pressure us to change our law in a way that we think beneficial. For example, it has now become really questionable whether copyright notice has any continued validity in the day of electronic media.

If we were to join, or want to join, the Berne Union, we would be pressured to change our law in that respect.

Similarly, it might increase the degree of protection accorded to moral rights in these countries, as the Berne Convention itself refers to moral rights.

Mr. DANIELSON. Thank you.

Mr. BAUMGARTEN. I think those are the major reasons.

Mr. DANIELSON. I don't want to throw you too far off your path here.

Mr. KASTENMEIER. While you are on the subject, one of the major inducements to revising the copyright law was to make it conform to the Berne Convention, to enable us to join the Berne Convention.

Mr. BAUMGARTEN. In its early stages, I think that was true. But as time went on, because of the particular problems we face in this country with respect to jukeboxes and the imposing liability for the first time, revision in its own right became more of an end than revision to enable us to join the Berne Convention. It always remained the goal.

One of the chief advantages to changing the system from two terms of copyright to a system of life plus 50, was with respect to Berne.

I think we have come a long way, and I think your subcommittee, the committee, and the full Congress has made it more possible than ever before to join the Berne Union.

But there are still obstacles and these are under active consideration. Dr. Bogsch, whom you know, will be visiting this country within the next 2 months to "take our temperature" and see how we feel about it.

From the viewpoint of private industry, again, it was a goal and the goal has been partially fulfilled, but not completely.

Turning from the international scene and back to strictly domestic matters, one of the most significant aspects of our operations is our function in enriching the collections of the Library of Congress.

Under the new copyright statutes, copies of all works published in the United States with a notice, except those works we exclude by regulation, are required to be deposited with our office and made available through our office to the Library of Congress for its collection.

A significantly different form of deposit for the Library existed under the old law. It is through the copyright system upon which the Library of Congress has developed its very extensive collection of books, periodicals, music, maps, prints, photographs, and motion pictures.

In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions I just described, the new copyright statute has given us additional responsibilities. We are involved in licensing jukeboxes through the United States to perform copyrighted music.

We also receive statutory fees or royalties from jukebox and cable television operators. These sums are processed and accounted in our office, and after deduction of reasonable administrative expenses, are deposited with the Treasury Department for investment in interest bearing U.S. securities and later distribution to copyright owners through the Copyright Royalty Tribunal.

Since January 1, 1978, we have collected approximately \$12.5 million from cable television operators, and approximately \$2 million from jukebox.

We do not have enforcement powers under the cable and jukebox compulsory license. If an operator does file the required notice, or pay the required fee, enforcement is left strictly to private infringement actions by the copyright owner.

In the cable television area, we believe that there has been very substantial compliance by cable operators with the formal notice and accounting provisions of the new statute.

Unfortunately, our experience with jukebox licensing has not been the same. At the present time, only about one-third, although it is rising somewhat, of the estimated 400,000 jukeboxes in this country appear to have complied with the application and payment provisions of the new statute.

This is something which troubles our office, I know it troubles the Tribunal.

Under the existing law, it is not something that we can really do anything about.

The new copyright act and accompanying reports also require, or request, the Register to make certain studies and reports to Congress and your committee. Section 114, for example, directed the Register to consult and report on the advisability of performance rights in sound recordings. This is essentially the obligation of a broadcaster, jukebox operator, a background music service, to pay royalties, not only to the owner of the copyright in the music, the publisher and composer—these are already paid—but also to the recording artist whose performance is captured on the record, and to the record producer.

Some of the details of the report are spelled out on page 10 of my statement, but suffice it to say that based upon very extensive study and analysis and thousands of pages of data which were submitted to your subcommittee and printed by you, the Register did recommend the adoption of the performance right in sound recordings.

In the current Congress, Mr. Danielson has introduced two bills, both supported by the Copyright Office, to provide the performance right in sound recordings.

Some of the variations between the two bills involve its impact on jukebox operators. Under one version, they will pay the \$8 required by law. Under another, they will pay \$9.

Another variation is the provision of specific royalty fees for discotees and similar establishments.

As we have in the past, we will be pleased to assist your committee as it may require, and to assist Mr. Danielson's office in any way his office may require, as you proceed with consideration of these measures.

A second study of current importance is based on a recommendation made at pages 71 through 72 of the House report, reprinted at pages 11 and 12 of this statement.

Without quoting, you will recall that you adverted to the problem of video recording in educational institutions, and suggested that the parties try to negotiate guidelines under the leadership of the Register of Copyrights.

The problem adverted to in your report is very substantial. Its importance and concern for its resolution increase with each day.

The interest involved is significant, it involves the economic livelihood of all of those involved in producing this country's audiovisual and broadcast materials, as well as the effective operation of our schools.

Following your committee's suggestion in July 1977, the Copyright Office, together with the Ford Foundation, cosponsored a conference at which representatives of various effected interested groups expressed their interests and their concerns regarding off-air video taping.

No resolution of the issues emerged at the 1977 conference, and indeed none was expected.

However, the conference was successful, I think, in that it brought the parties together for a forthright discussion among each other. They talked to each other, and not at each other, for perhaps the first time, and sensitized the interests to their respective needs and problems.

Perhaps most importantly, the conference provides the foundation for the recent meeting convened in this building March 2, 1979, by your committee and our office for further exploration of the issues.

The March 1979 meeting on off-air video taping for educational uses was a very significant undertaking. It was successful as a staging point toward resolution of one of today's most significant copyright issues.

Its success is due to your chairman, your counsel, Mr. Lehman, and as well, minority counsel, Mr. Mooney, and Mr. Ivan Bender, consultant to our office, in bringing about a truly representative exposure of various, numerous factors and issues involved, including educational film producers, theatrical film producers, public broadcasters, networks, craft guilds, writers, directors, actors, schools, librarians, media specialists, and the like.

The 18 formal presentations showed that the earlier conference as well as intervening discussions among the parties, consultations with the Copyright Office and with the subcommittee staff, had made their mark.

As a result of the March meeting, an informal committee consisting of representatives of educators, independent and theatrical film producers, network, local public broadcasters, authors, publishers and craft unions and teachers, school administrators and librarians, was appointed by your chairman to negotiate guidelines applicable to off-air taping for educational uses.

The first meeting of this committee will take place on April 17, 1979. And the Copyright Office will look forward to working with your staff in monitoring and assisting where necessary the work of this committee.

At this time, our office believes that there is considerable hope of resolving this issue by mutual agreement and without additional specific legislation.

It should be noted, however, that some aspects of off-air video taping are also currently the subject of judicial inquiry.

In February 1978, for example, a Federal court in upstate New York awarded a partial preliminary injunction against a very extensive system of off-air taping, cataloging, duplicating, and distribution of tapes to a school system.

The date for trial on the merits of that case has not yet been set.

Off-air video taping has also been the subject of litigation outside of educational context. The well known case of *Universal City Studios v. Sony Corp.*, in the Central District of California, raises questions concerning the liability for copyright infringement of those who tape in the privacy of their own home, or retailers who demonstrate the use of video recording equipment, and of the manufacturer of the equipment itself.

The trial in this case was held in February 1979 and it is concluded, and a decision is expected later this year.

Mr. KASTENMEIER. I am afraid we will have to suspend. We have a vote. We will return in 10 minutes following this recess.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

When we recessed 10 minutes ago, we were in the process of hearing Mr. Baumgarten, who was approaching the conclusion of his statement.

Mr. Baumgarten, you might as well conclude.

Mr. BAUMGARTEN. Thank you very much.

In conclusion, there is some material in the statement I haven't adverted to. I would like to give brief remarks on several of the pieces of legislation that have recently been introduced for consideration by Congress.

Mr. Railback's bill, H.R. 2706, is a successor to title II of the Copyright Revision Act as it existed when passed by the Senate and as struck out by your subcommittee, and proposes a new form of protection directed toward the special problems in the industrial design field.

As the office has in the past, and indeed since probably 1914, we support the principle of protection expressed in that legislation.

And one particular point the subcommittee might want to consider would be to review the discussions that were held in late 1976 about the special problems which might be engendered by extending the design protection to typeface designs, and the adoption of both a compulsory licensing scheme and a limitation on remedies so as to avoid hindering competition and to avoid impairing the possible dissemination of literary works produced in an infringing type.

Mr. Harsha's bill, H.R. 2847, has not been studied by the Copyright Office at this point. I think at this point we would simply call the subcommittee's attention to the discussion in the House report about the old line between profit and nonprofit uses being eroded and disap-

pearing, and the possibility that nonprofit uses will now and in the future have a more significant impact upon the rights and royalties receivable by copyright owners than was true in the past.

The quotation in the report is printed on page 17 of my statement.

We have also had an opportunity to briefly review Mr. Van Deerlin's proposal for the comprehensive revision of the Communications Act of 1934.

Among its other far-reaching effects, that bill would prohibit Federal regulation of cable televisions, and would prohibit the retransmission of a program by a cable system without the express authority of the originating station, or of the person who owns or controls exclusive rights in the program.

Section 111 of the Copyright Act provides a compulsory licensing system for cable retransmission, but that section is based on the cable operator's compliance with rules and regulations of the Federal Communications Commission. Although copyright payments under section 111 of the Copyright Act may be based upon the cable system's carriage complement, that complement was left to determination by the FCC, not the Copyright Office, and not the Copyright Royalty Tribunal.

The proposed deregulation of cable systems raises significant questions, including whether section 111 of the Copyright Act is intended to be, or should be, repealed or modified in whole or in part.

Mr. Chairman, on behalf of the Register and myself, I want to thank you for this opportunity to again appear before you, and we will be pleased to answer any questions you may have now, or in the future.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Baumgarten, for your comprehensive and thorough statement.

The last point you raised does concern us. You are correct in stating that section 111 provides for compulsory licensing for cable retransmission.

And what is proposed by Mr. Van Deerlin tends to suggest exceptions to that.

I am not really knowledgeable about how he has recast it, but it would tend to undo in part copyright law that was enacted.

Mr. BAUMGARTEN. It would change the entire basis of section 111, which is based upon the existence of FCC rules, authorizations, or regulations. If they disappear, then I think a number of questions would be asked.

I am not suggesting that we either oppose or favor the Van Deerlin. I am suggesting, as the Van Deerlin bill progresses, it will have an impact on section 111 as it now stands.

Mr. KASTENMEIER. We had agreement, industry agreement, at the time, as you remember very well—

Mr. BAUMGARTEN. Yes, sir.

Mr. KASTENMEIER [continuing]. If not enthusiastic acquiescence by the broadcasting networks.

What is suggested, of course, would modify that so substantially, presumably, as to reopen the whole question.

Mr. BAUMGARTEN. The chairman is correct.

Mr. KASTENMEIER. At this time I will not ask any further of you in that connection, although, presumably, we will have to confront that question later.

Mr. BAUMGARTEN. Yes, sir.

Mr. KASTENMEIER. Do you feel that the new law imposes a number of responsibilities on the Office and the Register personally, and on the Office collectively? Do you see any of those responsibilities or duties which could be removed, or diverted to other sources?

I ask that because you have detailed a number of them that have been difficult for the Office to cope with in the last year or so.

Mr. BAUMGARTEN. I think the continued functioning of our licensing division would depend upon the future of the jukebox and the cable compulsory licensing.

The compulsory license for cable, if it would be changed in any respect by the Van Deerlin bill, or any other proposal than that, would probably have an impact on reducing the workload of our office through the licensing division.

I think rather than seeing us lose some of our responsibilities, I think what you will be seeing the Office doing is moving more closely, both physically and operationally, to the Library of Congress.

For example, we now have a cataloging division in the Library, and the Library of Congress catalogs those works selected by the Library of Congress. There is some duplication.

We hope to, and we have discussed it with the Library of Congress—I should say with other offices of the Library since we are part of the Library—moving toward a cooperative cataloging venture which will eliminate some duplication and make the entire data base more usable.

But I think our basic responsibilities will remain unchanged.

Mr. KASTENMEIER. Have you or the Register been asked to testify on the Van Deerlin bill, or any other bills?

Mr. BAUMGARTEN. To my knowledge, we have not been asked to testify as to the Van Deerlin bill. We will be testifying during your subcommittee's hearing on the Edwards bill a week from today.

Mr. KASTENMEIER. I am aware of that.

We will look forward to that.

The gentleman from North Carolina, Mr. Gudger?

Mr. GUDGER. Mr. Baumgarten has given a very enlightening piece of testimony, and I have no questions.

Mr. BAUMGARTEN. Thank you.

Mr. KASTENMEIER. In view of the late hour and the fact that we have another vote, believe it or not, for those who don't think the Congress is busy at this time of the year, I will not pursue other questions we might have had, and we can perhaps pursue those by letter or at some other time.

Mr. BAUMGARTEN. Yes, sir.

Mr. KASTENMEIER. I too, would like to join in and compliment Mr. Baumgarten on his statement. As usual, he was very professional and very thorough.

Thank you.

Mr. BAUMGARTEN. Thank you.

Mr. KASTENMEIER. Because of the vote, we will again have to recess, and I beg the indulgence of the Copyright Royalty Tribunal.

Incidentally, I should ask one last question of you; that is, what is your relationship with the Copyright Royalty Tribunal, and are there any changes you would recommend in that connection?

Mr. BAUMGARTEN. We have no operational connection with the Tribunal. Under two sections of the law, cable and jukebox, we were required to consult with the Tribunal in developing our regulations and forms.

We did so, but at that stage it was so early in the Tribunal's existence that the consultation was there and carried out. But there was not such give and take as there might be in the future.

We obviously have a very amicable relationship with the Tribunal and are great admirers of the Tribunal.

Mr. KASTENMEIER. You are great admirers.

Mr. BAUMGARTEN. Yes.

Mr. KASTENMEIER. Despite criticism you might have of the Tribunal.

Mr. BAUMGARTEN. I don't have any criticism yet. After 1980, I might have some, together with everyone else who watches what they do.

Mr. KASTENMEIER. Thank you again, Mr. Baumgarten.

[Statement of Mr. Baumgarten follows:]

STATEMENT OF JON A. BAUMGARTEN, GENERAL COUNSEL
UNITED STATES COPYRIGHT OFFICE, BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES

April 9, 1979

Mr. Chairman and members of the subcommittee, my name is Jon Baumgarten and I am General Counsel of the United States Copyright Office. The Register of Copyrights, Barbara Ringer, has asked me to convey to you her regrets at being unable to appear personally before you this morning. The Register does look forward, as do I, to the continued benefit of your subcommittee's advice and counsel in the exercise of its oversight responsibilities.

On January 1, 1978, an entirely new copyright law came into effect in the United States. This law marked the first general revision of our copyright statute since 1909. The changes -- in both the theory and practical application of copyright -- effected by this new law were most fundamental and substantial. To briefly review some of the highlights of the new law:

- Instead of the old dual system of protecting works under the common law before they are published and under the Federal statute after publication -- a system that had characterized our copyright laws since 1790 -- the new law established a single federal system of statutory protection for all copyrightable works, whether published or unpublished. Concurrently, state law rights equivalent to copyright were preempted.

- The new law adopted the principle of "automatic copyright" -- i.e., the rule that copyright attaches immediately, and automatically, upon the creation of a work. For this purpose, "creation" means the embodiment of a work in some tangible medium such as paper, film, video or audio tape, or the like. Although copyright notice and registration are still important attributes of the system, they are not conditions to the acquisition of protection.
- Consistent with the principle of "automatic copyright", the formality of copyright notice was relaxed. Although the new statute does call for a notice on published copies, omissions or errors will not immediately result in forfeiture of the copyright, and can be corrected.
- Under the old law, copyright duration was generally measured by a set term (28 years) from publication, with the possibility of renewal for an additional like term. For works created after January 1, 1978, the new law provides an entirely new system of duration. For these works, copyright will last throughout the author's life, plus an additional 50 years after the author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the new term will be 75 years from publication or 100 years from creation, whichever is shorter.
- The new law governs the rights of copyright owners and establishes, in considerable detail, some limitations on those rights. For example, the long-existing judicial doctrine of "fair use" was codified for the first time, and specific provisions dealing with photocopying by libraries were adopted. The new law also removed the exemption for performances of copyrighted music by jukeboxes. It substituted a system of compulsory licenses based upon the payment by jukebox operators of an annual royalty fee to the Register of Copyrights for later distribution by the Copyright Royalty Tribunal to the copyright owners. A similar

system of compulsory licensing and statutory royalties was adopted for the retransmission of copyrighted works by cable television systems; and -- in the absence of voluntary agreements -- noncommercial transmissions by public broadcasters of published musical and graphic works were also subject to a compulsory license at terms and rates prescribed by the Copyright Royalty Tribunal.

Adoption of these -- and other -- sweeping changes in the United States copyright system, together with the accommodation of that system to new (and rapidly changing) technologies of information creation, dissemination, and use, was not an easy task; nor was it accomplished quickly. The new law was the product of over twenty years of administrative and legislative effort. That history may be briefly summarized as follows:

The movement for general revision of the copyright law that culminated in the new statute actually began in 1955 with a program that produced, under the supervision of the Copyright Office, a series of 35 extensive studies of major copyright problems. This was followed by a report of the Register of Copyrights on general revision in 1961, by the preparation in the Copyright Office of a preliminary proposed draft bill, and by a series of meetings with a Panel of Consultants consisting of copyright experts, the majority of them from outside the Government. Following a supplementary report by the Register and a bill introduced in Congress in 1964, primarily for consideration and comment, the first legislative hearings were held before your predecessor subcommittees in 1965. Also, in the same year a companion bill was introduced in the Senate.

In 1967, after extensive hearings, the House of Representatives passed a revision bill whose major features were similar to the new law.

There followed another series of extensive hearings before a subcommittee of the Senate Judiciary Committee but, owing chiefly to an extended impasse on the complex and controversial subject of cable television, the revision bill was prevented from reaching the Senate Floor.

It was not until 1974 that the copyright revision bill was enacted by the Senate. In February 1976 the Senate again passed the bill in essentially the same form as the one it had previously passed. Thereafter the House, following further hearings and consideration by your subcommittee, passed the bill on September 22, 1976. There followed a meeting of a conference committee and signature by the President on October 19, 1976.

This capsule summary of twenty years effort is hardly a just recognition of the many members of Congress, the Copyright Office, the bar, and representatives of diverse interest groups, who labored long and hard in the best traditions of representative government. Without in any way minimizing the efforts of any of those individuals, I do want to take note of a fact recognized by anyone who has had any connection with copyright revision: namely, that this long-awaited milestone in United States copyright law is a very particular tribute to the outstanding wisdom, perseverance, and tireless efforts of your Chairman and present and former members of your subcommittee and its staff.

When I last appeared before your subcommittee, in February 1977, I described the substantive and organizational steps the Copyright Office was taking to implement the new copyright law. The period since that date has been so extraordinary one for the Copyright Office. The revisions of the new law were so fundamental, that everything the Office had been doing -- every policy, practice, procedure, regulation, form, and information

circular -- had to be reviewed and changed. Substantively and organizationally, we had to absorb and effectuate both the substantial enlargement of old responsibilities and the creation of new duties and services. To quote a recent statement by the Register of Copyrights:

"The new law presented the Copyright Office with an enormous challenge, and in meeting it the entire staff of the Office demonstrated a truly remarkable devotion to duty. Their resiliency and courage in the face of horrendous pressures, their initiative and imagination in solving one unprecedented problem after another, their good-humored willingness to pitch in and do incredible amounts of sustained hard work -- all this and more approached heroic proportions. One can hope that the Copyright Office never again has to face the transitional problems and growing pains it met and surmounted in 1978, but if it ever does, the achievements of that year will be an inspiring example to follow."

I would like to turn now to a brief review of the functions of the Copyright Office under the new Copyright Act.

The Copyright Office is one of seven departments in the Library of Congress and is within the legislative branch of government. A principal function of the Office is the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners. The Office also records assignments and other transfers of copyright and related documents, and certain notices pertaining to the recording of musical works and the termination of rights earlier granted by authors.

In its examination and registration function, the Copyright Office, unlike the Patent and Trademark Office, does not "grant" copyrights. As noted earlier, under the 1976 Copyright Act, copyright attaches automatically upon the creation of a work. Upon application, the Copyright

Office registers "claims" to the copyright that the proprietor has automatically acquired. Registration of claims is not a condition to copyright under the new law, but the statute does provide a number of incentives to registration. The examination carried out by the Office is also more limited than that practiced in the patent area. We look to whether the subject of the claim is within a category of copyrightable subject matter and whether the conditions prescribed by the law respecting notice, application, and national origin have been met. We do not examine the "prior art," apply standards of aesthetic merit or novelty, determine whether the claimant is in fact the creator of the work, or resolve conflicting claims.

A major impact of the new law has been felt in our examining operations. Under the old law, the Copyright Office was able to make registration for some 85% of the applications in the form in which they were first received, and only the remaining 15% required correspondence. Beginning in January 1978, however, this ratio was almost exactly reversed: only about 15% of the applications could be registered on the first action, and 85% had to be the subject of Copyright Office letters to help applicants put their claims in registrable order.

The problem was essentially that the people who deal with the Copyright Office (authors, publishers, and others) were not familiar with some of the concepts of the new statute and with new Copyright Office application forms, which necessarily reflect the new law. Although the

situation has improved considerably -- we are now registering more than half the claims on the first application -- the Office has accumulated a backlog of correspondence cases. These consist mainly of cases where we have written to the applicant and are awaiting reply and, to some extent, cases for which Copyright Office correspondence is being prepared. Steady progress toward bringing the Office back to currency is clearly being made.

The Copyright Office performs several other functions related to or resulting from its registration and recordation duties. Our Cataloging Division prepares and distributes bibliographic descriptions of all registered works. During fiscal 1978, this division absorbed and implemented its greatest changes since its organization in the 1940's. There were two fundamental reasons for the changes. First, of course, there was the new copyright law. But of equal importance was a decision to make the Division's cataloging product compatible with the cataloging practices of the Library of Congress Processing Department. This decision paves the way for eventually adding hundreds of thousands of copyright entries to national and international data bases.

Our Information and Reference Division searches and reports, upon request, the facts contained in our records, provides certified copies, and assists the public in using our files. This division also maintains a public information office for answering mail, telephone and personal-visit inquiries about the copyright law and registration procedures, and has an active publication program for the distribution,

free of charge, of circulars and similar materials on copyright. Since January 1, 1978, the Information and Reference Division has faced and handled an enormous influx of letters, visitors and telephone calls pertaining to the new law.

Our Office also cooperates with the United States Customs Service in that agency's enforcement of certain importation prohibitions of the copyright law, and assists the Department of State in matters relating to the protection of American copyright interests in foreign countries, and the development of international copyright treaties and studies of copyright and related problems undertaken at the international level. One major issue now attracting particular attention in domestic and international copyright circles is the extent to which our law comports with, or may require additional revision to meet, the conditions for accession of the United States to the Berne Union for Protection of Literary and Artistic Works.

A most significant aspect of Copyright Office operations is its enrichment of the collections of the Library of Congress. Under the new copyright law, copies of works published in the United States with a notice of copyright are required to be deposited with the Copyright Office and made available through the Office to the Library of Congress for its collections. A variant form of deposit for the Library existed under the old law. The copyright system is the very base upon which the Library of Congress has developed its extensive collections of books, periodicals, music, maps, prints, photographs and motion pictures. In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions described above, the new copyright law gives additional responsibilities to the Copyright Office. We are engaged in licensing jukeboxes throughout the United States to perform copyrighted music; we also receive statutory fees or royalties from both jukebox and cable television operators. These sums are processed and accounted in our Office, and, after deduction of reasonable administrative expenses, are deposited with the Treasury Department for investment in interest-bearing U.S. securities and later distribution to copyright owners. Since January 1978, approximately \$12.5 million was collected from cable television operators and approximately \$2 million was received from jukebox operators. The distribution of collected royalties and accumulated interest will be made by the Copyright Royalty Tribunal, a separate agency created by the new Copyright Act. The Copyright Office does not have enforcement powers under the cable and jukebox compulsory licenses. If an operator does not file the required notices or fees, enforcement is left to private infringement actions by copyright owners. In the cable television area, we believe that there has been very substantial compliance by cable operators with the formal notice and accounting provisions of the new law. Unfortunately, our experience with jukebox licensing has not been the same; only about one-third of the estimated 400,000 jukeboxes in this country appear to have complied with the application and payment provisions of the new law.

The new Copyright Act, and accompanying legislative reports, also required or requested the Register of Copyrights to make certain studies and reports to Congress and your committee. Section 114(d),

for example, directed the Register to consult with various affected interests in the broadcasting, recording, motion picture and entertainment industries, as well as representatives of copyright owners, organized labor and performing artists, as the basis for a report to Congress on whether the copyright law should be further amended to provide a performance right to performers and producers of sound recordings — that is, a right to compensation for the public performance and broadcast of their creative endeavors. The report was to include a consideration of such rights in foreign countries, and specific legislative or other recommendations.

The question of performance rights has a long history, and has engendered considerable controversy in this country. In compliance with section 114(d), the Copyright Office submitted its basic Report on Performance Rights in Sound Recordings to Congress on January 3, 1978; several addenda to the report were submitted in March, 1978. The documentation comprised the transcript of five days of administrative hearings at which some twenty-five interested parties testified; an independent economic analysis of the potential effect of enacting performance rights legislation, together with public comments to the analysis; an exhaustive study of labor union involvement with the performance rights issue during the past thirty years; legal and practical studies of domestic and international performance rights case law and legislation; and bibliographic materials. Based upon consideration of these materials, the Register recommended the adoption of performance rights legislation, and submitted draft legislation for the consideration of your subcommittee.

In the current Congress, Representative Danielson has introduced two bills, both supported by the Copyright Office, to provide a performance right in sound recordings. One bill, H.R. 237, essentially follows the draft legislation proposed in the Register's 1978 report; the second, H.R. 997, incorporates a number of changes suggested by the recording industry and agreed to by the Copyright Office. Among these changes are: the provision of a blanket license for "discos" and other establishments whose principal form of entertainment is dancing to sound recordings; and the increase of the jukebox compulsory license fee now set in the law at \$8 to \$9, with \$1 allocated to performers and record producers. In both versions, the proposed legislation would provide a compulsory license to perform a sound recording publicly. The Copyright Office will be pleased to assist your committee as it may require when it proceeds to consideration of these measures.

A second study of current importance is based on a recommendation made at pages 71-72 of House Report No. 94-1476. Your committee there stated:

The problem of off-the air taping for nonprofit classroom use of copyrighted works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented.

Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

The "problem" adverted to in your Report is a substantial one; its importance and concern for its resolution increase with each day. The interests involved are significant. They include both the economic livelihood of all those involved in producing this country's audiovisual and broadcast materials, as well as the effective operation of our schools. Following your committee's suggestion, in July, 1977, the Copyright Office, together with the Ford Foundation, co-sponsored a conference at which representatives of various affected interest groups expressed their interests and concerns regarding off-air videotaping. No resolution of the issues emerged at this conference; indeed, none was expected. However, the conference successfully brought the parties together for a forthright discussion among -- and not "at" -- each other, and sensitized the interests to their respective needs and problems. Most importantly, the conference provided the foundation for the recent meeting convened on March 2, 1979 by your committee and our Office for a further airing of the issues.

The March, 1979, meeting on off-air videotaping for educational uses was a significant undertaking. Its success as a staging point toward resolution of one of today's most significant copyright issues is due in large part to the efforts of your Chairman, your counsel, Mr. Lehman, as well as those of the minority counsel, Mr. Mooney, and Mr. Ivan Bender of our Office, in bringing about a truly representative exposure of the numerous factors and issues involved. Like its 1977 predecessor, the March, 1979, meeting did not yield immediate answers. However, the eighteen formal presentations did show that the earlier conference, as well as intervening discussions among the parties and consultations with the Copyright Office and your committee's staff, had made their mark.

As a result of the March meeting, an informal committee consisting of representatives of educational, independent and theatrical film producers; network, local, and public broadcasters; authors, publishers, and craft unions; and educators, school administrators, librarians, and media specialists was appointed by your Chairman to negotiate guidelines applicable to off-air taping for educational uses. The first meeting of this committee will take place on April 17, 1979, and the Copyright Office will work with your staff in monitoring and assisting where necessary the work of this committee.

At this time, our Office believes that there is considerable hope of resolving this issue by mutual agreement and without additional specific legislation. I should add, however, that some aspects of off-air videotaping by educational institutions are also currently the subject of judicial inquiry. In February, 1978, the District Court for the

Northern District of New York granted a partial preliminary injunction against the operation of an extensive system of off-air taping, and reproduction and distribution of the tapes, engaged in by a state educational resource center serving over one hundred schools in twenty-one upper New York State school districts. A date for trial on the merits has not yet been set.

Off-air taping of copyrighted television programming has also been the subject of litigation outside of educational contexts. Universal City Studios v. Sony Corp. of America, (C.D. Calif.) raises numerous questions concerning the liability for copyright infringement of individuals taping copyrighted programming at home, of retailers demonstrating and selling videotape machines and of the manufacturer of such equipment. The trial in this case was held in February, 1979, and a decision is expected later this year.

Other sections of the new law calling for Copyright Office reports are 118(e)(2), concerning voluntary licensing arrangements between copyright owners of nondramatic literary works and public broadcasting entities, and 108(i) relating to the practical effects of the library photocopying provisions of the new law. In addition, members of the Senate requested the Register of Copyrights to study the economic impact of the 1982 elimination of the domestic manufacturing provisions from the copyright law. In each of these areas, the Copyright Office is developing vehicles for the consultation and fact-gathering that will form the bases for its reports.

In connection with the library photocopying report, for example, we have appointed an advisory committee of representatives of authors, publishers, and school, industry, and public libraries, and have had several meetings to define the relevant area of inquiry and develop the appropriate analytical tools.

A separate report to Congress that deserves mention is the Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU). CONTU was authorized by Public Law 93-573, enacted December 31, 1974. The Commissioners were appointed in July 1975, and the Commission began its program of research in October. After nearly three years of study of some of the copyright problems involving photocopying and computers, the Commission, under the Chairmanship of Judge Stanley H. Fuld, rendered its Final Report on September 30, 1978.

In summary the recommendations of the Commission concerning prospective legislation are:

1. To enact a section 107(b) to require the posting of a notice in commercial copying organizations, both to describe that copying which in most cases would constitute fair use, and to warn prospective customers of the liability they might incur for copying in violation of the copyright law.

2. To amend the new Copyright Law to make it explicit that computer programs, to the extent they embody an author's original creation, are proper subject matter of copyright (Commissioner Hershey dissented from this recommendation).

3. To delete the present section 117 of the copyright law so that the provisions of the new law will apply to all computer uses of copyrighted works, including programs, data bases and other works published in computer readable media.

4. To enact a new section 117 to assure that rightful possessors of copies of computer programs can use or adapt these copies for their use.

The Office believes that these recommendations are basically sound; however, we would suggest that the proposed new section 117 be subject to additional consideration, and possible refinement of its language and scope. The existing proposal appears to raise questions as to the ability of a program owner to enter into lease arrangements that place restrictions (for example, based upon trade secret or proprietary information) on the use to which the program could be put.

In concluding my remarks, I would add a brief comment concerning several proposed bills that have recently been introduced.

• H.R. 2706, introduced by Mr. Railsback on March 7, 1979, proposes to amend the Copyright Act by providing a new form of protection directed toward the special problems in the industrial design field. The design patent law, while affording protection to some designs, has proven too costly and cumbersome, and its standards too difficult to meet, for a wide range of industrial creations. The copyright law itself, as explained in detail at pages 54-55 of your Judiciary Committee's 1976 report, excludes coverage of all designs whose creative features are not recognizable apart from the shape of the useful article. As it has throughout past years, the Copyright Office supports this measure as offering just encouragement and reward to the creators of original ornamental

designs of useful articles. As your committee proceeds to consider this legislation, you might review the hearings and discussions during late 1976 concerning the addition of special provisions -- notably compulsory licensing and a limitation on remedies -- designed to protect typeface designs while ensuring free competition and unhampered distribution of literary material under this type of protection.

. H.R. 2487, introduced by Mr. Harsha on February 28, 1979, proposes to amend section 110 of the copyright act to exempt the "performance of a musical work in the course of the activities of a nonprofit veteran's organization". We have not had adequate opportunity to review this proposal or its justifications. I would, however, recall to your attention the following statement made in the 1976 report of the Judiciary Committee dealing with non-profit uses of copyrighted works: "The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write."

. H.R. 3333, introduced by Mr. Van Deerlin on March 29, 1979, proposes a comprehensive revision of the Communications Act of 1934. Among other effects, the bill would prohibit federal regulation of cable television systems, and would prohibit the retransmission or rebroadcast of a program by a cable system without the express authority of the originating station or person who owns or controls exclusive rights in the program. Section 111 of the copyright act provides a compulsory licensing system for cable retransmission; however, that section is based on the cable operators compliance

with rules and regulations of the Federal Communications Commission. Although copyright payments under section 111 may be based upon a cable system's signal complement, that complement was left to determination by the F.C.C. The proposed deregulation of cable systems raises significant questions as to whether section 111 of the Copyright Act is intended to be, or should be, repealed or modified in whole or in part.

On behalf of the Register and myself, I want to thank you for this opportunity to appear before you. We will be pleased to answer any inquiries you may have now or in the future.

Mr. KASTENMEIER. We are in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee is reconvened, and we are very pleased and proud to greet not only the witnesses, but also a gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I do not have an opening statement, Mr. Chairman.

Mr. KASTENMEIER. We are indeed pleased to greet the Honorable Douglas Coulter, chairman of the Copyright Royalty Tribunal.

We understand he is accompanied by Commissioners Mary Lou Burg, Frances Garcia and, Clarence James?

You are all most welcome and, Mr. Coulter, we will recognize you, sir, and we also appreciate your willingness to stay, even though the hour grows late and there have been delays in reaching you.

Thank you for your patience.

TESTIMONY OF DOUGLAS COULTER, CHAIRMAN OF THE U.S. COPYRIGHT ROYALTY TRIBUNAL, ACCOMPANIED BY COMMISSIONERS MARY LOU BURG, FRANCES GARCIA, AND CLARENCE JAMES

Mr. COULTER. I am Douglas Coulter, Chairman of the Copyright Royalty Tribunal.

With me are Commissioners Burg, James, and Garcia. Commissioner Brennan is on a vacation that he had planned for several months.

It is my understanding that you have asked us to testify here to familiarize yourselves, especially the new members, without activities. It is a pleasure to do so.

The Copyright Royalty Tribunal, as you know, is structured along the lines initially established by this subcommittee as part of the new Copyright Act.

Our purpose was to provide some mechanism for reviewing the compulsory licensing rates established in the act and for resolving certain disputes concerning royalty distribution.

The compulsory licensing rates we review are those concerning cable television, records, jukeboxes, and public broadcasting. The royalty distributions we adjudicate are those for cable television and jukeboxes. We had the additional responsibility last year of establishing the initial compulsory licensing rate for public broadcasting.

This year cable television and jukebox distribution are our primary concern, and next year, 1980, we conduct the first review of the initial compulsory licensing rates established in the statute for cable television, records, and jukeboxes. The scope and timing of our proceedings are determined by statute.

The Copyright Royalty Tribunal was structured and established as an experimental agency. The new systems of compulsory licensing had not been tested yet, and their consequences could not be foreseen.

As a result, after the distribution proceedings during the second half of this year and the rate reviews in 1980, it might be appropriate to review the Tribunal's role.

So far we have done our best to abide by the House Report accompanying the statute. That report emphasized that the Copyright Royalty Tribunal was a working commission, in other words, that the Commissioners performed their own professional responsibilities. These guidelines we have adhered to.

During the formation period of the Tribunal our budget was prepared by the Library of Congress and provided for several professional positions. These positions were funded by the Congress. However, we decided not to fill these positions.

Actually, we are operating with fewer personnel than the subcommittee contemplated. Rather than hire the small general administrative staff authorized in the House Report, the administrative duties have been divided among the assistants to the Commissioners. One office handles dockets, another the filing of claims, a third budget matters, et cetera.

As we directed by the subcommittee, the Tribunal's housekeeping functions have been contracted out generally to the Library of Congress, and in miscellaneous matters to the General Services Administration.

In connection with this you may have heard that we paid GSA last year for maintaining office plants. This was a standard contract at the time and we have since terminated it.

The sum was \$468.

As far as our budget is concerned generally, and this we feel is in keeping with the House report, we anticipate underspending our budget this year by 26 percent, and next year our request is for 22 percent less than our current appropriation.

As a new agency it was necessary for the Tribunal to develop policies in several areas including our proper function in the study of certain copyright questions.

In consultation with the chairmen of the House and Senate subcommittees, we decided that the Tribunal should not become involved in copyright issues not directly related to royalty and licensing matters concerning the industries involved in our statutory proceedings.

The only current activity in that regard is the development of objective data on the extent of personal taping of copyrighted audio works and on its impact, if any, on the industries subject to our royalty procedures.

The subcommittee may be interested in an appeal involving the Tribunal and filed by representatives of the jukebox industry. In accordance with section 116 of the Copyright Act, we adopted regulations which we felt were necessary for the proper distribution of jukebox royalties.

The jukebox industry, however, did not, and appealed.

Originally their complaint was limited to the issue surrounding the regulation, but later the question was raised concerning our constitutionality; that we are in the legislative branch and perform certain functions that could be called executive in nature. A similar question has been raised in regards to the Copyright Office.

The Department of Justice is representing the Tribunal and maintains that the structure of the Tribunal originally proposed by this subcommittee is constitutional.

The Federal district judge recently granted the Government's motion to dismiss the complaint. However, we understand that an appeal is likely.

This is a brief explanation of our activities, sir. I hope it is helpful. I would be more than happy to answer any questions.

[Statement of Mr. Coulter follows:]

Statement by Douglas Coulter
Chairman, Copyright Royalty Tribunal
before the
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
April 9, 1979

Mr. Chairman,

I am Douglas Coulter, Chairman of the Copyright Royalty Tribunal. With me are Commissioner Burg, Commissioner James, and Commissioner Garcia. Commissioner Brennan is on a vacation that he had planned for several months.

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So far we have done our best to abide by the House Report accompanying the statute. That report emphasized that the Copyright Royalty Tribunal was a working commission, in other words, that the Commissioners performed their own professional responsibilities. These guidelines we have adhered to.

During the formation period of the Tribunal our budget was prepared by the Library of Congress and provided for several professional positions. These positions were funded by the Congress. However, we decided not to fill these positions and we have eliminated any funding for a permanent professional staff from our pending budget request.

Actually we are operating with fewer personnel than the Subcommittee contemplated. Rather than hire the small general administrative staff authorized in the House Report, the administrative duties have been divided among the secretaries to the commissioners. One office handles dockets, another the filing of claims, a third budget matters, etc.

As was directed by the Subcommittee, the Tribunal's house-keeping functions have been contracted out generally to the Library of Congress, and in miscellaneous matters to the General Services Administration. In connection with this you may have heard that we paid GSA last year for maintaining office plants. This was a standard contract at the time and we have since terminated it. The amount was \$468. As far as our budget is concerned generally, and this we feel is in keeping with the House Report, we anticipate underspending our budget this year by 26%, and next year our request is for 22% less than our current appropriation.

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I hope this brief explanation of our activities is helpful.

Mr. KASTENMEIER. The issue of constitutionality of the Tribunal, in terms of whether it is legislative or otherwise, in character, was raised in 1976, and I thought we had satisfactorily disposed of that question, but obviously it has again been raised.

I am not really interested in whether you do or do not maintain office plants and that kind of triviality. I don't think that is central to anything.

But I am interested in your decision not to fill certain position with professionals, not that I either disagree or agree, but I am interested in whether you feel you have no need for professionals, or whether you felt it was necessary to hold down in budget terms, or what your reasoning was in deciding not to avail yourself of professional staff support in dealing, as you have dealt with and will deal with, some very difficult complex legal questions.

Mr. COULTER. Sir, our decision to do that was based upon our experience during the public broadcasting proceedings last year. When we went into those proceedings, we had outlined a very simple personnel format. And during those proceedings, we found that it wasn't as necessary as we anticipated and that we ourselves could digest the material and data. And therefore, at the conclusion of those proceedings, we felt that it would be premature to hire permanent personnel.

We felt that was also in keeping with the mood of Congress and the wording of the House report. And at present, while we are preparing to go into the distribution proceedings at the end of this year, we felt that it also would not be necessary to hire professional permanent staff.

What we plan to do for the much heavier proceedings next year, 1980, is hire consultants. We anticipate an expert or a professional in each of the three areas, with very likely an assistant.

So rather than burden the Tribunal with permanent personnel over a long period of time, we felt that we would proceed ad hoc, given the fairly large fluctuations in our workload, because of the statute.

Mr. KASTENMEIER. Let me ask you about the proposed deregulation of cable under H.R. 3333. Have you examined that proposal in light of your responsibilities to review the rate structure of cable in the following year, 1980?

Are you familiar with Mr. Van Deerlin's bill and its potential effect on cable copyright liability, as it exists under present law? Or as it may affect your deliberations?

Mr. COULTER. We are following the legislation. We are certainly familiar with the bill itself. The issue, of course, isn't just communications. It is heavily involved in the copyright area.

We aren't really empowered to do any other than what we are prescribed to do in the statute, sir.

As it exists now, our responsibilities in reviewing the cable rates are to take into account the effect of inflation, and the effect of any FCC rule change.

Mr. Van Deerlin's bill obviously would eliminate all of that. As we are currently proceeding, we are going to observe our statutory responsibilities, and if there are FCC rule changes—so far there has only been the *Artec* case, which was more a passive ruling than one that can be applied generally—we will act accordingly and we will

also take into account the effect of inflation on the return to copy-right owners, as it is currently structured in the act.

I guess to answer your question, while we are observing the legislation very closely, and we are planning to proceed as we are presently structured.

Mr. KASTENMEIER. You mentioned that you had the responsibility last year of establishing the initial compulsory licensing rate for public broadcasting.

Can you tell the committee more fully what that entailed in terms of hearing hours for you, and in terms of being able to effectively establish your rate? Whether or not the parties affected by that rate are complying with it, or are challenging it?

Could you give us some background in terms of your first major responsibility?

Mr. COULTER. Yes, sir.

Both sides accepted the rate we set. They both have indicated some dissatisfaction and some satisfaction with it. Therefore, we felt our success can be measured by that.

We had, I believe, sir, 14 days of formal full proceedings on that issue. The issue centered around, first of all, whether public broadcasting should observe the industry practice of paying for a blanket license to ASCAP.

There were two issues; one, blanket licensing. The other one the fee, and how the fee would be structured once blanket licensing was established.

We felt that the ASCAP arguments that there should be a blanket licence were correct. And we felt that the public broadcasting arguments on how they should be licensed was different from the common practice in the industry.

We felt that those arguments weren't solid. They were based upon the use of an individual piece of music.

On the other hand, ASCAP's desire to treat public broadcasting the same way it treats commercial broadcasting, we felt, were not solid and we did not go along with them.

There were a number of different proposals made. One of them was that the percentage that the ASCAP fee would be based upon should be a percentage of revenue. We toyed with the idea of population, television population, and none of the concepts seemed satisfactory.

As a result, we determined finally upon a fixed fee, which was \$1.25 million. This satisfied both the need to remunerate the creator properly, and at the same time did not draw the direct comparison between commercial and public broadcasting.

That was primarily the issue. BMI and SESAC, the other performing arts societies, had already reached agreement.

Is that a sufficient answer?

Mr. KASTENMEIER. Yes; I guess that is generally what I had in mind.

When the Tribunal reaches a conclusion, is it the Chair's intention to have a unanimous, a single voice, a single result? Do you have dissent? Does your procedure allow for one or more of the Tribunal to dissent from the majority opinion in terms of establishing rates? How do you proceed in that connection?

Mr. COULTER. I think ideally we would like unanimity, but our procedures very definitely allow for dissenting opinions.

And in the public broadcasting opinion, there were two commissioners who did present a dissenting opinion.

Mr. KASTENMEIER. The vote was 3 to 2?

Mr. COULTER. Yes, sir.

On one aspect of it, sir, not the entire decision.

Mr. KASTENMEIER. I would like to yield to the gentleman from Illinois.

Mr. RAILSBACK. Yes.

I wonder if you might be able to give us a copy of your procedures? Do you have bylaws?

Mr. COULTER. Yes, sir. We published them last year. I don't have them with me today.

Mr. RAILSBACK. I wonder if you would do this; I wonder if you could give us a set of your bylaws and procedures and your own backgrounds.

I don't want to ask you about your backgrounds, but maybe you could give us your resumés.

[Information furnished: See app. 1. "Rules of Procedure for the Copyright Tribunal," app. 2. "Resumés."]

Mr. RAILSBACK. When you make a decision, it is simply a majority vote that determines?

Mr. COULTER. We would not state that it is a majority vote, unless there were strongly dissenting opinions, in which case we would publish the dissenting opinions.

And if there aren't, then we simply publish it in the Federal Register as a decision and as a ruling.

Mr. RAILSBACK. I see. Could you also perhaps give us a copy of the complaint that was filed against you?

Mr. COULTER. Yes, sir.

Mr. RAILSBACK. And also, if you have a copy of the Justice Department's reply; the motion to dismiss.

Mr. COULTER. Yes, sir.

[Documents furnished: See app. 3, "Materials Including Briefs and Court Order Regarding *Amusement and Music Operations Association, et al., v. Copyright Royalty Tribunal, et al.*"]

Mr. RAILSBACK. Has that been appealed?

Mr. COULTER. They have a decision from the district court.

Mr. RAILSBACK. And that was favorable to you.

Mr. COULTER. It dismissed the complaint.

Mr. RAILSBACK. Do you know whether they are going to appeal or not?

Mr. COULTER. Every indication is that they will, sir. They have until April 22 to file their appeal.

Mr. RAILSBACK. Did I understand you to say that you have had 14 days of hearings so far?

Mr. COULTER. No; that was in 1978 with respect to public broadcasting.

Mr. RAILSBACK. All right.

I take it there are transcripts of all of those hearings?

Mr. COULTER. Yes, sir.

Mr. RAILSBACK. Have you had a number of other meetings in addition to those formal proceedings?

Mr. COULTER. We have had rulemaking proceedings in the jukebox area. We have had proceedings on initial rulemaking concerning the distribution hearings later this year.

We have had hearings issuing our own regulations, and we had some orientation hearings initially, sir.

I can provide you a list of those if you would like.

Mr. RAILSBACK. I am curious inasmuch as this is something that all of us worked on. I would be interested to see how it is operating.

I don't have any other questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from North Carolina?

Mr. GUDGER. One question.

You have testified that you have the responsibility, I believe, for compulsory license rate review for cable television and jukebox, and adjudicatory responsibility on cable television and jukebox, and of course, you have indicated that you will conduct your first review of the initial compulsory licensing rates established by statute for cable television and jukebox in 1980.

I was impressed by the testimony of Mr. Baumgarten, General Counsel of the Copyright Office; I believe you were present when he testified, in which he said in the cable television area he believed that there had been very substantial compliance, but felt that there had been a breakdown as far as the jukebox licensing was concerned.

Would you concur with this? I believe, as a matter of fact, he went so far as to say that only about one-third of the estimated 400,000 jukeboxes appeared to comply with the application and payment provisions.

Mr. COULTER. Yes, sir, I would have to agree. We don't, however, have any enforcement responsibility in the area. And our figures, because they are the licensing authority, are from the Copyright Office.

So our experience matches theirs because they are providing us the figures.

Mr. GUDGER. I believe he pointed that out in his testimony, also, that the question of notice and fees is largely a private enforcement function.

Mr. COULTER. Yes, sir.

Mr. GUDGER. Do you see any need for you to have any authority or responsibility beyond that of merely reviewing these rates? Do you see any need for any legislation in this area?

Mr. COULTER. Legislation in the area might be necessary. I think it would present problems for us to have too much enforcement authority.

Mr. GUDGER. I didn't perceive you as having the responsibility, but once you begin to set these rates and begin to confirm that they are not being administered, do you expect to have any recommendatory responsibility in this area?

Mr. COULTER. As of now, we hadn't contemplated it, but we certainly will if called to do so.

I can only speak personally as one Commissioner, and I would think that enforcement in some regard in that area might be helpful.

Mr. GUDGER. Thank you.

No further questions.

I yield back the balance of my time.

Mr. KASTENMEIER. I perhaps have one more question or comment.

The statutory directive creating the Tribunal was very narrow, and didn't contemplate very much more than the ratemaking process. Although, I think in the intervening months we have understood that the Tribunal was not—did not need to fully utilize each working day because of the nature of the duties that commended the attention of the Tribunal, the 250 or 300 working days a year.

I am not sure if there are other duties that are also appropriate for the Tribunal, or whether future work will, as each of these years mature, 1980 and the years beyond, whether these will be in fact enough to more fully occupy the time of the Tribunal.

One of the questions collaterally was whether the Tribunal might look into additional problems. I know I was contacted one or twice or three times over a period of time. And I think that in the situation, that I may have been inconsistent myself.

I know Commissioner Burg talked to me informally about one project of the Tribunal. And I indicated no particular objection, although subsequent to that conversation, I recall having written a letter to the Tribunal more specifically perhaps expressing reservations about the propriety or at least the logic of the Tribunal getting into certain areas. I gather that it was one area, that you are referring to in your testimony; development of objective data on the extent of personal taping of copyright audio works, and its impact on industries. That may have been suggested in the Senate originally. Maybe Mr. Brennan brought that idea with him.

I don't care to make an issue of it, but I guess, to be consistent, I have to write back a letter which corrected, the sort of offhand views I had suggested to Commissioner Burg.

Technically, I really don't see the utility of that in terms of the Tribunal's work. We did have, of course, the CONTU, the Commission on New Technological Uses of copyright works. We had very hot contests, litigation and otherwise, regarding Beta Max, and so forth.

So to the extent to which such research is relevant to the Tribunal's work, I guess that is a question. I gather at the present time you intend to fulfill what ever obligation you have to develop this one area, but are not involving yourselves in other areas of sponsoring research in collateral matters involving copyright works.

Is that correct?

Mr. COULTER. Yes, sir.

Mr. KASTENMEIER. I say this to sort of clarify the record. I think I owe it, particularly to Commissioner Burg, who talked to me one time about it recently.

Well, we wish you the very best. I think that you are going to be busy coming up 1980 with this cable issue.

We will continue to be interested in how the Commission functions. We hope you are successful. There will always be questions raised like the constitutional one, on your assistants, and I think that was a good idea that the gentleman from Illinois suggested, that you make the complaint available to us.

We did deal with the question legislatively in 1976. However it is ultimately resolved, I trust that the decision of the court of appeals will be upheld. We will be prepared to address that question.

In any event, we appreciate Chairman Coulter, you and your fellow Commissioners Burg, James, and Garcia, for being here today.

We stand ready to be of any help we can be to you.

Mr. COULTER. Thank you.

Mr. KASTENMEIER. That concludes our oversight hearings today. Tomorrow morning we will go on to the question of the U.S. Parole Commission oversight also the Probation Division of the Administrative Office of the U.S. Courts, will also be here at 9:30 in this room.

Those hearings should be relatively short.

Until that time, the committee stands adjourned.

[Whereupon, at 5:20 p.m., the hearing was adjourned.]



APPENDIXES

1. Rules of Procedure for the Copyright Tribunal.
2. Résumés of: Douglas Coulter, Thomas Brennan, Mary Lou Burg, Clarence L. James, Jr., and Frances Garcia.
3. Materials including briefs and court order regarding *Amusement and Music Operators Association, et al. v. Copyright Royalty Tribunal et al.*
4. Bernard Korman and Fred Koensberg, "The First Proceeding Before the Copyright Royalty Tribunal: ASCAP and the Public Broadcasters." *Communications and the Law*, vol. 1, No. 1, winter 1979.
5. Proposal of the Motion Picture Association of America, Inc., regarding amendments to the General Revision of the Copyright Act. Transmitted by Edward Cooper, April 23, 1979.
6. Material presented by the Graphic Artists Guild concerning Work-for-hire contracts. Transmitted by Tad Crawford, May 31, 1979 and June 26, 1978.

APPENDIX 1

TITLE 37—PATENTS, TRADEMARKS, AND COPYRIGHTS

CHAPTER III—COPYRIGHT ROYALTY TRIBUNAL

Part 301—Agency Rules of Procedure

Agency: Copyright Royalty Tribunal (Tribunal).

Action: Final rule.

Summary: Copyright Royalty Tribunal adopts its rules of procedure, including regulations required by the Government in the Sunshine Act, the Privacy Act, the Freedom of Information Act, and the equal employment opportunity procedures of the Tribunal.

Effective date: November 20, 1978.

For further information contact: Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 202-653-5175.

Supplementary information: On October 23, 1978, the proposed rules of procedure of the Copyright Royalty Tribunal were published in the Federal Register (43 F.R. 49318-49326). Interested persons were given until November 8, 1978 to submit comments. The rules were considered and adopted by the Tribunal on November 9.

Several substantive comments were received which proposed more detailed procedures in the rules pertaining to rate adjustment and royalty fee distribution proceedings. The Tribunal, without prejudice to the content of these comments, determined that further refinement of rate adjustment and royalty fee procedures should be deferred.

The only change in the proposed rules is a technical amendment to 301.75 to amend the sixth line to read "publication of a proposed royalty distribution determination" rather than "publication of a proposed rate determination."

Accordingly, pursuant to 17 U.S.C. 803(a), Title 37 is amended by establishing a Chapter III entitled "Copyright Royalty Tribunal" and by adding the following new part 301, reading as set forth below.

Effective date: This rule shall become effective on November 20, 1978.

Adopted: November 9, 1978.

THOMAS C. BRENNAN, *Chairman.*

Part 301 is added to read as follows:

*Part 301—Copyright Royalty Tribunal Rules of Procedure***Subpart A—Organization**

- Sec.
 301.1 Purpose.
 301.2 Address for information.
 301.3 Composition of the Tribunal.
 301.4 The Chairman.
 301.5 Standing committees.
 301.6 Administration of the Tribunal.
 301.7 Proceedings.

Subpart B—Public Access to Tribunal Meetings

- 301.11 Open meetings.
 301.12 Conduct of open meetings.
 301.13 Closed meetings.
 301.14 Procedure for closing meeting.
 301.15 Transcripts of closed meetings.
 301.16 Requests to open or close meetings.
 301.17 Ex parte communication.

Subpart C—Public Access to and Inspection of Records

- 301.21 Public records.
 301.22 Public access.
 301.23 Freedom of Information Act.
 301.24 Privacy Act.

Subpart D—Equal Employment Opportunity

- 301.31 Purpose.
 301.32 Recruitment and hiring.
 301.33 Complaint procedures.
 301.34 Third party allegation of discrimination.
 301.35 Business relations.

Subpart E—Procedures and Regulations

- 301.40 Scope.
 301.41 Formal hearings.
 301.42 Suspension, amendment, or waiver of rules.
 301.43 Notice of proposed rulemaking.
 301.44 Conduct of proceedings.
 301.45 Declaratory rulings.
 301.46 Testimony under oath.
 301.47 Transcript and record.
 301.48 Closing the hearing.
 301.49 Documents.
 301.50 Reopening of proceedings, modification, or setting.
 301.51 Rules of evidence.
 301.52 Participation in any proceeding.
 301.53 Examination, cross-examination, and rebuttal.
 301.54 Proposed findings and conclusions.
 301.55 Promulgation of rules or orders.
 301.56 Public suggestions and comments.

Subpart F—Rate Adjustment Proceedings

- 301.60 Scope.
 301.61 Commencement of adjustment proceedings.
 301.62 Content of petition.
 301.63 Consideration of petition.
 301.64 Disposition of petition.
 301.65 Rate adjustment proceedings.
 301.66 Publication of proposed rate determination.
 301.67 Final determination.
 301.68 Reopening of proceedings.
 301.69 Effective date of final determination.

Subpart G—Royalty Fees Distribution Proceedings

- 301.70 Scope.
- 301.71 Commencement proceedings.
- 301.72 Determination of controversy.
- 301.73 Royalty distribution proceedings.
- 301.74 Publication of proposed royalty distribution determination.
- 301.75 Final determination.
- 301.76 Reopening of proceedings.
- 301.77 Effective date of final determination.

Authority: 17 U.S.C. 803(a).

SUBPART A—ORGANIZATION

§ 301.1 Purpose.

The Copyright Royalty Tribunal (Tribunal) is an independent agency in the Legislative Branch, created by Public Law 94-553 of October 19, 1976.

The Tribunal's statutory responsibilities are:

- (a) To make determinations concerning copyright royalty rates in the areas of cable television covered by 17 U.S.C. 111.
- (b) To make determinations concerning copyright royalty rates for phonorecords (16 U.S.C. 115) and for coinoperated phonorecord players (jukeboxes) (17 U.S.C. 116).
- (c) To establish and later make determinations concerning royalty rates and terms for non-commercial broadcasting (17 U.S.C. 118).
- (d) To distribute cable television and jukebox royalties under 17 U.S.C. 111 and 17 U.S.C. 116 deposited with the Register of Copyrights.

§ 301.2 Address for information.

The official address of the Copyright Royalty Tribunal is 1111 20th Street NW., Washington, D.C. 20036, until March 31, 1979. Office hours are Monday through Friday, 8:30 a.m. to 5:30 p.m., excluding legal holidays.

§ 301.3 Composition of the Tribunal.

The Tribunal is composed of five members appointed by the President with the advice and consent of the Senate.

§ 301.4 The Chairman.

(a) On December 1st of each year the Chairman will be designated for a term of 1 year from the most senior Commissioner who has not yet previously served as Chairman, or, if all the Commissioners have served, the most senior Commissioner who has served the least number of terms will be designated Chairman.

(b) The responsibilities of the Chairman are, first, to preside at meetings and hearings of the Tribunal, and second, to represent the Tribunal officially in all external matters. In matters of legislation and legislative reports, the Chairman will represent the majority opinion of the Tribunal; however, any Commissioner with a minority or supplemental opinion may have that opinion represented also. The Chairman is the initial authority for all communications with other government officials or agencies and is the contracting officer; however, another Commissioner or subordinate official may be designated to act in his stead. The Chairman shall convene a meeting of the Tribunal upon the request of a majority of the Commissioners.

§ 301.5 Standing committee.

The Tribunal may establish standing or temporary committees to act in whatever capacity the Tribunal feels is appropriate. Said committees are authorized, in the areas of their jurisdiction, to conduct hearings, meetings, and other proceedings, but no such subdivision shall be authorized to act on behalf of the agency as a whole within the official meeting of 5 U.S.C. 552(n)(1).

§ 301.6 Administration of the Tribunal.

The administration of the Tribunal denotes chiefly the maintenance of the Tribunal records and the custodianship of Tribunal property. The records to be maintained include legal and public records, a current index of opinions, orders, policy statements, procedures, and rules of practice, and instructions that affect the public. Also, announcements of Tribunal actions must be published in the Federal Register as required, and the observance by the Tribunal of appropriate administrative procedure must be supervised, as well as the dis-

position of Tribunal correspondence. From time to time other administrative responsibilities may emerge. To manage the above, the Tribunal may choose to install an Administrative Officer, however, if not, it will be the Chairman's duty to see that these responsibilities are met.

§ 301.7 Proceedings.

(a) *Location.*—The Tribunal will normally hold all proceedings at its principal office, except under exceptional circumstances, in which case the Tribunal may perform its duties anywhere in the United States. The Tribunal's proceedings will be public, except as exempted in § 301.15.

(b) *Quorum.*—A majority of the members of the Tribunal constitutes a quorum.

(c) *Voting.*—Each Commissioner's vote shall be recorded separately, and the votes of the Commissioners shall be taken in order of their seniority, except that the Chairman shall vote last. No proxy votes will be recorded.

SUBPART B—PUBLIC ACCESS TO TRIBUNAL MEETINGS

§ 301.11 Open meeting.

(a) The purpose of this chapter is to comply with the Government in the Sunshine Act, Pub. L. 94-409; 90 Stat. 1241 et seq., 5 U.S.C. 522(b), and insure that all Tribunal meetings shall be open to the public. The conditions under which meetings, as an exception, may be closed, are listed in § 301.13.

(b) Each meeting announcement by the Tribunal shall be made at least 7 calendar days in advance in the Federal Register and shall state the time and place of the meeting, the subject to be discussed, whether the meeting is to be open or closed, and the name and telephone number of the person to contact for further information.

(c) If amendments are made to the original announcement, they must be placed in the Federal Register as soon as practicable. Changes in time and place may be made simply by making such an announcement, but a change in subject matter requires a recorded vote by Commissioners, with the results of that vote appearing in the announcement of the amendment.

(d) If it is decided that a meeting must be held on shorter notice than 7 days, that decision must be made by recorded vote of Commissioners and included in the announcement.

§ 301.12 Conduct of open meetings.

(a) Meetings of the Tribunal will be conducted in a manner to insure both the public's right to observe and the ability of the Tribunal to conduct its business properly. The Chairman or presiding officer will take whatever measures he feels necessary to achieve this.

(b) The right of the public to be present does not include the right to participate or make comments.

(c) Reasonable access for news media will be provided at all public sessions provided that it does not interfere with the comfort of Commissioners, staff, or witnesses. Cameras will be admitted only on the authorization of the Chairman, and no witness may be photographed or have his testimony recorded for broadcast if he objects.

§ 301.13 Closed meetings.

In the following circumstances (as per 5 U.S.C. 552(c), 1-10) the Tribunal may close its meetings or withhold information from the public:

(a) If the matter to be discussed has been specifically authorized to be kept secret by Executive order, in the interests of national defense or foreign policy;

(b) If the matter relates solely to the internal personnel rules and practices of the Tribunal;

(c) If the matter has been specifically exempted from disclosure by statute (other than 5 U.S.C. 552) and there is no discretion on the issue;

(d) If the matter involves privileged or confidential trade secrets or financial information;

(e) If the result might be to accuse any person of a crime or formally censure him;

(f) If there would be a clearly unwarranted invasion of personal privacy;

(g) If there would be disclosure of investigatory records compiled for law enforcement, or information which if written would be contained in such records, and to the extent disclosure would (1) interfere with enforcement

proceedings, (2) deprive a person of the right to a fair trial or impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source or, in the case of a criminal investigation or a national security intelligence investigation, confidential information furnished only by a confidential source, (5) disclosure investigative techniques and procedures, or (6) endanger the life or safety of law enforcement personnel.

(h) If premature disclosure of the information would frustrate the Tribunal's action, unless the Tribunal has already disclosed the concept or nature of the proposed action, or is required by law to make disclosure before taking final action.

(i) If the matter concerns the Tribunal's participation in a civil action or proceeding or in an action in a foreign court or international tribunal, or an arbitration, or a particular case of formal agency adjudication pursuant to 5 U.S.C. 554, or otherwise involving a determination of the record after opportunity for a hearing.

§ 301.14 Procedure for closing meetings.

(a) Meetings may be closed, or information withheld from the public, only by a recorded vote of a majority of the Commissioners. Each question, either to close a meeting or withhold information, must be voted on separately, unless a series of meetings is involved, in which case the Tribunal may vote to keep the discussions closed for 30 days, starting from the first meetings. If the Tribunal feels that information about a closed meeting must be withheld, the decision to do so must also be the subject of a recorded vote.

(b) Before a discussion to close a meeting or withhold information, the Chairman must certify that, in his opinion, such a step is permissible, and he shall cite the appropriate exemption under § 301.13. This certification shall be included in the announcement of the meeting and be maintained as part of the Tribunal's records.

(c) Following such a vote, and by the end of the working day, the Chairman must transmit the following information to the Federal Register for publication:

- (1) The vote of each Commissioner;
- (2) The appropriate exemption under § 301.13;
- (3) A list of all persons expected to attend the meeting and their affiliation.

§ 301.15 Transcripts of closed meetings.

(a) All meetings closed to the public shall be subject to either a complete transcript or, in the case of § 301.13(i) and at the Tribunal's discretion, detailed minutes. Detailed minutes shall describe all matters discussed, identify all documents considered, summarize action taken as well as the reasons for it, and record all rollcall votes as well as any views expressed.

(b) Such transcripts or minutes shall be kept by the Tribunal for 2 years or 1 year after the conclusion of the proceedings, whichever is later. Any portion of transcripts of meetings which the Chairman does not feel is exempt from disclosure under § 301.13 will ordinarily be available to the public within 20 working days of the meeting. Transcripts or minutes of closed meetings will be reviewed by the Chairman at the end of each calendar year and if he feels they may at that time be disclosed, he will resubmit the question to the Tribunal to gain authorization for their disclosure.

§ 301.16 Requests to open or close meetings.

(a) Any person may request the Tribunal to open or close a meeting or disclose or withhold information. Such a request must be captioned "Request to Open" or "Close" a meeting on a specific date concerning a specific subject. The requester must state his or her reasons, and include name and address, and desirably, telephone number.

(b) In the case of a request to open a meeting the Tribunal has previously voted closed, the Tribunal must receive the request within 3 working days of the meeting's announcement. If not, it will not be heeded, and the requester will be so notified. Requests are desired in seven copies.

(c) For the Tribunal to act on a request to open or close a meeting, the question must be brought to a vote before the Tribunal by one of the Commissioners. If the request is granted, an amended meeting announcement will be issued immediately and the requester notified. If a vote is not taken, or if after a vote the request is denied, the requester will also be notified promptly.

§ 301.17 *Ex parte communication.*

(a) No person not employed by the Tribunal and no employee of the Tribunal who performs any investigative function in connection with a Tribunal proceeding shall communicate, directly or indirectly, with any member of the Tribunal or with any employee involved in the decisions of the proceeding, with respect to the merits of any proceeding before the Tribunal or of a factually related proceeding.

(b) No member of the Tribunal and no employee involved in the decision of a proceeding shall communicate, directly or indirectly, with any person not employed by the Tribunal or with any employee of the Tribunal who performs an investigative function in connection with the proceeding, with respect to the merit of any proceeding before the Tribunal or of a factually related proceeding.

(c) If an *ex parte* communication is made to or by any member of the Tribunal or employee involved in the decision of the proceeding, in violation of paragraph (a) or (b) of this section, such member or employee shall promptly inform the Tribunal of the substance of such communication and of the circumstance surrounding it. The Tribunal shall then take such action it considers appropriate; provided that any written *ex parte* communication and a summary of any oral *ex parte* communication shall be made part of the public records of the Tribunal, but shall not be considered part of the record for the purposes of decision unless introduced into evidence by one of the parties.

(d) A request for information with respect to the status of proceeding shall not be considered an *ex parte* communication prohibited by this section.

SUBPART C—PUBLIC ACCESS TO AND INSPECTION OF RECORDS

The following is the manner in which Tribunal opinions, recommended decisions, orders, public reports and records shall be made available to the public.

§ 301.21 *Public records.*

(a) Final official determinations of the Tribunal will be published in the Federal Register and include the relevant facts and the reasons for those determinations.

(b) An annual report, required of the Tribunal to be presented to the President and Congress each fiscal year, along with a detailed fiscal statement of account, will be available both for inspection at the Tribunal and for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(c) All other Tribunal records are available, for inspection or copying at the Tribunal, except:

(1) Records that relate solely to the internal personnel rules and practices of the Tribunal;

(2) Records exempted by statute from disclosure;

(3) Interoffice memoranda or correspondence not available by law except to a party in litigation with the Tribunal;

(4) Personnel, medical, or similar files whose disclosure would be an invasion of personal privacy;

(5) Communications among Commissioners concerning the drafting of decisions, opinions, reports, and findings on any Tribunal matter of proceeding;

(6) Offers of settlement which have not been accepted unless they have been made public by the offerer;

(7) Records not herein listed but which may be withheld as "exempted" if the Tribunal finds compelling reasons exist.

§ 301.22 *Public access.*

(a) Information may be requested from the Tribunal in person, by telephone, or by mail.

(b) If the material sought is not a Tribunal record, is exempted, or for some reason is unavailable, the person requesting it will be so informed and, in the case of an "exempted record," will be explained the reason for the exemption and the procedure for appeal under the Freedom of Information Act, § 301.13.

(c) Fees for copies of Tribunal records are: \$.45 per page for 24 pages or less, and \$.35 per page for 25 copies or more, with a minimum fee of \$4; \$10 for each hour or fraction thereof spent searching for records; \$4 for certification of each document; and the actual cost to the Tribunal for any other costs incurred.

§ 301.23 Freedom of Information Act.

(a) If a request is made under the Freedom of Information Act (5 U.S.C. 552), it must be in writing, be captioned "Freedom of Information Act Request," and identify as accurately as possible, the information desired.

(b) Within 10 working days after the Tribunal has received such a request, the Chairman shall inform the requester how the records may be inspected or copied and the cost (as under § 301.22) of copying. The chairman may, however, extend this time limit up to 10 working days if:

- (1) Records must be located or transferred;
- (2) Voluminous material must be examined;
- (3) Other agencies with substantial interest in the matter must be consulted or other elements of the Tribunal must be consulted.

In this case the requester shall be notified in accordance with 5 U.S.C. 552(a) (6) (B).

(c) If the request is denied, the Chairman shall so inform the requester in writing, citing the exemption authorizing the denial and informing the requester that he or she may appeal the denial to the Tribunal within 20 working days. Appeals must be in writing and must be acted on by the Tribunal within 20 working days of their receipt. If the appeal is rejected, the requester must be so notified immediately and informed of the provisions for judicial review under 5 U.S.C. 552(a) (4).

§ 301.24 Privacy Act.

(a) The Privacy Act of 1974 (Pub. L. 93-579) 5 U.S.C. 552(a), concerns only requests which contain personal information retrievable by a personal identified. This section does not apply to personnel records located in Government-wide systems elsewhere.

The purpose of the Privacy Act is to enable individuals to:

- (1) Learn if the Tribunal maintains records concerning them;
- (2) Have access to such records;
- (3) Learn if and to whom the Tribunal has disclosed such records; and
- (4) Amend such records.

The Tribunal, in compliance with paragraph (a) (4) of this section, will record the disclosures of all records, their dates, the material disclosed, and to whom the material has been disclosed.

(b) A request made under the Privacy Act must be in writing, captioned "Privacy Act Request," and identify as accurately as possible the records in question and the nature of the information desired. This section is not to be construed as allowing an individual access to information compiled in reasonable anticipation of a civil action or proceeding.

(c) The request must be signed by the person making it, and such signature will be considered certification that the person signing is either the individual involved or that person's guardian. If the Chairman considers it necessary, he may require additional verification. Section 552(a) (i) (3) of the Privacy Act; 5 U.S.C. 552(a) (i) (3), states the penalties for false representation.

(d) If a medical record is involved and the chairman feels that its disclosure might adversely affect the individual, he shall require that person to designate a medical doctor to whom the record will be transmitted.

(e) Within 10 working days after the Tribunal has received such a request, the Chairman shall acknowledge its receipt to the requester and within 30 days shall inform the requester how the records may be inspected and the cost for copying, unless the records are exempted under § 301.21(c).

(f) If an individual who has obtained access to personal records wishes to have those records amended, he or she must make such a request in writing, state the nature of the information desired amended, and cite the reasons. Within 10 working days after the Tribunal has received such a request, the Chairman shall acknowledge its receipt and inform the requester whether or not the request has been granted. If the request is denied, the Chairman shall explain why and inform the requester of the right to appeal the denial to the Tribunal. All appeals must be in writing, with the caption "Privacy Act Appeal," and the Chairman will inform the requester of their disposition within 30 working days, unless there is good cause for the time to be extended. If the appeal is denied the requester will be notified of the provision for judicial review under 5 U.S.C. 552(b).

(g) Exempt from this section is all investigatory material compiled for law enforcement purposes as stipulated in 5 U.S.C. 552(k) (2).

SUBPART D—EQUAL EMPLOYMENT OPPORTUNITY

§ 301.31 Purpose.

(a) This section sets forth the Tribunal's policy concerning Equal Employment Opportunity and the complaint procedures in the case of discrimination.

(b) The policy of the Tribunal is to oppose discrimination in all areas of job application, employment, and promotion on the basis of race, religion, sex, national origin, age, or physical handicap; this is because such a policy is right and any other would be morally indefensible. This policy will be pursued actively and affirmatively.

§ 301.32 Recruitment and hiring.

(a) Except in the case of the personal staffs of Commissioners, responsibility for equal employment opportunity is the Tribunal's as a whole; however, the authority to execute this policy may be delegated to a Personnel Committee.

(b) All hiring will be done on the basis of individual qualifications, without discrimination. The criteria of who is best qualified to fill a vacancy rests with the Tribunal, but there will be no criteria which discriminates in the areas covered by § 301.31(b).

(c) In soliciting job applicants, systematic efforts will be made to locate and encourage qualified minority and women candidates. Where appropriate, the positions will be advertised in publications with primarily minority and women readership and announced through organizations or groups with high minority and women representation.

(d) Applicants for the same position will be required to have the same skills and to provide the same background information. The total number of applicants considered must reflect the proportion of minorities and women reasonably available for such a position. The criteria by which applicants are screened and selected shall be job related.

§ 301.33 Complaint procedures.

(a) Any person who believes that he or she has been discriminated against on the basis of race, religion, sex, national origin, age, or physical handicap, must first resolve such a complaint through the following procedure before taking civil action. Before a complaint may be presented formally the procedures for resolving it informally must be exhausted.

(1) *Informal complaint procedures.*—(i) Within 30 days of an alleged discriminatory act, or in the case of a personnel action, within 30 days of its effective date, the complainant must contact the Chairman of the Personnel Committee and explain the case for the complaint. In case the complaint is against the Chairman of the Personnel Committee, it will be made to the chairman of the Tribunal. The complainant may be accompanied or represented by any person of his or her choosing.

(ii) The chairman of the Personnel Committee, or the Chairman of the Tribunal, or a Commissioner designated by the Chairman, shall then make whatever inquiry seems necessary into their circumstances surrounding the complaint and shall attempt to resolve it informally through counseling. Such counseling shall be completed within twenty-one (21) days of the date on which the complaint was first brought, and written record will be kept. If an informal resolution is reached, its terms will be in writing. The identity of the complainant at this stage, however, will at no time be revealed unless he or she specifically authorizes it.

(iii) If an informal resolution is not reached, the complainant will be advised that he or she may then file a formal complaint.

(2) *Formal complaint procedure.*—(1) Within 15 days of the final counseling session under the informal procedure above, and if no resolution has been reached, the complainant may file a formal written complaint addressed to the Chairman of the Tribunal, signed by the complainant, and specifying all the details surrounding the complaint.

(ii) On receipt of the complaint, the Chairman shall request an investigation by the Chairman of the Personnel Committee and two Commissioners not on the Committee. This investigation will review thoroughly all the circumstances surrounding the alleged discrimination and analyze the treatment of the complaint as compared with others in the same situation. The results shall be in writing and a copy sent to the complainant. The complainant shall then be given the opportunity to meet with the Commissioners who prepared this report to try to reach an adjustment of the complaint. The complainant may be accompanied or

represented by a person of his or her own choosing. If the complainant is an employee of the Tribunal, he or she shall be allowed sufficient official time to present the complaint. If the complainant has designated another Tribunal employee to advise or represent him, that person shall be allowed sufficient official time to perform the appropriate duties.

(iii) If an adjustment is reached at this point, it must be signed by the complainant and shall serve to terminate the matter. If an adjustment is not reached, the investigative report will be transmitted to the Chairman of the Tribunal, and the Tribunal shall make a disposition of the complaint to take effect within 15 days. This disposition will be relayed to the complainant in writing immediately. The complainant shall also be advised of his or her right to file a civil action, or in the case of an employee of the Tribunal to demand a hearing.

(iv) Within 15 days of the announcement of the Tribunal's proposed disposition, a complainant who is an employee of the Tribunal may request a hearing. Upon receipt of such a request, the Chairman shall request from another Federal agency, a qualified Hearing Examiner who has been certified to hear Equal Employment Opportunity complaints.

(v) The Hearing Examiner, within 21 days, shall conduct a hearing. Witnesses will be allowed to testify, but their testimony must relate only to the complaint; information will be admitted into evidence, but only information having a direct bearing on the complaint. Both parties to the complaint shall have the opportunity to cross-examine. The hearing shall be recorded, and the transcript as well as the findings and recommendations of the Hearing Examiner shall be transmitted to the Tribunal for a final decision.

(vi) The Tribunal will give special consideration to the recommendations of the Hearing Examiner, and if he wishes to reject or modify those recommendations, the Tribunal must accompany such a decision with a letter detailing his reasons. The Tribunal's final decision will be accompanied by a copy of the Hearing Examiner's findings and recommendations and a transcript of the hearing.

(vii) After the decision has been issued, the complainant shall be advised immediately that he or she has the right to file a civil action in the appropriate District Court within 30 days.

(viii) If within one hundred eighty (180) days from the date the complainant first brought the complaint, the Tribunal has failed to issue a decision, the complainant will also have the right to file a civil action.

(ix) Where discrimination is found, the Tribunal shall review the matter which gave rise to the complaint and determine whether or not disciplinary action is necessary. The basis for this action shall be in writing, but not included in the complaint file.

§ 301.34 Third party allegation of discrimination.

Organizations or third parties may bring allegations of discrimination against the Tribunal in areas unrelated to individual complaints, but such allegations must be in writing, and in sufficient detail for the Tribunal to investigate them. The Tribunal may order an investigation, and the party bringing the allegations will be informed of its results as well as of any decision by the Tribunal and corrective action.

§ 301.35 Business relations.

Business contracts entered into by the Tribunal shall stipulate that all contractors, subcontractors, and suppliers to the Tribunal conform in their own policies with the substance of the Tribunal's Equal Employment Opportunity Policy.

SUBPART E—PROCEDURES AND REGULATIONS

§ 301.40 Scope.

All Tribunal proceedings will be governed by the procedures of this Subpart. This subpart does not apply to general statements of policy or to rules of agency organization, procedure, or practice.

§ 301.41 Formal hearings.

(a) The formal hearings which will be conducted pursuant to the rules of this subpart are rate adjustment proceedings, royalty fee distribution proceedings, and all rulemaking proceedings in which it has been determined to conduct a hearing. The Tribunal may also, on its own motion or on the petition of an interested party, hold other proceedings it deems necessary on any matter it has the authority to investigate, in order to obtain information in determining its policies, in exercising its duties, or in formulating or amending its rules and regulations. Such proceedings also will be subject to the rules of this subpart.

(b) Studies or conferences the Tribunal may hold in carrying out its statutory responsibilities may be conducted in whole or in part under the provisions of this subpart, depending upon the discretion of the Tribunal.

§ 301.42. Suspension, amendment, or waiver of rules.

(a) The provisions of this subpart may be suspended, revoked, amended, or waived, in whole or in part, at any time by the Tribunal for good cause shown, subject to the provisions of the Administrative Procedure Act. Where procedures have not been specifically prescribed in this subpart, the Tribunal shall follow those which in its opinion will best serve the purposes of a proceeding.

§ 301.43 Notice of proposed rulemaking.

(a) *General notice.*—Public notice for rate adjustment and royalty distribution proceedings is covered in Subpart F and G of this Part. Before the adoption of any rule of general applicability, or the commencement of any hearing on any proposed rulemaking, the Tribunal shall publish a general notice in the Federal Register, such notice to be published not less than 30 days prior to the date on which the proposed rules may be considered by the Tribunal, or the date of any hearing on such proposed rules. However, where the Tribunal, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may adopt the rules without notice by incorporating a finding to such effect and a concise statement of the reasons therefor in the notice.

(b) *Notice.*—A rule proceeding shall commence with a notice of proposed rulemaking. Such notice shall be published in the Federal Register, and to the extent practicable, otherwise made available to interested persons. The notice shall include: (1) The terms or substance of the proposed rule or a description of the subjects and issues involved; (2) reference to the legal authority under which the rule is proposed; (3) a statement describing the particular reason for the rule; and (4) an invitation to all interested persons to comment.

(c) *Hearing notice.*—A hearing notice of proposed rulemaking shall be published in the Federal Register, and to the extent practicable, otherwise made available to interested persons. The hearing notice shall include: (1) Designated issues which are to be considered; (2) the time and place of hearing, and (3) instructions to interested persons seeking to make oral presentations.

§ 301.44 Conduct of proceedings.

(a) At the opening of the proceeding the Chairman shall announce the subject under consideration.

(b) Only Commissioners of the Tribunal, authorized Tribunal staff, or counsel as provided in this chapter shall question witnesses.

(c) Subject to the approval of the Tribunal, the Chairman will have the responsibility for:

- (1) Settling the order of presentation of evidence and appearance of witnesses;
- (2) Ruling on objections and motions;
- (3) Administering oaths and affirmations to all witnesses;
- (4) Making all rulings with respect to introducing or excluding documentary or other evidence;
- (5) Regulating the course of the proceedings and the decorum of the parties and their counsel, and insuring that the proceedings are fair and impartial;
- (6) Announcing the schedule of subsequent hearings;
- (7) Taking any other action which is consistent with the chapter and which has been authorized by the Tribunal.

(d) With all due regard for the convenience of witnesses, proceedings shall be conducted as expeditiously as possible.

(e) Following the opening statement, the Tribunal may convene first in executive session if such is the requirement of a statute or rule.

§ 301.45 Declaratory rulings.

In accordance with 5 U.S.C., Sec. 554(e), the Tribunal may on motion of its own, or on motion of an interested party, issue a declaratory ruling in order to terminate a controversy or remove uncertainty.

§ 301.46 Testimony under oath or affirmation.

All witnesses at Tribunal proceedings shall be required to take an oath or affirmation before testifying; however, attorneys who do not appear as witnesses shall not be required to do so.

§ 301.47 *Transcript and record.*

(a) An official reporter for the recording and transcribing of hearings will be designated by the Tribunal from time to time. Anyone wishing to inspect the transcript of any hearing may do so at the Tribunal; however, anyone wishing a copy must purchase it from the official reporter.

(b) After the close of the hearing, the complete transcript of testimony together with all exhibits shall be certified as to identity by the Chairman and filed in the offices of the Tribunal.

(c) The transcript of testimony and all exhibits, papers, and requests filed in the proceeding, shall constitute the exclusive record or decision. Any decision resting on official notice of a material fact not appearing in the record shall automatically afford any party, on timely request, to have an opportunity to show the contrary.

§ 301.48 *Closing the hearing.*

To close the record of hearing, the Chairman shall make an announcement that the taking of testimony has concluded. In its discretion the Tribunal may close the record as of a future specified date, and allow time for exhibits yet to be prepared to be admitted: *Provided*, That the parties to the proceeding stipulate on the record that they waive the opportunity to cross-examine or present evidence with respect to such exhibits. The record in any hearing which has been recessed may not be closed by the Chairman prior to the day on which the hearing is to resume, except upon 10 days' notice to all parties.

§ 301.49 *Documents*

(a) *Copies of documents.*—The original and 15 copies of every document filed and served in proceedings before the Tribunal shall be furnished for the Tribunal's use, except exhibits made a part of the record.

(b) *Subscription and verification.*—(1) The original of all documents filed by any party represented by counsel, shall be signed by at least one attorney of record and list his address and telephone number. All copies shall be confirmed. Except when otherwise specifically provided, documents signed by the attorney for a party need not be verified or accompanied by an affidavit. The signature of an attorney constitutes certification by him that he has read the document, that to the best of his knowledge and belief here is good ground to support it, and that it has not been interposed for delay.

(2) The original of all documents filed by a party not represented by counsel shall be both signed and verified by that party and list that party's address and telephone number.

(3) The original of a document that is not signed, or is signed with intent to defeat the purpose of this section, may be stricken as sham and false and the matter proceed as though the document had not been filed.

§ 301.50 *Reopening of proceedings, modification or setting.*

(a) *Condition for reopening.*—(1) Except in the case of rate adjustment proceedings and distribution proceedings the Tribunal may, upon petition or its own motion, reopen any proceeding, after reasonable notice, for the purpose of rehearing arguments or reconsideration.

(2) After granting an opportunity to be heard, the Tribunal may alter, modify or set aside in whole or in part, the report of its finding or order if it finds such action required by changed conditions, by material mistake of fact or law, or by the public interest.

(b) *Petition for reopening.*—A petition for reopening shall be made in writing and shall state its grounds. If it is a petition to take further evidence, the nature and purpose of the new evidence to be adduced shall be stated briefly, and an explanation given for why such evidence was not available at the time of the prior hearing. If it is a petition for reargument or reconsideration, the matter that is claimed to have been erroneously decided shall be specified and the alleged errors outlined briefly. Copies of the petition shall be furnished to all participants or their counsel.

(c) *Stay of rule or order.*—No petition for reopening nor permission for reopening shall constitute a stay of any Tribunal rule or order; except that the Tribunal may postpone the effective date of any action taken by it pending judicial review and if, in the Tribunal's opinion, justice so requires.

§ 301.51 *Rules of evidence.*

(a) *Admissibility.*—In any public hearing before the Tribunal, evidence which is not unduly repetitious or cumulative and its relevant and material shall be

admissible. The testimony of any witness will not be considered evidence in a proceeding unless the witness has been sworn.

(b) *Documentary evidence.*—Evidence which is submitted in the form of documents or detailed data and information shall be presented as exhibits. Relevant and material matter embraced in a document containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence. A document in which material and relevant matter occurs which is of such bulk that it would unnecessarily encumber the record, may instead be marked for identification, and the relevant and material parts, once properly authenticated, may be read into the record. If the Tribunal desires, a true copy of the material and relevant matter may be presented in extract and submitted as evidence. Anyone presenting documents as evidence must present copies of all other participants at the hearing or their attorneys, and afford them an opportunity to examine the documents in their entirety and offer any other portion in evidence which may be felt material and relevant.

(c) *Documents filed with the Tribunal.*—If the matter offered in evidence is contained in documents already on file with the Tribunal, the documents themselves need not be produced, but may instead be referred to according to how they have been filed with the Tribunal.

(d) *Public documents.*—If a public document is offered in evidence either in whole or in part, such as an official report, decision, opinion or published scientific or economic data, and the document has been issued by an Executive Department, a legislative agency or committee, or a Federal administrative agency (Government-owned corporation included), and is proved by the party offering it to be reasonably available to the public, the document need not be produced physically, but may be offered instead by identifying the document and signaling the relevant parts.

(e) *Copies to participants.*—Copies of all prepared testimony and exhibits must be distributed to the Tribunal and to other participants or their counsel at a hearing, unless the Chairman directs otherwise. For its use the number of copies the Tribunal requires is seven.

(f) *Reception and ruling.*—Any ruling on the admissibility of evidence will be made by the Chairman, and he shall control the reception of evidence and insure that it confines itself to the issues of the proceeding.

(g) *Offers of proof.*—If the Chairman rejects or excludes proposed oral testimony and an offer of proof is made, the offer of proof shall consist of a statement of the substance of the evidence which is contended would have been adduced. In the case of documentary or written evidence, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(h) *Introduction of studies and analysis.*—If studies or analysis are offered in evidence, they shall state clearly the study plan, all relevant assumptions, the techniques of data collection, and the techniques of estimation and testing. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. If requested, tabulations of input data shall be made available to the Tribunal.

(i) *Statistical studies.*—Statistical studies offered in evidence shall be accompanied by a summary of their assumptions, their study plans, and their procedures. Supplementary details shall be added in appendices. For each of the following types of statistical studies the following should be furnished:

(1) *Sample surveys.*—(i) A clear description of the survey design, the definition of the universe under consideration, the sampling frame and units, the validity and confidence limits on major estimates; and

(ii) An explanation of the method of selecting the sample and of which characteristics were measured or counted.

(2) *Econometric investigations.*—(i) A complete description of the econometric model, the reasons for each assumption, and the reasons for the statistical specification;

(ii) A clear statement of how any changes in the assumptions might affect the final result; and

(iii) Any available alternative studies, if requested, which employ alternative models and variables.

(3) *Experimental analysis.*—(i) A complete description of the design, the controlled conditions, and the implementation of controls; and

(ii) A complete description of the methods of observation and adjustment of observation.

(4) *Studies involving statistical methodology.*—(i) The formula used for statistical estimates;

(ii) The standard error for each component;

(iii) The test statistics, the description of how the tests were conducted, related computations, computer programs, and all final results, and

(iv) Summarized descriptions of input data and, if requested, the input data itself.

(j) *Cumulative evidence.*—Cumulative evidence will be discouraged by the Tribunal and the Tribunal may limit the number of witnesses that may be heard in behalf of any one party on any one issue.

(k) *Further evidence.*—At any state of a hearing the Chairman may call upon any party to furnish further evidence upon any issue.

(l) *Rights of parties as to presentation of evidence.*—Every participant shall have the right to present his case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be necessary to disclose the facts fully and truthfully. The Chairman, however, may limit introduction of evidence, examination, and cross-examination if in his judgment this evidence or examination would be cumulative or cause undue delay.

§ 301.52 *Participation in any proceeding.*

Interested persons will be afforded an opportunity to participate in any proceeding and submit written data, views, or arguments, with or without the opportunity to present the same orally. If proposed rules are required by statute to be made on the record after opportunity for a hearing, such a hearing shall be conducted pursuant to 5 U.S.C., Subchapter II, and 7 U.S.C., and the procedure will be the same as in § 301.55 herein.

§ 301.53 *Examination, cross-examination, and rebuttal.*

(a) Each Commissioner may examine any witness at any time.

(b) Examination, cross-examination, and rebuttals relevant to the issues under consideration, shall be allowed by the Chairman, but only to the extent they are necessary for a full and true disclosure of the facts.

(c) *Selection of representatives for cross-examination.*—The Tribunal will encourage individuals or groups with the same or similar interests in a proceeding to select a single representative to conduct their examination and cross-examination for them. However, if there is no agreement on the selection of a representative, then each individual or group will be allowed to conduct his own examination and cross-examination, but only on issues affecting his particular interest.

§ 301.54 *Proposed findings and conclusions.*

(a) Any party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law, or may be directed by the Chairman so to file, such filings to take place within 20 days after the record has been closed, unless additional time is granted.

(b) Failure to file when directed to so do may be considered a waiver of the right to participate further in the proceeding, unless good cause is shown.

(c) Proposed findings of fact shall be numbered by paragraph and include all basic evidentiary facts developed on the record used to support proposed conclusions and cite appropriately the record for each evidentiary fact. Proposed conclusions shall be stated separately. Proposed findings submitted by someone other than an applicant in a proceeding shall be restricted to those issues which specifically affect that person.

(d) Proof of service upon all other counsel or parties in a proceeding must accompany pleadings and all other papers filed under this section.

§ 301.55 *Promulgation of rules or orders.*

(a) In adopting a rule or order the Tribunal will consider all relevant matters of fact, law, and policy, and all relevant matters which have been presented by interested persons, and will exercise due discretion. Together with a concise general statement of its basis and purpose and any necessary findings, the rule or order will be published in the FEDERAL REGISTER, and if any other public notice is necessary that will be made also.

(b) The effective date of any rule, or its amendment, suspension, or repeal, will be at least 30 days after it is published in the FEDERAL REGISTER, unless good cause has been shown and is published with the rule.

§ 301.56 *Public suggestions and comments.*

(a) The Tribunal encourages the public, not just those persons subject to its regulations, to submit suggestions and proposals concerning any substantial question before it, when that question will have substantial impact either upon those directly regulated by the Tribunal or upon others. It is in the best interests of both the Tribunal and the public at large that the Tribunal be advised on issues and problems that are potentially significant to it. This will permit the Tribunal to consider policy questions and administrative reforms early enough so that they may be viewed in a general context and not in the detailed application of a particular proceeding.

(b) Upon receiving such suggestions or proposals, the Tribunal shall review them and take whatever action seems necessary. Further information may be requested from the party submitting the suggestion or proposals, and the Tribunal staff may be asked to make a study, or an informal public conference may be held. Conferences or procedures undertaken pursuant to this section shall not be deemed subject to the Administrative Procedure Act with respect to notice of rulemaking. They are intended by the Tribunal simply as a means of determining the need for Tribunal action, prior to issuing a notice of proposed rulemaking.

(c) Such suggestions or proposals, however, shall be filed in accordance with the Tribunal's rules.

(d) This policy may not be used to advocate *ex parte* a position in a pending proceeding. Suggestions or proposals offered must relate to general conditions, such as conditions in industry, the public interest, or the policies of the Tribunal.

SUBPART F—RATE ADJUSTMENT PROCEEDINGS

§ 301.60 *Scope.*

This chapter governs only those proceedings dealing with royalty rate adjustments affecting cable television (17 U.S.C. 111), the production of phonorecords (17 U.S.C. 115), coin-operated phonorecord players (jukeboxes) (17 U.S.C. 116), and non-commercial broadcasting (17 U.S.C. 118). It does not govern unrelated rulemaking proceedings. Those provisions of subpart E generally regulating the conduct of proceedings shall apply to rate adjustment proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 301.61 *Commencement of adjustment proceedings.*

(a) In the case of cable television, phonorecords, and coin-operated phonorecord players (jukeboxes) rate adjustment proceedings will commence by the publication of a notice to that effect in the FEDERAL REGISTER on January 1, 1980, pursuant to 17 U.S.C. 804(a)(1). In the case of non-commercial broadcasting the notice will be published on June 30, 1982 and at 5-year intervals thereafter, pursuant to 17 U.S.C. 118(c). The notice shall, to the extent feasible, describe the general structure and schedule of the proceeding.

(b) Initially, as outlined in paragraph (a) of this section a petition from an interested party is not necessary to commence proceedings. Thereafter, however, for rate adjustment proceedings to commence, a petition must be filed by an interested party according to the following schedule:

(1) Cable Television: During 1985 and each subsequent fifth calendar year.

(2) Phonorecords: During 1987 and each subsequent 10th calendar year.

(3) Coin-operated phonorecord players (jukeboxes): During 1990 and each subsequent 10th calendar year.

(c) Cable television rate adjustment proceedings may also be commenced by the filing of a petition, according to 17 U.S.C., 801(b)(2)(B) and (C), if the Federal Communications Commission amends certain of its rules concerning the carriage by cable of broadcast signals, or with respect to syndicated and sports program exclusivity.

(d) In the case of non-commercial broadcasting, a petition is not necessary for the commencement of proceedings. They commence automatically according to paragraph (a) of this section.

§ 301.62 *Content of petition.*

(a) The petition shall detail the petitioner's interest in the royalty rate sufficiently to permit the Tribunal to determine whether the petitioner has "significant interest" in the matter. The petition must also identify the extent to which the petitioner's interest is shared by other owners or users, and owners or users with similar interests may file a petition jointly.

(b) In the case of a petition for rate adjustment as the result of a Federal Communications Commission rule change, the petition shall also set forth the action of the Federal Communications Commission which the party filing the petition fees authorizes a rate adjustment proceeding.

§ 301.63 Consideration of petition.

The Tribunal shall not start to consider any petition before the expiration of 90 days from the start of the calendar year specified in § 301.61(b) or 90 days from the effective date of the Federal Communications Commission action mentioned in § 301.62(c). Similar petitions may be joined together by the Tribunal for the purpose of determining "significant interest", and the Tribunal may permit written comments or a hearing on pending petitions.

§ 301.64 Disposition of petition.

At the end of the 90-day period, the Tribunal shall determine as expeditiously as possible if one or more petitioner's interest is "significant"; and shall publish in the FEDERAL REGISTER a notice of its determination and the reasons therefor, together with a notice of the commencement of proceedings if it has been determined to commence a proceeding. Any commencement notice shall, to the extent feasible, describe the general structure and schedule of the proceeding.

§ 301.65 Rate adjustment proceedings.

In any rate adjustment proceeding, all interested persons shall have the opportunity to present written comments and oral testimony, subject to the general provisions of subpart E.

§ 301.66 Publication of proposed rate determination.

(a) Following the conclusion of the hearings, the Tribunal shall publish as soon as possible in the FEDERAL REGISTER, a notice of its proposed findings and conclusions in the rate adjustment proceeding. The Tribunal shall afford all parties a reasonable opportunity to submit written comments on the proposed determination. The Tribunal may, if necessary, conduct additional hearings.

(b) A proposed determination will not be published if, in the Tribunal's judgment, a final determination cannot be rendered before the year's end as required by 17 U.S.C. 118(c) and 17 U.S.C. 804(e) concerning the termination of proceedings.

§ 301.67 Final determination.

Upon the conclusion of the procedures for proposed determinations described in § 301.66, or upon the conclusion of the rate adjustment proceedings provided in § 301.65, if the publication of a proposed rate determination is not feasible because of the requirements to reach a final determination before the end of the year (17 U.S.C. 118(c) and 17 U.S.C. 804(e)), the Tribunal shall publish in the FEDERAL REGISTER a written opinion stating in detail the criteria it found applicable, the facts found relevant, and the specific reasons for its determination.

§ 301.68 Reopening of proceedings.

Following the publication of a final determination in the FEDERAL REGISTER the Tribunal shall not reopen or conduct any further proceedings.

§ 301.69 Effective date of final determination.

A final determination by the Tribunal shall become effective thirty days following its publication in the FEDERAL REGISTER, unless an appeal has been filed prior to that time pursuant to 17 U.S.C. 810 to vacate, modify or correct a determination, and notice of the appeal has been served on all parties who appeared in the proceeding.

SUBPART G—ROYALTY FEES DISTRIBUTION PROCEEDINGS

§ 301.70 Scope.

This subpart governs only those proceedings dealing with the distribution of compulsory cable television and coin-operated phonorecord player (jukebox) royalties deposited with the Register of Copyrights, according to the terms of 17 U.S.C. 111(d) (5) and 116(c). It does not govern unrelated rulemaking proceedings. Those provisions of subpart E generally regulating the conduct of proceedings shall apply to royalty fee distribution proceedings, unless they are inconsistent with the specific provisions of this subpart.

§ 301.71 Commencement proceedings.

(a) *Cable television.* In the case of compulsory royalty fees for secondary transmissions by cable television, any person claiming to be entitled to such fees must file a claim with the Tribunal during the month of July each year in accordance with Tribunal regulations.

(b) *Coin-operated phonorecord players.* In the case of compulsory royalty fees for the use of nondramatic musical works by coin-operated phonorecord players (jukeboxes) any person claiming to be entitled to such fees must file a claim with the Tribunal during the month of January each year in accordance with Tribunal regulations.

§ 301.72 Determination of controversy.

(a) *Cable television.* After the first day of August each year, the Tribunal shall determine whether a controversy exists among the claimants of cable television compulsory royalty fees. In order to determine whether a controversy exists, the Tribunal may conduct whatever proceedings it feels necessary, subject to the procedures and regulations of subpart E. The results of this determination shall be announced in the FEDERAL REGISTER. If the Tribunal decides that a controversy exists, the FEDERAL REGISTER notice shall also announce the commencement of the royalty distribution proceeding, and shall, to the extent feasible, describe the general structure and schedule of the proceeding.

(b) *Coin-operated phonorecord players.* After the first day of October each year, the Tribunal shall determine whether a controversy exists among the claimants of coin-operated phonorecord player (jukebox) compulsory royalty fees. In order to determine whether a controversy exists the Tribunal may conduct whatever proceedings it feels necessary, subject to the procedures and regulations of subpart E. The results of this determination shall be announced in the FEDERAL REGISTER. If the Tribunal decides that a controversy exists, the FEDERAL REGISTER notice shall also announce the commencement of the royalty distribution proceeding, and shall, to the extent feasible, describe the general structure and schedule of the proceeding.

§ 301.73 Royalty distribution proceedings.

In any royalty distribution proceeding all interested claimants shall have the opportunity to present written comments and oral testimony, subject to the general provisions of subpart E.

§ 301.74 Publication of proposed royalty distribution determination.

(a) Following the conclusion of the hearings, the Tribunal shall publish, as soon as possible, in the FEDERAL REGISTER, a notice of its proposed findings and conclusions in the royalty distribution proceeding. The Tribunal shall afford all claimants a reasonable opportunity to submit written comments on the proposed determination. The Tribunal may, if necessary, conduct additional hearings.

(b) A proposed determination will not be published if, in the Tribunal's judgment, a final determination cannot feasibly be rendered before the year's end, as required by 17 U.S.C. 804(e) concerning the termination of proceedings.

§ 301.75 Final determination.

Upon the conclusion of the procedures for proposed determination described in § 301.74, or upon the conclusion of the royalty distribution proceedings provided in § 301.75, if the publication of a proposed royalty distribution determination is not feasible because of the requirements to reach a final determination before the end of the year (17 U.S.C. 804(e)), the Tribunal shall publish in the Federal Register a written opinion stating in detail the criteria it found applicable, the facts found relevant, and the specific reasons for its determination.

§ 301.76 Reopening of proceedings.

Following the publication of a final determination in the Federal Register, the Tribunal shall not reopen or conduct any further proceedings.

§ 301.77 Effective date of final determination.

A final determination by the Tribunal shall become effective thirty days following its publication in the Federal Register, unless an appeal has been filed prior to that time pursuant to 17 U.S.C. 810 to vacate, modify, or correct a determination, and notice of the appeal has been served on all parties who appeared in the proceeding.

[FR Doc. 78-32471 Filed 11-16-78; 8:45 am]

APPENDIX 2

BIOGRAPHICAL SKETCH

Douglas Coulter, Chairman, Copyright Royalty Tribunal, Harvard University, B.A., Phi Beta Kappa, 1963; European Institute of Business Administration, Fontainebleau, France, M.B.A., 1970; Harvard Business School, M.B.A., 1971; served in U.S. Army Special Forces, 1964-1967; assistant to the director of finance, AMP de France, Inc., 1969; campaign staff, McGovern presidential campaign, 1971-1972; free-lance writer, 1973-1976; campaign staff, Carter presidential campaign, 1976.

BIOGRAPHICAL SKETCH

Thomas C. Brennan is a life-long resident of New Jersey. He graduated magna cum laude from Seton Hall University and received his J.D. and LL.M. degrees from Georgetown University. He had a long association with the United States Senate Committee on the Judiciary, principally as Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights. He was nominated by President Jimmy Carter as the senior commissioner of the Copyright Royalty Tribunal, and has been elected as the first Chairman of the Tribunal.

BIOGRAPHICAL SKETCH

Mary Lou Burg, Commissioner, Copyright Royalty Tribunal, University of Wisconsin, B.S., 1952; General Manager and Sales Manager, radio station WYLO, Wisconsin, 1967-1970; Sales Representative, WYLO, Wisconsin, 1964-1967. Director of Continuity and Public Service, WEMP, Wisconsin, 1958-1964; sales and program promotion writer, WXIX-TV, Wisconsin, 1955-1957; served as vice chairman and deputy chairman, Democratic National Committee, 1970-1977.

BIOGRAPHICAL SKETCH

Clarence L. James, Jr., Commissioner, Copyright Royalty Tribunal; Pasadena City College, A.A., 1953; Ohio State University, B.S., 1957; Cleveland Marshall College of Law, Cleveland State University, J.D., 1962; Case Western University; Management Development Program, 1968. Held various staff positions with the Legal Aid Society of Cleveland, Inc., 1964-1968; Chief Counsel to City of Cleveland, 1968; Director of Law/Deputy Mayor of Cleveland, 1968-71; campaign staff, Carter presidential campaign, 1976; Special Counsel to Attorney General, State of Ohio 1972-1977; law practice with James Moore, Douglas & Co., LPA, 1971-77. Commissioner James is a member of the Ohio and Federal Bar.

BIOGRAPHICAL SKETCH

Frances Garcia, a native Texan, graduated from Midwestern University in Wichita Falls, Texas with a BBA degree in Accounting. Upon graduation, she joined the international accounting firm, Arthur Andersen & Co., where she became an audit manager in the Dallas/Fort Worth office and later assisted in opening the firm's new Austin, Texas office as audit and office manager.

In addition to her job responsibilities, Frances has been active in professional activities and civic organizations, such as Past President of the Dallas Chapter of the American Society of Women Accountants; Board of Trustees of the Dallas Mexican Chamber of Commerce Local Business Development Organization; and Board of Trustees of the Austin Minority Economic Development Corporation, the United Way of Austin and the Southwest Texas Public Broadcasting Council (KRLN-TV).

Frances was nominated as one of the five Commissioners on the Copyright Royalty Tribunal by President Jimmy Carter and is the Chairperson of the Tribunal's Budget Committee.

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ensen Lee.
Sp. Asst. U.S. Atty.

AMUSEMENT & MUSIC)
OPERATORS ASSOCIATION, et al.,)
)
Plaintiffs.)
)
v.)
)
COPYRIGHT ROYALTY TRIBUNAL, et al.,)
)
Defendants.)

CIVIL ACTION NO. 78-2030

FILED

FEB 22 1979

O R D E R

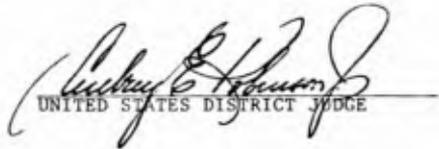
JAMES E. DAVEY, CLERK

This matter having come before the Court on Defendants' Motion to Dismiss and/or for Summary Judgment, Plaintiffs' Memorandum In Opposition, and the entire record herein,

It is this 22nd day of February, 1979.

ORDERED that Defendants' Motion be and hereby is granted, and it is

FURTHER ORDERED that Plaintiffs' Complaint be and hereby is dismissed.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT AND MUSIC OPERATORS	:	
ASSOCIATION, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	Civil Action No. 78-2030
	:	
THE COPYRIGHT ROYALTY TRIBUNAL,	:	
et al.	:	
	:	
Defendants	:	

PARTIES' STATEMENT CONCERNING PROPOSED
SCHEDULE OF FURTHER PROCEEDINGS

Plaintiffs request a hearing, with approximately five witnesses, on the issue of confidentiality of jukebox locations as a ground for annulling the CRT's regulations insofar as they require the filing of jukebox location lists (37 CFR 303.3).

Plaintiffs can be prepared for such a hearing within a two or three week time-period, and therefore request the matter be set down for hearing during the weeks of December 11 or December 18, 1978.

Defendant proposes instead to dispose of the case by motion and can file a motion to dismiss or for summary judgment within a thirty-day time-period. Defendant proposes therefore to file a motion to dismiss or for summary judgment on or before December 27, 1978, and to permit plaintiffs to file points and authorities with

affidavits within two weeks thereafter, that is January 10,
1979.

Susan Lee
Susan Lee
Assistant U.S. Attorney
Attorney for Defendants,
Copyright Royalty Tribunal,
et al.
U.S. Court House
Washington, D. C. 20001

Philip F. Herrick
Philip F. Herrick

Nicholas E. Allen
Nicholas E. Allen, Attorneys
for Plaintiffs, A.M.O.A., et al
1701 K Street, N.W., Suite 706
Washington, D. C. 20006
Tel: 452-1331

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT AND MUSIC OPERATORS
ASSOCIATION, et al.,

Plaintiffs,

v.

THE COPYRIGHT ROYALTY TRIBUNAL,
et al.,

Defendants.

Civil Action No. 78-2030

A N S W E R

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Thomas Brennan, Douglass Coulter, Mary Lou Burg, Clarence L. James, Jr., and Frances Garcia are not proper parties to this action.

Third Defense

The defendants answer the numbered paragraphs of the amended complaint as follows:

1. This paragraph contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, deny.

2. The defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

3. Admit.

4. Deny last sentence. Admit remainder of this paragraph and the Court is referred to the complete text of the regulations for a full statement of their contents.

5. Admit, except to deny that this paragraph states all duties imposed by statute upon defendants and the Court is referred to the Copyright Act of 1976 for a full and complete statement of its contents.

6. Admit, except that the word "Allegedly" be deleted.

7. Deny.

8. Deny first paragraph.

Admit subparagraph (a).

Admit subparagraph (b), except deny that this subparagraph contains a complete statement of all duties imposed by statute upon the defendants.

Admit subparagraphs (c) and (d).

Admit (e), except to deny that the legislative history of the duties of the Copyright Office has any relevance to the legislative history of those portions of the Copyright Act governing the duties of the Copyright Royalty Tribunal.

Admit subparagraphs (f), (g), (h), and (i).

Admit subparagraph (j), but deny that the Register of Copyrights has any authority to direct the actions of the defendants.

9. Deny the first sentence. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the second and third sentences. Deny the remainder of this paragraph.

10. Admit subparagraphs (a) and (b).

Deny subparagraph (c), except to admit the second sentence.

11. Deny, except that defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the second sentence or the averment in the first sentence which states that operators take great pains to protect information on jukebox locations.

12. Deny the first, second, and third sentences. Admit the remainder of this paragraph.

13. Deny that this is the Broadcast Music Inc. (BMI) position concerning location listing of jukeboxes, but admit that this is the BMI position concerning the use of trade journals. The Court is referred to the letter for a full and accurate statement of its contents.

14. Admit first sentence. Deny remainder of this paragraph.

15. Deny.

16. The defendants' answers to paragraphs 1 and 2 of the complaint are hereby adopted by reference as though they were fully set forth herein.

17. Admit.

18-19. Deny.

20. The defendants' answers to paragraphs 1 through 15 of the complaint are hereby adopted by reference as though they were fully set forth herein.

21-22. Deny.

Any and all allegations not hereinbefore specifically admitted or denied are denied.

Defendants deny that plaintiff is entitled to the relief sought in the complaint or to any relief whatsoever.

Wherefore, defendants having fully answered, pray that the action be dismissed with prejudice.

Respectfully submitted,

EARL J. SILBERT
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Susanne M. Lee

SUSANNE M. LEE
Special Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing defendants' Answer has been made upon plaintiff by mailing a copy thereof to counsel for plaintiffs, Nicholas E. Allen, Suite 706, 1701 K Street, N.W., Washington, D.C. 20006 on this 29th day of December, 1978.

Susanne M. Lee

SUSANNE M. LEE
Special Assistant U.S. Attorney
United States Court House
3rd & Constitution Avenue, N.W.
Room 3718
Washington, D.C. 20001
(202) 472-4759

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT & MUSIC OPERATORS ASSOCIATION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 78-2030
)	
COPYRIGHT ROYALTY TRIBUNAL, et al.,)	
)	
Defendants.)	

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' COMPLAINT OR IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Defendants respectfully move this Court to dismiss Plaintiffs' Complaint and/or for Summary Judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

In support of this Motion, defendants submit a Statement of Material Facts As To Which There Is No Genuine Issue, a Memorandum of Points and Authorities, and a Proposed Order.

Respectfully submitted,

Earl J. Silbert

 EARL J. SILBERT
 United States Attorney

Royce G. Lamberth

 ROYCE G. LAMBERTH
 Assistant United States Attorney

Susanne M. Lee

 SUSANNE M. LEE
 Special Assistant United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT AND MUSIC OPERATORS)
ASSOCIATION, et al.,)

Plaintiffs,)

v.)

THEY COPYRIGHT ROYALTY)
TRIBUNAL, et al.,)

Defendants.)

Civil Action No. 78-2030

STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff, Amusement and Music Operators Association (AMOA), is a non-profit corporation whose membership consists of jukebox operators throughout the country. The individual plaintiffs are members of the AMOA and are jukebox operators. Complaint, par. 2.

2. Defendant, Copyright Royalty Tribunal (Tribunal or CRT) is an independent agency of the legislative branch of the United States, established by the Copyright Act of 1976. The individual defendants are the Chairman and the four other members of the Tribunal, who are sued in their official capacities. Complaint, par. 3.

3. The Copyright Act of 1976 abolished the exemption granted to jukebox operators by the previous Copyright Act of 1909 and authorizes the collection and distribution of a royalty fee of \$8.00 per jukebox operator. Complaint, par. 8.

4. The Copyright Act of 1976 was enacted after twelve years of Congressional debate and compromise between competing interests, during which plaintiffs were active participants in the legislative process. Defendants' Exhibit B, page 15.

5. On September 6, 1978, the Tribunal adopted regulations to permit copyright owners access to jukeboxes as required by Section 116(c)(5) of the Copyright Act. The regulations require that jukebox operators submit to the Tribunal a list of the locations of their jukeboxes and an annual submission of any changes in the locations. The regulations further provide that access may be had only for the

purpose of obtaining information concerning the performance of musical works. Furthermore, access may be had only during customary business hours on regular business days, and only in a manner which does not cause significant interference in the functioning of the establishment. Complaint, paragraphs 5 & 6. Defendants' Exhibit A.

6. The regulations were published in the Federal Register on September 10, 1978 and have an effective date of October 10, 1978. They require the submission of jukebox location lists no later than November 1, 1978. Defendants' Exhibit A.

7. The regulations were issued as a result of extensive rulemaking proceedings. On December 8, 1977, the Tribunal issued an advance notice of proposed rulemaking concerning access to jukeboxes. On May 13, 1978, the Tribunal published a proposed rule which included location listings. A public hearing on the proposed rule was conducted on June 21, 1978. Defendants' Exhibit A at 40499.

8. Plaintiffs participated in the entire rulemaking process below, including the public hearing, at which plaintiffs were permitted to make formal statements, present witnesses, and cross-examine witnesses. Defendants' Exhibit A, Defendants' Exhibit B at page 5.

9. Broadcast Music Inc., a performing rights society, believes that requiring location listings is essential to the implementation of the Tribunal's duties. Defendants' Exhibit D at page 9.

10. On October 27, 1978, plaintiffs filed their Complaint seeking a temporary restraining order and preliminary injunction. After hearing arguments of counsel on plaintiffs' motion for a temporary restraining order and preliminary injunction, this Court denied plaintiffs' motion stating that plaintiffs had not demonstrated any likelihood of prevailing on the merits of the action. Complaint, pages 16 & 17. Order of this Court filed October 30, 1978.

11. By order dated November 1, 1978, the United States Court of Appeals for the District of Columbia affirmed this Court's denial of plaintiffs' motion. Defendants' Exhibit G.

12. During the November 9, 1978 public meeting of the Tribunal, plaintiffs presented a motion for consideration by the Tribunal which requested that location listings submitted to the Tribunal be deemed confidential. Defendants' Exhibit F at pages 61-63.

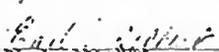
13. The Tribunal considered plaintiffs' motion, and after hearing the views of other interested parties, the Tribunal unanimously adopted the following policy and practice concerning the disclosure of jukebox location lists:

- (a) The actual lists filed by jukebox operators will not be disclosed;
- (b) Information will not be disclosed which links the name of the operator with the location of the jukebox;
- (c) Potential claimants will be provided with a catalog composed only of the number, not the location, of jukeboxes by state or, if possible, by local government entity; and
- (d) The Tribunal will not provide potential claimants with a list of all locations, but instead the Tribunal will provide a selected list of locations which the Tribunal first determines is appropriate and which it then compiles.

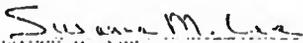
Defendants' Exhibit C.

14. The Comptroller General of the United States, by decision dated November 14, 1978, ruled that the Tribunal is not subject to the provisions of the Federal Reports Act, 44 U.S.C. §§3501 et seq. (1970 and Supp. V 1975) because the Act does not apply to agencies within the legislative branch. Defendants' Exhibit E.

Respectfully submitted,


 EARL J. SILBERT
 United States Attorney


 ROYCE G. LAMBERT
 Assistant United States Attorney


 SUZANNE M. LEE
 Special Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT & MUSIC OPERATORS
ASSOCIATION, et al.,

Plaintiffs,

v.

COPYRIGHT ROYALTY TRIBUNAL, et al.,

Defendants.

CIVIL ACTION NO. 78-2030

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS,
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiffs, the Amusement and Music Operators Association and several of its members, seek to have the Court declare null and void, and set aside, regulations issued by defendants, the Copyright Royalty Tribunal and its Commissioners (Tribunal), which require the submission of lists of locations of jukeboxes. Plaintiffs contend that the regulations are in excess of defendants' authority, violate the mandates of the Copyright Act and the Federal Reports Act, and are in violation of the Fifth Amendment of the Constitution. Plaintiffs further contend that the Copyright Royalty Tribunal is unconstitutionally organized in the legislative branch.

Defendants contend that the regulations are fully in accord with the relevant provisions of the statute and the legislative history, and essential to the implementation of the jukebox royalty provisions of the Copyright Act of 1976. Defendants further contend that the regulations are not violative of the Fifth Amendment because they are reasonable, rational, and have a real and substantial relation to the statute which requires that copyright owners be given access to the jukeboxes. Defendants also contend that they have taken appropriate action to insure that the confidentiality of the location lists will be protected against disclosure to competitors. Moreover, defendants contend that the Tribunal is not subject to the Federal Reports Act because the Act does not apply

to agencies within the legislative branch. Defendants further contend that the Tribunal is correctly established within the legislative branch. Even assuming the Tribunal performs some executive functions, this does not mean that it cannot properly be placed within the legislative branch as is the Copyright Office. The promulgation of the regulations by defendants was not arbitrary, capricious or an abuse of discretion. Instead, the regulations must be sustained because they are reasonably related to a specific purpose of the statute.

For the foregoing reasons, this Court should grant defendants' Motion for Summary Judgment.

STATUTORY AND FACTUAL BACKGROUND

Plaintiff, Amusement and Music Operations Association (AMOA) is a non-profit corporation whose membership consists of jukebox operators located throughout the country. The individual plaintiffs are members of AMOA and are jukebox operators. Complaint, paragraph 2.

Defendant, Copyright Royalty Tribunal (CRT or Tribunal), is an independent agency of the legislative branch of the United States government, established by the Copyright Act of 1976, 17 U.S.C. §§ 801-810. The Tribunal is composed of five members appointed by the President with the advice and consent of the Senate, 17 U.S.C. 802. The individual defendants are the Chairman and the remaining four members of the Tribunal, all of whom are sued in their official capacities.

The Copyright Act of 1976 (Act) abolished the exemption granted to jukebox operators by the previous Copyright Act of 1909. As a result, operators of jukeboxes are required to pay an annual eight dollar royalty fee for each jukebox, 17 U.S.C. 116(b)(1). The Act requires the Tribunal, as part of its duties, to distribute the royalty fees collected among copyright owners. During January of each year, copyright owners are required to file with the Tribunal their claims for these royalties based upon performances during the preceding twelve month period.

17 U.S.C. 116(c)(2). The Tribunal is then required to distribute the royalties collected among copyright owners who have filed claims. 17 U.S.C. 116(c)(3), (4).

The Congress, in adopting the jukebox royalty provisions, also provided copyright owners with the right to reasonable access to jukeboxes in order to determine the basis for their claims for royalty fees. The "access" provisions of the statute and the regulations promulgated thereunder are the subject of this litigation. The relevant portion of the statute provides as follows:

The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such persons to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Tribunal may bring an action in the United States District for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof. 17 U.S.C. 116(c)(5).

In order to gain access to the jukeboxes, copyright owners must first know where the jukeboxes are located. As a result, on September 6th, 1978, CRT adopted regulations, pursuant to 17 U.S.C. 116(c)(5), which require that jukebox operators submit to CRT a list of the locations of their jukeboxes and the number of boxes at each location. The regulations require a one time only submission of the list and an annual submission of any changes in locations. 37 C.F.R. 303.3.

The regulations also provide for access by copyright owners

but, in accordance with the statute, such access:

shall be only for the purpose of obtaining information concerning the performance of musical works by the phonorecord players. The right of access shall be exercised in such a manner as not to cause any significant interference with the normal functioning of an establishment. 37 C.F.R. 303.2.

The regulations were published in the Federal Register on September 10, 1978, and have an effective date of October 19, 1978. They require the submission of the lists of the jukebox locations no later than November 1, 1978. 37 C.F.R. 303.3, 43 F.R. 40498-40501, attached herein as Defendants' Exhibit A.

The regulations were issued as a result of extensive rule-making proceedings. On December 8, 1977, the CRT issued an advance notice of proposed rulemaking concerning access to jukeboxes. 42 F.R. 62019. On May 13, 1978, the CRT published a proposed rule which included location listings. 43 FR 20513. A public hearing on the proposed rule was conducted on June 21, 1978. Plaintiffs participated in the entire rulemaking process below, including the public hearing, at which plaintiffs were permitted to make formal statements, present witnesses, and cross-examine witnesses. Defendants' Exhibit A and Exhibit B at 5.1/

On October 27, 1978, plaintiff filed a complaint against the Tribunal seeking a temporary restraining order and preliminary injunctive relief. The complaint alleges that the regulations promulgated by the CRT on September 6, 1978, 37 CFR 303.3, were in excess of CRT's statutory authority, unduly harassing, burdensome, and costly, and create an unreasonable risk of the disclosure of confidential information. Plaintiff sought injunctive relief to stay the regulations, which required filing of the list of locations no later than November 1, 1978.

After hearing arguments of counsel on plaintiff's motion for a temporary restraining order and preliminary injunction on October 30, 1978, this Court, by order dated that same day,

I/ The pertinent portions of the transcript of the hearing on plaintiffs' motion for temporary restraining order heard by this Court on October 30, 1978 are attached herein as Defendants' Exhibit B.

denied plaintiffs' motion for temporary restraining order and preliminary injunction. This Court denied the motion because plaintiffs failed to satisfy the requirements of Virginia Petroleum Jobbers and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977), "especially in that Plaintiffs have not demonstrated any likelihood of prevailing on the merits of this action."

On October 31, 1978, plaintiffs appealed to the United States Court of Appeals for the District of Columbia for an order overruling this Court's denial of the temporary restraining order and preliminary injunction. Defendants moved for summary affirmance. By order dated November 1, 1978, the United States Court of Appeals for the District of Columbia denied plaintiffs' motion and granted defendants' motion for summary affirmance, attached herein as Defendants' Exhibit G.

At a public meeting on November 9, 1978, the Tribunal met to consider a motion submitted by plaintiffs to require confidentiality of the location listings submitted pursuant to the regulations at issue. Plaintiffs and other interested individuals addressed the Tribunal. After hearing the views of all interested parties, and after considering the remarks of the Court at the hearing on the motion for temporary restraining order, the Tribunal unanimously adopted the following statement of policy and practice with regard to the disclosure of jukebox location lists:

SUBJECT: CRITERIA AND PROCEDURES FOR THE DISCLOSURE OF JUKEBOX LOCATION LISTS

Resolved, That the Copyright Royalty Tribunal should not disclose the actual location lists filed by jukebox operators pursuant to the Copyright Royalty Tribunal's regulations requiring licensed jukebox operators to file location lists with the Copyright Royalty Tribunal.

In the form that the Copyright Royalty Tribunal receives said information from the operators, the Copyright Royalty Tribunal shall not disclose to any person the name of any jukebox operator corresponding to any identifiable or particular location list.

Further resolved, That the Copyright Royalty Tribunal shall compile a catalog listing the number of jukeboxes by state, and if possible, by local governmental entities. Such a catalog shall be made available to persons who can reasonably be expected to have a claim.

Upon application by persons who can reasonably be expected to have a claim, the Copyright Royalty Tribunal shall make available a selected location identification, determined and compiled by the Copyright Royalty Tribunal from information received from jukebox operators.

On November 20, 1978, plaintiffs amended their complaint to include two additional allegations: that the Tribunal is unconstitutionally established; and, that the requirement for filing location lists violates the Fifth Amendment.

1. The Promulgation of Access Regulations Was A Reasonable, Rational Action Based On All The Relevant Factors And Fully In Accord With The Statute.

The standard of review to be applied by the Court in its examination of the regulations at issue in this action is well established. The validity of a regulation promulgated pursuant to specific statutory authority "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'". Mourning v. Family Publications Service, Inc., 441 U.S. 356, 369 (1973). Even if the Court does not agree with the action required by regulations, "It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner." Ibid. at 378.

The Tribunal did not exist under the previous copyright statute, the Copyright Act of 1909, and is an entirely new entity created by the Copyright Act of 1976 (Act). The regulations at issue reflect the interpretation given the statute by those individuals who were instrumental in formulating the legislation and the establishment and functioning of the Tribunal. Particular deference is due an agency's interpretation of a statute "when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making

the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961) citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

A basic principle of statutory construction, one recently articulated by this Court, is that an agency's "construction" of its own enacting legislation is entitled to great deference from the courts. The agency's interpretation is to be sustained "as long as that interpretation has a reasonable basis in the law. Only where there are compelling indications that the interpretation is plainly erroneous should a Court invalidate an administrative construction of a statute." American Bankers v. Connell, 447 F.Supp. 296, 298 (D.D.C. 1978)). As set forth below, not only are the access regulations promulgated by the Tribunal reasonable and based upon the precise language of the Act but they represent the minimum requirements necessary to enable the Tribunal to fulfill its statutory obligations.

The Act provides that jukebox royalty fees are to be distributed annually by the Tribunal. 17 U.S.C. 116(c)(3). During January of each year persons with claims to jukebox royalty fees for performances during the prior year must file such claims with the Tribunal. 17 U.S.C. 116(c)(1). In order to permit individuals who can reasonably expect to have claims to substantiate their claims, the statute requires that the Tribunal promulgate regulations which provide potential claimants with access to establishments in which jukeboxes are located. 17 U.S.C. 116(c)(5).

The definition of the word "access" encompasses the means, the power or opportunity of approaching an object. Black's Law Dictionary, 4th ed., 1968. It certainly was not arbitrary or capricious for the Tribunal to require the submission of location listings since there can be no access if there is no way to deter-

mine where the jukeboxes are located.

Plaintiffs cite portions of the legislative history of the Act to support their position that Congress did not intend to require location listings. Revisions in the Copyright Act of 1909, which resulted in the enactment of the current statute, took place over a period of twelve years, involved extensive legislative activity and included extensive hearings and negotiations among all interested parties. Plaintiffs were actively involved in the entire process and had ample opportunity to convince the Congress that access to individual jukeboxes should not be required. Defendants' Exhibit B at 15 & 20. Despite plaintiffs' efforts, the Congress enacted a statute which requires that potential claimants be given access to the jukeboxes. The language of the statute is clear and the Court need not resort to an examination of the legislative history to determine its meaning.

Furthermore, not one portion of the legislative history cited in support of plaintiffs' position is relevant. With the exception of legislative history cited in subparagraphs (h), (i); and (j) of paragraph 8 of the Complaint, all other examples relate to legislative history which occurred before 1970. The Tribunal and its duties did not appear in the Act or the legislative history until after 1970. Complaint, par. 8, subparagraph(f).

Of the remaining citations to the legislative history, subparagraph (h) cites language which prohibits metering devices. This legislative history was followed in the regulations at issue because they do not require the installation of such devices. Subparagraph (h) contains a completely irrelevant statement concerning the decline of the jukebox industry.

The inclusion by plaintiffs of the statement of the Register of the Copyright in subparagraph (j) is illustrative of the manner in which plaintiffs have attempted to misinterpret the Act's legislative history. Although the Register states that she does not

believe location lists could be required by the Copyright Office, she is careful to indicate that her interpretation is not intended to limit the authority of the Tribunal. In fact, statutory duties of the Tribunal and the Copyright Office are different resulting in the imposition of diverse requirements. The Copyright Office issues licenses for jukeboxes upon payment of a royalty fee. The Copyright Office has no need to know the location of individual jukeboxes and the statute does not provide for access by the Copyright Office. The Tribunal, on the other hand, must provide location lists so that claimants can find and obtain access to jukeboxes. The Tribunal and the potential claimants must know the location in order to gather information sufficient to establish a basis for distribution of the royalties.

In summary, plaintiffs' citations to the legislative history are in most instances irrelevant to the regulations at issue. Other citations indicate that the regulations are fully in accord with the legislative history because they do not require metering or other record-keeping devices. This Court should not now grant plaintiffs what the statute and legislative history indicate that they could not obtain from Congress.

Equally unfounded are plaintiffs' contentions that the regulations are outside the scope of the statute, which requires that access be had "without expense to or harassment" of operators or proprietors of establishments where jukeboxes are located. 17 U.S.C. 116(c)(5). The regulations require a one time only submission of the location of each jukebox and an annual revision if there have been changes in the location or number of jukeboxes at a location. 37 C.F.R. 303.3. The regulations further state that potential claimants shall have access to the jukeboxes only during customary business hours on regular business days. The right of access is only for the purpose of obtaining information concerning the performance of

musical works. Furthermore, the right is to be exercised so as not to cause any significant interference in the normal functioning of the establishment. 37 C.F.R. 303.2.

The regulations represent a reasonable and rational interpretation of a statute which requires access but also requires that it be effected without harassment or expense. The regulations are not burdensome, nor do they permit harassment of the jukebox operators. They are specifically in accord with the legislative history in that they do not require the installation of a metering device or other record keeping requirement which would count the frequency with which a record is played. H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 115 (1976).

The harassment prohibited by the statute means more than interference of any kind. The word "harassment" connotes a continuing or chronic annoyance or badgering, the occurrence of significant interference. Access during normal business hours which does not significantly interfere with the normal functioning of the business, and a one time only submission of a location listing can not be considered to be harassment.

Affidavits submitted by plaintiffs which allege that the regulations will require large expenditures of time and money and thus are harassing and burdensome are not creditable. It is beyond belief that a jukebox operator involved in the continual collection of receipts and the servicing of machines does not know, or have in readily accessible form, information concerning the locations of all his jukeboxes. The expenses involved in writing down the locations just one time and the annual submission of the changes if needed, are de minimus.

Plaintiffs also argue that the regulations are impractical, unnecessary and serve no public interest because the information sought is available elsewhere. However, trade journals indicate

only the number of records sold, not the frequency with which they are played. Furthermore, trade journals include only certain single records; they do not include religious and ethnic music or long playing records. Plaintiffs also state that information submitted to the Copyright Office could be used, but these monthly statements indicate the number of songs recorded, not the frequency with which they are played.

Plaintiffs quote the memo of a performing rights society, Broadcasting Music Inc. (BMI), as support for the use of trade journals exclusively. Exhibit A to complaint. Plaintiffs failed to state as, indicated in Defendants' Exhibit D, that BMI as well as the other performing rights societies support the access regulations and believe they are necessary as an additional source of information. During the public hearing on the proposed rules at issue here, conducted on June 21, 1978, the BMI representative testified that "BMI believes that location listings are essential to the full realization of the statutory mandate which the Tribunal must implement." Defendants' Exhibit D at 9.

The statute and the regulations at issue here provide a necessary method, in addition to the trade journals, for ensuring the equitable distribution of the royalty fees. Certainly the public interest is best served when decisions concerning the distribution of fees are made upon the best and most comprehensive information available.

Neither do the regulations violate the Federal Reports Act requirements because the Tribunal is an independent agency within the legislative branch, and the Act does not apply to agencies in the legislative branch.^{2/} The Tribunal, although not subject to the requirements of the Federal Reports Act, has fashioned the access regulations in a manner consistent with the Federal Report Act. The information to be furnished

^{2/} Attached herein as Exhibit F is the Decision of the Comptroller General which describes the basis for his determination that the Federal Reports Act is not applicable to the Tribunal. Although not binding, the Court may properly take into account the decision of General Accounting Office, the agency responsible for administering the Federal Reports Act. H. Steinhil & Co. v. Seaman, 455 F.2d 1289, 1305 (1971).

is not otherwise available to the Federal Government and is to be obtained "with a minimum burden upon business enterprises." 44 U.S.C. §502

Plaintiffs also contend that the regulations do not allow sufficient time for compliance. The only evidence which plaintiffs submit in support of this contention is the otherwise unsubstantiated statements of the affiants who themselves are obviously aware of the regulations. Jukeboxes performances were included within the Copyright Act only after years of study and legislative debate, including strenuous opposition by the jukebox operators. Certainly all operators have knowledge of the statutory changes as a result of the normal communication channels within any trade group. With regard to the access regulations, they were promulgated as the result of extensive rulemaking including extensive participation by plaintiffs themselves. The conduct and results of the rulemaking have been made known throughout the industry. The regulations require submission of one listing, nothing more. The time to complete this simple task must be balanced against the immediate need for the lists in order to permit their use by persons filing claims as required in January, 1979.

II. No Fifth Amendment Rights Have Been Violated.

Any claim that the Fifth Amendment rights of any jukebox operator will be violated by the access regulations is totally without basis in reality. First, no privacy rights will be violated since the actual location listings submitted by plaintiffs will never be released by the Tribunal. Furthermore, the very limited data provided to potential claimants will never be released in a manner which would permit the linking of location lists to individual operators. See page 18 *infra*.

As set forth above, the expenditure of effort required to provide these lists is de minimus. The regulations provide that

access may be had only for the "purpose of obtaining information concerning the performance of musical works" by the copyright owners and only during "customary business hours on regular business days". The right of access must be exercised in a "manner as not to cause any significant interference with the normal functioning of the establishment." 37 C.F.R. 305.2.

The overwhelming majority of jukeboxes are located in public establishments. Thus, there can be no claim of invasion of one's own privacy such as would be involved if access was to private homes. Instead, any claim must be based on some deprivation of the freedom of commercial enterprise. The standard of review of government regulations of business enterprises was set forth in the leading case of Nebbia v. New York, 291 U.S. 502, 525 (1934):

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The constitution provides that the Congress shall have the power,

"To promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective Writings and Discoveries;," Article I, sec. 8.

The provisions of the Copyright Act of 1976, including the statutory provisions for collection and distribution of jukebox royalty fees, are clearly constitutionally permissible. The "exclusive right" provided by the Constitution would be meaningless without the ability to determine a monetary value to be placed on the use of artistic performances. The access provisions of the statute provide a necessary method for determining this value. The regulations are reasonable,

rational and have a direct relation to the objective of determining the extent of individual performers' rights under the Constitution and the Act. The access regulations are not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt," and therefore the regulations impose no "unnecessary and unwarranted interference with individual liberty". Nebbia at 539.

III. The Confidentiality Of The Location Lists
Will Be Protected Against Disclosure To Competitors.

Plaintiffs' complaint alleges that the location of a jukebox is confidential business information, the secrecy of which must be maintained in order to protect operators' locations against competitors. At the time the complaint was filed, the CRT had not yet determined its policy with regard to disclosure of the jukebox location lists.

On November 9, 1978, the Tribunal met and undertook consideration of a motion presented by plaintiffs' counsel which would ensure the confidentiality of the location lists. As summarized by counsel, plaintiffs requested the Tribunal to adopt a policy as set forth below:

We insist that location lists, if and to the extent they are required by the Tribunal, be completely exempt to disclosure to any person outside the CRT, under the authority of 552 b(4) of the Act.

We insist further that the CRT should exercise its authority to provide selected disclosures for locations identifications. This is to be done in limited numbers and by categories as specified by the CRT, the selections to be made by the CRT, on its own initiatives or upon the request of the using societies or by individual song-writers.

We insist also that no disclosures should be made that would identify the operator of a location. And also, that selections be limited in numbers also to avoid identification of the operator's location.

* * * * *
That, location lists, as filed with the CRT should be exempted from disclosure to persons outside of the CRT, and that CRT should provide by regulation for selected disclosures of locations identifications, in limited numbers, by categories specified by the CRT to be supplied by the CRT on its own initiative or upon request by the performing rights societies or an individual songwriter

demonstrates a right thereto. Defendants' Exhibit E.

At the meeting, testimony was presented by plaintiffs as well as various groups who represent copyright owners. Portions of the hearing transcript were read and discussed by the Tribunal after hearing the views of all interested parties. The Tribunal adopted a resolution concerning its policy and practice as to disclosure of the location listings. Defendants' Exhibit C.

All of plaintiffs' concerns regarding confidentiality of location listings are met in the Tribunal's resolution:

(1) The actual lists filed by jukebox operators will not be disclosed;

(2) Information will not be disclosed which links the name of the operator with the location of the jukebox.

(3) Potential claimants will be provided with a catalog composed only of the number, not the location, of jukeboxes by state or, if possible, by local government entity.

(4) The Tribunal will not provide potential claimants with a list of all locations, but instead the Tribunal will provide a selected list of locations which the Tribunal first determines is appropriate and which the Tribunal then compiles.

As a result of the Tribunal's recent actions, competitors will be unable to obtain any information from the Tribunal which would permit them to identify and link locations of the jukeboxes with particular operators. Plaintiffs' previous allegations of damage to competitive interest are now, therefore, moot.

The Freedom of Information Act (FOIA) 5 U.S.C. 552a is improperly raised in this litigation. The FOIA should not be used to prohibit the government from initially collecting information, since the statute addresses the disclosure not the gathering of data. If plaintiffs still are not satisfied with the Tribunal's a policy, their proper recourse is separate "reverse

Freedom of Information Act" litigation if and when the Tribunal decides to release specific information against plaintiffs' objections.

IV. The Copyright Royalty Tribunal Is Properly Constituted
As An Independent Agency In The Legislative
Branch

The Copyright Royalty Tribunal is an independent agency in the legislative branch. 17 U.S.C. 801(a). Plaintiffs claim that because the Tribunal has published regulations to facilitate computation of royalty claims, and because the Tribunal distributes jukebox royalties among claimants, the Tribunal is unconstitutionally established. Although not entirely clear from the complaint, it appears that plaintiff believes that the Tribunal functions are unconstitutional unless performed by the executive or judicial branches, rather than the legislative branch of government.^{3/} For the reasons set forth below, the functions of the Tribunal in determining the distribution of royalty fees are properly conducted within the legislative branch of government.

Congress is empowered by the constitution to enact copyright legislation (Act 1, Sec. 8). Determinations of royalty rates and their distribution are regarded as within this legislative authority. Furthermore, ratemaking, specifically the collection and distribution of royalty fees, is clearly within the authority of the legislature. This function can be delegated however, so long as the "will of Congress is obeyed". Yakis v. United States, 321 U.S. 414, 423 (1944), Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F. Supp. 737, 745 (D.C. Cir. 1971).

Determinations concerning the rate and distribution of royalties are subject to continuous change and are particularly suited for delegation to another entity such as the Tribunal. The legislative history of CRT indicates that Congress was seeking

^{4/} Plaintiffs do not contend that the Tribunal actions in imposing a royalty fee and the distribution of the fees are unconstitutional.

just such a device for determining royalty fees which would not require continuous statutory changes. Within the House of Representatives the remarks of Rep. Danielson indicate the need for establishment of the Tribunal.

"Provision is made for future adjustments to the royalty schedules because the setting of royalties is unduly burdensome for a legislative body and should not be one of the problems of the Congress." 122 Cong. Rec. H10, 904 (1976).

The Senate Report also indicates the congressional objectives in establishing the tribunal.

"The Committee believes that sound public policy requires that the royalty rates specified in the statute and those established for public broadcasting shall be subject to periodic review. It is neither feasible nor desirable that these rates should be adjusted exclusively by the normal legislative process . . . It has been suggested that, if in the future cable television revenues are distorted, the appropriate course of action would be legislation to amend the copyright law. The Congress by now is well acquainted with the difficulties inherent in obtaining controversial piecemeal amendments to the copyright law. Consequently, the Committee in drafting the legislation has endeavored to provide procedures that will permit appropriate adjustments in the light of future developments." S. Rep. No. 94-473, 94th Cong., 1st Sess. 155-156 (1975).

Although early drafts of the legislation dealt only with the function of determining annual fees paid by jukebox operators, the Copyright Act expanded the Tribunal's functions to include distribution of the the royalty fees as well. The annual distribution of royalty fees based on claims submitted each January would be equally burdensome for the Congress.

The Tribunal functions in a vital role as distributor of fees, and provides an ongoing method of distribution without continuous recourse to Congress for distribution determinations. The Tribunal's role with regard to the distribution of jukebox royalties, however, is narrowly limited to certain ministerial duties

set forth in the Act, within which the Tribunal exercises little to no discretion. It does not execute the law but instead merely provides an accounting mechanism by which the royalty fees collected by the Register of Copyrights can be distributed.

The Tribunal is to be involved in specific royalty fee determinations only in very limited circumstances. The statute, in fact, grants the Tribunal narrow authority and instead relies heavily upon the copyright owners to determine the proper distribution of royalty fees. In January of each year, copyright owners must file a claim with the Tribunal based on performances during the preceding twelve month period. Prior agreements among claimants are encouraged and are specifically exempt from the antitrust statutes:

During the month of January, in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under the subclause (A) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf. 17 U.S.C. 115(c)(2). Emphasis added.

After the proper distribution is agreed upon by the copyright owners, the Tribunal, after deducting any administrative fees, must proceed to distribute the fees among copyright owners. Only in the rare instances when owners cannot agree will the Tribunal intervene to settle a controversy. Even then, the Tribunal exercises little discretion because the statute provides specific standards for division of the fees:

The fees to be distributed shall be divided as follows:

(A) to every copyright owner not affiliated with performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) to the performing rights societies, the remainder of the fees to be distributed if such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

(C) during the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy. 17 U.S.C. 116(c)(4).

Neither do the regulations permitting access to jukeboxes which are at issue here transform a basic legislative function into a regulatory one. Access is given not to regulate the conduct of the jukebox industry, but only to permit the collection of data necessary for the legislative branch to determine an equitable distribution of fees. In fact, as discussed above, Congress specifically deleted all but the narrowest of activities which would provide sufficient data to divide the royalty fees. ^{5/}

The lack of legislative intent to create a regulatory agency is further indicated by the narrow rule making authority of the Tribunal which extends only to rules governing its "procedure and methods of operation." 17 U.S.C. 803. Furthermore, the Tribunal and its staff are limited by their small numbers from performing any but minimal information gathering. The legislative history indicates the limited activities to be undertaken by the Tribunal:

"The Commission ^{6/} is authorized to appoint a staff to assist it in carrying out its responsibilities. However, it is expected that the staff will consist only of sufficient clerical personnel to provide one full time secretary for each member and one or two additional employees to meet the clerical needs of the entire Commission. Members of the Commission are expected to perform all professional respon-

^{5/} Congress specifically rejected any record keeping requirements or the installation of "any metering devices for counting the play of particular recordings." H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 115 (1976).

^{6/} The House version of the bill used the designation "Commission" instead of "Tribunal" adopted in the final version of the Act.

abilities themselves, except where it is necessary to employ outside experts on a consulting basis." H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 174 (1976).

Thus it was contemplated that the entire Tribunal would consist of five commissioners plus five to seven clerical persons, or a total of at most twelve individuals. In no way could such an entity regulate and enforce a statute in an industry which consists of an estimated 5,000 to 7,000 jukebox operators who collectively operate an estimated 400,000 to 500,000 jukeboxes. It is clear that the Tribunal's functions are limited to distributing royalty fees on the basis of claims submitted, and the gathering of additional data upon which distribution can be based, when a controversy exists. These narrow data gathering and accounting duties are clearly within the scope of legislative duties.

Even if this Court should find that the Tribunal does exercise some executive or regulatory functions in addition to its legislative functions, the Tribunal's activities do not violate the constitutional doctrine of the separation of legislative and executive powers. In Buckley v. Valeo, 424 U.S. 1 (1976) the Supreme Court held that certain responsibilities of the Federal Elections Commission violated the constitutional requirement that legislative and executive powers be separate. However, the decision in Buckley turned on the Appointments Clause of the Constitution which states in pertinent part as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Offices of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Offices, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the Department." (Art. II, Sec. 2, cl. 2).

A majority of the Federal Election Commission members were appointed by Congress, yet many of the Commission's functions were executive or administrative in nature. As a result, the Court in Buckley declared the administrative and enforcement duties to be unconstitutional as violative of the Appointments Clause.

The flaw in the Federal Election Commission statute which rendered its responsibilities invalid was specifically remedied in the establishment of the CRT. The Tribunal is "composed of five commissioners appointed by the President with the advice and consent of the Senate," 17 U.S.C. §02(a). In enacting these provisions of the Copyright Act, the Congress took special care to ensure that the structure of the Tribunal was constitutionally sound:

"Due to constitutional concern over the provision of the Senate Bill that the Register of Copyrights, an employee of the Legislative Branch, appoint the members of the Tribunal, the committee adopted an amendment providing for direct appointment of three individuals by the President". H.R. Rep. No. 1476, 94th Cong. 2d Sess. 174 (1976). 7/

Any remaining doubts concerning the constitutionality of the structure and functions of the CRT are resolved in the recent case of Eltra Corporation v. Ringer, 579 F.2d 294 (4th Cir. 1978), which involved similar issues raised by plaintiffs, but as applied to the Copyright Office. The Copyright Office is a separate and distinct office within the Library of Congress, 17 U.S.C. 701. 8/ The head of the office is the Register of Copyrights who is "appointed by the librarian of Congress who in turn is appointed by the President with the advice and consent of the Senate." Eltra at 300. The court in Eltra found that the structure of the Copyright Office was in accord with the Appointments Clause. The Tribunal, composed of commissioners appointed by the President with the advice and consent of the Senate is likewise fully in accord with the requirements of the Appointments Clause.

The Eltra court further explained the duties of the Copyright Office to determine if, notwithstanding compliance with the Appointments Clause, the functions of the Copyright Office were invalid because they violate the separation of powers doctrine. Indeed, the Eltra court did find some of the activities of the Copyright Office to be executive

7/ The number of commissioners was expanded to five in the final version of the Act.

8/ The Library of Congress also provides the Tribunal with all "necessary administrative services." 17 U.S.C. §06.

and administrative as well as legislative. However, because the requirements of the Appointments Clause have been met in the appointment of the Register, these administrative and executive functions can be performed by the Register without violating the constitutional requirements of separation of powers. *Idra* at 301. Similarly, if executive, administrative, or regulatory functions must be performed by the Tribunal, they too would be valid since all commissioners have been appointed by the President.

Equally important is the finding by the Court that legislative and executive functions can be mixed within the same entity. Thus, the court found:

The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (i.e., Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character it could have been grouped code-wise under either the legislative or executive department. But such code-grouping cannot determine whether a given function is executive or legislative. After all, the Federal Election Campaign Act of 1971, under which the Federal Election Commission reviewed in *Buckley* was appointed, is codified under the legislative heading and its appropriations were made under that heading. Neither the Supreme Court nor the parties in *Buckley* regarded that fact as determinative of the character of the Commission, whether legislative or executive. It is no more permissible to argue, as the appellant did in the article in the *George Washington Law Review*, that the mere codification of the Library of Congress and the Copyright Office under the legislative branch placed the Copyright Office "within the constitutional confines of a legislative agency" than it would be to contend that the Federal Election Commission, despite the 1974 amendment of the Act with reference to the appointment of its members, is a legislative agency unconstitutionally exercising executive administrative authority. (Footnotes deleted) *Idra* at 301.

The Copyright Office has operated within the Library of Congress since 1909 without successful challenge to its position in the legislative branch. The Tribunal's functions are similar to those of the Copyright Office. It is also a small agency whose administrative

support is provided by the Library of Congress. For these reasons the decision to place it within the legislative branch was a reasonable one. Clearly, the Tribunal, merely because it may exercise some administrative functions, is not therefore, unconstitutionally situated within the legislative branch.

Conclusion

As has been demonstrated in the argument presented above, the complaint should be dismissed and summary judgment granted.

Respectfully submitted,

Earl J. Silbert

 EARL J. SILBERT
 United States Attorney

Royce C. Larrabee

 ROYCE C. LARBENIA
 Assistant United States Attorney

Susanne M. Lee

 SUSANNE M. LEE
 Special Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMUSEMENT & MUSIC OPERATORS ASSOCIATION, et al.,)	
)	
Plaintiffs.)	
v.)	CIVIL ACTION NO. 78-2030
COPYRIGHT ROYALTY TRIBUNAL, et al.,)	
)	
Defendants.)	

O R D E R

This matter having come before the Court on Defendants' Motion to Dismiss and/or for Summary Judgment, Plaintiffs' Memorandum In Opposition, and the entire record herein,

It is this _____ day of _____, 1979.

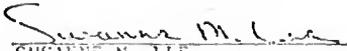
ORDERED that Defendants' Motion be and hereby is granted, and it is

FURTHER ORDERED that Plaintiffs' Complaint be and hereby is dismissed.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment was served upon plaintiffs by mailing a copy thereof to plaintiffs' counsel Nicholas E. Allen, Esq.: 706, 1701 K Street, N.W., Washington, D.C. 20006 this the 3rd day of January, 1979.


SUSANNE M. LEE
Special Assistant United
States Attorney
U.S. Courthouse, Rm. 3718
3rd and Constitution Ave., N.W.
Washington, D.C. 20001
(202) 472-4759

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Amusement and Music Operators)	
Association, a corporation,)	
35 East Wacker Drive,)	
Chicago, Illinois 60601, and)	
)	
Don Van Brackel)	
15 Capri Road)	
Defiance, Ohio 43512,)	
)	
Dorothy W. Christensen)	
815 South Central Avenue)	
Malta, Montana 59538,)	
)	
Fred Collins, Jr.)	
801 Botany Road)	
Greenville, South Carolina 29609,)	
)	
Walton Lowry)	
303 West Adams Street)	
Pittsfield, Illinois 62363, and)	
)	
Harold Morris)	
945 Park Lane)	
East Meadow, New York 11554,)	
)	
)	
Plaintiffs)	
)	
vs.)	<u>Civil Action No. 78-2030</u>
)	
The Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	
Washington, D. C. 20036, and)	
)	
)	AMENDMENT TO
)	<u>COMPLAINT</u>
Thomas C. Brennan, Chairman)	
Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	(Declaratory Judgment
Washington, D. C. 20036,)	and Preliminary and
)	Permanent Injunctive
)	Relief)
Douglas E. Coulter, Member)	
Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	
Washington, D. C. 20036,)	
)	
)	
Mary Lou Burg, Member,)	
Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	
Washington, D. C. 20036,)	
)	
)	
Clarence L. James, Jr., Member)	
Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	
Washington, D. C. 20036, and)	
)	
)	
Frances Garcia, Member)	
Copyright Royalty Tribunal)	
1111 20th Street, N.W.)	
Washington, D. C. 20036)	
)	
)	
Defendants)	

Plaintiffs amend their Complaint by adding Counts II and III (the Original Complaint, paragraphs 1 through 15 and prayers for relief, becoming Count I), as follows:

COUNT II
(For Declaratory Judgment)

The Copyright Royalty Tribunal, being charged by Congress with the duty to regulate access by owners of copyrighted musical works to establishments and phonorecord players (jukeboxes) therein, for purposes of carrying out the Tribunal's executive responsibilities relating to distribution of jukebox royalties among claimants to such royalties, is unconstitutionally organized in the legislative branch of the Government.

16. The allegations of paragraphs 1 and 2 are incorporated by reference herein.

17. The Copyright Royalty Tribunal is organized in the legislative branch of the Government by Chapter 8 of the Copyright Act of 1976 (17 U.S. Code Sections 801-810).

18. The Copyright Royalty Tribunal is charged by Congress with the duty, among others, to regulate access by owners of copyrighted musical works to establishments and phonorecord players (jukeboxes) therein, for purposes of carrying out the Tribunal's executive responsibilities relating to distribution of jukebox royalties among claimants to such royalties (17 U.S. Code Section 116(c)(5)).

19. Being so organized and so charged with regulatory and executive responsibilities and duties, the Tribunal is unconstitutionally established.

WHEREFORE, the plaintiffs pray that:

1. Chapter 8 of the Copyright Act of 1976 (17 U.S. Code, Sections 801-810) be declared unconstitutional.
2. The Court order such other relief as may be justified.

COUNT III
(For Declaratory Judgment)

The Copyright Royalty Tribunal's regulations, by imposing upon jukebox operators requirements for filing unnecessary lists of their jukebox locations, interfere with jukebox operators' liberty, freedom, right of privacy and right to conduct their businesses without undue Government interference in violation of the Fifth Amendment to the Constitution.

20. The allegations of paragraphs 1 through 15 are incorporated by reference herein.

21. The Copyright Royalty Tribunal's regulations impose upon jukebox operators requirements for filing with the Tribunal unnecessary lists of locations of licensed jukeboxes (37 C.F.R. 303.3).

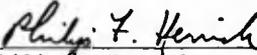
22. The Tribunal's said regulations interfere with jukebox operators' liberty and freedom in the conduct of their businesses by impairing their right of privacy and their right to conduct their businesses without undue Government interference, in violation of the Fifth Amendment to the Constitution.

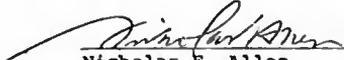
WHEREFORE, the plaintiffs pray that:

1. The Section 303.3 of the regulations of the Copyright Royalty Tribunal (37 C.F.R. 303.3) be declared unconstitutional.
2. The Court order such other relief as may be justified.

Respectfully submitted

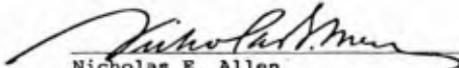
HERRICK, ALLEN & DAVIS


Philip F. Herrick


Nicholas E. Allen
Attorneys for Plaintiffs
1701 K Street, N.W., Suite 706
Washington, D. C. 20006
Tel: 452-1331

CERTIFICATE OF SERVICE

I certify that on November 20, 1978, I mailed postage prepaid, five copies of the foregoing Amendment to Complaint to Susan Lee, Assistant U.S. Attorney, U. S. Court House, 3rd and Constitution, Washington, D. C. 20001.


Nicholas E. Allen

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Amusement and Music Operators
Association, a corporation
35 East Wacker Drive
Chicago, Ill. 60601, and

Don Van Brackel
15 Capri Road
Defiance, Ohio 43512,

Dorothy W. Christensen
815 South Central Avenue
Malta, Montana 59538,

Fred Collins, Jr.
801 Botany Road
Greenville, South Carolina 29609,

Walton Lowry
303 West Adams Street
Pittsfield, Illinois 62363,

and

Harold Morris
945 Park Lane
East Meadow, New York 11554

Plaintiffs

v.

Civil Action no. _____

The Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036
and

Thomas C. Brennan, Chairman
Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036

Douglas E. Coulter, Member
Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036

Mary Lou Burg, Member
Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036

Clarence L. James, Jr., Member
Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036
and

Frances Garcia, Member
Copyright Royalty Tribunal
1111 20th Street NW
Washington, D.C. 20036

Defendants

COMPLAINT

(Declaratory Judgment and
Preliminary and Permanent
Injunctive Relief)

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Sections 1331, 1361, 1651; the Administrative Procedure Act, as amended, P.L. 89-554, Sept. 6, 1966, 80 Stat. 381, 5 U.S.C. 551-559, 701-706; the Copyright Act, as amended, P.L. 92-140, Oct. 15, 1976, 90 Stat. 2541, 17 U.S.C. 1 et seq., especially § 116 (c) (5) and § 801-810; the Federal Reports Act, 44 U.S.C. 3501 et seq., as amended by § 409 of P.L. 93-153, Nov. 16, 1973, 87 Stat. 593, and the Declaratory Judgments Act, as amended, 28 U.S.C. 2201.

Parties

2. Plaintiff Amusement and Music Operators Association (AMOA) is a corporation organized as a non-profit membership association under the laws of Delaware, and having a headquarters office in Chicago, Illinois. Its membership consists of about 1,200 operators of phonorecord players (jukeboxes) located throughout the United States. The individual plaintiffs are members of AMOA and are jukebox operators in their respective States of Illinois, Montana, New York, Ohio and South Carolina. Plaintiff Van Brackel is presently national president of AMOA. Plaintiff Collins is a past president of AMOA and is presently a member of its Government Relations Committee.

3. The defendant Copyright Royalty Tribunal (CRT) is an independent agency in the legislative branch of the United

States Government. The individual defendants are the chairman and the other four members of CRT, and they are sued in their official capacities.

Nature of Controversy and
Basis of Equitable Relief

4. An actual controversy exists between plaintiffs and defendants as to defendants' attempts (1) to require each plaintiff and every other jukebox operator in the United States who operates jukeboxes that are certificated by the Copyright Office prior to October 1, 1978 to file by November 1, 1978 a list identifying the locations where his jukeboxes are placed and the number (if more than one) of jukeboxes at each location, (2) to require every jukebox operator who operates jukeboxes that are certificated after October 1, 1978 to file a similar list within thirty days of the issuance of his initial certificate and (3) to require every jukebox operator to file by October 1 of each year a list of any locations where there have been subsequent changes in number of jukeboxes on locations. The said requirements are contained in regulations dated Sept. 6, 1978, 37 C.F.R. Chap. III, Part 303, § 303.3; 43 Fed. Reg. 40498-40501 (Sept. 12, 1978). They are in excess of the defendants' statutory authority, they impose unduly harassing, burdensome, costly and unreasonable requirements upon the plaintiffs if they are to comply with the said listing requirements, and they create unreasonable risk that confidential data contained therein will be disclosed to competitors and others to plaintiffs' substantial prejudice.

The Act and The Regulations

5. The CRT was established by Act of Congress approved October 19, 1976 (P.L. 94-553, §801, 90 Stat.2594, 17 U.S.C. 801-810). It is a five-member body whose purpose is to determine the adjustment of reasonable copyright royalty rates, and to distribute royalty fees (after resolving controversies if any exist(17 U.S.C.801)). By 17 U.S.C. 803 it is directed to adopt regulations, not inconsistent with law, governing its procedure and methods of operation.

Determinations concerning the adjustment of statutory royalty rates is provided for in Sections 115 (with respect to the royalties levied upon the production of phonorecords), in 116 with respect to the "jukebox royalty," and in other sections relating to other musical copyright royalties (cable TV under Section 111, and public broadcasting under Section 118 (17 U.S.C. 111, 115, 116, 118)). Section 116 (c)(5) requires the CRT to

"promulgate regulations under which persons who can reasonably be expected to have claims may, ...without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contributions of the musical works of each person to the earnings of the phonorecord players for which fees have been deposited."

6. Allegedly pursuant to the above authority, the CRT adopted § 303.2 and § 303.3 of its regulations. Section

303.2 reads as follows:

Access to establishments and phonorecord players

"A person, or authorized representatives of such person, who can reasonably be expected to have claims to royalty fees paid by the operators of phonorecord players shall have access to the establishments in which such phonorecord players are located during customary business hours on regular business days. Such access shall be only for the purpose of obtaining information concerning the performance of musical works by the phonorecord players. The right of access shall be exercised in such a manner as not to cause any significant interference with the normal functioning of an establishment."

Section 303.3 reads as follows:

Recording of location listings in Copyright
Royalty Tribunal

"(a) Not later than November 1, 1978, every operator of a phonorecord player who has filed in the Copyright Office an application for a phonorecord player compulsory license according to the requirements of 17 USC 116 and the regulations of the Copyright Office and been issued prior to October 1, 1978 a Copyright Office phonorecord player certificate, shall record in the offices of the Copyright Royalty Tribunal a list identifying the location or locations where licensed phonorecord players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(b) Every operator of a phonorecord player who subsequent to October 1, 1978, obtains his initial Copyright Office phonorecord certificate shall record in the office of the Copyright Royalty Tribunal within thirty days after the issuance of the initial certificate a list identifying the location or locations where licensed phonorecord players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(c) On October 1 of each year every operator of a phonorecord player who alters the number of licensed phonorecord players at a location reported under clause (a) or (b), or who has provided a licensed phonorecord player or players to a location not previously reported to the Copyright Royalty Tribunal shall report to the Copyright Royalty Tribunal the revised number of phonorecord players, or the new location and the number of licensed phonorecord players at that location."

7. Section 303.2 and 303.3 of the Regulations are neither expressly nor impliedly authorized by Section 116(c) (5) of the Act.

Legislative History

8. The legislative history of the Copyright Act of 1976 shows that Congress not only did not intend to give CRT the power to require location listing but clearly negated the giving of such power. Provisions which were once in the bill which would have required the identification of location were deleted, and the Act as finally passed did not call for the identification of locations. The legislative history shows that this omission was deliberate.

(a) The Copyright Act of 1909 (35 Stat. 1075, 1088; 17 U.S. Code 1 (1952 Ed)) granted two exclusive rights to the owners of musical copyrights, and provided an exemption for coin-operated music machines. These provisions were as follows:

(1) They established a performance right, which was a right given a musical copyright owner to control the public performance of copyrighted music for profit. No stated rate of royalty was specified. The royalty charged with respect to this right is known as the "performance royalty."

(2) They established a mechanical reproduction right, by requiring each manufacturer who wished to produce phonorecords of copyrighted music without the copyright owner's express permission to pay a maximum royalty of two cents for every phonorecord he made. This royalty is sometimes referred to as the "mechanical fee."

(3) The playing of music on coin-operated machines was expressly excepted from the performance right and the performance royalty unless a fee was charged for admission to the place where the playing occurred. The execution did not apply to the mechanical reproduction right or to the mechanical fee. The exception was sometimes referred to as the "jukebox exemption." This exemption was repealed by the 1976 Act, which by Section 116 substituted a "jukebox royalty" in place of the exemption.

(b) The relevant provisions of the 1976 Act are as follows:

§106 gives the copyright owner the exclusive right to do and to authorize certain things, including, in the case of musical works, the right to perform the copyrighted work publicly.

§115 authorizes a royalty of 2-3/4¢ per recording to be paid periodically by the record manufacturer to the copyright owner (mechanical fee). The Register of Copyrights is authorized to issue regulations under which "detailed cumulative annual statements of account, certified by a certified public accountant," must be filed by each manufacturer of copyrighted music.

§116 authorizes a royalty of \$8. per jukebox per year, to be paid by the jukebox operator to the Register of Copyrights when a jukebox has been placed in an establishment for coin-operated play, and when a certificate showing payment of the royalty has been issued by the Register of Copyrights. Royalties, when collected, are to be deposited by the Register in the U. S. Treasury, for distribution among copyright owners by CRT, which is given authority to allocate the royalties among copyright owners. Both the Register and the CRT are given authority to issue regulations - the Register with respect to registration of jukeboxes (Section 116(b)(1)(A)); the CRT with respect to (1) providing for "access" by copyright owners to jukeboxes and establishments where jukeboxes are located (Section 116(c)(5)) and (2) for filing by copyright owners of claims for royalties (Section 116(c)(2)). The CRT also is given authority to revise royalty rates periodically - the mechanical fee under Section 115 in 1980, and then in 1987 and every 10th year thereafter (Sections 801(b)(1), and 804(a)(2)(B)) - the jukebox royalty under Section 116 in 1980, and then in 1990 and every 10th year thereafter (Sections 801(b)(1), and 804(a)(2)(c)). Detailed guidelines are set out in Section 801(b)(1).

(c) Bills for general revision of the Copyright law were introduced in both houses of Congress in 1964 after a long period of study by the Copyright Office (S. 3008, H.R.

11947, 88th Congress). Both bills provided for an increase in the mechanical fee from 2¢ to 3¢ per recording a song (Section 11), and they also provided for repeal of the jukebox exemption from the performance royalty (Section 12).

(d) Twelve years later, on October 19, 1976, the legislative process was completed. Significant events relative to the instant proceeding are summarized below.

(e) A requirement to identify the locations of jukeboxes was at one period included in both House and the Senate versions of the Copyright bill.

In 1966 the House Judiciary Committee reported favorably on a bill (H.R. 4347, 89th Congress) which included in Section 116 (b)(1) a provision that any jukebox operator who wished a license for the public performance of copyrighted music should, before or within one month after placing his machine on location and in January of each succeeding year, record in the Copyright Office, in accordance with regulations issued by the Register of Copyrights, a statement which would include, among other things, "the name and address of the establishment in which it is located", (House Report No. 2237, 89th Congress, October 12, 1966, p.11). In 1967 the House Judiciary Committee reported favorably on a similar bill containing the same language about location listing (House Report No. 83, 90th Congress, March 8, 1967, on H.R. 2512, p.186). In the Senate in 1967 a bill similar to H.R. 2512 and

containing the identical language with respect to the name and address of the establishment in which the jukebox was located was introduced and was the subject of hearings in the Senate Judiciary Committee in March of that year (Hearings on S. 597, 90th Congress, Committee on the Judiciary, p.12).

H.R. 2512 was passed by the House on April 11, 1967 with substantial changes in the jukebox royalty provisions, which changes, inter alia, omitted the requirement of "the name and address of the establishment in which it is located" (113 Cong. Rec. H.3888). On the Senate side the requirement for location identification was deleted in the Committee Print of the then pending bill (See the Committee Print of S. 543, 91st Congress, December 10, 1969, and compare page 19, lines 38 and 39, where the requirement for listing "the name and address of the establishment in which (the jukebox) is located" is shown as part of the earlier bill, with page 85, lines 6 through 9, where the requirement is omitted).

(f) In the same Committee Print the Register of Copyrights was the official designated to issue regulations governing both the registration of jukeboxes and access to establishments where jukeboxes are located (S. 543, 91st Congress, § 116 (b)(1)(A) and § 116 (a)(4)). The two functions

were later divided between the Register and the Tribunal, the Register retaining authority with respect to registration and the Tribunal being given authority with respect to issuance of access regulations (House Report No. 94-1476, 9th Congress, September 6, 1976, pages 17,18).

(g) The provision authorizing access regulations that was added to the bill on December 10, 1969, explicitly restricted the regulation - making power to provide for such access as would be "without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located" (S. 543, 91st Congress, December 10, 1969, page 87, lines 6 to 23).

(h) In all the subsequent revisions the same anti-harassment mandate was included. Referring to the provision in several later bills, that access to establishments and jukeboxes therein shall be "without expense to or harassment of operators or proprietors", as they moved towards final passage in 1974, 1975, and 1976, the Committee Reports of both Houses stated:

"This clause is not intended to authorize the Register of Copyrights (Commission) to impose any record keeping requirements upon jukebox operators, or to require the installation in jukeboxes of any metering devices for counting the play of particular recordings." (Senate Report No. 93-983, 93d Congress, on S. 1361, July 3, 1974, page 154; Senate Report No. 94-473, 94th Congress, on S. 22, November 20, 1975, p. 99; House Report No. 94-1476, 94th Congress, on S. 22, September 6, 1976, page 115).

(i) In submitting its final report on this legislation in September, 1976, the House Judiciary Committee took note of the decline in the jukebox industry during the long period this legislation had been under consideration, saying:

"The Committee was impressed by the testimony offered to show that shifting patterns of social activity and public taste, combined with increased manufacturing and servicing costs, have made many jukebox operations unprofitable." (House Report No. 94-1476, page 116).

(j) In December, 1977, the Register of Copyrights, when issuing regulations under the registration provisions of the Act (Section 116(b)(1)(A)) stated that this legislative history precluded her from requiring identification of jukeboxes by location; although she was careful to observe she did not intend her interpretation to be binding upon the . CRT (42 FR 63779, December 20, 1977).

The Location Listing Provisions
of the Regulations are Harassing and Burdensome

9. The location listing provisions of the Regulations are harassing, burdensome, and costly. There are an estimated 5,000 to 7,500 jukebox operators in the United States. They operate an estimated 400,000 to 500,000 jukeboxes, for an estimated average of 50 to 70 jukeboxes per operator. For an operator with 400 to 500 jukeboxes the

estimated cost of preparing the list due November 1, 1978 is estimated at \$2,860, and the cost of preparing subsequent lists is estimated at \$1,248 per year (see affidavit of Don Van Brackel attached to the accompanying Motion for Temporary Restraining Order). For a small operator with 70 or less jukeboxes the cost of preparing the list due November 1, 1978 is estimated at \$70 (see affidavit of Walton Lowry, accompanying the Motion for Temporary Restraining Order).

10. The sanctions attached to the failure to comply with the location listing provisions of the Regulations are many.

(a) Section 116(c) (5) of the Act (17 U.S.C. 116(c) (5)) provides that anyone claiming he has been denied the access permitted by the CRT regulations may sue in the U.S. District Court for the District of Columbia for cancellation of the operator's registration for the jukebox in question, and that the Court may then invalidate the registration retroactively back to the date of issue (which could be March 1, 1978). Failure by an operator to comply with Regulation 303.3 is equated by CRT with denial of access (see CRT Supplementary Information, Denial of Right of Access, 43 F.R. 40500).

(b) The invalidation of an operator's license retroactively would subject the operator to the possibility of thousands of infringement suits (17 U.S.C. 501; see Affidavit of Don Van Brackel attached to the

accompanying Motion for Temporary Restraining Order), the destruction of all jukebox records which may have been played during the period (17 U.S.C. 503), and actual damages (17 U.S.C. 504 (b)), or, in the alternative, statutory damages of up to \$50,000 per infringement (17 U.S.C. 504 (c)), plus attorney's fees and costs (17 U.S.C. 505).

(c) The CRT has not allowed sufficient time for all jukebox operators to comply with the regulations. The Regulations were approved September 6, 1978; they were published in the Federal Register on September 12, 1978; they were effective October 10, 1978; they require the filing of location lists at the CRT office in Washington, D. C. on November 1, 1978. It is doubtful whether many of the smaller operators have knowledge of the Regulations (see Affidavit of Fred Collins, Jr., attached to the accompanying Motion for Temporary Restraining Order).

Confidentiality of Locations

11. The locations where an operator places his jukeboxes constitute confidential business information which each operator takes great pains to protect. He would not give this information to anyone outside his own organization (unless compelled by public authority). The secrecy of his locations must be maintained if he is to protect his locations against competitors and others seeking

to take his locations away. Once his locations are listed and filed there is no way, under the Freedom of Information Act (5 U.S.C. 552) or otherwise, in which the confidentiality of the data can be fully maintained (see Affidavits of Don Van Brackel, paragraph 7, and of Fred Collins, Jr., supra).

Location Listing is Impractical,
Unnecessary and Serves No National Interest

12. The requirements of Regulation 303.3 are unnecessary and serve no national interest. In the interest of holding down the proliferating paperwork which the American business man must do for the government, they should be scrapped. The most reliable sources of information relative to the popularity of jukebox records are the trade journals, which periodically report this information. There are at least four prominent trade journals which do this: Billboard, Replay, Play Meter, and Cash Box. Nine pages from the October 1978 issue of Replay are attached hereto as Exhibit "A". They show the 75 most-played jukebox records during the week ending October 20, 1978, the 60 most-played jukebox country singles records, the 60 most-played jukebox rhythm and blues records, together with the best singles releases, and a nationwide roundup of the most popular jukebox records in particular areas.

13. Broadcast Music, Inc. (BMI), a performing rights society, stated to CRT in a letter dated February 8, 1978 (attached hereto as Exhibit "B"):

"We agree with the AMOA and jukebox manufacturers that the use of trade

charts provides an excellent, immediately available, and ongoing means for determining copyright owner's share of jukebox music use."

BMI's statement went on to say:

"Thus, we have a virtual consensus. The jukebox manufacturers, the leading association of operators (AMOA) and BMI, the organization which licenses most music used on the boxes, all agree that the use of charts provides a fair and expeditious way to determine distribution."

14. By the terms of the Copyright Act (17 U.S.C. 115(c)(3)), each manufacturer of phonorecords must furnish to the copyright owners or their representatives, in accordance with regulations of the Register of Copyrights, monthly statements of the number of copyrighted songs recorded by the manufacturer. Such statements would give the CRT a second accurate source for gauging the popularity of jukebox records (See Copyright Office Regulations 43 Fed. Reg. 44511, Sept. 28, 1978).

The CRT Procedure Violates
the Federal Reports Act

15. The CRT, in issuing Regulation 303.3, violated the provisions of the Federal Reports Act (44 U.S.C. 3502, 3512(c)) in that it failed to submit to the Comptroller General its plans for the collection of information from jukebox operators, together with copies of its Regulation.

WHEREFORE, the plaintiffs pray that:

1. A temporary restraining order issue staying the November 1, 1978 deadline and all other deadlines for filing

location lists as required by Section 303 of the CRT Regulations (37 C.F.R., Chapter III, Part 303).

2. A preliminary injunction issue postponing the November 1, 1978 deadline and all other deadlines for filing location lists, and enjoining the defendants from carrying out the provisions of the Regulations until a hearing can be held on the Complaint.

3. The Court declare, pursuant to the Federal Declaratory Judgments Act, that:

(a) The said Regulations are in excess of CRT's authority;

(b) The said Regulations violate the mandate of the Copyright Act that they shall be "without expense to or harassment of" jukebox operators; and

(c) The said Regulations violate the mandate of the Federal Reports Act (44 U.S.C. 3501, especially 3512).

4. The Court declare null and void, and set aside, the said Regulations.

5. A permanent injunction issue enjoining the CRT from carrying out the provisions of the said Regulations.

6. The Court award the plaintiffs their costs and reasonable attorneys' fees, and give such other relief as may

be justified.

HERRICK, ALLEN & DAVIS

By Philip F. Herrick
Philip F. Herrick

and Nicholas E. Allen
Nicholas E. Allen

1701 K Street, N.W., #706
Washington, DC 20006

Attorneys for Plaintiffs

DISTRICT OF COLUMBIA, ss:

Don Van Brackel and Fred Collins, Jr., being duly sworn,
state that we have read the foregoing Complaint and that the
allegations made therein are true to the best of our knowledge
and belief.

Don Van Brackel
Don Van Brackel
Fred Collins, Jr.
Fred Collins, Jr.

Subscribed and sworn to before me this 24th day of October 1978.

Louise A. Hagan
Notary Public

My Commission Expires: _____

My Commission Expires Sept 14, 1993

RePlay Jukebox

NATIONAL SINGLES SALES LIST

RePlay Magazine, P.O. Box 2550, Woodland Hills, CA 91365 - 213/347-3820

for week ending Oct. 20, 1978

1	HOT CHILD IN THE CITY Nick Odger - Chrysalis 2226	7	26	GET OFF Easy - Dash 5048	16	51	HOT SHOT Karen Young - West End 1211	60
2	RIGHT DOWN THE LINE Gerry Rafferty - United Artists 1233	6	27	HOPELESSLY DEVOTED TO YOU Olivia Newton-John - RSO 903	16	52	SHAKE & DANCE Con Funk Shun - Mercury 74008	52
3	KISS YOU ALL OVER Exile - Warner Bros. 8588	1	28	ALMOST LIKE BEING IN LOVE Michael Johnson - EMI/America 8004	33	53	GREASED LIGHTNIN' Travis/Tra-Conway - RSO 906	62
4	SUMMER NIGHTS Travis/Newton-John - RSO 906	2	29	JUST WHAT I NEEDED Cars - Elektra 45481	29	54	HOT SUMMER NIGHTS Water Egan - Columbia 10824	57
5	DON'T LOOK BACK Boston - Epic 50580	3	30	PRISONER OF YOUR LOVE Prayer - RSO 908	31	55	LITTLE THINGS MEAN A LOT Marsie Smith - Warner Bros. 8953	63
6	REMINISCING Little River Band - Harvest 4605	6	31	IT'S A LAUGH Hall & Oates - RCA 11271	34	56	I JUST WANNA STOP Gino Vanelli - A&M 2072	64
7	BACK IN THE U.S.A. Linda Ronstadt - Asylum 45518	10	32	HOLDING ON L.T.O. - A&M 2057	37	57	STRAIGHT ON Heart - Portrait 70020	65
8	HOLLYWOOD NIGHTS Bob Seger - Capitol 4816	4	33	SWEET LIFE Paul Davis - Bang 738	38	58	I JUST WANT TO LOVE YOU Eddie Rabbitt - Elektra 49531	66
9	SHE'S ALWAYS A WOMAN Billy Joel - Columbia 10788	11	34	BLUE COLLAR MAN Ervx - A&M 2087	42	59	EVERYBODY NEEDS LOVE Stephen Bishop - ABC 12408	67
10	WHENEVER I CALL YOU "FRIEND" Kenny Loggins - Columbia 10794	13	35	CRAZY FEELIN' Jefferson Starship - Grunt 11374	43	60	MOONLIGHT SERENADE Tuxedo Junction - Butterfly 1210	61
11	BOOGIE OOGIE DOOGIE Tate Of Honey - Capitol 4565	8	36	YOU NEEDED ME Anne Murray - Capitol 4574	35	61	ONE NATION UNDER A GROOVE Funkadelic - Warner Bros. 8616	68
12	LOVE IS IN THE AIR John Paul Young - Scepter Bros. 402	12	37	GREASE Frankie Valli - RSO 897	23	62	ONLY YOU Teddy Pendergrass - Phila. Int'l. 3657	72
12	FOOL Chris Rea - United Artists 1198	6	38	LET'S TAKE THE LONG WAY Ronnie Minkap - RCA 11309	41	63	S.T.S. City Boy - Mercury 73999	68
14	MAGNET & STEEL Water Egan - Columbia 10719	14	38	HOT BLOODED Foreigner - Atlantic 3488	27	64	GOT TO GET YOU INTO MY LIFE Earth, Wind & Fire - Columbia 10798	28
16	WHO ARE YOU Who - MCA 40248	18	40	CHAMPAGNE JAM Atlanta Rhythm Section - Polydor 14504	47	65	CRYIN' AGAIN Oak Ridge Boys - ABC 12397	71
16	DEVOTED TO YOU C. Simon/J. Taylor - Elektra 45508	17	41	SGT. PEPPER'S LONELY HEARTS Beatles - Capitol 4812	44	66	INTO THE NIGHT Toby Beau - RCA 11388	72
17	JOSIE Stevy Nyan - ABC 12404	20	42	LONDON TOWN Wings - Capitol 4525	50	67	RAINING IN MY HEART Leo Sayer - Warner Bros. 8582	74
19	MAC ARTHUR PARK Donna Summer - Casablanca 838	30	43	BADLANDS Bruce Springsteen - Columbia 10801	48	68	COME TOGETHER Aerosmith - Columbia 10802	78
18	YOU NEVER DONE IT LIKE THAT Curtis & Tennifer - A&M 2082	21	44	FLYIN' HIGH Commodores - Motown 1453	53	69	RIDE-O-ROCKET Brothers Johnson - A&M 2086	78
20	THREE TIMES A LADY Commodores - Motown 1443	18	45	HOW MUCH I FEEL Ambrosia - Warner Bros. 8540	55	70	TONIGHT IS THE NIGHT Betty Wright - Alton 3740	-
21	I'VE ALWAYS BEEN CRAZY Waylon Jennings - RCA 11344	22	46	SHARING THE NIGHT TOGETHER Dr. Hook - Capitol 4821	56	71	STRANGE WAY Firefall - Atlantic 3518	-
22	READY TO TAKE A CHANCE AGAIN Bobby Mandlow - Arista 0357	32	47	DOUBLE VISION Foreigner - Atlantic 3514	56	72	YOUR SWEETNESS IS MY WEAKNESS Barry White - 20th Century-Fox 2380	-
23	ALL I SEE IS YOUR FACE Dan Hill - 20th Century-Fox 2378	24	48	EASE ON DOWN THE ROAD D. Road/M. Jackson - MCA 40847	48	73	TOOK THE LAST TRAIN David Gates - Elektra 45500	-
24	BEAST OF BURDEN Rolling Stones - Rolling Stone 18308	36	49	BLAME IT ON THE BOOGIE The Jacksons - Epic 50595	51	74	LOVE, I NEVER HAD IT SO GOOD Dwight Jones - A&M 2080	-
25	BLUE EYES Waltie Nakan - Columbia 10784	25	50	I DON'T WANT TO LIVE WITHOUT IT Robin Cruise - A&M 2075	58	75	CHANGE OF HEART Eric Carmen - Arista 0354	-

SUPER PICKS

IT'S OVER - Electric Light Orchestra - Jet 5052; P - T - R.
 I'M LEAVING IT ALL UP TO YOU - Freddy Fender - ABC 12415; C.
 STANDING IN THE SHADOW OF LOVE - Deborah Washington - Arista 7718; D - S - P - T.

EXHIBIT A

country singles saleslist

1	IT'S BEEN A GREAT AFTERNOON	2	31	'87 CHEVROLET	22	41	I FOUGHT THE LAW	48
	Merle Haggard - MCA 40926			Billy Joe Sover - United Artists 1229			Hank Williams, Jr. - Warner Bros. 8641	
2	HEARTBREAKEN	1	32	SWEET OESINE	32	43	HELLO, REMEMBER ME	26
	Dolly Parton - RCA 11296			The Kendalls - Ovation 1113			Billy Smart - A&M 2046	
3	OH, YEAH!	8	33	BOOGIE GRASS BAND	14	45	WHAT TIME DO YOU HAVE TO BE	53
	Oak Ridge Boys - ABC 12387			Conway Twitty - MCA 40929			Nazzy Bailey - RCA 11388	
4	LET'S TAKE THE LONG WAY	7	34	OLD FLAMES	25	44	WHEN A WOMAN CRIES	52
	Ronnie Millsap - RCA 11369			Joe Sun - Ovation 1107			David Rogers - Republic 029	
5	HENE COMES THE HUNT AGAIN	6	35	SWEET FANTASY	37	46	BORDER TOWN WOMEN	46
	Mickey Gilley - Epic 50580			Bobby Borchers - Epic 50585			Mel McDaniel - Capitol 4597	
6	ANYONE WHO ISN'T ME TONIGHT	10	36	TWO LONELY PEOPLE	38	48	ON MY KNEES	56
	Rogers/West - United Artists 1234			Moe Bandy - Columbia 10820			C. Niemi/J. Fricks - Epic 50618	
7	AIN'T NO CALIFORNIA	11	37	DANGENI HEARTBREAK AHEAD	28	47	OOHE OURL	47
	Mel Tillis - MCA 40948			Zella Lahr - RCA 11359			Johnny Cash - Columbia 10817	
8	WOMANHOOD	8	38	TOE TO TOE	29	48	LAST LOVE OF MY LIFE	51
	Tanny Wright - Epic 50574			Freddie Hart - Capitol 4509			Lynn Anderson - Columbia 10809	
9	SLEEPING SINGLE IN A DOUBLE BED	13	39	HELLO MEXICO	18	48	JULIET & ROMEO	50
	Barbara Mandrell - ABG 12403			Johnny Duncan - Columbia 10783			Ronnie Sessoms - MCA 40952	
10	EASY FROM NOW ON	12	40	THE FEELING'S ALRIGHT	33	49	SHARING THE NIGHT TOGETHER	-
	Emmylou Harris - Warner Bros. 8623			Dan King - Con Bro 137			Or. Mack - Capitol 4521	
11	PENNY ARCADE	8	31	HOPELESSLY DEVOTED TO YOU	31	81	HANDCUFFED TO A HEARTACHE	54
	Cristy Lane - GRT 187			Olivia Newton-John - RSO 903			Mary K. Miller - Inerg 310	
12	TEAN TAMB	15	39	FADIN' IN, FADIN' OUT	42	52	SLEEP TIGHT, GOONIGHT MAN	57
	Dave & Sugar - RCA 11322			Tommy Overstreet - ABG 12408			Bobby Bare - Columbia 10831	
13	I'VE ALWAYS BEEN CRAZY	4	33	ONE-SIDED CONVERSATION	34	53	RAMBLIN' ROSE	58
	Waylon Jennings - RCA 11344			Gene Watson - Capitol 4618			Hank Snow - RCA 11377	
14	LITTLE THINGS MEAN A LOT	20	34	DAYLIGHT	44	54	DO IT AGAIN TONIGHT	55
	Margo Smith - Warner Bros. 8653			T.G. Sheppard - Warner Bros. 8678			Larry Gordin - Monument 288	
15	ANOTHER GOODBYE	18	35	TWO HEARTS TANGLED IN LOVE	39	55	WHAT CHA GOIN' AFTEN MIGNIGHT	60
	Donna Fargo - Warner Bros. 8643			Kenny Dale - Capitol 4618			Helen Cornelius - RCA 11375	
16	WHAT HAVE YOU GOT TO LOSE	24	36	I JUST WANT TO LOVE YOU	48	56	WHAT'S THE NAME OF THAT SONG	-
	Tom T. Hall - RCA 11376			Eddie Habbitt - Elektra 45531			Ottens Barber - Century 21-100	
17	NO SLEEP TONIGHT	17	37	WHO AM I TO SAY	18	87	THE MAN THAT TURNED MY MAMA	58
	Randy Barlow - Republic 024			Studer Brothers - Mercury 55037			Ed Bruce - Epic 50613	
18	IF YOU GET TEN MINUTES	3	38	NAKE & NAMBLIN' MAN	23	58	LOVE GOT IN THE WAY	-
	Joe Stampley - Epic 50575			Dan Williams - ABG 12373			Freddie Wetler - Columbia 10837	
19	IF THE WORLD RAN OUT OF LOVE	21	29	YOU NEEDED ME	38	59	GAN YOU FOOL	-
	Brown/Cornelius - RCA 11304			Anne Murray - Capitol 4574			Olan Campbell - Capitol 4638	
20	HUBBA, HUBBA	30	40	IF THIS IS JUST A GAME	45	60	ALL OF ME	-
	Billy Crash Craddock - Capitol 4624			David Allen Coe - Columbia 10818			Willie Nelson - Columbia 10834	

country playwheel

1	BLUE SKIES - Willie Nelson - Columbia 10784
3	IT'S BEEN A GREAT AFTERNOON - Haggard - MCA 40926
3	I'VE ALWAYS BEEN CRAZY - Waylon Jennings - RCA 11344
4	HEARTBREAKEN - Dolly Parton - RCA 11296
5	YOU NEEDED ME - Anne Murray - Capitol 4574
6	BOOGIE GRASS BAND - Conway Twitty - MCA 40929
7	ANYONE WHO ISN'T ME TONIGHT - Rogers/West - U.A. 1234
8	IF YOU GET TEN MINUTES - Joe Stampley - Epic 50575
8	AIN'T NO CALIFORNIA - Mel Tillis - MCA 40948
10	ANOTHER GOODBYE - Donna Fargo - Warner Bros. 8643
11	TALKING IN YOUR SLEEP - Crystal Gayle - U.A. 1193
12	NO SLEEP TONIGHT - Randy Barlow - Republic 024
13	TWO HEARTS TANGLED IN LOVE - Kenny Dale - Capitol 4618
14	SWEET OESINE - The Kendalls - Ovation 1112
15	LITTLE THINGS MEAN A LOT - Margo Smith - W.B. 8653

new 'n cookin' country

BREAK MY MIND	Vern Gosdin - Elektra 45532
THE WAY IT WAS IN '51	Merle Haggard - Capitol 4636
STORMY WEATHER	Stella Parton - Elektra 45533
YOU'VE STILL GOT A PLACE IN MY HEART	Con Hunley - Warner Bros. 8671
THINGS I'D DO FOR YOU	Mundo Earwood - GMC 104
FRIEND, LOVER, WIFE	Johnny Paycheck - Epic 50621

r&b singles saleslist

1	GET OFF Foxy - Dash 5046	31	YOUR SWEETNESS IS MY WEAKNESS Barry White - 20th Century-Fox 2380 27	41	SPECIAL OCCASION Dorothy Moore - MCA 1052	45
2	GOY TO GET YOU INTO MY LIFE Earth, Wind & Fire - Columbia 10796	32	HOT SHOT Karen Young - West End 1211	42	SHOWDOWN Isley Brothers - T-Neck 2278	50
2	HOLDING ON L.T.D. - A&M 2057	33	VICTIM Candi Staton - Warner Bros. 8582	6	STRAIGHT ON Heart - Portrait 70020	41
4	BOOGIE, OOGIE, OOGIE Taste Of Honey - Capitol 4566	4	EHAKE B GANCE Can Funk Shun - Mercury 74008	21	MARY JANE Rick James - Gordy 7182	-
6	THREE TIMES A LADY Commodores - Motown 1443	8	YOU & I Rick James - Gordy 7156	72	WHOLE LOT OF SHAKIN' Emotions - Columbia 10828	-
6	I LIKE GIRLS Fatback Band - Spring 161	6	IT'S A BETTER THAN GOOD Gladys Knight & The Pips - Buddah 588	46	I JUST WANNA STOP Gina Vannelli - A&M 2072	46
7	MAC ARTHUR PARK Donna Summer - Casablanca 839	12	LOST & TURNED OUT The Whispers - Solar 11353	26	STUFF LIKE THAT Quincy Jones - A&M 2043	26
8	YOU ENOUGH TO GO IT Peter Brown - Dinetik 8272	10	ONLY YOU Teddy Pendergrass - Phila. Int'l. 2657	38	DON'T STOP, GET DFP Gybers - Casablanca 926	56
9	MIND BLOWING DECISIONS Heatwave - Epic 50588	11	I LOVE THE NIGHT LIFE Alicia Bridges - Polydor 14483	30	DO YOU FEEL ALRIGHT KC & The Sunshine Band - TK 1030	59
10	I'M IN LOVE Rose Royce - Whitfield/W.B. 8629	13	TAKE ME I'M YOURS Michael Henderson - Buddah 587	30	I DON'T KNOW IF IT'S RIGHT Evelyn "Champagne" King - RCA 11386	-
11	LET'S START THE DANCE Hamilton Bohannon - Mercury 74106	16	LOVE WILL FIND A WAY Pablo Cruise - A&M 2048	26	WIZARD OF OZ Mecca - Millennium 820	84
12	ONE NATION UNDER A GROOVE Funkadelic - Warner Bros. 8681	18	WHAT YOU WAITIN' FOR Ettergard - MCA 40932	31	LUCY IN THE SKY Natalie Cole - Capitol 4823	40
12	STAND UP Atlantic Starr - A&M 2066	14	COME LYL WITH ME Bobby Blue - ABC 12406	32	LDVIN' FEVER High Energy - Gordy 7181	87
14	YOU McCrays - Portrait 70017	8	DO WHAT YOU WANT TO DO Oranice - ABC 12450	33	MOONLIGHT SERENADE Tusalee Junction - Butterfly 1210	42
18	IT SEEMS TO HANG ON Ashford & Simpson - Warner Bros. 8651	17	SWEET MUSIC MAN Millie Jackson - Spring 185	37	LAST DANCE Donna Summer - Casablanca 926	44
18	BLAME IT ON THE BOOGIE The Jacksons - Epic 50589	18	LOVE BROUGHT ME BACK D.J. Rogers - Columbia 10754	34	MISE YOU Rolling Stones - Rolling Stone 19307	56
17	EASE ON DOWN THE ROAD D. Ross/M. Jackson - MCA 40847	20	YOU'RE ALL I NEED Martha/Williams - Columbia 10772	28	BARE BACK Temptations - Atlantic 337	60
18	BRANDY O'Jays - Philadelphia Int'l. 3682	7	SOFT & WET Prince - Warner Bros. 8618	41	DON'T LET IT GO TO YOUR HEAD Jean Carne - Philadelphia Int'l. 2654	-
19	TNIGHT IE THE NIGHT Betty Wright - Alton 2740	29	UNLOCK YOUR MIND The Staples - Warner Bros. 8680	47	NATURE James Brown - Polydor 14512	-
20	FLYIN' HIGH Commodores - Motown 1452	28	RIDE-O-CROCKET Brothers Johnson - A&M 2086	48	I JUST CAN'T LEAVE YOUR LOVE B.B. King - ABC 12412	-

r&b playwheel

1	GET DFP - Foxy - Dash 5046
2	THREE TIMES A LADY - Commodores - Motown 1443
3	BOOGIE, OOGIE, OOGIE - Taste Of Honey - Capitol 4566
4	BRANDY - O'Jays - Philadelphia Int'l. 2682
8	ONE NATION UNDER A GROOVE - Funkadelic - W.B. 8681
8	CLOSE THE DOOR - Teddy Pendergrass - Phila. Int'l. 3648
7	EHAKE - Evelyn King - RCA 11122
9	MAC ARTHUR PARK - Donna Summer - Casablanca 839
9	LAST DANCE - Donna Summer - Casablanca 926
10	I JUST WANNA STOP - Gina Vannelli - A&M 2072
11	STRAIGHT ON - Heart - Portrait 70020
12	HOT SHOT - Karen Young - West End 1211
12	VICTIM - Candi Staton - Warner Bros. 8582
14	HOLDING ON - L.T.D. - A&M 2057
16	LOST & TURNED OUT - Whispers - Solar 13353

new 'n cookin' r&b

LOVE, I NEVER HAD IT SO GOOD Quincy Jones - A&M 2080
THAT'S WHAT FRIENDS ARE FOR Johnny Mathis/Deniece Williams - Columbia 10826
SO EASY Can Funk Shun - Mercury 74024
SINGLE AGAIN Odyssey - RCA 11399
IN THE BUSH Musique - Prelude 71110
LET ME BE YOUR LOVE Jimmy Bo Horne - Sunshine Sound 1005

- 1 KISS YOU ALL OVER - Esile - Warner Bros. 8589
- 2 HOT BLOODED - Foreigner - Atlantic 3488
- 3 SUMMER NIGHTS - Travis/Newton-John - RSO 906
- 4 DON'T LOOK BACK - Boston - Epic 50590
- 5 REMINISCING - Little River Band - Harvest 4605
- 6 YDU NEEDED ME - Anne Murray - Capitol 4574
- 7 HOW MUCH I FEEL - Ambrosia - Warner Bros. 8640
- 8 BLUE COLLAR MAN - Stry - A&M 2087
- 9 MAC ARTHUR PARK - Donna Summer - Casablanca 838
- 10 THREE TIMES A LADY - Commodores - Motown 1442
- 11 HOPELESSLY DEVOTED TO YOU - Newton-John - RSO 903
- 12 BOOGIE, DOGIE, DOGIE - Taste Of Honey - Capitol 4565
- 13 BEAST OF BURDEN - Rolling Stones - Rolling Stone 19309
- 14 HOLLYWOOD NIGHTS - Bob Seger - Capitol 4818
- 15 BACK IN THE U.S.A. - Linda Ronstadt - Asylum 45518

POP

- 70 TONIGHT IS THE NIGHT - Betty Wright - Alston 3740
- 71 STRANGE WAY - Firefall - Atlantic 3518
- 72 YOUR SWEETNESS - Barry White - 20th Century-Fox 2380

COUNTRY

- 54 SHARING THE NIGHT TOGETHER - Dr. Hook - Capitol 4621
- 58 WHAT'S THE NAME - Glenn Barber - Century 21 - 100
- 59 LOVE GOT IN THE WAY - Freddy Weller - Columbia 10837

R&B

- 55 MARY JANE - Rick James - Gordy 7182
- 56 WHOLE LDT OF SHAKIN' - Emotions - Columbia 10828
- 57 I DON'T KNOW IF IT'S RIGHT - Evelyn King - RCA 11386

prime chart movers

POP

- 30-38 MAC ARTHUR PARK - Donna Summer - Casablanca 938
- 38-24 BEAST OF BURDEN - Rolling Stones - Rolling Stone 19309
- 58-47 DOUBLE VISION - Foreigner - Atlantic 3514

COUNTRY

- 30-20 HUBBA, HUBBA - Billy Crash Craddock - Capitol 4624
- 32-22 SWEET DESIRE - The Kendalls - Ovation 1112
- 36-26 TWO LONELY PEOPLE - Moe Bandy - Columbia 10820

R&B

- 29-18 TONIGHT IS THE NIGHT - Betty Wright - Alston 3740
- 38-28 ONLY YDU - Teddy Pendergram - Phila. Int'l. 2657
- 39-29 I LOVE THE NIGHT LIFE - Alicia Bridges - Polydor 14483

new 'n cookin' pop

NORTHEAST

- DON'T THROW IT ALL AWAY - Andy Gibb - RSO 811
- SEARCHING FOR A THRILL - Starbuck - United Artists 1246
- DRIFTWOOD - Moody Blues - London 373

SOUTHEAST

- WAVELENGTH - Van Morrison - Warner Bros. 8661
- TIME PASSAGES - Al Stewart - Arista 0362
- I WILL STILL LOVE YDU - Stonebolt - Parachute 516

CENTRAL

- DRIFTWOOD - Moody Blues - London 373
- SUBSTITUTE - Clout - Epic 50581

WEST

- LIKE A SUNDAY IN SALEM - Gene Cotton - Arista 7723
- TIME PASSAGES - Al Stewart - Arista 0362

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RePlay **best single releases**

HOLD THE LINE — Toto — Columbia 10830 (3:29): This easy rock 'n' roll tune can be a big earner for operators. The melody is fabulous and the vocal excellent. A dynamic blend of 70s and slightly 50s flavors that has already had good FM coverage; so watch this one catch on jukewise in a very big way. P-T-R

ONE RUN FOR THE ROSES — Nerval Felts — ABC 12412 (3:10): Do not overlook this latest release from Felts. It's a beautiful heartache number with pretty lyrics that should be immediately programmed in country location boxes. Very strong vocal and instrumentation. C

I'M EVERY WOMAN — Chaka Khan — Warner Bros. 8683 (4:00): Perhaps a bit long for juke play, but give it a serious listen and a chance. This Ashford & Simpson penned tune is excellently interpreted by Khan and is slickly produced by Arif Mardin. Khan fans are always eager for more and she does it richly and "naturally" in this fine piece of vocal and production work. D-S-P-T

SAVE ME, SAVE ME — Frankie Valli — Warner Bros. 8670 (3:15): Get it while he's hot! This new single effort from Valli plays slightly on the successful sound of the recent hit "Grease," and should provide a strong follow-up for the artist. Very contemporary with tremendous pop appeal. T-P-R-E-D

KISS AWAY — Jody Miller — Epic 50612 (2:51): Miller's crisp vocal and incredible range inject vibrance into this touching song. Destined for prime radio coverage, this cut will fare well in country location boxes. C

WHAT YOU WON'T DO FOR LOVE — Bobby Caldwell — Clouds/TK 11-A (3:30): This impressive Caldwell-penned tune is slow and sexy, with a stunning vocal, horns and percussion. A very romantic R&B ballad that bears a hint of jazz. Programmers! Don't pass this up! S-D-E

NEW YORK GROOVE — Ace Frehley — Casablanca 941 (3:01): This familiar song has received huge initial one-stop response. The able Kiss guitarist has a hit going for him with this awesome rendition that boasts a compelling and bassy beat and precise production. A sure box winner that no youth location should be without. P-T-R

JUST HANGIN' ON — Mel Street — Mercury 55043 (2:54): Street's vocal performance highlights this slow and pretty ballad. He is a solid box earner, so program into country locations without delay. C

IN THE BUSH — Musique — Prelude 71110 (3:58): A very suggestive cut with irresistible and sexy dance beat. Hearing much one-stop comment and street talk on this one, so be a jump ahead and position in R&B location boxes. D-S-T-P

THAT'S WHAT FRIENDS ARE FOR — Johnny Mathis/Deniece Williams 10826 (3:11): This beautiful belted can be expected to cross to heavy pop play action. Delicious vocal blend with very positive feel. S-P-T-E

THE LOVE IN ME — Jim Norman — Republic 030 (3:07): A soft and lovely romantic ballad. Norman's strong vocal makes this meaningful and sentimental declaration of love really work. Watch for airplay support and program into country locations. C

I JUST CAN'T LEAVE YOUR LOVE ALONE — B. B. King ABC 12412 (3:20): This song has a fantastic New Orleans flavor that is sure to extend beyond regional airplay popularity. Wonderful vocal end horns with smooth background production. S-D

HOT NITE IN DALLAS — Moon Martin — Capitol 4639 (2:59): This cut has been catching the ears of FM listeners and is receiving highly positive one-stop response. The erie backing vocals add dramatically to the distinct sound of this appealing rocker. P-T-R

FRIEND, LOVER, WIFE — Johnny Paycheck — Epic 50621 (3:09): This newest Paycheck single has excellent pop potential, so watch for early crossing activity. The lively country lyric is driven by a consistent beat that marks this one for heavy repeat-play. C-P

I DON'T KNOW IF IT'S RIGHT — Evelyn "Champagne" King — RCA 11386 (3:40): A follow-up to the huge hit "Shame," this slower, moodier cut will do well, crossing to pop very early. This young and impressive artist's popularity knows no bounds, so program immediately. S-D-P-T

LIKE A SUNDAY IN SALEM — Gene Cotton — Ariola 7723 (3:29): This to-the-point comment on the suffering and struggle of creativity will see nice across the board action. Thoughtfully structured, the cut contains some nice imagery. Seeing good one-stop activity. P-T-R-C

LET'S BE LONELY TOGETHER — Dale McBride — Con Brio 140 (2:58): This medium-paced cut has a big country sound and full-bodied vocal. Station support increases weekly, so keep an eye on this one. C

MARY JANE — Rick James — Gordy 7162 (3:49): Huge appeal! This easy disco cut will be a hit in soul location boxes. Fantastic lead end bass guitar interplay with savory piano end overall structure make this an easy winner. A well-timed successor to "You & I" that will enjoy a lengthy chart stay. S-O-T-P-E

BREAK MY MIND — Vern Gosdin — Elektra 45532 (3:36): Very upbeat, with clever lyrics, nice vocals and catchy bridge. Give this a serious listen. Gosdin puts in a remarkable performance. C

WHOLE LOT OF SHAKIN' — Emotions — Columbia 10828 (3:19): A big dance cut that is very catchy, upbeat, with great horns and happy sounds. D-S-T-P.

AIN'T LIFE HELL — Henk Cochran & Willie Nelson — Capitol 4635 (2:19): A lot of folks will relate to this one! The title itself is sure to garner big play activity. Cute with strong fiddle end harmonica work add to this tongue-in-cheek number. C

Recently released singles which RePlay feels have the best potential for charting and jukebox play. While this is a good guide to new titles, RePlay suggests you also check your local one-stop for additional record releases, especially those of particular interest to your locale and customer tastes. Codes: P (pop); R (rock); T (teen); C (country); S (soul/rhythm & blues); E (easy listening); D (disco).

RePlay / programmer roundup

New records added at major jukebox operations. [Routes reporting this issue control about 10,500 phonographs.]
(MPR — Most Played Record during most recent collection period.)

<p>Frank Gallo C&L AMUSEMENTS 388 Danbury Road Wilton, Conn. 06897</p>	<p>POP: C&W: R&B: MPR:</p>	<p>Come Together - Aerosmith (Columbia); Josie - Steely Dan (ABC); MacArthur Park - Donna Summer (Casablanca); Sleeping Single In A Double Bed - Barbara Mandrell (ABC); Love Me With All Your Heart - Johnny Rodriguez (Mercury); Cryin' Again - Oak Ridge Boys (ABC) Only You - Teddy Pendergrass (Philadelphia International); Unlock Your Mind - The Staples (Warner Bros.); Don't Stop, Get Off - Sylvers (Casablanca) Who Are You - The Who (MCA); What Have You Got To Lose - Tom T. Hall (RCA); You - McCrarys (Portrait)</p>
<p>Kathy Morse MANCHESTER MUSIC CO. 62 Lowell Street Manchester, N.H. 03101</p>	<p>POP: C&W: R&B: MPR:</p>	<p>Back In The U.S.A. - Linda Ronstadt (Asylum); Beast Of Burden - Rolling Stones (Rolling Stone); Who Are You - The Who (MCA); Close The Door - Teddy Pendergrass (Philadelphia International) Come Girl - Johnny Cash (Columbia); Do It Again Tonight - Larry Getlin (Monument) Ain't No California - Mel Tillis (MCA); I Fought The Law - Hank Williams, Jr. (W. B.) Hot Shot - Karen Young (West End); Victim - Candi Staton (Warner Bros.) Kiss You All Over - Exile (Warner Bros.); Anyone Who Isn't Me - Rogers & West (United Artists); Dance (Disco Heat) - Sylvester (Fantasy)</p>
<p>Bernie Silverman RUNYON SALES U.S. Route 22 Springfield, N.J. 07081</p>	<p>POP: C&W: R&B:</p>	<p>6,000,000 Steps - Rahni & Friends (Inspirational Sounds); How Much I Feel - Ambrosia (Warner Bros.); Don't Want To Live Without It - Pablo Cruise (A&M); MacArthur Park - Donna Summer (Casablanca) On My Knees - C. Rich/J. Fricke (Epic); I Just Want To Love You - Eddie Rebbitt (Elektra); Give Her What She Wants - Tony Sexon (Scorpion) Only You - Teddy Pendergrass (Philadelphia International); Your Sweetness Is My Weakness - Barry White (20th Century-Fox); In The Bush - Musique (Prelude); MacArthur Park - Donna Summer (Casablanca)</p>
<p>Tony Mastro PARAMOUNT VENDING 421 Bruckner Blvd. Bronx, N.Y. 10455</p>	<p>POP: R&B:</p>	<p>MacArthur Park - Donna Summer (Casablanca); How Much I Feel - Ambrosia (Warner Bros.); I Just Wanna Stop - Gino Vannelli (A&M) Only You - Teddy Pendergrass (Philadelphia International); Your Sweetness Is My Weakness - Barry White (20th Century-Fox)</p>
<p>Mary T. Moore UPSTATE VENDING 331 Main Street Laka Placid, N.Y. 12946</p>	<p>POP: C&W:</p>	<p>All I See Is Your Face - Dan Hill (20th Century-Fox); Crazy Feelin' - Jefferson Starship (Grant); Prisoner Of Your Love - Playaz (RSO); Beast Of Burden - Rolling Stones (Rolling Stone); How Much I Feel - Ambrosia (Warner Bros.) Two Lonely People - Moe Bandy (Columbia); Hubba, Hubba - Billy Crash Craddock (Capitol); Sleeping Single In A Double Bed - Barbara Mandrell (ABC)</p>
<p>Bernie Hodges COLUMBIA VENDING 6424 Frankford Ave. Baltimore, Md. 21206</p>	<p>POP: C&W: R&B:</p>	<p>Greased Lightnin' - J. Travolta/J. Conaway (RSO); Wizard Of Oz - Meco (Millennium); Substitute - Clout (Epic) '57 Chevrolet - Billy Jo Spears (United Artists); Let's Shake Hands And Come Out Lovin' - Kenny O'Dall (Capricorn) Stand Up - Atlantic Starr (A&M); Only You - Teddy Pendergrass (Philadelphia International)</p>
<p>T.J. Strahan PLAYMOR MUSIC P.O. Box 791 Greenfield, Mass. 01301</p>	<p>POP: C&W:</p>	<p>Greased Lightnin' - J. Travolta/J. Conaway (RSO); Wizard Of Oz - Meco (Millennium); Double Vision - Foreigner (Atlantic); MacArthur Park - Donna Summer (Casablanca); Reining In My Heart - Leo Sayer (Warner Bros.); Beast Of Burden - Rolling Stones (Rolling Stone) On My Knees - C. Rich/J. Fricke (Epic); Break My Mind - Vam Godin (Elektra); Old Flames Can't Hold A Candle To You - Joe Sum (Ovation)</p>
<p>Russell J. Mawdsley RUSSELL HALL 116 Race Street Holyoke, Mass. 01040</p>	<p>POP: C&W: R&B:</p>	<p>You Never Done It Like That - Captain & Tennille (A&M); Josie - Steely Dan (ABC); How Much I Feel - Ambrosia (Warner Bros.); Beast Of Burden - Rolling Stones (Rolling Stone); Took The Last Train - David Gates (Elektra); Ready To Take A Chance Again - Barry Manilow (Arista) Sleeping Single In A Double Bed - Barbara Mandrell (ABC); Sleep Tight, Goodnight Man - Bobby Bare (Columbia); On My Knees - C. Rich/J. Fricke (Epic) Who Are You - The Who (MCA); I Love The Night Life - Alicia Bridges (Polydor)</p>
<p>Maryanne Butterworth APPEL VENDING 188 West Wingohocking Philadelphia, Pa. 19140</p>	<p>POP: R&B:</p>	<p>Everybody Needs Love - Stephen Bishop (ABC); Substitute - Clout (Epic); Whenever I Call You "Friend" - Kenny Loggins (Columbia); Hot Child In The City - Nick Gilder (Chrysalis) Tonight Is The Night - Barry Wright (Almon); MacArthur Park - Donna Summer (Casablanca); In The Bush - Musique (Prelude); Only You - Teddy Pendergrass (Philadelphia International)</p>

Clifford Bardiff PELL AMUSEMENT 2438 E. Robinson St. Orlando, Fla., 32803	POP: C&W: R&B:	Greased Lightnin' - J. Travolta/J. Conway (RSO); Hot Child In The City - Nick Gilder (Chrysalis) Fenny Arcades - Candy Lane (GRT); Heartbreaker - Oolly Parton (RCA); Here Comes The Hurt Again - Mickey Gilley (Epic) Stand Up - Atlantic Starr (A&M); MacArthur Park - Donna Summer (Casablanca)
Charles Capps MUSIC VENDORS 1836 Gumbanch Road Jacksonville, N.C. 28540	POP: C&W: R&B:	Greased Lightnin' - J. Travolta/J. Conway (RSO); Double Vision - Foreigner (Atlantic); Blue Collar Man - Styx (A&M) Sweet Desire - Kendalls (Ovation); I Just Want To Love You - Eddie Rabbitt (Elektra); Two Lonely People - Moe Bandy (Columbia) Flyin' High - Commodores (Motown); MacArthur Park - Donna Summer (Casablanca); One Nation Under A Groove - Funkadadlic (Warner Bros.)
Marvin Delpidio LUCKY COIN 1711 St. Charles New Orleans, La. 70130	POP: C&W: R&B:	Took The Last Train - David Gates (Elektra); Everybody Needs Love - Stephen Bishop - (ABG); Double Vision - Foreigner (Atlantic); MacArthur Park - O. Summer (Casablanca) Offshore Blues - Tom Warren (Starbarn); Sleeping Single In A Double Bed - Barbara Mandrell (ABG); Leaving It All Up To You - Freddy Fender (ABG) Angel Dust - Gil Scott-Heron (Columbia); Mary Jane - Rick James (Gordy); Showdown - Isley Brothers (T-Neck)
Henry Holzenthal TAC AMUSEMENT CO. 1525 Airline Highway Metairie, La. 70001	POP: C&W: R&B:	Double Vision - Foreigner (Atlantic); MacArthur Park - Donna Summer (Casablanca); Don't Hold Back - Chanson (Ariola); I Love The Night Life - Alicia Bridges (Polydor) Someday You Will - John Wesley Ryles (Columbia); Ain't No California - Mel Tillis (MCA) Only You - Teddy Pendergrass (Phila. Int'l.); Unlock Your Mind - The Staples (Warner Bros.)
Jimmy Watkins WATKINS MUSIC 1214 Pee Dee Ave. Albemarle, N.C. 28001	POP: C&W: R&B:	Who Are You - The Who (MCA); 5.7.0.S. - City Boy (Mercury); You Needed Me - Anne Murray (Capitol) It's Been A Great Afternoon - Marla Haggard (MGA); If The World Ran Out Of Love Tonight - J. Brown/H. Cornelius (RCA); Ain't No California - Mel Tillis (MCA) You Got Me Running - Lenny Williams (Columbia); It Seem To Hang On - Ashford & Simpson (Warner Bros.); Blame It On The Boogie - The Jacksons (Epic)
Neil Crenshaw RALEIGH MUSIC CO. 4013 Vesta Drive Raleigh, NC 27603	POP: C&W: R&B:	Straight On - Heart (Portrait); Double Vision - Foreigner (Atlantic); I Just Wanna Stop Gino Vannelli (A&M) What Have You Got To Lose - Tom T. Hall (RCA); I Just Want To Love You - Eddie Rabbitt (Elektra); Tonight I'm Gonna Make You A Star - Branda & Herb (H&L) Love, I Never Had It So Good - Quincy Jones (A&M); Say A Prayer For Two - Crown Heights Affair (DeLite); I Just Wanna Stop - Gino Vannelli (A&M); Straight On - Heart (Portrait)
Olive Kennedy CAPE FEAR MUSIC 2508 Burnell Blvd. Wilmington, N.C. 28401	POP: C&W: R&B:	Boogie, Oogie, Oogie - Taste Of Honey (Capitol); Flyin' High - Commodores (Motown); Double Vision - Foreigner (Atlantic); Kiss You All Over - Exile (Warner Bros.) Heartbreaker - Oolly Parton (RCA); Sleeping Single In A Double Bed - Barbara Mandrell (ABG); Ain't No California - Mel Tillis (MCA) Only You - Teddy Pendergrass (Philadelphia International); I'm In Love - Rose Royce - (Whitfield/W.B.); Smile - Emotions (Columbia)
Bob Nelson / Jim Parent COLLINS MUSIC CO. 1341 Rutherford Road Greenville, S.C. 29609	POP: C&W: R&B:	Whenever I Call You "Friend" - Kenny Loggins (Columbia); Hollywood Nights - Bob Seger (Capitol) One-Sided Conversation - Gena Watson (Capitol); Ain't No California - Mel Tillis (MCA) Your Sweetness Is My Weakness - Barry White (20th Century-Fox); Movin' On - George Duke (Epic)
Janet Parker NEWPORT-NEWS AMUSE. 1021 - 48th Street Newport News, VA 23607	POP: C&W: R&B: MPR:	Best Of Burdett - Rolling Stones (Rolling Stone); Jamie's Crying - Van Halen (Warner Bros.); Double Vision - Foreigner (Atlantic); Raining In My Heart - Leo Sayer (W. B.) I Just Want To Love You - Eddie Rabbitt (Elektra); Sweet Desire - Kendalls (Ovation); When A Woman Cries - David Rogers (Republic) Showdown - Isley Bros. (T-Neck); Flyin' High - Commodores (Motown); Don't Hold Back - Chanson (Ariola) Champagne Jam - Atlanta Rhythm Section (Polydor); Little Things Mean A Lot - Margo Smith (Warner Bros.); MacArthur Park - Donna Summer (Casablanca)
L.N. Baker TIDEWATER MUSIC 3770 Progress Road Norfolk, Va. 23502	POP: C&W: R&B: MPR:	Devoted To You - G. Simon/J. Taylor (Elektra); Hot Child In The City - Nick Gilder (Chrysalis); Right Down The Line - Garry Rafferty (United Artists) What Have You Got To Lose - Tom T. Hall (RCA); Sweet Fantasy - Bobby Borchers (Epic); Two Lonely People - Moe Bandy (Columbia) I Love The Night Life - Alicia Bridges (Polydor); Blame It On The Boogie - The Jacksons (Epic) Double Vision - Foreigner (Atlantic); Sweet Desire - The Kendalls (Ovation); Take It On Up - Pocketa (Gordy)

<p>Mary Bona R&M MUSIC CO. 1731 E. 22nd St. Des Moines, Iowa 50317</p>	<p>POP: C&W: R&B:</p>	<p>Double Vision - Foreigner (Atlantic); Greased Lightnin' - J. Travolta/J. Conway (RSO); Everybody Needs Love - Stephan Bishop (ABC) Two Lonely People - Moe Bandy (Columbia); Sweet Desire - Kandalls (Ovation); I Just Want To Love You - Eddie Rabbitt (Elektra); Little Things Mean A Lot - Margo Smith (Warner Bros.); Sweet Fantasy - Bobby Berchans (Epic) Flyin' High - Commodores (Motown); Raining In My Heart - Leo Sayer (Warner Bros.); I Love The Night Life - Alicia Bridges (Polydor)</p>
<p>Liz Christensen JOHNSON VENDING 127-31st Avenue Rock Island, Ill. 61201</p>	<p>POP: C&W:</p>	<p>You Needed Me - Anna Murray (Capitol); Whenever I Call You "Friend" - Kenny Loggins (Columbia); Hollywood Nights - Bob Seger (Capitol); Back In The U.S.A. - Linda Ronstadt (A&M); MacArthur Park - Donna Summer (Casablanca) Anyone Who Isn't Me - Rogers & West (United Artists); Sleeping Single In A Double Bed Barbara Mandrell (ABC); '57 Chevrolet - Billy Jo Spears (United Artists); Panny Arcade Cristy Lane (GRT)</p>
<p>Brad Hamma A.H. ENTERTAINERS 1151 N. Rohlwing Rd. Rolling Meadows, Ill. 60008</p>	<p>POP: C&W:</p>	<p>Ready To Take A Chance Again - Barry Manilow (Arista); Greased Lightnin' - J. Travolta/ J. Conway (RS); Hot Child In The City - Nick Gilder (Chrysalis); Don't Want To Live Without It - Pablo Cruise (A&M); Straight On - Heart (Portrait); London Town - Wings (Capitol); Double Vision - Foreigner (Atlantic); Power Of Gold - Fogelberg/Weisberg (Epic) Do It Again Tonight - Larry Gatlin (Monument); Little Things Mean A Lot - Margo Smith (Warner Bros.); Fair & Tender Ladies - Charlie McCoy (Columbia); Ain't No California - Mal Tillis (MCA)</p>
<p>John Gustwiller A. VAN BRACKEL & SONS 1301 Ottawa Avenue Defiance, Ohio 43512</p>	<p>POP: C&W: R&B:</p>	<p>MacArthur Park - Donna Summer (Casablanca); Greased Lightnin' - J. Travolta/J. Conway (RSO); Beat Of Burden - Rolling Stones (Rolling Stone); I Just Wanna Stop - Gino Vannelli (A&M); Prisoner Of Your Love - Player (RSO) Bordertown Woman - Mel Daniels (Capitol) MacArthur Park - Donna Summer (Casablanca); I Just Wanna Stop - Gino Vannelli (A&M)</p>
<p>Henry Gray LEONARD AMUSEMENT 122 North Winter Adrian, Mich. 49221</p>	<p>POP: C&W:</p>	<p>How Much I Feel - Ambrosia (Warner Bros.); Prisoner Of Your Love - Player (RSO); Beat Of Burden - Rolling Stones (Rolling Stone); Crazy Feelin' - Jefferson Starship (Grunt); MacArthur Park - Donna Summer (Casablanca); Greased Lightnin' - Travolta/ Conway (RSO) Ain't No California - Mel Tillis (MCA); Let's Take The Long Way Around The World - Ronnie Milsap (RCA); Here Comes The Hurt Again - Mickey Gilley (Epic)</p>
<p>Tom Hameyar PIONEER SERVICE 3726 Kessen Avenue Cincinnati, Ohio 45211</p>	<p>POP: C&W: R&B: MPR:</p>	<p>Ready To Take A Chance Again - Barry Manilow (Arista); Sgt. Pepper's - Beatles (Capitol); Crazy Feelin' - Jefferson Starship (Grunt); Sweet Life - Paul Davis (Bang) Ain't No California - Mel Tillis (MCA); Sleeping Single In A Double Bed - Barbara Mandrell (ABC); What Have You Got To Lose - Tom T. Hall (RCA) MacArthur Park - Donna Summer (Casablanca); Ride-O-Rocket - Brothers Johnson (A&M); I Love The Night Life - Alicia Bridges (Polydor) Double Vision - Foreigner (Atlantic); Little Things Mean A Lot - Margo Smith (Warner Bros.); Hot Shot - Karen Young (West End)</p>
<p>Jake Hayes GEM MUSIC 902 E. Second St. Dayton, Ohio 45402</p>	<p>POP: C&W: R&B:</p>	<p>Double Vision - Foreigner (Atlantic); Straight On - Heart (Portrait); Love Is In The Air - John Peel Young (Scotti Bros.); Ready To Take A Chance Again - Barry Manilow (Arista); Sgt. Pepper's - Beatles (Capitol) Little Things Mean A Lot - Margo Smith (Warner Bros.); Sweet Desire - Kandalls (Ovation) Your Sweetness Is My Weakness - Barry White (20th Century-Fox); Flyin' High - Commodores (Motown); Only You - Teddy Pendergrass (Phila. Int'l.); Let Me - Jimmy Bo Home (Sunshine Sound)</p>
<p>Betty Schott WESTERN AUTOMATIC MUSIC 4206 N. Western Ave. Chicago, Illinois 60618</p>	<p>POP: R&B:</p>	<p>Who Are You - The Who (MCA); Don't Look Back - Boston (Epic); MacArthur Park Donna Summer (Casablanca); Ready To Take A Chance Again - Barry Manilow (Arista); Greased Lightnin' - J. Travolta/J. Conway (RSO) Get Off - Foxy (Qash); Boogie Oogie, Dogie - Taste Of Honey (Capitol); Ease On Down The Road - Ross/Jackson (MCA)</p>
<p>Bill D' Connor, Jr. O'CONNOR VENDING 8119 Diplomacy Rd. Dallas, Texas 75247</p>	<p>POP: C&W: R&B:</p>	<p>Josie - Svelly Dan (ABC); She's Always A Woman - Billy Joel (Columbia) Ain't No California - Mel Tillis (MCA); I Just Want To Love You - Eddie Rabbitt (Elektra) Too Bad - Ashford & Simpson (Warner Bros.); Don't Stop, Get Off - Sylvers Only You - Teddy Pendergrass (Phila. Int'l.); Your Sweetness Is My Weakness - Barry White (20th Century-Fox)</p>
<p>Kathy Schaaf RAPIDS COIN 3241 Plover Rd. Wisc. Rapids, Wisc. 54404</p>	<p>POP: C&W: R&B: MPR:</p>	<p>Blue Collar Man - Stryx (A&M); Beat Of Burden - Rolling Stones (Rolling Stone); Sharing The Night Together - Dr. Hook (Capitol); Ready To Take A Chance Again - Barry Manilow (Arista) Sweet Desire - Kandalls (Ovation); Two Lonely People - Moe Bandy (Columbia); Day- light - T. G. Sheppard (Warner Bros.); Anyone Who Isn't Me Tonight - Rogers & Hart (United Artists) MacArthur Park - Donna Summer (Casablanca); Ease On Down - Ross/Jackson (MCA) Double Vision - Foreigner (Atlantic); Ain't No California - Mel Tillis (MCA)</p>

<p>Margot Green JONES MUSIC CO. 3874 Riverton Ave. N. Hollywood, Cal. 91604</p>	<p>C&W: R&B: MPR:</p>	<p>Don't Want To Live Without It - Pablo Cruise (A&M); Straight On - Heart (Portrait); Everybody Needs Love - Stephan Bishop (ABC); Hot Summer Night - Walter Egan (Columbia) Two Lonely People - Moe Bandy (Columbia); Sweet Desire - Kendall's (Ovation); I Just Want To Love You - Eddie Rabbitt (Elektra); I Fought The Law - Hank Williams, Jr. (Warner Bros.) I Just Wanna Stop - Gino Vannelli (A&M); Only You - Taddy Pendergrass (Phil. Int'l.) Double Vision - Foreigner (A&I); Gone Girl - J. Cash (Col.); Oz - Mecca (Millennium)</p>
<p>Alex Ferrero OVERLAND MUSIC 2328 East 14th St. Oakland, Cal. 94601</p>	<p>POP: R&B:</p>	<p>Substitute - Clout (Epic); Crazy Feelin' - Jefferson Starship (Grunt) What Che Doin' After Midnight, Baby-Heian Cornelius (RCA) Flyin' High - Commodores (Motown); Movin' On - George Duke (Epic); Take Me, I'm Yours - Michael Henderson (Buddah)</p>
<p>Tom Tomczyk STAR SERVICES 4441 Park Blvd. San Diego, Cal. 92116</p>	<p>POP: C&W:</p>	<p>Flyin' High - Commodores (Motown); Hot Child In The City - Nick Gilder (Chrysalis); I Don't Want To Live Without It - Pablo Cruise (A&M); Ready To Take A Chance Again - Barry Manilow (Arista); Straight On - Heart (Portrait) Hubba, Hubba - Billy 'Crash' Craddock (Capitol); Anyone Who Isn't Me - Rogers & West (United Artists); One Run For The Roses - Narvel Feltz (ABC); What Have You Got To Lose - Tom T. Hall (ABC)</p>
<p>Mary Lou Derverona ROCKWELL VENDING 1301 E. McFadden Ave. Santa Ana, Cal. 92705</p>	<p>POP: C&W: R&B:</p>	<p>Don't Want To Live Without It - Pablo Cruise (A&M); MacArthur Park - Donna Summer (Casablanca); Sharing The Night Together - Dr. Hook (Capitol) What Have I Got To Lose - Tom T. Hall (RCA); I Just Want To Love You - Eddie Rabbitt (Elektra) Your Sweetness Is My Weakness - Barry White (20th Century-Fox); Don't Stop, Get Off Sylvies (Casablanca); Beast Of Burden - Rolling Stones (Rolling Stone); Hot Summer Night - Walter Egan (Columbia)</p>
<p>Helen Teasck SERVOMATION 7402 Balsa Westminster, Cal. 92683</p>	<p>POP: C&W: R&B:</p>	<p>Sharing The Night Together - Dr. Hook (Capitol); Hot Shot - Karen Young (West End); I Just Wanna Stop - Gino Vannelli (A&M) I Just Want To Love You - Eddie Rabbitt (Elektra); Name Of That Song - Glenn Barber (Century 21) I Just Wanna Stop - Gino Vannelli (A&M); Hot Shot - Karen Young (West End); Only You - Teddy Pendergrass (Philadelphia International)</p>
<p>Earle O'Neal DEL ROQUE MUSIC 764 S.W. 6th Street Grants Pass, Ore. 97526</p>	<p>POP: C&W:</p>	<p>Don't Want To Live Without It - Pablo Cruise (A&M); Crazy Feelin' - Jefferson Starship (Grunt); Greased Lightnin' - J. Travolta/J. Conway (RSO); Sharing The Night Together Or, Hook (Capitol) What Have I Got To Lose - Tom T. Hall (RCA); Sweet Desire - Kendall's (Ovation); Mend- cuffed To A Heartache - Mary K. Miller (Inergij); Oeylight - T.G. Sheppard (Warner Bros.)</p>
<p>Eole Tomlin ACTION AMUSEMENT 1453 Esplanade Klamath Falls, Ore. 97601</p>	<p>POP: C&W:</p>	<p>Back In The U. S. A. - Linda Ronstadt (Asylum); Prisoner Of Your Love - Player (RSO); All I See Is Your Face - Oan Hill (20th Century-Fox); How Much I Feel - Ambrosie (Warner Bros.) I Fought The Law - Hank Williams, Jr. (Warner Bros.); Sweet Fantasy - Bobby Borchers (Epic); Another Goodbye - Donna Fargo (Warner Bros.); Toe To Toe - Freddie Hart (Capitol); Little Things Mean A Lot - Margo Smith (Warner Bros.)</p>
<p>Audrey Dodd APOLLO-STEREO MUSIC 4230 Elard Denver, Colo. 80216</p>	<p>POP: C&W: R&B:</p>	<p>Strange Way - Firefall (Atlantic); Hot Summer Night - Walter Egan (Columbia); Prom- ises - Eric Clapton (RSO); Double Vision - Foreigner (Atlantic) I Just Want To Love You - Eddie Rabbitt (Elektra); Love Got In The Way - Freddy Warler (Columbia); Just Out Of Reach - Larry G. Hudson (Lonestar) Flyin' High - Commodores (Motown); La Freak - Chic (Atlantic); I Don't Know If It's Right - Evelyn King (RCA)</p>
<p>Bill Skinner RAY'S MUSIC CO. 2019 S. Main Street Salt Lake City, Utah 84115</p>	<p>POP: C&W:</p>	<p>Whenever I Call You "Friend" - Kenny Loggins (Columbia); Hot Child In The City - Nick Gilder - Chrysalis); Blue Collar Man - Styx (A&M); Ready To Take A Chance Again - Barry Manilow (Arista); Double Vision - Foreigner (Atlantic); MacArthur Park Donna Summer (Casablanca); Greased Lightnin' - J. Travolta/J. Conway (RSO); Beast Of Burden - Rolling Stones (Rolling Stone) Cryin' Again - Dek Ridge Boys (ABC); Little Things Mean A Lot - Margo Smith (Warner Bros.); Ain't No California - Mel Tillis (MCA); Two Lonely People - Moe Bandy (Col.)</p>
<p>Richard Silla SILLA MUSIC CO. 800 E. Tenth St. Oakland, Cal. 94606</p>	<p>POP: C&W: R&B:</p>	<p>Greased Lightnin' - J. Travolta/J. Conway (RSO); I Don't Want To Live Without It - Pablo Cruise (A&M) Heartbreaker - Golly Paron (RCA); Anyone Who Isn't Me Tonight - Rogers & West (Uni- ted Artists) MacArthur Park - Donna Summer (Casablanca); Soft & Wet - Prince (Warner Bros.)</p>

COPYRIGHT ROYALTY TRIBUNAL

POLICY AS TO DISCLOSURE OF INFORMATION CONCERNING LOCATIONS OF CERTAIN
PHONORECORD PLAYERS (JUKEBOXES)

Agency: Copyright Royalty Tribunal (Tribunal).

Action: Final statement of agency policy.

Summary: This notice is published under authority of 17 U.S.C. 116(c)(5), to establish the policy and practice of the Copyright Royalty Tribunal as to the disclosure of information concerning the location of certain jukeboxes, which data has been filed with the Tribunal as required by its regulations.

Effective date: November 9, 1978.

For further information contact: Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 202-653-5175.

Supplementary information: The Copyright Royalty Tribunal adopted a regulation, which became effective October 10, 1978, providing for the filing in the offices of the Tribunal of current listings of locations where licensed jukeboxes are placed and the number of jukeboxes at such locations. The regulation was published in the Federal Register of September 12, 1978 (43 FR 40498).

At a public meeting on November 9, 1978, the Tribunal considered and, after hearing the views of interested parties, determined its policy and practice as to the disclosure of the jukebox location lists.

The text of the Copyright Royalty Tribunal Policy statement is as follows:

SUBJECT: CRITERIA AND PROCEDURES FOR THE DISCLOSURE OF JUKEBOX LOCATION LISTS

Resolved, That the Copyright Royalty Tribunal should not disclose the actual location lists filed by jukebox operators pursuant to the Copyright Royalty Tribunal's regulations requiring licensed jukebox operators to file location lists with the Copyright Royalty Tribunal.

In the form that the Copyright Royalty Tribunal receives said information from the operators, the Copyright Royalty Tribunal shall not disclose to any person the name of any jukebox operator corresponding to any identifiable or particular location list.

Further resolved, That the Copyright Royalty Tribunal shall compile a catalog listing the number of jukeboxes by state, and if possible, by local governmental entities. Such a catalog shall be made available to persons who can reasonably be expected to have a claim.

Upon application by persons who can reasonably be expected to have a claim, the Copyright Royalty Tribunal shall make available a selected location identification, determined and compiled by the Copyright Royalty Tribunal from information received from jukebox operators.

Dated: November 9, 1978.

THOMAS C. BRENNAN,
Chairman.

[FR Doc. 78-32467 Filed 11-16-78; 8:45 am]

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-192766

DATE: November 14, 1978

MATTER OF: Applicability of Federal Reports Act to
Copyright Royalty Tribunal

DIGEST: The Copyright Royalty Tribunal, created as an independent agency "in the legislative branch," is not subject to the provisions of the Federal Reports Act, or the amendment which gave the General Accounting Office jurisdiction over independent regulatory agencies, because the Act does not apply to the legislative branch. 44 U.S.C. § 3512 was not intended to enlarge the scope of the Federal Reports Act with regard to the agencies covered.

This decision is in response to a request by the Chairman of the Copyright Royalty Tribunal (Tribunal) that we determine whether the Tribunal's information gathering activities are subject to review and clearance under the Federal Reports Act, 44 U.S.C. §§ 3501 et seq. (1970 & Supp. V 1975). The Chairman asserts that "the Act does not apply to agencies of the Legislative Branch." For the reasons set forth below, we agree with this conclusion.

The Tribunal was established by title I of Pub. L. No. 94-553, October 19, 1976, 90 Stat. 2594, 17 U.S.C. §§ 801-810, as "an independent Copyright Tribunal in the legislative branch", for the purpose of periodically reviewing and adjusting copyright royalty rates and to resolve disputes concerning distribution of certain royalties paid by users of copyrighted materials. 17 U.S.C. § 802 (1976) gives the President the power to appoint five commissioners to the Tribunal, subject to confirmation by the Senate, for a term of 7 years. The President has no authority to remove any commissioners, and vacancies in the Tribunal can be filled only for the duration of the unexpired term, in the same manner as the original appointment was made.

The Tribunal is given authority to adopt its own regulations (17 U.S.C. § 803 (1976)) and to appoint, fix the compensation, and prescribe functions and duties of its employees. 17 U.S.C. § 805 (1976). Administrative support is provided to the Tribunal by the Library of Congress which is compensated by the Tribunal. 17 U.S.C. § 806(a) (1976). The Library is also authorized to disburse funds

DEFENDANT'S EXHIBIT E

for the Tribunal, in accordance with regulations prescribed jointly by the Librarian of Congress and the Tribunal with the approval of the Comptroller General. 17 U.S.C. § 306(b) (1976).

Under the general criteria agreed upon by the Office of Management and Budget (OMB) and the General Accounting Office (GAO) in our letter of February 8, 1974, B-180224, the Tribunal would qualify as an "independent regulatory agency" subject to our jurisdiction if the Federal Reports Act were to apply to the legislative as well as the executive branch. However, both the language of that letter and of the statute, in light of its legislative history, exclude the legislative branch from the Act's coverage. The relevant portion of the general criteria, agreed upon by GAO and OMB, follows:

"Agencies. There is no indication that section 409 is designed to enlarge the scope of the Federal Reports Act in terms of agencies covered. Thus agencies which were wholly or partially exempt from the act prior to its amendment by section 409 of Public Law 93-153 would retain the same status at present. For example, the basic act exempts '* * * the obtaining by a Federal bank supervisory agency of reports and information from banks as authorized by law and in the proper performance of the agency's functions in its supervisory capacity.' 44 U.S.C. 3507. Accordingly, agencies whose information collection activities for regulatory purposes are exempt under 44 U.S.C. 3507 would not be included under section 409."

The legislative history of the Federal Reports Act and the language of the Act itself demonstrate no intent by Congress to extend coverage of the Act beyond the executive branch. And, as noted above, the 1973 amendment which transferred review functions over reporting requirements for independent regulatory agencies to GAO was not intended to enlarge the scope of the Federal Reports Act with regard to the agencies covered. For the purposes of OMB review authority, "Federal agency" is defined by 44 U.S.C. § 3502 (Supp. V 1975) as--

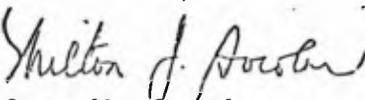
"an executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government; but does not include

the General Accounting Office, independent Federal regulatory agencies, nor the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions;"

The exception for GAO was included in the bill by a House Committee amendment introduced at the request of Comptroller General Lindsay Warren. The amendment was apparently necessary, not because the Act was considered to cover the legislative branch, but because GAO was specifically described as an "independent establishment." 31 U.S.C. § 41 (1976).

OMB does not now review any of the reporting requirements of legislative branch agencies such as the Congressional Budget Office, Office of Technology Assessment or the Library of Congress. GAO informally advised the Federal Election Commission that, prior to its restructuring as an independent regulatory commission under Pub. L. No. 94-283, May 11, 1976, 90 Stat. 475, it was a legislative branch agency exempt from our clearance jurisdiction. After it was restructured as an independent Federal regulatory agency, GAO advised the Commission that it was no longer exempt from 44 U.S.C. § 3512. B-150961, April 20, 1977.

In view of this longstanding interpretation and the absence of any congressional directive to review reporting requirements of legislative branch agencies, we cannot extend the Federal Reports Act coverage beyond the executive branch and the independent, regulatory agencies therein. Therefore, the Commission is not subject to GAO reports clearance procedures.



for
Comptroller General
of the United States

COPYRIGHT ROYALTY TRIBUNAL

AGENDA MEETING

Dirksen Senate Office Building
First and C Streets, N.E.
Room No. 1318
Washington, D.C.

Thursday, November 9, 1976

The meeting convened at 10:00 a.m., before:

COMMISSIONER THOMAS C. BRENNAN, Chairman

COMMISSIONER DOUGLAS E. COUNTER

COMMISSIONER MARY LOU BURG

COMMISSIONER CLARENCE L. JAMES, Jr.

COMMISSIONER FRANCIS GARCIA

A P P E A R A N C E S

MR. HERBERT KOPMAN, ASCAP

MR. I. FRED KOENIGSBURG, ASCAP

ALBERT CIANCIMINO, SESAC

PHILIP F. HERRICK, AMOA

NICHOLAS F. ALLEN, AMOA

EDWARD CHAPIN, BMI

MICHAEL JEROME ZISSU,
Italian Book Corporation

JAMES J. POPHAM,
National Association of Broadcasters

PHILIP HOFBERG,
National Basketball Association and
the National Hockey League

ROBERT ALAN GARRETT,
representing Commissioner of Baseball

WILLIAM E. STELX,
A.C. Nielsen Company

Irving Gastfreund,
Fly, Shuebruk, Blume, Gaguine, Boros &
Schulkind

FRITZ ATTANAY
Motion Picture Association

ROGER WAGNER,
P.I. Associates

PETER FRINDBERG,
Smith & Pepper

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1 they are going to be completely irresponsible in light
2 of 10 or 11 years history of this, we're not dealing with
3 irresponsible people". I thought the Tribunal should have
4 that on the record.

5 I will go on with my argument, Mr. Chairman.
6 We contend that the Freedom of Information Act applies to
7 the CRT as "an independent regulatory agency as defined
8 in Section 551(1), and 552--

9 CHAIRMAN BRENNAN: Mr. Allen. I don't think
10 you need to argue the point. The rules that were adopted
11 earlier this morning recognize that application.

12 MR. ALLEN: Then, do I understand, Mr. Chairman,
13 the Tribunal is, in its opinion, subject to the Freedom
14 of Information Act?

15 CHAIRMAN BRENNAN: We have adopted rules which
16 resolve that.

17 MR. ALLEN: Then, again, location lists are
18 trade secrets, they're commercial information; they are
19 privileged and confidential, we say, as provided in
20 Section 552 b(4) of the Freedom of Information Act, for
21 reasons that I have given earlier.

22 We insist that location lists, if and to the
23 extent they are required by the Tribunal, be completely
24 exempt to disclosure to any person outside the CRT, under
25 the authority of 552 b(4) of the Act.

1 We insist further that the CRT should exercise
2 its authority to provide selected disclosures for location
3 identifications. This is to be done in limited numbers
4 and by categories as specified by the CRT, the selections
5 to be made by the CRT, on its own initiatives or upon the
6 request of the using societies or by individual songwriters.

7 We insist also that no disclosures should be
8 made that would identify the operator of a location. And
9 also, that selections be limited in numbers also to avoid
10 identification of the operator's location.

11 By limiting the number of locations that would
12 be required by the regulation--and I guess we've passed
13 that point--the CRT could provide the surest way to control
14 the demands for disclosure under the Freedom of Information
15 Act, and so, provides protection for the operators who
16 supply the lists.

17 That is why I wanted to make my presentation
18 together. They are so interrelated. In sum', then, we
19 insist that the CRT should accept--. I'll have to jump
20 over the things you've already ruled against me on. --in
21 combination with, as part of our original proposal for
22 an alternate limiting of locations.

23 That, location lists, as filed with the CRT
24 should be exempted from disclosure to persons outside of
25 the CRT, and that the CRT should provide by regulation

1 for selected disclosures of locations identifications,
2 in limited numbers; by categories specified by the CRT
3 to be supplied by the CRT on its own initiative or upon
4 request by the performing rights societies or an individual
5 songwriter demonstrates a right thereto.

6 And finally, one word of caution we wish to
7 offer the Tribunal. Given the fact that there are many
8 small non and pop jukebox operators, the location information
9 you require may very well be in many such instances
10 personal information that is protected against disclosure
11 by the Privacy Act of 1974, if not authorized by the
12 operators.

13 The Tribunal must be aware of the severe
14 penalties that attach to the violations of that Act. That
15 concludes my presentation.

16 CHAIRMAN BRENNAN: Thank you, Mr. Allen.

17 MR. ALLEN: Mr. Chairman, I have in summary
18 form the statements that I have made today, which I would
19 be pleased to leave with the Tribunal.

20 CHAIRMAN BRENNAN: Do you wish to have the
21 entire statement printed in the record?

22 MR. ALLEN: All right.

23 CHAIRMAN BRENNAN: Mr. Herrick, do you wish to
24 be heard?

25 MR. HERRICK: No, Mr. Chairman.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2065

September Term, 19 78
United States Court of Appeals
for the District of Columbia Circuit

Amusement and Music Operators
Association, et al.,
Appellants

FILED NOV 1 1978

v

Civil Action No. 78-2030

The Copyright Royalty Tribunal,
et al.

GEORGE A. FISHER
CLERK

BEFORE: Bazelon and Tamm, Circuit Judges

ORDER

On consideration of appellants' motion for order overruling the District Court's denial of motion for temporary restraining order and preliminary injunction, of appellees' motion for summary affirmance, and of the record on appeal herein, it is

ORDERED by the Court that appellants' aforesaid motion is denied.
It is

FURTHER ORDERED by the Court that appellees' motion for summary affirmance is granted.

Per Curiam

DEFENDANT'S EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----- X
AMUSEMENT AND MUSIC OPERATORS
ASSOCIATION, et al., :

Plaintiffs :

v. :

Civil Action No. 78-2030

THE COPYRIGHT ROYALTY TRIBUNAL, :
et al., :

Defendants :
----- X

Washington, D. C.

Monday, October 30, 1978

The above-entitled cause came on for a hearing on plaintiffs' motion for temporary restraining order before the Honorable AUBREY E. ROBINSON, JR., United States District Judge at 11:10 a.m.

APPEARANCES:

On behalf of the Plaintiffs:

PHILIP F. HERRICK, ESQ., and
NICHOLAS E. ALLEN, ESQ.

On behalf of the Defendants:

SUSANNE M. LEE, Special Assistant
United States Attorney

EVA MARIE SACHS
Official Court Reporter

FOR: The Copyright Royalty
Tribunal

DEFENDANT'S EXHIBIT 2

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EXHIBITS

<u>Defendants':</u>	<u>Identification</u>	<u>In evidence</u>
No. 1 - Copy of rules and regulations	36	36

P R O C E E D I N G S

THE DEPUTY CLERK: Amusement and Music Operators Association, et al v. The Copyright Royalty Tribunal, et al, Civil Action 73-2030.

MR. HERRICK: May it please the Court --

THE COURT: Good morning, Mr. Herrick.

ARGUMENT IN SUPPORT OF THE MOTION

MR. HERRICK: My name is Philip Herrick. I am with Nicholas Allen. I am representing the jukebox industry of the United States.

Your Honor, since we were down here on Friday, we have received an additional affidavit which I should like to offer. It is the affidavit of Dorothy M. Christensen, a jukebox operator in Illinois -- Excuse me, Montana.

THE COURT: Under the ERA impetus, we will certainly receive an affidavit from a female operator.

MR. HERRICK: Thank you, sir.

(Document was handed to the Court.)

MR. HERRICK: Your Honor, the motion before you is one in which the jukebox operators seek a temporary restraining order to defer the effective date of certain regulations of the Copyright Royalty Tribunal -- which I shall simply call the CRR from now on.

The regulations would require the plaintiffs, who

are certain jukebox operators and their trade association, would require them to divulge their customers -- it's a requirement calling for customer lists -- to CRT for the use of ASCAP, the American Society of Composers, Authors and Playwrights, to be used in enforcing the royalty provisions of the Act.

Jukebox operators, Your Honor, own their jukeboxes. They are generally small businessmen. We estimate that there are between four and five hundred thousand jukeboxes set up in the United States, and between five thousand and seven thousand jukebox operators. We figure there is an average of about 50 to 70, perhaps 70 jukeboxes per operator. Of course, some are large and some are small.

The first named plaintiff, Amusement and Music Operators Association or AMOA, is a trade association which represents 1200, by no means all of the jukebox operators.

The jukeboxes are placed by the operators in places such as schools, amusement centers, restaurants, bars. The jukebox operators own the jukeboxes. They go around and collect the quarters and they divide the take with the owner of the location.

The defendants, Your Honor, are the CRT and its members. This is a new federal agency established under the Copyright Act of 1976 and it was actually organized by the appointment of its members in 1977.

At issue before us today are the Tribunal's recently adopted regulations reported in 43 Federal Register at 46498. They were adopted on September 6th, 1978. We, through, AMOA, participated in that rule making. They were published in the Federal Register on September 12th, made effective on October 10th, and they require all operators of licensed jukeboxes to file their customer lists by November 1, two days from now.

The specific issue before Your Honor is whether the CRT has the authority to require the operators to divulge, list and file the names of their customers. We, of course, say that it does not have this power. They say that they do.

The reasons why we say they do not have this power is, one, the language of the Act doesn't specifically authorize it; two, the language actually negates it; and, three, the legislative history negates it and makes it clear, it seems to me, that this power was not delegated to the CRT.

The authority to promulgate regulations is found in Section 116(c) (5) of 17 U.S.C., and that reads: The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims -- that is claims for royalties, and that is composers or their trade association, ASCAP or BMI -- may during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which the juke-

MR. HERRICK: Yes, but it's not one that I would ever take, Your Honor, because "de minimis" is an expression I learned way back in law school, Your Honor.

THE COURT: Yes. It is a poorly written statute.

MR. HERRICK: So many statutes are.

THE COURT: Well, you see that is what happens when you go through this compromise business.

MR. HERRICK: This statute has been in the works since 1964 and it came out of the works in 1976, so it was being kicked around for twelve years.

THE COURT: And tremendous pressure were had on the part of the record industry, the people who want the royalties, to get some system worked out whereby they would get something out of these jukeboxes.

MR. HERRICK: No doubt about that, Your Honor. This thing represented a tug of war between the composers and AMOA for all of those years.

Incidentally, Your Honor, the jukebox operators do have to pay a royalty of \$8.00 a jukebox. That isn't disputed here. It's not before you, but it is a part of what they must pay. For a man with 500 jukeboxes, that's \$4,000.00 per year. He doesn't want to spend any more than that if he can help it, and I don't blame him.

THE COURT: Well, there is nothing we can do about

Then the federal agency compiles it, and then they dole out money payments to the people who hold the copyrights. That's what they are talking about. We will have none of that.

Mr. Operator, all you have to do is let the people through your door and they can only come, Mr. Operator, during the normal business hours.

MR. HERRICK: But the words that they used, Your Honor, was that the clause was not intended to authorize the Registrar to impose any record keeping requirements upon jukebox operators.

THE COURT: You want me to repeal the statute. That's what you want me to do and I can't do it. I think you are in the wrong hall. You ought to go back to Congress and spend ten more years with it.

MR. HERRICK: You know, Your Honor, we were in Congress for a long time. We feel that we have exhausted our congressional remedies and that we now have to come to court.

Anyhow, it does seem to me that the legislative history is right clear that there shall not be any location listing.

THE COURT: By statute.

MR. HERRICK: By statute or regulation.

THE COURT: You get the "or regulation" in there. I don't get that because the statute says "shall have records."

[1410-1]

TITLE 37—PATENTS, TRADEMARKS AND COPYRIGHTS

CHAPTER III—COPYRIGHT ROYALTY TRIBUNAL

Part 303—Access to Phonorecord Players (Jukeboxes)

Regulations for Copyright Owner Access to Phonorecord Players (Jukeboxes) and Certain Establishments

Agency : Copyright Royalty Tribunal (CRT).

Action : Final rule.

Summary : Copyright Royalty Tribunal adopts rule whereby persons who may reasonably be expected to have claims resulting from public performances of nondramatic musical works by coin-operated phonorecord players may have access to such establishments and to the phonorecord players to determine the proportion of contribution of the musical works of such person to the earnings of the phonorecord players for which fees have been deposited. The rule requires the recording in the offices of the Copyright Royalty Tribunal of current listings of locations where licensed phonorecord players are placed, and the number of players at such locations. The rule establishes the regulations required by 17 U.S.C. 116(c) (5) to assist the functions of the Copyright Royalty Tribunal, as provided in 17 U.S.C. 801 (b).

Effective date : October 10, 1978.

For further information contact : Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 202-653-5175.

Supplementary information : 17 U.S.C. 116(c) (5) requires the CRT to promulgate regulations "under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures of otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited."

On December 8, 1977 the CRT issued an advance notice of proposed rulemaking concerning access to phonorecord (jukebox) players (42 FR 62019). On May 12, 1978 the CRT published a proposed rule on this subject (43 FR 20513). A public hearing on the proposed rule was conducted on June 21, 1978. Under the rules of the CRT, interested persons were permitted to make formal statements, present witnesses, and cross-examine witnesses. Additional written materials were received by the CRT prior to the closing of the hearing record. Both the hearing and the comment period afforded interested persons a full opportunity to present all relevant jurisdictional and policy issues.

Enforcement of the Copyright Act—The proceedings of the CRT and the public records of the Copyright Office of the Library of Congress establish that the number of jukeboxes licensed in accordance with the provisions of section 116 of the Copyright Act and the regulations of the Copyright Office is substantially less than the number of jukeboxes estimated to be in operation at the time of the proceedings in the Congress on the Copyright Act. While there are no accurate statistics as to the number of jukeboxes currently performing copyrighted musical compositions, the record suggests that a number of jukeboxes have not been licensed. The CRT has determined that this situation is not relevant to the proceedings of the CRT. While the failure of jukebox operators to pay the required royalty fees will reduce the total royalty fees to be distributed by the CRT, the Congress has not granted any authority to the CRT to enforce those provisions of the Copyright Act applying to the licensing of jukeboxes. If jukebox operators are not in compliance with the Copyright Act, the Copyright Act provides a remedy for injured copyright owners. If the remedy is not adequate or effective, relief should be sought in the Congress.

Legislative history—Since the representatives of jukebox operators and the manufacturers of jukeboxes have raised jurisdictional issues, as to a portion of the proposed rule, the CRT has carefully reviewed the protracted proceedings in the Congress which resulted in section 116. It is clear from these proceedings and the specific language in 17 U.S.C. 116(c) (5) that the Congress did not

intend—in fact undertook to preclude—the imposition on jukebox operators of burdensome record-keeping requirements. The Congress however, did not har the CRT from requiring any information of licensed jukebox operators.

Section 303.3 of the rule requires licensed jukebox operators to record with the CRT the location of establishments in which they have placed jukeboxes, and the number of such boxes. The value of such listings for distribution purposes was not unknown to the Congress. Certain versions of the copyright revision legislation included specific language providing that licensed jukebox operators list the locations of establishments. It has been suggested that the absence of this language from the enacted legislation indicates that Congress has determined that such listings are not useful for distribution purposes, and that such a requirement was excluded from the rulemaking power granted to the CRT. We do not so read the legislative history. The Senate and House committee reports accompanying the copyright revision legislation are detailed and clearly reflect the legislative intent when the Congress had so resolved. The Congress in the reports (Senate Rept. 94-473 p. 99 and House Rept. 94-1476 p. 115) has directly stated what it intended to exclude from the scope of the CRT's rulemaking jurisdiction. We conclude that the legislative history establishes only that the Congress intended to preclude the CRT from requiring jukebox operators to maintain records as to the copyrighted musical compositions being performed, or to require the installation in jukeboxes of metering devices for counting the play of particular recordings.

Chapter 8 of title 17 establishes the CRT and enumerates the purposes for which this agency has been constituted. One of these purposes is "To afford the copyright owner a fair return for his creative work." The Congress contemplated that controversy may exist as to the distribution of royalty fees. Having constituted the CRT to resolve such disputes, it is not plausible that the Congress determined to deny copyright owners and the CRT every practical and effective means of obtaining information as to musical works actually being performed by jukeboxes. There can be no right of access to an establishment if one does not know where the establishment is located.

In resolving disputes, the CRT may well find it necessary to conduct an independent review of data submitted by claimants to establish the shares of copyright owners. The Congress surely did not intend that Commissioners walk the streets of New York or Chicago looking for establishments with licensed jukeboxes. How could private establishments with licensed jukeboxes be located? We conclude that the rule is within the grant of our rulemaking authority under the Copyright Act.

Impact of rule upon jukebox operators.—The testimony presented by jukebox operators and other representatives of the jukebox industry alleged that the proposed rule will require some operators "to add one full-time employee to their staff just to handle this extra work." The testimony of a witness claimed that "every operator I have talked to says he cannot live with these requirements." Another witness testified that the published rule would require an employee's full time for one and a half days each week.

We do not find this testimony creditable. The proposed rule should not have required any jukebox operator to hire a single employee or have consumed any significant work time of an employee. The CRT has determined that the objectives of the rule can be accomplished by further reducing the reporting requirements. As adopted, the rule will require a jukebox operator to file once a year a report if the operator has placed a jukebox in a previously unreported location, or altered the number of jukeboxes at a location.

Access to the interior of a jukebox.—The proposed rule as published provided for certain access to the interior of a jukebox if it was "essential to obtain accurate information concerning the performance of musical works." The testimony reflected that this section of the proposed rule may be burdensome to jukebox operators while of doubtful value at the present time to the CRT and copyright owners. Without prejudice to any future action on the issue, this section of the proposed rule has been deleted.

The rule and the Freedom of Information Act.—The Amusement and Music Operators Association and the manufacturers of jukeboxes assert that the location of establishments in which licensed jukeboxes are placed is confidential "commercial" information to be regarded as a listing of customers. It is further claimed that even if the information is required by the CRT it could not be made available to copyright owners, or otherwise publicly disclosed because of the Freedom of Information Act. The fourth exemption to the Freedom of In-

formation Act embraces "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

We have not found these arguments convincing, especially in the particular situation before us. We are not imposing a regulation on an industry that is operating according to the economic laws of the marketplace. The Congress determined that the performance of copyrighted musical compositions by jukeboxes should require the payment of a royalty fee. As an accommodation to the jukebox industry, the Congress enacted a statutory compulsory license, and further provided that the operators of jukeboxes would not be required to pay fees to individual copyright owners, but would merely be required to deposit the royalty fee with the Register of Copyrights. No jukebox operator is required to obtain a certificate from the Copyright Office. A jukebox operator may elect to obtain licenses from the performing rights societies and other copyright owners; or refrain from the performance of copyrighted musical compositions. Having chosen to avail itself of the statutory compulsory license, a jukebox operator cannot be said to be transacting a private commercial venture, at least as it relates to the payment and distribution of royalty fees under the provisions of the Copyright Act.

Moreover, independent of the obligations assumed by a jukebox operator who seeks a section 116 license, we find that the location of jukeboxes is not confidential "commercial" information. If another person, including a competitor, devoted the time and effort necessary, a location listing could be prepared for a particular area. We conclude on the record before us that the disclosure of the location listings to certain copyright owners will not cause substantial harm to the competitive position of a jukebox operation. We hold that the disclosure of such listings to performing rights societies as defined in 17 U.S.C. 116(e) (3) and the copyright owner of a musical composition whose work may be performed by a jukebox operator under the compulsory license is not precluded by any Federal statute, and promotes the purposes of the Congress in enacting section 116 of the Copyright Act.

Even assuming that the location listings come within the scope of exemption (4) of the Freedom of Information Act, the CRT is not barred from the disclosure of such information, at least to performing rights societies and other copyright owners. While the law in this area is evolving, the better view, as reflected in judicial decisions, legislative materials and academic commentary is that the agency has discretion as to whether exempt information should be disclosed. The courts have identified several factors which may be considered by the agency in balancing the benefits of disclosure against the possible damage to the submitter of the information. We find in this situation that the application of these factors would support the disclosure of location listings to copyright owners of musical compositions. The location lists would be filed with the CRT to assist in the execution of a specific governmental function, no promises of total confidentiality have been made by the agency, and the persons to whom the information would be disclosed have a direct and valid interest in the information, namely, to use the information to meet the requirements of the Copyright Act for the filing of claims to jukebox royalty fees.

It was not within the scope of this proceeding to consider whether the disclosure of location listings to appropriate copyright owners should be subject any conditions or protective safeguards. Such issues may be explored in a future proceeding.

We express no opinion at this time as to whether the disclosure of location listings may, or should be, restricted to the copyright owners of musical compositions. We observe, however, that the CRT presently is not aware that any person, other than performing rights societies and other copyright owners of musical compositions, would have a valid claim to such information. This subject may be further considered in an appropriate future rulemaking proceeding.

The Privacy Act—It has been argued that the Privacy Act (5 U.S.C. 552(b) (5)) prohibits the disclosure, even to copyright owners, of location listings of jukeboxes. Nothing in the Privacy Act or its legislative history supports such a conclusion. The concern of the Congress in enacting that legislation was to protect an individual from the "dissemination of personal information by Federal agencies" and "to provide certain safeguards for an individual against an invasion of personal privacy."

The Federal Reports Act—It has been argued that "nothing in the Tribunal's enabling statute gives it the authority to deviate from the letter and spirit of * * * the Federal Reports Act." The Federal Reports Act provides that "Information

needed by Federal agencies shall be obtained with a minimum burden upon business enterprises, especially small business enterprises, and other persons required to furnish the information, at a minimum cost to the Government." (44 U.S.C. 3501.)

It has not been held that the Federal Reports Act applies to independent agencies of the legislative branch. However, the rule as adopted is consistent with the objectives of that statute. The information required to be furnished is not otherwise available to the Federal Government, and is to be obtained "with a minimum burden upon business enterprises."

Use of trade charts.—Certain testimony and statements presented during this proceeding advocated the use of trade charts as a fair and expeditious means for determining the respective shares of copyright owners. In determining that location listings are necessary to provide effective access by copyright owners to establishments in which jukeboxes are located, the CRT at this time refrains from any judgment as to the value of trade charts for distribution purposes.

Denial of right of access.—Section 116(c) (5) provides that any person who alleges that "he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the U.S. District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied." We hold that a licensed jukebox operator who does not comply with all the provisions of this rule is denying copyright owners the access granted by the Copyright Act and the regulations of the CRT, and that such operator is not complying with the requirements of the statutory compulsory license.

Since the matter is not before us, we did not consider if there are judicial means, other than a suit brought by a copyright owner under section 116(c) (5), to enforce this regulation of the CRT.

Accordingly, pursuant to 17 U.S.C. 116(c) (5), the purposes of the Copyright Royalty Tribunal set forth in 17 U.S.C. 801(b), and the phonorecord player royalty distribution jurisdiction provided in 17 U.S.C. 801(b) (3), 37 CFR chapter III is amended by adding a new part 303, reading as follows:

Sec.

303.1. General.

303.2 Access to establishments and phonorecord players.

303.3 Recording of location listing in Copyright Royalty Tribunal.

Authority (17 U.S.C. 116(c) (5), 17 U.S.C. 801(b).)

§ 303.1 *General.*

This regulation prescribes the procedures pursuant to 17 U.S.C. 116 by which persons who can reasonably be expected to have claims to royalty fees paid by the operators of coin-operated phonorecord players under the compulsory license established by 17 U.S.C. 116 may have access to the establishments in which such phonorecord players are located and to the phonorecord players located therein to obtain information which may be reasonably necessary to determine the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. The terms "operator" and "coin-operated phonorecord player" have the meanings given to them by paragraph (3) of section 116 of title 17.

§ 303.2 *Access to establishments and phonorecord players.*

A person or authorized representatives of such person, who can reasonably be expected to have claims to royalty fees paid by the operators of phonorecord players shall have access to the establishments in which such phonorecord players are located during customary business hours on regular business days. Such access shall be only for the purpose of obtaining information concerning the performance of musical works by the phonorecord players. The right of access shall be exercised in such a manner as not to cause any significant interference with the normal functioning of an establishment.

§ 303.3 *Recording of location listings in Copyright Royalty Tribunal.*

(a) Not later than November 1, 1978, every operator of a phonorecord player who has filed in the Copyright Office an application for a phonorecord player compulsory license according to the requirements of 17 U.S.C. 116 and the regulations of the Copyright Office and been issued prior to October 1, 1978 a Copyright Office phonorecord player certificate, shall record in the offices of the Copyright Royalty Tribunal a list identifying the location or locations where licensed phono-

record players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(b) Every operator of a phonorecord player who subsequent to October 1, 1978, obtains his initial Copyright Office phonorecord certificate shall record in the office of the Copyright Royalty Tribunal within thirty days after the issuance of the initial certificate a list identifying the location or locations where licensed phonorecord players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(c) On October 1 of each year every operator of a phonorecord player who alters the number of licensed phonorecord players at a location reported under paragraph (a) or (b) of this section, or who has provided a licensed phonorecord player or players to the Copyright Royalty Tribunal shall report to the Copyright Royalty Tribunal the revised number of phonorecord players or that new location and the number of licensed phonorecord players at the location.

(d) The location listing required under this section shall include the full address of the location, including a specific number and street name or rural route.

Approved: September 6, 1978.

THOMAS C. BRENNAN,
Chairman, Copyright Royalty Tribunal.

[FR Doc. 78-25559 Filed 9-11-78; 8:45 am]

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COPYRIGHT ROYALTY TRIBUNAL

Hearing on
PROPOSED REGULATIONS GOVERNING ACCESS TO
PHONORECORD PLAYERS

10:25 a.m.
Wednesday, June 21, 1973

Copyright Royalty Tribunal
Room 460
1111 20th Street, N.W.
Washington, D. C.

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7 EDWARD CHAPIN, ESQ.

8 MICHAEL FABER, ESQ.

APPEARING ON BEHALF OF ASCAP:

9 BERNARD ROBIN, ESQ.

10 BENJAMIN ZELENYO, ESQ.

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11 NICHOLAS E. ALLEN, ESQ.

12 MICHAEL BAILEY, ESQ.

APPEARING ON BEHALF OF SESAC:

13 ALBERT CIANCIMINO, ESQ.

14 APPEARING ON BEHALF OF AMERICAN MANUFACTURERS OF
 15 JUKEBOXES; ROCK-OLA MANUFACTURING CORPORATION;
 16 RCMB INTERNATIONAL, INC.; AND SLEBORG PRODUCTS DIVISION:

17 MICHAEL O. WISE, ESQ.

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1 certain concerning regulations providing for reasonable rights
2 of access to jukebox establishments and players, substantial
3 controversy appears to exist with respect to location listings.
4 The major arguments supporting a requirement for location
5 listings and alleged problems anticipated in providing such
6 data have been addressed in prior proceedings before the
7 Copyright Office and have been summarized in our prior filings
8 with the Tribunal.

9 BMI believes that location listings are essential to the
10 full realization of the statutory mandate which the Tribunal
11 must implement herein. Without such listings, music licensing
12 organizations would be required to rely upon voluntary
13 compliance and costly and often unnecessary on-site inspections.

14 In this regard the Tribunal should note that the
15 performing rights organizations have been mindful of the
16 statutory prohibition against undue expense to or harassment
17 of jukebox operators in conjunction with our legitimate efforts
18 to enforce the rights of our members.

19 Therefore, the performing rights organizations have not
20 pressed their demand that location information be provided for
21 specific jukeboxes. See the joint statement of ASCAP and SESAC
22 of January 17 and BMI's memorandum of January 13th, both in
23 1970.

24 The regulation now proposed by the Tribunal is sensitive
to this matter and provides only a centralized listing of



Broadcast Music, Inc. 40 West 57th Street, New York, N. Y. 10019 212 586-2000
 Cable Address: Broadcastmus NY

MEMORANDUM

February 8, 1978

TO: Copyright Royalty Tribunal
 FROM: Broadcast Music, Inc.
 RE: Advance Notice of Proposed Rulemaking Relating to Jukeboxes

As a result of the recent comments made to the Tribunal by all interested parties, a unique opportunity exists for the Tribunal to issue without delay regulations to determine the method of distribution of jukebox royalties.

I

The Amusement and Music Operators Association and the American manufacturers of coin-operated phonorecord machines emphasize the reliability, availability and industry dependence on various trade publication music popularity "charts". Mr. Nicholas Allen (AMOA counsel) stated that jukebox operators "rely primarily on the popularity charts from these trade papers in programming" and appended a typical chart from RePlay magazine. During an orientation meeting with AMOA some months ago, BMI representatives were told that RePlay was the most significant of these publications insofar as the jukebox industry is concerned and that its charts reflect a broad national and regional sampling of music popularity as determined by what is being purchased and placed into play. We agree with the AMOA and jukebox manufacturers that the use of trade charts provides an excellent, immediately available, and ongoing means for determining copyright owners' share of jukebox music use.

Thus, we have a virtual consensus. The jukebox manufacturers, the leading association of operators (AMOA) and BMI, the

S E R V I N G M U S I C S I N C E 1 9 4 0

EXHIBIT B

organization which licenses most music used on the boxes, all agree that the use of the charts provides a fair and expeditious way to determine distribution. We recognize, however, that a reasonable percentage must be reserved for those performances not reflected by the current charts. This is a relatively minor matter, however, and should not delay determination of the overriding major issue.

II

The copyright community, especially those involved with music, is understandably apprehensive about administrative delay. A prompt determination will have a positive impact far beyond the narrow issue decided. We also note that a portion of 1978 has already passed and unless the information is already recorded, such as in the charts, any system will, of necessity, have to have missed this time period and probably much of 1978.

We want to emphasize that this recommendation is not intended to preclude the Tribunal from exploring other alternatives as technology and measuring techniques advance.

* * *

It should also be pointed out that two primary questions were addressed by the various comments before the Tribunal. The foregoing concerns itself with only one of those questions. Insofar as the other - a location listing of jukeboxes - we stand on the position as expressed in our previous comment (January 13, 1978).

APPENDIX 4

Communications and the Law

**BERNARD KORMAN
I. FRED KOENIGSBERG**

The First Proceeding Before the Copyright Royalty Tribunal: ASCAP and the Public Broadcasters

Mr. Korman is General Counsel of
ASCAP.

Mr. Koenigsberg is an Attorney, Office of
General Counsel, ASCAP.

INTRODUCTION

The 1976 Copyright Act,¹ the first omnibus revision of the United States Copyright Law since 1909, made a number of significant changes, the effects of which are just beginning to be seen.

One of the major changes in the new law was the expansion of compulsory licensing. The 1909 Copyright Act² contained the first and only compulsory license, the so-called "mechanical" license for making recordings of copyrighted musical compositions.³ The 1976 Act contains

1. 17 U.S.C. §§101-810 (1976) (generally effective January 1, 1978).
2. 17 U.S.C. §§1-216 (1970, as amended) (repealed October 19, 1976, effective January 1, 1978) (hereinafter, "1909 Act").
3. 1909 Act, §1 (e).

BERNARD KORMAN AND I. FRED KOENIGSBERG

four: a modified "mechanical" compulsory license,⁴ and new compulsory licenses for performances of nondramatic musical compositions by jukeboxes,⁵ for secondary transmissions by cable television and radio systems,⁶ and for performances and recordings of published nondramatic musical compositions and displays of pictorial, graphic and sculptural works by public broadcasting.⁷

Congress entrusted regulation of key elements of the compulsory licenses—including the amount of license fees paid by users and the allocation of license fees to copyright owners—to a new administrative agency, the Copyright Royalty Tribunal.⁸ The CRT immediately became a major force in the copyright world because of the importance of the compulsory licenses and the ramifications its decisions may have in other areas.

The first substantive CRT proceeding dealt with the compulsory license for public broadcasting.⁹ How the CRT approached and resolved the issues involved in the public broadcasting compulsory license hearings is a matter of interest not only to the parties, but to all who may be appearing before the CRT or affected by what the CRT does in connection with any of the compulsory licenses.

These licenses were sought by user industries and opposed by copyright owners. The merits of compulsory licensing in general, and of each of these new licenses, have been debated and, no doubt, the debate will go on. We shall comment on the merits, but our main purpose here is to examine the public broadcasting proceedings.¹⁰

4. 17 U.S.C. §115 (1976).

5. 17 U.S.C. §116 (1976).

6. 17 U.S.C. §111 (1976).

7. 17 U.S.C. §118 (1976).

8. 17 U.S.C. §§801-810 (1976). See, also, 17 U.S.C. §§111 (d), 116 (b) and (c), and 118 (1976). (The Copyright Royalty Tribunal will be referred to hereinafter as the "CRT" or "Tribunal".) The Copyright Office also has some regulatory duties involving each compulsory license, most notably in the collection of compulsory license fees paid by cable and jukebox operators. 17 U.S.C. §§111 (d) and 116 (b) (1976).

9. 17 U.S.C. §118 (1976).

10. The public broadcasting rate proceedings involved CRT determination of a schedule of compulsory license rates and terms in several areas: 1) for the performance of copyrighted musical compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) by the Public Broadcasting Service (PBS), National Public Radio (NPR), and their member stations (collectively referred to as "public broadcasting"); 2) for the performance of music licensed by ASCAP and the other two performing rights organizations, Broadcast Music, Inc. (BMI) and SESAC, Inc. (SESAC) by non-NPR noncommercial educational radio stations, which were mostly college stations; 3) for the recording and synchronization rights in musical compositions needed by public broadcasting entities; and 4) for the display of pictorial, graphic and sculptural works by public broadcasting television stations. The CRT proceedings dealt mainly with the first issue—the use of ASCAP music by public broadcasting—and this paper deals only with that issue.

The First Proceeding Before the Copyright Royalty Tribunal

Before doing so, we shall sketch the background of the CRT and consider why it was necessary, how it first took form, and how its form changed during the course of legislative consideration of the new copyright law.

THE BACKGROUND OF THE CRT

The Necessity for Compulsory License Fee Adjustments

The licensing of copyrighted works ordinarily proceeds in the same way as the buying and selling of any other form of property in our society—by voluntary negotiations between buyer and seller. Prices change over time as economic factors and conditions change.¹¹

A compulsory license changes normal marketplace bargaining because the copyright owner—the seller of the property—has no right to refuse to license his property. And, if a statutory fee is set, the amount paid for use of the property is either that fee or a lower one.

Any price fixed by statute, even if viewed as fair by all concerned at the time the law is passed, will be seen as unfair to one party or the other when economic conditions change. Therefore, some mechanism for reviewing and changing the compulsory license fee must be created.

One approach is to leave review and modification to Congress. This was the approach taken by Congress in 1909 in enacting the “mechanical” compulsory license—and the statutory fee, two cents, remained unchanged until enactment of general revision in 1976. That history, together with the hard fought legislative battles over the new compulsory licenses, was convincing evidence that it was not reasonable for Congress to assume the burden of periodic review of such narrow matters, each of which requires considerable expertise, but none of which is of direct interest to most Americans.

The decision to regulate through another body meant consideration had to be given to other methods of regulation. Others exist, and have been used in the past.

Precedents for Compulsory License Regulation

The very first copyright statute, the Statute of Anne,¹² provided a system to control the price of copyrighted works. Any person who con-

11. For reasons we shall describe, this ordinary system is not as satisfactory as a clearinghouse system for either the creators and publishers of musical compositions, or for bulk users of such works, insofar as nondramatic performances are concerned—hence the establishment of ASCAP.

12. 8 Anne c.19 (1710).

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sidered the price of a book to be too high could seek relief from a number of officials, such as the Archbishop of Canterbury, the Chancellor, the Lord Keeper of the Great Seal of Britain, the Bishop of London, the Lord Chief Justices, the Lord Chief Baron of the Exchequer, and the Vice-Chancellors of the Universities. If, after examination, the official hearing the case found the price to be unreasonable, he was empowered to set a "just and reasonable" price.¹³

The Statute of Anne's protection against an unreasonable price and the compulsory licenses found in the 1976 Copyright Act are very distant relatives indeed: it is one thing to protect the consumer against demonstrated price abuse, and quite another to force an owner of property to allow his work to be used without permission in all cases, and without the demonstration of any abuse whatever.

Nevertheless, this provision of the Statute of Anne may be seen as the model for three types of rate-making machinery: 1) judicial rate-making (by the Chancellor and the Lord Chief Justices); 2) administrative rate-making (by the Lord Chief Baron of the Exchequer); and 3) rate-making by private bodies cloaked with official sanction (by the Vice-Chancellors of the Universities). And, each of these regulatory mechanisms has been used or suggested in connection with compulsory licensing.

The drafters of copyright revision bills had other precedents besides the Statute of Anne. First were precedents involving judicial rate-making.

Twelve of the original thirteen states enacted copyright statutes under the Articles of Confederation.¹⁴ Five of those state copyright statutes—those of Connecticut,¹⁵ South Carolina,¹⁶ North Carolina,¹⁷ Georgia¹⁸ and New York¹⁹—contained, in virtually identical language, judicial rate-making machinery in the event the copyright owner failed to furnish the public with sufficient "editions"—that is, copies—of his work or sold his work at an unreasonable price. In such cases, certain courts were empowered to fix reasonable prices, and indeed to direct publication and sale of additional copies of the work.

A more modern example of judicial rate-making is found in the anti-trust consent decree which governs ASCAP's operations.²⁰ Under that

13. *Id.*, Section IV.

14. The one state which failed to enact a copyright statute was Delaware. For the text of the twelve acts, see *Copyright Enactments*, Copyright Office Bulletin No. 3 (Revised), Library of Congress (1963), 1-21.

15. *Id.*, at 1-4.

16. *Id.*, at 11-14.

17. *Id.*, at 15-17.

18. *Id.*, at 17-19.

19. *Id.*, at 19-21.

20. *U.S. v. ASCAP*, (Civ. Action No. 13-95, S.D.N.Y., March 14, 1950), 1950 Trade Cases, ¶62,595 (S.D.N.Y.) (hereinafter, the "Amended Final Judgment").

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Amended Final Judgment, any user of music who wishes to obtain a license to perform the copyrighted musical compositions in the ASCAP repertory may obtain a license simply by writing and requesting it. ASCAP then quotes a fee; if the user believes the fee quoted to be unreasonable, the user may petition the United States District Court for the Southern District of New York for determination of a reasonable license fee.²¹ ASCAP must grant licenses to users, so that the Amended Final Judgment in *United States v. ASCAP* is one kind of compulsory license.²² ASCAP itself involves a second kind of compulsory license: the ASCAP licensee is free to perform any composition in ASCAP's repertory. As a consequence, simply by joining ASCAP, each member gives up the right to refuse to permit users licensed by ASCAP to perform his or her works. The element of compulsion is quite different, of course, because members join ASCAP voluntarily and own and control the Society.

It appears that, in considering the mechanism for fixing and adjusting fees for the new compulsory licenses, Congress did not seriously consider judicial rate-making. The more usual approach is to assign rate-making functions to an administrative agency and this had been Congress' approach through earlier revision efforts.

For example, in the years between the enactment of the 1909 Act and the Second World War there were many attempts at revision or amendment of the 1909 Act. Some of these proposals included administrative rate-making in compulsory license areas, with existing administrative agencies given the responsibility of setting reasonable license fees for the use of copyrighted works in certain circumstances.²³

Perhaps the closest parallels to the form the Tribunal finally took are found in two bills introduced by Congressman Emanuel Celler²⁴ to repeal the so-called jukebox exemption of the 1909 Act.²⁵ The first proposal would have established an Office of Performing Rights Trustees, comprised of three Trustees named by the Attorney General, to fix, collect and distribute compulsory license fees for jukebox performances.²⁶ The second would have granted a compulsory license for

21. *Id.*, Section IX.

22. A user may not dictate the *form* of license. *U.S. v. ASCAP, Metromedia, Inc.*, Petitioner, 341 F.2d 1003, appeal denied 382 U.S. 28, cert. denied 382 U.S. 877 (1965). Final orders in Section IX proceedings typically provide that users who have not complied with interim fee orders or with prior license agreements may be denied new licenses until their breach has been cured.

23. See, H.R. 10633, 75th Cong., 2d Sess. (1938) and H.R. 6243, 76th Cong., 1st Sess. (1939), giving the FCC rate-making authority in certain cases; and H.R. 3456, 77th Cong., 1st Sess. (1941), granting the FTC limited rate-making authority.

24. H.R. 12450, 87th Cong., 2d Sess. (1962), H.R. 5174, 88th Cong., 1st Sess. (1963).

25. 1909 Act. §1 (e).

26. H.R. 12450, 87th Cong., 2d Sess. (1962).

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jukebox performances, at a statutorily set license fee, which would be paid to the Copyright Office. Thereupon, an "administrator" in the Copyright Office would make distributions of the royalties paid to the various claimants among copyright owners, and also modify the fees in the future when warranted.²⁷ Neither proposal was enacted.

Foreign precedents also exist for the establishment of an administrative tribunal to set compulsory license fees. England and Canada have, for many years, had such tribunals, which have set license fees for the performance of copyrighted musical compositions in certain circumstances.²⁸

When the need for rate-making machinery became apparent in the revision effort which culminated in the 1976 Act, the least-used precedent was tried first, the use of essentially private bodies given official sanction. We turn now to the legislative history of the copyright revision effort and the concept of the Copyright Royalty Tribunal.

Legislative History of the Copyright Royalty Tribunal

The effort to revise the copyright law which resulted in the 1976 Act began in 1955, with a Congressional appropriation for a Copyright Office study which would lead to the drafting of a new copyright law.²⁹ As we have noted, the 1909 law had only one compulsory license—for making mechanical recordings of copyrighted musical compositions.³⁰ In the Copyright Office study which examined that issue,³¹ the questions whether a statutory compulsory license fee should be fixed by statute and periodically revaluated were examined. The study said:

If the [mechanical] royalty is not fixed by statute, some machinery, either administrative or judicial, would have to be established (and supported) to fix the royalty either by general regulations or individual action.³²

At the time, the only compulsory license envisioned was a continuation of the "mechanical" compulsory license. Given this limited contemplated

27. H.R. 5174, 88th Cong., 1st Sess. (1963).

28. In England, a "performing Rights Tribunal" exists to determine license fees for performance of copyrighted works which are licensed by a "licensing body." 4 and 5 Eliz. II, Ch. 77, Part IV (1956, as amended). In Canada, a similar agency, the "Copyright Appeal Board," exists. Revised Statutes of Canada, 1952, c.55, §§49,50 (as amended).

29. See S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975), 47; H.Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), 47.

30. 1909 Act. §1 (e).

31. H. Henn, Copyright Office Study No. 4, The Compulsory License Provisions of the U.S. Copyright Law (1956), found in Copyright Law Revision Studies prepared for the Senate Judiciary Comm., 86th Cong., 1st Sess. (1960).

32. *Id.*, at 55-56.

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use of compulsory licensing, the question of compulsory license regulation was not even recapitulated by the Copyright Office study as a "major issue."³³

The first copyright revision proposals introduced in Congress included only this one compulsory license.³⁴ No mechanism for adjusting the compulsory fee was provided. And, since that compulsory license simply regulated the price to be paid by an individual buyer directly to an individual seller, there was no need for any administrative mechanism for distribution of royalty fees.

However, as revision efforts progressed, disputes arose over various provisions of the revision bills and Congress compromised certain issues through the mechanism of compulsory licenses. Thus, the questions of royalties for cable television and for jukebox performances were solved through compulsory licensing.³⁵ Those compulsory licenses, it should be noted, were qualitatively different from the mechanical compulsory license. They called for *one* payment to be made by a user, not to the individual owners of the rights, but to the Copyright Office. The royalties would then be distributed to various copyright claimants.

At the time of the jukebox and cable compromises, Congress was also considering a new compulsory license for a new right—the performance right in sound recordings, to be owned by the performers and producers of sound recordings. This right, too, would be subject to a compulsory license, with users paying one fee which would then be divided among copyright claimants.³⁶

This proliferation of compulsory licensing led to consideration of a way to distribute compulsory license fees, and periodically adjust them, without involving Congress. In late 1969, the Senate Subcommittee on Patents, Trademarks and Copyrights, chaired by Senator John L. McClellan, redrafted the then-current copyright revision bill to include a Copyright Royalty Tribunal. This body would adjust fees as conditions warranted, and determine the distribution of fees if necessary.³⁷ The Subcommittee's report succinctly stated the reasons for the rate-making aspect of the Tribunal's function:

The bill establishes in the Library of Congress a Copyright Royalty Tribunal to adjust royalty rates paid to copyright owners by users of copyrighted works under the various systems of compulsory licensing created

33. *Id.*, at 57-58.

34. H.R. 11947, S.3008, 88th Cong., 2d Sess. (1964). The proposed compulsory license fee was three cents per record, or one cent per minute of playing time, whichever was greater. *Id.* §11 (c) (2).

35. The compromises were first proposed in the late 1960s, and were embodied, in modified form, in 17 U.S.C. §§111 and 116 (1976).

36. See, e.g., S.543, 91st Cong., 1st Sess., §114 (c) (1969).

37. S.543, 91st Cong., 1st Sess. (1969) (Committee Print), §§801-807.

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under the measure. The subcommittee felt that it would not be sound public policy to require that an Act of Congress be enacted every time an adjustment of one of these rates is desired.³⁸

The structure of the Copyright Royalty Tribunal as envisioned by the Senate Subcommittee was unique. It responded to current attitudes which mitigated against expansion of the federal bureaucracy and in favor of Congressional oversight. Thus, the Copyright Royalty Tribunal was not to be a continuing federal agency. Rather, it would be a series of *ad hoc* panels created if the Register of Copyrights determined that a dispute over rate-making or distribution needed resolution.³⁹ In each such case, the Register would request the convening of a three-member panel of the American Arbitration Association. The Association would furnish a list of three proposed members and, if the parties had no well-founded objection to those named, their appointment would be certified by the Register of Copyrights and they would function as a panel of the Copyright Royalty Tribunal in the specific matter being considered.⁴⁰ Each panel would be dissolved after rendering its decision. Either House of Congress could veto any rate-making determination within ninety days.⁴¹

The Tribunal concept was quickly accepted,⁴² but as copyright revision wended its way through the years, the performance right in sound recordings was dropped, and with it went its attendant compulsory license.⁴³ A new compulsory license was added at the eleventh hour, for performance or display of certain works by public broadcasting.⁴⁴

The version of the copyright revision bill ultimately passed by the Senate on February 19, 1976,⁴⁵ included the Copyright Royalty Tribunal in essentially the same form as originally conceived.⁴⁶ The Tribunal was a three-member *ad hoc* panel of arbitrators, whose decisions were subject to Congressional veto. In addition to adjusting and distributing statutory compulsory license fees, the Tribunal was to make the initial determination of compulsory license fees for public broadcasting.⁴⁷

When the bill, after Senate passage, was sent to the House, the

38. S.Rep. No. 91-1219, 91st Cong., 2d Sess. (1970), 9-10.

39. S.543, *supra* n. 36, §802.

40. *Id.*, §803.

41. *Id.*, §807.

42. *Billboard*, April 4, 1970.

43. *Congressional Record*, September 9, 1974, S.16153.

44. 17 U.S.C. §118 (1976). See, generally, Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S.L. Rev. 521 (1977).

45. S.22, 94th Cong., 1st Sess. (1976), *Congressional Record*, February 19, 1976, S.2047.

46. *Id.*, §§801-809. See, generally, S.Rep. No. 94-473, *supra* n. 28, at 155-158.

47. *Id.*, §118 (c).

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House Subcommittee on Courts, Civil Liberties and the Administration of Justice, chaired by Congressman Robert Kastenmeier, made major changes in the structure of the Tribunal.⁴⁸ First, the Tribunal was changed from a temporary, *ad hoc* series of arbitration panels to a permanent agency of the federal government; it was also renamed the Copyright Royalty Commission.⁴⁹ The House Report did not comment on the change from a series of *ad hoc* panels to a permanent body, but did note a "constitutional concern" over the Senate concept that an employee of the Legislative Branch, the Register of Copyrights, was to appoint the Tribunal members.⁵⁰ The House version called for Presidential appointment instead. The body would still be made up of three members, but they would be appointed by the President and would serve five-year terms.⁵¹

Further, the House broadened the scope of judicial review and eliminated Congressional veto power over Tribunal decisions.⁵² The House Committee concluded that such determinations "were not appropriate subjects for regular review by Congress."⁵³

After passage by the House,⁵⁴ the bill went to a Conference Committee to iron out the differences between the Senate and House versions. Further changes in the structure of the Tribunal were made by the Conference Committee.⁵⁵ The Senate conferees accepted the House structure of the Tribunal as a permanent agency within the Legislative Branch.⁵⁶ They also accepted Presidential appointment of Tribunal members but raised a new constitutional concern: the need for Senate confirmation of Presidential appointments. Thus, Tribunal members were to be appointed by the President and confirmed by the Senate.⁵⁷ In addition, the conferees decided that a permanent panel of five Commissioners was preferable to one of only three Commissioners because the smaller Tribunal might be paralyzed if one or more Commissioners were incapacitated, or if a vacancy occurred. Accordingly, Tribunal membership was expanded to five and the terms of the Commissioners were expanded to staggered seven-year terms rather than the five-year terms of the House version.⁵⁸ The Act signed by President Ford on October 19, 1976 included the Tribunal in this form.

48. S.22 in the House of Representatives, 94th Cong., 2d Sess. (1976).

49. *Id.*, §801.

50. H.Rep. 94-1476, *supra*, n. 28, at 174.

51. S.22 in the House, *supra*, n. 47, §802.

52. *Id.*, §809.

53. H.Rep. 94-1476, *supra*, n. 28, at 179.

54. Congressional Record, September 22, 1976, H.10911.

55. H.Rep. No. 94-1733, 94th Cong., 2d Sess. (1976), 81-82.

56. The change was embodied in 17 U.S.C. §801 (a) (1976).

57. 17 U.S.C. §802 (a).

58. 17 U.S.C. §802 (a) (1976).

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ESTABLISHMENT AND IMPLEMENTATION OF THE COPYRIGHT ROYALTY TRIBUNAL

The 1976 Copyright Act directed the President to appoint the five members of the Copyright Royalty Tribunal no later than six months following the date of enactment of the law.⁵⁹ President Ford signed the Act on October 19, 1976. The appointments, therefore, should have been made no later than April 19, 1977.

This date was especially important because of the timetable for the CRT's initial determination of reasonable compulsory license fees for public broadcasting. That timetable required the CRT to publish a notice of commencement of public broadcasting compulsory license proceedings no later than thirty days after the Tribunal was constituted,⁶⁰ and to complete its deliberations within six months from the date of publication of that notice.⁶¹ The law also provided that the CRT's decision would take effect on the date it was published in the Federal Register.⁶² Until then, the 1909 law, rather than the 1976 law, would apply to performances by public broadcasting.⁶³ Thus, if the President adhered to the statutory timetable for appointment of Tribunal Commissioners, the CRT's decision would take effect January 1, 1978, when virtually all of the rest of the act took effect.⁶⁴

However, April 19, 1977 came and went with no word from the White House.⁶⁵ The delay on the part of the President was serious enough to cause Senator McClellan and Congressman Kastenmeier to write jointly to the White House, stressing the importance of the Tribunal to copyright revision, and urging prompt appointment of the Commissioners.⁶⁶

However, it was not until September 26, 1977 that President Carter named the Commissioners of the Copyright Royalty Tribunal.⁶⁷ In order of seniority as designated by the President they were: Thomas C. Brennan, Douglas Coulter, Mary Lou Burg, Clarence L. James, Jr., and Frances Garcia.

59. 17 U.S.C. §801 (c) (1976).

60. 17 U.S.C. §118 (b) (1976).

61. 17 U.S.C. §118 (b) (3) (1976).

62. 17 U.S.C. §118 (b) (1976).

63. 17 U.S.C. §118 (b) (4) (1976).

64. By the terms of one of the 1976 Act's transitional and supplementary provisions, §118 went into effect immediately upon enactment. Pub.L. No. 94-553 (October 19, 1976), Transitional and Supplementary Provisions §102, 90 Stat. 2598-2599.

65. It was suggested that one reason for the delay was a Presidential desire to include the CRT in a program of reorganization of the Federal Government. Letter of Senator John L. McClellan and Representative Robert W. Kastenmeier to the President, May 16, 1977.

66. *Id.*

67. 42 FR 49435 (1977)

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Thomas C. Brennan was no stranger to the world of copyright. He had served as a staff member of the Senate Committee on the Judiciary since 1959, and had been Chief Counsel to the Subcommittee on Patents, Trademarks and Copyrights throughout the years of revision efforts. Indeed, he drafted much of the final language of the law and of the Senate Report. He was widely regarded—by copyright owners and users alike—as an excellent choice.

The other four Commissioners were not known to the copyright community. Their backgrounds were in politics rather than in copyright. Douglas Coulter, a writer, holds an MBA from the Harvard Business School and has had experience in business management. He was a Presidential campaign organizer for Senator George McGovern in 1972, political field director for the Howell gubernatorial campaign in Virginia in 1973, and political campaign director for the Carter campaign in Indiana in 1976.

Mary Lou Burg had worked, in various capacities, for commercial radio and television stations in Milwaukee, Wisconsin and, at the time of her appointment, had been serving as Deputy Chairman of the Democratic National Committee, a post she had held since 1972.

Clarence L. James, Jr., a lawyer, served from 1968 through 1971 as Chief Counsel and later as Director of Law for the City of Cleveland. In 1976 he served as California State Deputy Coordinator for the Carter campaign. When appointed, he was engaged in the private practice of law.

Frances Garcia, a Certified Public Accountant with Arthur Andersen & Co., one of the "Big Eight" accounting firms, had been active in civic affairs in her home state of Texas.

Senate confirmation of the appointments, on October 27, 1977, was without objection and the swearing-in of the Commissioners was held on November 10, 1977. The Tribunal held its first organizational meeting on December 1, 1977.

For the purpose of introducing the parties to the new Commissioners, the CRT held three days of orientation hearings on December 6 through 8, 1977.⁶⁸ Interested parties appeared and provided overviews of their industries and operations to the CRT.⁶⁹

68. A three-volume transcript of the orientation hearings exists. Tribunal documents are not assigned a docket number or other identification beyond the caption of the proceedings, e.g. "Orientation Hearings;" "Public Broadcasting Rate Proceedings;" and so forth.

69. Those appearing, in order of appearance, were ASCAP; SESAC; the American Guild of Authors and Composers; the National Music Publishers Association; the Recording Industry Association of America; National Cable Television Association and others; sports organizations including professional baseball, basketball and hockey; the Copyright Office; the FCC; the National Association of Broadcasters; jukebox operators, represented by the AMOA, and jukebox manufacturers; BMI; public broadcasting; and the Motion Picture Association of America.

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Shortly thereafter, the Tribunal began its public broadcasting rate proceedings.

A NARRATIVE CHRONOLOGY OF THE PUBLIC BROADCASTING RATE PROCEEDINGS

Pre-Hearing Proceedings

The 1976 Copyright Act directed copyright owners and public broadcasting entities to negotiate in good faith and cooperate fully with the Tribunal to reach reasonable and expeditious results. The Act encouraged voluntary negotiation of a license agreement which would supercede any Tribunal determination.⁷⁰ In fact, unsuccessful negotiations for a voluntary license agreement had occurred from time to time over the decade prior to enactment of the new law.⁷¹

In February 1977, soon after enactment of the new law, ASCAP and public broadcasting agreed to try to reach a voluntary license agreement which would make a Tribunal determination unnecessary.⁷² A series of meetings was held in March and April 1977. Little progress was made.

As the statutory deadline for the President's nomination of Tribunal Commissioners—April 19, 1977—came and went, it became apparent that the Tribunal proceedings would be delayed. At about that time, the public broadcasters and ASCAP were able to reach written agreement on certain matters. That agreement, however, was to become a matter of dispute almost immediately.⁷³

70. 17 U.S.C. §118 (b) (1976).

71. Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 927 ff. (1975); Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S.L. Rev. 521, 537-544 (1977).

72. Public broadcasting formed a "Public Broadcasting Copyright Project" to negotiate with copyright owners. Eugene Aleinikoff, an attorney who had previously served public broadcasting as counsel in negotiations with ASCAP, was Director of the Project and acted as principal. He was joined by the Associate General Counsel of PBS, Eric Smith, who served as counsel to the Project, and others. Public broadcasting also retained Alan Latman to serve as counsel in Tribunal proceedings. ASCAP was represented by its President, Stanley Adams, Managing Director, Paul Marks, and Chief Economist and Director of Special Projects, Dr. Paul Fagan, among others. The authors served as counsel to ASCAP.

73. Through an exchange of letters dated April 29, and May 27, 1977, public broadcasting and ASCAP agreed that any license would commence on January 1, 1978, whether reached by voluntary agreement or by Tribunal determination. When ASCAP filed those letters in the Copyright Office as a "voluntary license agreement" pursuant to 17 U.S.C. §118 (b) (2) (1976) and 37 CFR §201.9 (1977), public broadcasting objected, saying the correspondence did not constitute an agreement and that the statutory timetable would govern. The dispute is as yet unresolved.

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The negotiations continued through the summer and fall of 1977. At one point, ASCAP and BMI were negotiating jointly with public broadcasting.⁷⁴ However, as the year ended, and the CRT was formed and began operations, it became apparent that ASCAP and the public broadcasters were too far apart to reach agreement on rates and terms. Both sides professed a desire to avoid a Tribunal proceeding. But the likelihood of a Tribunal proceeding grew.

A Tribunal proceeding had advantages and disadvantages to both sides. Public broadcasting is an industry whose expenditures are closely examined by Congress, which makes appropriations for its operations, by foundations and corporations which sponsor its programs, by state governmental authorities such as school boards, which also support its local programming, and even by members of the general public, many of whom make individual contributions.

From public broadcasting's point of view, then, the amount of every expenditure must be justified, even when that expenditure is clearly necessary—as is the case with the payment for copyrighted music under the new copyright law. An advantage of a Tribunal proceeding for public broadcasting was that the fees it would pay to copyright owners would have been determined as reasonable by a governmental body, an independent third party. The expenditure would, therefore, be immune from attack or criticism, unlike a voluntary agreement. On the other hand, the danger for public broadcasting was that the CRT would grant copyright owners an amount greater than public broadcasting could obtain in a voluntary arrangement.

From ASCAP's point of view, there were similar advantages and disadvantages to a Tribunal proceeding. ASCAP has always believed that voluntary negotiation is the best way to arrive at a license agreement. Of course, ASCAP agreements, since 1950, have been worked out against the background of the rate-making machinery of the Amended Final Judgment. However, the amounts paid by users have always been determined by voluntary negotiations and never by the court. The Society's members found unattractive the notion that a third party, the CRT, would decide the value of their music to public broadcasting.

Further, ASCAP had to consider the effect a CRT decision might have on pending judicial proceedings involving commercial broadcasters.⁷⁵ Negotiations were in progress with the commercial radio and television broadcasting stations. Litigation was pending concerning net-

74. 17 U.S.C. §118 (b) allows copyright owners or their representatives jointly to negotiate and agree on voluntary license agreements, notwithstanding the provisions of the antitrust laws.

75. *U.S. v. ASCAP*—Application of Berkshire Broadcasting Co., Inc., (Civ. Action No. 13-95, S.D.N.Y., March 14, 1950). The proceeding was started in March, 1977.

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work television.⁷⁶ An unfavorable decision could have repercussions in the commercial world. A favorable Tribunal decision could assist ASCAP in dealing with other users and might even produce more money than ASCAP would have accepted in a voluntary agreement.

ASCAP believed it had more to lose from an adverse Tribunal decision than did public broadcasting. For public broadcasting, all that was involved was a relatively small sum of money. For ASCAP, much larger sums, and some vital principles, were at risk.

Following the statutory timetable, the Tribunal published notice of initiation of the public broadcasting rate proceedings in the Federal Register on December 8, 1977.⁷⁷ The notice scheduled hearings for January 30 and 31, 1978.

After the notice was published, an initial meeting to discuss hearing procedures with the parties was held at the Tribunal's office on December 19, 1977. Public broadcasting's representatives stated that voluntary agreements had very recently been reached with the other two performing right organizations, BMI and SESAC, but were not yet in final form. The law allows the CRT to consider "the rates for comparable circumstances under [negotiated] voluntary license agreements."⁷⁸ The public broadcasters stated that the BMI and SESAC agreements, when in final form, would be the basis for their proposed ASCAP fees. Therefore, they suggested a postponement of the hearings to enable the BMI and SESAC agreements to be drafted and signed. ASCAP did not object and the Tribunal reluctantly agreed to a postponement. The hearings were eventually scheduled for the first week in March.⁷⁹

The type of proceeding the Tribunal would conduct was discussed at the December 19 meeting. Chairman Brennan, speaking on behalf of the Tribunal, thought the proceeding should be the type envisioned by the Administrative Procedure Act, including witnesses and cross-examination. He invited comments from both sides.

The question of "prehearing discovery" was also discussed. ASCAP submitted a list describing data it sought from public broadcasting and offered to furnish data to public broadcasting. A schedule for submission of prehearing statements was set, in essence requiring each side to submit its statement at least a week before the commencement of the proceedings.

Throughout January and February, 1978, ASCAP and public broadcasting engaged in limited "discovery," through an exchange of

76. *CBS v. ASCAP*, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd. 562 F.2d 130 (2d Cir. 1977), cert. granted _____ U.S. _____ (October 3, 1978).

77. 42 FR 62019 (1977).

78. 17 U.S.C. §118 (b) (3) (1976).

79. 43 FR 1581 (1978).

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documents. The "discovery" was not as thorough as the usual judicial pre-trial discovery, due, at least in part, to the tight time schedule imposed upon the Tribunal by the statute.

On January 13, 1978, public broadcasting advised the Tribunal of its views on hearing procedures. They differentiated between a "legislative" or "rulemaking" hearing on the one hand and an "adversary" or "adjudicatory" hearing on the other. The former would consist of presentation of statements by each side and questioning only by Commissioners. There would be no cross-examination or application of courtroom procedures. The "adversary" type of hearing, on the other hand, would proceed very much like a trial, allowing cross-examination. Public broadcasting favored the "rulemaking" type of proceeding, arguing that an "adversary trial" might prejudice the rights of others.⁸⁰

ASCAP replied on February 6, 1978, favoring the "adversary" proceeding at which full cross-examination of witnesses would be possible. ASCAP said such a hearing would not prejudice the rights of others because its proposal of license rates and terms would be relevant only to the ASCAP repertory.⁸¹

Public broadcasting responded to ASCAP's views on February 10, 1978, and argued that a two-party adversary proceeding with ASCAP followed by separate proceedings for all other aspects of the compulsory license, would be "completely inconsistent with the guiding principles of Section 118." They suggested a further conference with the Tribunal.⁸²

Accordingly, on February 17, 1978, Chairman Brennan met with counsel for ASCAP and public broadcasting and reported that the CRT had come to a number of conclusions about the proceedings: First, voluntary agreements which had been reached with other parties could be presented to the Tribunal and explained by the parties who had reached the agreements. Second, the parties before the Tribunal for a determination of license fees would then present their cases, with the copyright owners to go first, followed by public broadcasting. The CRT agreed with ASCAP that individual presentations by each copyright owner appearing should be made. (Public broadcasting strenuously objected to this point.⁸³) Third, the proceedings would be a hybrid between "adjudicatory" and "rulemaking" proceedings and witnesses could either read statements or be examined by counsel, as each party preferred. In either case, there would be full cross-examination by parties and Commissioners. Dates for submission of witness lists were discussed. Fourth, the record would be kept open for further testimony and submission of statements for a limited time after the conclusion of the hearings.

80. Letter of Alan Latman to CRT, January 13, 1978.

81. Letter of Bernard Korman to CRT, February 6, 1978.

82. Letter of Alan Latman to CRT, February 10, 1978.

83. Letter of Alan Latman to CRT, February 21, 1978.

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Although prehearing statements were not due until February 28, 1978, public broadcasting submitted its prehearing statement on February 17, 1978⁸⁴; ASCAP's was submitted on February 28, 1978.⁸⁵

The positions taken in the prehearing statements showed the parties to be very far apart indeed. Public broadcasting urged that the voluntarily negotiated license agreements it had reached with others in the music field be the model for the ASCAP license.⁸⁶ Basically, those agreements were as follows:

SESAC was to receive "a general license fee" of \$50,000 per year for both performing and recording rights. That amount was to be adjusted based upon an increase or decrease in the number of public broadcasting stations. The \$50,000 payment was "a guaranteed amount" against a schedule of "per composition" fees for certain types of uses of each composition performed on national programs only. This schedule was identical to the schedule proposed for ASCAP, which we describe below.⁸⁷

BMI which, like ASCAP, licenses only performing rights, was to receive an initial payment of \$250,000 for 1978. Thereafter, BMI's license fee was to be adjusted annually. BMI was to receive the same proportion of public broadcasting's total payments for music as its share of performances on certain national programs.⁸⁸ The adjustment computation was to be based on a "per composition" schedule similar but not identical to the one appended to the SESAC agreement and proposed for ASCAP.

Synchronization rights and recording rights licensed through the Harry Fox Agency were also to be paid on the basis of a "per composition" schedule of fees, but only for national programs.⁸⁹

The public broadcasting proposal for an ASCAP license fee was unique: a form of license which came to be called the "per composition" license.

Public broadcasting proposed payment to ASCAP of specific fees for specific types of performances—e.g., \$100 for a "feature" performance. However, *most* performances would not earn any fee—rather, payment was to be made only once for a given composition in a given program. Payment was to be made for a composition only when it was first included in a national public broadcasting program—what the

84. Public Broadcasting Copyright Project, Statement of Position Before the Copyright Royalty Tribunal, February 17, 1978.

85. Statement of the American Society of Composers, Authors and Publishers, February 28, 1978.

86. Public Broadcasting Copyright Project Statement, *supra*, n. 84, at 6. The agreements were for five-year terms beginning January 1, 1978.

87. *Id.*

88. *Id.*, at 8.

89. *Id.*, at 7.

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public broadcasters referred to later as "entry into the system." That payment would authorize all subsequent performances of the musical composition in that program, whether the program was broadcast as a national network program or merely as a local station program.

Thus, payment was to be made only for a program carried on the national PBS or NPR network. No payment was to be made for any performance in a local program broadcast by a local station, even though the license would extend to and authorize all local performances.⁹⁰

Public broadcasting estimated the total payment for all music performing and recording rights under its proposal to be in the order of \$750,000.⁹¹ Its estimated payment to ASCAP was about \$400,000.

ASCAP rejected public broadcasting's "per composition" approach as essentially unfair and in conflict with the mandate of the new copyright law. Further, ASCAP said, and contrary to public broadcasting's representation, the SESAC and BMI agreements were not really licenses on a "per composition" basis at all: the SESAC "guarantee" was in fact a flat rate because public broadcasting's data showed that SESAC's performances on national programs would earn virtually nothing under the per composition schedule. And the BMI annual "adjustment" meant that the BMI agreement was really a one-year rather than a five-year agreement. The BMI license was, said ASCAP, a way for BMI to avoid the burden of a CRT hearing, and still reap benefits should ASCAP be awarded substantially greater fees than public broadcasting had offered.⁹²

ASCAP argued for a "blanket" license in two senses: first, "blanket" in the sense of giving access to the entire ASCAP repertory; and second, "blanket" in the sense of a single reasonable fee to be determined by the Tribunal.⁹³ ASCAP noted that public and commercial broadcasting were substantially similar for music licensing purposes, and suggested that the approach used in commercial broadcasting be used here. That approach would be a license fee based on a percentage of the broadcaster's revenue.⁹⁴

ASCAP proposed that the fee be the same effective percentage as the commercial broadcasters had agreed to. However, given the special role of public broadcasting in American society, ASCAP expressed its willingness to offer a discount, at least for the initial license term. The amount of that discount was not specified in the prehearing statement. ASCAP indicated the discount would be consistent with discounts the Society understood were made by some other suppliers to public broad-

90. *Id.*, at 3-4, 9-12.

91. *Id.*, at 12.

92. ASCAP Statement, *supra*, n. 85, at 5, 11-19.

93. *Id.*, at 5.

94. *Id.*, at 34-51.

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casting. Application of the ASCAP revenue formula would have resulted in an initial payment by public broadcasting of about \$3.6 million for 1978, based on 1976 revenue data, less the unspecified discount.⁹⁵

The parties submitted witness lists to the Tribunal on March 1, 1978, completed an exchange of information thereafter, and on March 7, 1978, the Tribunal hearings began.

The Hearings

The Tribunal's hearings began on March 7, 1978 and ran for six full days.⁹⁶ As its first order of business, the Tribunal adopted "temporary" rules for the conduct of the hearings. The rules detailed the "adversary" type of hearings the Tribunal had previously decided it would conduct.⁹⁷ Under the rules, the Tribunal first afforded an opportunity to public broadcasting and copyright owners to explain the provisions of their voluntary agreements.⁹⁸

Almost immediately, sharply differing views between public broadcasters and copyright owners emerged. Testifying first for the public broadcasters, Eugene Aleinikoff stated that the SESAC agreement was on the same "per composition" basis as public broadcasting's proposal for ASCAP music, and that the "per composition" fees had been "negotiated" with SESAC.⁹⁹

SESAC's Vice President and General Counsel, Albert F. Ciancimino, promptly asked to be heard. He stated that the SESAC agreement did not include a "negotiated per composition" fee.¹⁰⁰ Rather, he said, SESAC had simply agreed to a \$50,000 annual payment and the "per composition" schedule had been made part of the agreement only because the public broadcasters had wanted it. It was academic to SESAC, which had arrived at the \$50,000 fee by its own route: that was

95. *Id.*, at 9-11.

96. The transcript of the hearings is embodied in six volumes, one for each day of hearings. They are captioned "Public Broadcasting Rate Proceedings," and will be referred to hereinafter by volume and page number. Thus, "Tr. IV-22" refers to transcript volume IV (the fourth day), page 22. Since the transcript was not printed, neither the parties nor the CRT corrected it for typographical and other errors.

97. Tr. 1-4-5.

98. Testimony, not relevant here, was also presented concerning the recording and synchronization license between public broadcasting and the Harry Fox Agency, Inc. It should be noted that public broadcasting claimed the Fox license was also relevant for determination of ASCAP fees, a point ASCAP strongly contested, noting two different rights were involved. The CRT ultimately determined that ASCAP's view was correct.

99. Tr. 1-26-27.

100. Tr. 1-53-54.

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the amount public broadcasting would pay at SESAC's commercial broadcasting license rates, less a 50% discount.¹⁰¹

Having heard descriptions of the voluntary agreements,¹⁰² and the different meanings attached to the SESAC agreement, the CRT next considered an appropriate license for performance of ASCAP music.

ASCAP's first witness was Bernard Korman, the Society's General Counsel. Mr. Korman's testimony concerned the way musical performing rights were licensed throughout the world, the difficulties with the public broadcasters' approach, and the advantages of the blanket license ASCAP proposed. He suggested the public broadcasters "per composition" approach had no precedent in music performing right licensing and was unreasonable in its structure and in the total license fees it would produce.¹⁰³

The second day of the hearings, March 8, 1978, included testimony on behalf of ASCAP by Morton Gould and Joseph Raposo.

Mr. Gould, a member of the ASCAP Board of Directors and a noted "serious music" composer and conductor, explained to the Tribunal what is entailed in composing music for television programs.¹⁰⁴ Mr. Raposo, the first musical director for "Sesame Street" and "The Electric Company," explained the particular craft necessary for writing music for the children's programs which, he stressed, were so important to public broadcasting.¹⁰⁵

Testimony on the third day of hearings, March 9, 1978, was presented by four more ASCAP witnesses.

The first, Sam Pottle, was the current musical director for "Sesame Street." Mr. Pottle explained the financial arrangements involved in writing music for public broadcasting children's programs.¹⁰⁶

Next, Stuart Pope, a member of ASCAP's Board of Directors and President and Managing Director of Boosey and Hawkes, Inc., a major music publisher in the "serious music" field, gave the Tribunal some facts about music publishing. He explained the problems inherent in trying to value individual musical compositions.¹⁰⁷ Each of ASCAP's writer and publisher witnesses was familiar with the public broadcasting proposal and explained why he thought it unfair.

ASCAP next presented Dr. Paul Fagan, its Chief Economist and Director of Special Projects. Dr. Fagan offered an economic analysis of

101. Tr. I-55.

102. No representative of BMI testified concerning the public broadcasting-BMI agreement.

103. Tr. I-83-148.

104. Tr. II-33-73.

105. Tr. II-73-121.

106. Tr. III-3-26.

107. Tr. III-26-43.

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the public broadcasting industry and explained ASCAP's operations, including both licensing and distribution of license fees to members. He also analyzed the specifics of the public broadcasters' proposal and of ASCAP's proposal.¹⁰⁸

Paul Marks, ASCAP's Managing Director, closed out the day's testimony. Mr. Marks strongly attacked the public broadcasters' proposal, calling it "offensive and demeaning"—"offensive" because it misportrayed the nature of the BMI and SESAC agreements, and "demeaning" because the proposal bore little relation to the value of music to public broadcasting.¹⁰⁹

ASCAP's final witness testified on the fourth day of hearings, March 13, 1978. He was Robert R. Nathan, President of Robert R. Nathan Associates, Inc., consulting economists. Mr. Nathan offered a further economic analysis of the public broadcasting industry and the proposed licenses.¹¹⁰

The hearings continued with the public broadcasting presentation. To suit the convenience of their witnesses, the testimony of some public broadcasting witnesses was interrupted to allow others to testify.

Public broadcasting's first witness was Eugene Aleinikoff, Director of the Public Broadcasting Copyright Project. Mr. Aleinikoff's testimony, which was interrupted several times, summarized the public broadcasting proposal, and responded to some points made by ASCAP witnesses.¹¹¹

Public broadcasting also presented testimony by Betty Cope, President and General Manager of WVIZ-TV, the public television station in Cleveland, Ohio. Ms. Cope explained the operations of an average public broadcasting television station.¹¹² She was followed by Kenneth Cox, a member of the Board of Directors of NPR. Mr. Cox discussed the operations and economic circumstances of public radio in the United States.¹¹³

The fifth day of the Tribunal's proceedings, March 14, 1978, saw further testimony from Mr. Aleinikoff.¹¹⁴ In addition, the public broadcasters presented Dr. William Baumol, Professor of Economics at Princeton University. Dr. Baumol offered an economic analysis of the public broadcasters' proposal, and argued for the reasonableness of its results. He said he was responsible for the "overall logic" of the proposal. He was not prepared to discuss details.¹¹⁵

108. Tr. III-46-131.

109. Tr. III-132-170.

110. Tr. IV-3-50.

111. Tr. IV-73-106, V-11-45, 102-124.

112. Tr. IV-111-132.

113. Tr. IV-132-162.

114. Tr. V-11-45, 102-124.

115. Tr. V-45-102.

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Also testifying was David Ives, President of the WGBH Educational Foundation in Boston, which operates two public television stations and one public radio station, and Chairman of the Public Broadcasting Copyright Project. Mr. Ives described the operations of a major public television station.¹¹⁶

In the final day of the Tribunal's hearings, March 15, 1978, Eric Smith, Associate General Counsel of the Public Broadcasting Service and Counsel for the Public Broadcasting Copyright Project, discussed the public broadcasters' license fee proposal in some detail. He also furnished details Dr. Baumol had said he could not furnish.¹¹⁷ Thereafter, at the request of members of the Tribunal, Mr. Korman was recalled and additional questions put to him.¹¹⁸

The presentation of the testimony of all witnesses generally followed the same format. First, the witness would give direct testimony either elicited by examination by counsel, in the case of the ASCAP witnesses, or through the presentation of a prepared statement, in the case of most public broadcasting witnesses. Members of the Tribunal would then examine the witnesses, followed by cross-examination by counsel for the opposing party. Continued examination by Commissioners after cross-examination was frequent, as was redirect examination.

During the hearings, the issues for CRT resolution emerged and were narrowed. They were:

1. The form of the license. ASCAP advocated a single blanket license fee. Public broadcasting advocated its "per composition" license fee: specific payments would be made only for first performances, and only on national programs. This issue was tied to:

2. The scope of the license. ASCAP's proposal covered only music in the ASCAP repertory. Public broadcasting's proposal was intended to cover not just the ASCAP repertory, but also any other copyrighted music of copyright owners unaffiliated with any performing right licensing organization. ASCAP elicited testimony that, with the exception of one unaffiliated publisher which submitted a claim to the Tribunal by letter¹¹⁹ no unaffiliated owners were known.

3. The applicability of the voluntary license agreements. ASCAP claimed that the BMI agreement was not helpful because it was only a one year agreement on the fee. The fee for the next four years would turn on the outcome of these proceedings. The SESAC agreement, ASCAP

116. Tr. V-125-195.

117. Tr. VI-3-69, 94-141.

118. Tr. VI-141-153. Representatives of the American Council on Education and the Intercollegiate Broadcasting System also testified on the sixth day of hearings concerning license rates and terms for non-NPR college radio stations. Tr. VI-70-93. The CRT treated such stations on a different basis from NPR stations in its decision.

119. The Italian Book Corporation.

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contended, did not support the "per composition" approach; it did support the ASCAP concept of basing the fee on the commercial broadcasters' fees and allowing a discount. The Fox license was simply irrelevant because it dealt with a very different right—the recording right. Public broadcasting thought all three voluntary agreements were of great value in determining rates and terms for ASCAP.

4. The licensing procedure. ASCAP asked that the license terms be expressly extended to, and license fees be separately paid by, each individual public broadcasting network or station. Public broadcasting asked that one payment be made for all entities that are part of the PBS and NPR systems.

5. The license rate formula. ASCAP believed a fee based on revenues was appropriate, analogous to the license fee paid by commercial broadcasters. The rate for the public broadcasting fee would be the same effective percentage of gross revenues as commercial broadcasters paid, but with a discount for public broadcasting. Public broadcasting stayed throughout the hearings with its "per composition" rate schedule.

6. The amount of license fees to be paid. ASCAP's formula would result in a figure for 1978 of about \$3.6 million (based on 1976 data, the latest then available) which, when reduced by the discount of 50% which had been suggested during the hearings, resulted in a fee of about \$1.8 million. Public broadcasting sought payment to ASCAP limited to about \$400 thousand.

Post-Hearing Proceedings

After the conclusion of the hearings, ASCAP and the public broadcasters met on March 29, 1978 in a final attempt to reach a voluntary agreement. However, the parties were still too far apart, and it became apparent that a Tribunal determination was inevitable.

Accordingly, the parties submitted post-hearing statements to the Tribunal on April 10, 1978.¹²⁰ The public broadcasting statement made no changes in the public broadcaster's proposal. ASCAP formally modified its proposal by including a discount from the equivalent of its commercial license rates which would be a 50% discount for 1978. The discount would be reduced each year, to 20% by the end of the license term, 1982. The dollar figures, thus, remained the same—public broadcasting would pay about \$400,000 for 1978, while ASCAP proposed about \$1.8 million for that year.

Under the rules of the proceeding, all evidentiary materials were to

120. Public Broadcasting Copyright Project Post-Hearing Statement on Music and Supplementary Evidentiary Materials, April 10, 1978; Post-Hearing Statement of the American Society of Composers, Authors and Publishers, April 10, 1978.

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be submitted by April 10, 1978. Thereafter, the parties could submit reply statements no later than April 14, 1978. These were not to include any new evidentiary material. On April 14, 1978, the All-Industry Television Station Music License Committee—the negotiating body for the local (as distinguished from network) commercial television broadcasting industry—submitted a statement to the CRT attacking ASCAP's position and asserting that commercial broadcasters were not happy with ASCAP's revenue-based licenses.¹²¹ ASCAP asked for permission to reply to this statement,¹²² and subsequently filed a reply which offered proof that the commercial stations had been well satisfied with the license when it was worked out in 1969 and again five years later when, in 1973, they chose not to exercise their right of termination; instead they let their agreements run for another four years, through 1977.¹²³

Post-hearing reply statements were submitted by both sides on April 14, 1978.¹²⁴ Public broadcasting later objected to certain material included in ASCAP's post-hearing reply statement as being new evidentiary matter.¹²⁵

On May 4, 1978, the Tribunal held a public hearing to discuss the issues before it.¹²⁶ The Tribunal dealt with approximately 40 different issues which were raised during the course of the hearings and in the parties' statements. The most significant conclusion reached was the rejection of the public broadcasters' proposal for fees based on "per composition" rates. The Commissioners agreed that a blanket license for the ASCAP repertory, with a fee not related to actual performances, was the better and proper approach.

The question of the formula to be adopted was unresolved. Commissioner Burg asked the parties for comments on a formula based on market population. The parties filed comments on May 11, 1978.¹²⁷ ASCAP opposed that approach; public broadcasting thought it might be "useful."

Commissioners Garcia and James had come out strongly at the May 4th hearing for a revenue-based formula. One of public broadcasting's objections to that approach was that a true, nonduplicated revenue figure would be difficult to obtain. Commissioner Garcia, with appropriate notice to all parties, met with representatives of public broad-

121. Letter of Leslie G. Arries, Jr. to CRT, April 14, 1978.

122. Letter of Bernard Korman to CRT, April 17, 1978.

123. Letter of Bernard Korman to CRT, April 25, 1978.

124. Public Broadcasting Copyright Project, Supplementary Post-Hearing Statement on Music, April 14, 1978; Post-Hearing Reply Statement of the American Society of Composers, Authors and Publishers, April 14, 1978.

125. Letter of Alan Latman to CRT, April 20, 1978.

126. Transcript of Hearing, May 4, 1978.

127. Letter of Bernard Korman to CRT, May 11, 1978; Letter of Eric Smith and Ernest Sanchez to CRT, May 12, 1978.

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casting to investigate public broadcasting's claim that there were significant problems inherent in that approach.

The Tribunal held another hearing on May 31, 1978¹²⁸ at which the Tribunal voted on whether to adopt a revenue-based approach. Three Commissioners, Chairman Brennan, and Commissioners Garcia and James, concluded that the revenue-based approach was appropriate; Commissioners Burg and Coulter disagreed. Commissioner Garcia then advanced a revenue-based approach that would have resulted in payments of approximately \$1,380,000 for calendar year 1978. The parties were asked to comment on that approach and did so on June 2, 1978.¹²⁹ On that same day, at the request of the Tribunal and on notice to public broadcasting, ASCAP representatives met with Commissioners Garcia, Coulter and James to discuss technical aspects of a revenue-based approach—e.g., how to exclude “duplicated revenues” in applying a percentage rate to the revenues of a station or network.

The June 2 public broadcasting comments were a breakthrough: the public broadcasters abandoned their “per composition” fee approach, and instead suggested a flat blanket license fee of \$750,000 per year.

The CRT discussion of issues at the May 4 and 31 hearings and the parties' comments had, in the Commissioners' view, settled most of the major issues:

- The fee would be one blanket fee, not the total of “per composition” fees;
- The license for the ASCAP repertory would be separate from any other;
- The voluntary agreements with BMI and Fox were of no value and the SESAC agreement of very limited value;
- ASCAP had agreed to combined reporting and payment for all PBS and NPR networks and stations.

What remained, then, were the issues of the license fee formula and amount. ASCAP asked for a revenue-based fee which would reflect both growth and inflation, and result in payment of about \$1.8 million for 1978. Public broadcasting countered with a proposal of a flat fee of \$750,000 that would not change over the five year license term to reflect either growth or inflation.

On June 5, 1978 the Tribunal held its penultimate hearing.¹³⁰ The hearing included questioning of representatives of the parties concerning the license fee question. Commissioner Garcia proposed a revenue-based formula that would produce \$1.283 million in calendar year 1978. Com-

128. Transcript of Hearing, May 31, 1978.

129. Letter of Eric Smith and Ernest Sanchez to CRT, June 2, 1978; letter of Bernard Korman to CRT, June 2, 1978.

130. Transcript of Hearing, June 5, 1978.

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missioner Burg proposed a flat fee of \$1.224 million annually for the five years through 1982. Neither proposal commanded a majority of the members of the Tribunal. Commissioner Coulter then proposed a flat annual license fee, expressly derived from Commissioner Garcia's revenue formula, using the latest available figures (for fiscal year 1976), and subject to adjustment for inflation. That fee would have been the \$1.283 million figure. This proposal carried the Tribunal, by a vote of three to two, supported by the Chairman and Commissioners Coulter and Burg, and opposed by Commissioners James and Garcia.

The Tribunal held its final hearing on June 6, 1978.¹³¹ Chairman Brennan moved that Commissioner Coulter's proposal, adopted only the day before, be reconsidered and amended. In place of the figure to be determined by a revenue formula, the proposal inserted a flat fee of \$1.25 million for 1978, with annual adjustments for inflation. This proposal was adopted by a three to two vote, Chairman Brennan and Commissioner Coulter and Burg in the majority, and Commissioners Garcia and James dissenting in favor of an explicit revenue basis. The Tribunal adopted the schedule of rates and terms which was then published in the Federal Register on June 8, 1978,¹³² the statutory deadline for Tribunal determination.

THE TRIBUNAL'S DECISION

A Summary of the Decision

The Tribunal's decision contains both the regulations embodying the schedule of rates and terms for the use of ASCAP music by public broadcasting entities and, in accordance with the mandate of the 1976 Copyright Act,¹³³ an opinion expressing the reasons for the Tribunal's determination.¹³⁴ Commissioners Garcia and James filed a minority opinion.¹³⁵

The CRT decision first noted that it found congressional committee reports to be particularly helpful in making its determination.¹³⁶ It quoted with approval the Senate Report which states that Section 118 "requires the payment of copyright royalties reflecting the fair value of the materials used,"¹³⁷ and the House Report language that Congress did

131. Transcript of Hearing, June 6, 1978.

132. 43 FR 25068 (1978).

133. 17 U.S.C. §803 (b) (1976).

134. *Supra*, n. 132, at 25068-25070.

135. *Id.*, at 25070.

136. 43 FR 25068 (1978).

137. S.Rep. No. 94-473, 94th Cong., 1st Sess. 101 (1975).

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“not intend that owners of copyrighted material be required to subsidize public broadcasting.”¹³⁸ Noting the requirement in the legislative history that the Tribunal consider the “general public interest in encouraging the growth and development of public broadcasting,” the Tribunal concluded that “the royalty payments required by the schedule will not have any significant impact upon the ability of noncommercial broadcasting to perform its function.”¹³⁹ In sum, the CRT was “impressed” by the special contributions to American life by public broadcasting, but concluded that both the Copyright Act and equity require that copyright owners receive reasonable compensation for the use of their works by public broadcasting.¹⁴⁰

Turning to the voluntary agreements, the CRT decided they were of “limited guidance in the disposition of the more important issues presented in [the public broadcasting] proceeding.”¹⁴¹ The Tribunal found the BMI agreement to be of no assistance in establishing a royalty schedule for ASCAP, for the reasons advanced by ASCAP.¹⁴² The SESAC agreement was of assistance only “as a guide to the reasonableness of the payment to be made to ASCAP under the CRT schedule.”¹⁴³

The CRT decision next considered the question of an appropriate royalty payment, and reviewed the various formulas considered during the course of the hearings, including an annual flat payment, a fee based on market population or size of audience, formulas related to use of music, and formulas related to payments made by commercial broadcasters. The Tribunal also considered the licensing of commercial broadcasting in the United States and the licensing of foreign public broadcasting systems. It concluded “there is no one formula that provides the ideal solution, especially when the determination must be made within the framework of a statutory compulsory license.”¹⁴⁴

The CRT expressly rejected public broadcasting’s “per composition” approach, even though it had been withdrawn. It held the blanket license concept to be “the most suitable method for licensing public broadcasting.”¹⁴⁵

The Tribunal determined \$1,250,000 to be a reasonable annual license fee for the right to perform music in the ASCAP repertory. That amount, the decision said, was not determined by the application of a particular formula. Rather, “the amount of the payment is approxi-

138. H.Rep. No. 94-1476, 94th Cong., 1st Sess. 118 (1976).

139. *Supra*, n. 136.

140. *Id.*

141. *Id.*

142. *Id.*, at 25068-25069.

143. *Id.*, at 25069.

144. *Id.*

145. *Id.*

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mately what would have been produced by the application of several formulas explored by [the CRT] during its deliberations."¹⁴⁶

ASCAP had asked that the fee set by the CRT be explicitly considered as nonprejudicial to future proceedings, given the total lack of experience in licensing public broadcasting through the compulsory license or otherwise, and the fact that this was the first experience for both the parties and the CRT in this type of rate-making. The Tribunal agreed, saying it "does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding."¹⁴⁷

The decision then dealt with other matters, including license fees for recording rights in music and for display rights in visual works.¹⁴⁸ It also summarized the regulations to insure that public broadcasting would give proper notice to copyright owners or their representatives of performances.¹⁴⁹ ASCAP and public broadcasting had no serious dispute over this aspect of the decision.

The Tribunal then stated its belief "that it would be unfair to copyright owners if the schedule did not make some provision for changes in the cost of living." It concluded that annual cost of living adjustments, based on the Consumer Price Index, were warranted.¹⁵⁰

Finally, the Tribunal noted that it would be appropriate, and perhaps useful to Congress, if it presented to Congress on January 3, 1980¹⁵¹ a report of its experience with the operation of Section 118.¹⁵² As the Chairman had observed during the hearings, such a report would examine the question whether any compulsory license was necessary for public broadcasting.¹⁵³

Commissioners James and Garcia filed a brief, one-paragraph dissent.¹⁵⁴ They disagreed only with the basis for determining the license fee, stating their view that a revenue method, not a flat rate, should be used. "The most logical bench mark" for a public broadcasting fee, they wrote, "was to compare it to the established industry practice of commercial broadcasting." They then concluded that "[t]he arguments that the revenue proposal would generate too much money for ASCAP is without merit in face of the legislative history."¹⁵⁵ Since the majority decision did

146. *Id.*

147. *Id.*

148. *Id.*, at 25069-25070.

149. *Id.*, at 25070.

150. *Id.*

151. The date on which the Register of Copyrights is to report to Congress on the voluntary licensing of nondramatic literary works to public broadcasting stations. 17 U.S.C. §118 (e) (2) (1978).

152. *Supra*, n. 150.

153. Transcript of Hearing, May 4, 1978, 97-99.

154. *Supra*, n. 150.

155. *Id.*

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not mention this argument, the minority was either responding to points made by public broadcasting or to issues raised in the CRT's deliberations.

The schedule of rates and terms was embodied in a series of regulations¹⁵⁶ appended to the decision.¹⁵⁷

The Impact of the Decision on the Parties

It seems safe to say that neither ASCAP nor the public broadcasting industry was entirely happy with the CRT's decision.

From the public broadcasters' point of view, the major point they won was the Tribunal's refusal to use a revenue-based formula as the sole determinant of public broadcasting license fees. In all other significant aspects, the public broadcasters' arguments failed:

- The Tribunal rejected their "per composition" fee approach and accepted ASCAP's arguments for the traditional blanket license approach.

- The Tribunal also accepted ASCAP's proposal that a determination for the ASCAP repertory be made separate and apart from any other repertory.

- The Tribunal rejected an unchanging flat fee. While the Tribunal did not agree with ASCAP that license fees should be tied to the public broadcasting industry's growth as measured by its revenues, it did accept ASCAP's argument that, at the very least, an inflation adjustment should be made annually.

- Perhaps most significant from public broadcasting's point of view, and in terms of long-term economic impact, was the Tribunal's rejection of the low range of license fees the public broadcasters sought. They had repeatedly stressed to the Tribunal the importance they put on the final dollar figure. At the outset of the proceedings, the public broadcasters had offered ASCAP a "per composition" license proposal which would have resulted, they said, in license fees of about \$400,000 a year, the same amount offered as a blanket fee in voluntary negotiations. By the end of the proceedings, they had come up to a blanket fee of \$750,000. ASCAP had sought a figure of about \$1.8 million and had offered in voluntary negotiations to accept only \$1 million for the first year, as part of an experimental agreement to be made on a without-

156. 37 CFR §§304.1-304.14 (1978). The sections of relevance to the ASCAP schedule were §304.3, dealing with performance of ASCAP works by PBS, NPR and their stations, §304.10, dealing with the cost of living adjustment, and §304.14, dealing with the report to Congress.

157. 43 FR 25070-25073 (1978).

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prejudice basis. The Tribunal's decision thus came much closer to ASCAP's valuation of its repertory than to the public broadcasters'.

From ASCAP's point of view, certain principles embodied in the decision are important:

The CRT was unimpressed with public broadcasting's attempt to use the \$250,000 fee voluntarily negotiated by BMI as a bench mark for determining a reasonable fee for ASCAP.

The Tribunal's rejection of the public broadcasters' "per composition" approach, and statement "that a blanket license is the most suitable method for licensing public broadcasting to perform musical works," is important to ASCAP (and BMI) in connection with a major antitrust action pending in the Supreme Court.¹⁵⁸ In that case the CBS television network is seeking a so-called "per use" form of license from ASCAP, similar to the "per composition" form of license proposed by the public broadcasters. CBS argued successfully in the Second Circuit that ASCAP's blanket licensing of its television network is price-fixing, a *per se* violation of the antitrust laws. The CRT's determination that blanket licensing is the best method for licensing public broadcasting, and its rejection of the "per composition" approach, supports ASCAP's (and BMI's) position in the Supreme Court. A contrary CRT decision might have undermined to some extent ASCAP's position in the Supreme Court.

Similarly, ASCAP has long maintained that license fees should fairly reflect economic circumstances as they change. In most cases license fees have reflected the user's growth. To some degree, the CRT decision takes account of changing conditions by its CPI adjustment.

The Significance of the Decision for Future Proceedings

Procedurally, the public broadcasting proceedings may prove to be the model for future proceedings to modify compulsory license fees.¹⁵⁹ The adversary type of hearing, allowing for cross-examination by the parties and questioning by Commissioners, seems to have been a success from the Tribunal's point of view. The CRT found it the best way of eliciting the facts necessary to render a decision. Indeed, the Tribunal used the same procedure in a subsequent proceeding dealing with the jukebox compulsory license.¹⁶⁰

158. *CBS v. ASCAP*, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd 562 F.2d 130 (2d Cir. 1977), cert. granted _____ U.S. _____ (October 3, 1978).

159. The CRT will modify the mechanical, cable, jukebox and public broadcasting compulsory license fees at various intervals. 17 U.S.C. §§118 (c), 804 (1976).

160. In the matter of Access to Phonorecord Players (1978). See 43 FR 20513 (1978).

BERNARD KORMAN AND I. FRED KOENIGSBERG

In addition, the Tribunal's procedural model may be used elsewhere in the copyright world. The Copyright Office held a hearing on the compulsory license for mechanical reproductions of sound recordings, and the procedures for that hearing were very similar to the Tribunal's procedures during the public broadcasting proceedings.¹⁶¹ Copyright Office hearings held prior to the Tribunal's public broadcasting proceedings had been of the "legislative" type, with no cross-examination of witnesses by parties allowed.¹⁶²

Substantively, the CRT's public broadcasting decision may have interesting implications for future Tribunal proceedings both in the public broadcasting area and in other areas.

In comments made two months after the conclusion of the proceedings, Chairman Brennan revealed some of his thoughts on the matter, as well as those of his colleagues.¹⁶³

The Chairman noted that the public broadcasting proceeding "was dominated by the contest between PBS and ASCAP," and "assumed greater significance because issues were presented which were highly relevant to current negotiations between commercial broadcasting and the performing right societies."¹⁶⁴

In the procedural area, the Chairman indicated the public broadcasting proceeding "established a number of procedural precedents."¹⁶⁵ The Chairman continued that all Commissioners found the "adversary" type of proceeding helpful:

Although it was described as rulemaking, the participants were accorded the rights that they would have enjoyed in an adjudication proceeding. The parties were not only allowed to call witnesses, but were permitted to cross-examine witnesses. All the Commissioners found this procedure to be helpful and informative, and it is already apparent that the same format will be followed in future proceedings.¹⁶⁶

The Chairman restated the CRT's view that royalty determinations should be made only on the basis of the record, and that neither the CRT

161. Compulsory License for Making and Distributing Phonorecords (Copyright Office Docket RM 77-3), 43 FR 44511 (1978), Hearings of November 28-29, 1978.

162. E.g., Compulsory License for Cable Systems (Copyright Office Docket RM 77-2), Hearings of April 12 and 13, 1977; Recordation and Certification of Coin-Operated Phonorecord Players (Copyright Office Docket RM 77-4), Hearing of October 25, 1977.

163. Remarks of Thomas C. Brennan to the Annual Meeting of the Section on Patent, Trademark and Copyright Law of the American Bar Association, August 8, 1978.

164. *id.*, at 4.

165. *id.*

166. *id.*, at 4-5.

The First Proceeding Before the Copyright Royalty Tribunal

nor the copyright system should subsidize the users of copyrighted materials for any "public interest" reasons.¹⁶⁷

Chairman Brennan then offered his personal view of the proceeding. He found as its main deficiency "the failure of the parties to develop a good record on the central issues," and blamed this in part on the CRT's lack of subpoena power.¹⁶⁸ How the parties could have improved the record is not at all clear, given the limitations of time, the lack of formal pre-trial discovery and the absence of subpoena power. Certainly, both sides made strenuous efforts to present a full record.

The Chairman thought the most difficult single issue was the question of a revenue-based formula for license fees.¹⁶⁹ He said he was "sympathetic" to the revenue approach, "in part because of its use in American commercial broadcasting and by foreign public broadcasting," but concluded its use was not "feasible."¹⁷⁰ His reasons again seemed to go to the record:

In my view, the proponents of the revenue approach failed in the testimony to adequately provide the necessary linkage between an increase in revenue and the value to PBS of the ASCAP catalog. Furthermore, no workable revenue formula was proposed.¹⁷¹

Again, it is not clear what more could have been done. The record was replete with explanations of the revenue basis for license fees. As Commissioners James and Garcia said in their dissent—and as Chairman Brennan noted—the revenue approach was the licensing standard in the marketplace. Although the CRT decision included an express disclaimer that any one formula was used, it is clear that the fee arrived at by the CRT for 1978 was initially proposed on the basis of a revenue approach—it was the amount suggested for 1978 by Commissioner Garcia's revenue formula and the same amount suggested by Commissioner Coulter's revenue formula.

In the long run the most significant result of this proceeding may well be the evidence that the Tribunal sees its mandate from Congress in terms of the constitutional purpose behind copyright: the promotion of the arts. The Tribunal considered its mandate to stem from the language in the legislative history which calls for "fair value" for the use of copyrighted works, without "subsidization" of the user of copyrighted materials. This attitude reflects the congressional intent in establishing the Tribunal which, as the CRT noted in its decision, is reflected in the

167. *Id.*, at 5.

168. *Id.*

169. *Id.*

170. *Id.*, at 6.

171. *Id.*

BERNARD KORMAN AND I. FRED KOENIGSBERG

legislative history. It also quiets some fears that copyright community may have had concerning the posture the CRT would take: there is no doubt that it recognizes the importance of supporting creators by granting the most important kind of encouragement, economic reward.

There is confusion in many minds about the underlying purpose of the copyright law. One finds users prone to quote from antitrust decisions of the Supreme Court adverse to corporate copyright owners, to the effect that "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."¹⁷² This suggests that the first consideration is the public's right of access to copyrighted material, which is often the result of a user's exploitation of copyrighted works for the user's economic benefit, and to the creator's detriment.

Another, and we submit, better statement of the purpose of the copyright law is found in cases in which copyright owners prevail. This statement is to the effect that the public benefit is secured when the creator's economic interest is secured. Mr. Justice Reed put the idea succinctly:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.¹⁷³

Based on the general approach taken by the CRT, that body seems to share the view of Mr. Justice Reed.

CONCLUSION

The public broadcasting proceeding raises sharply the question of the value of compulsory licensing generally.

Congress enacted the compulsory license for public broadcasting because "the nature of public broadcasting does warrant special treatment in certain areas"—such as "the special nature of programming, the repeated use of programs, and, of course, limited financial resources."¹⁷⁴ Public broadcasting wanted the compulsory license—the copyright owners did not. During the course of the proceedings, it became apparent

172. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

173. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

174. H.Rep. No. 94-1476, 94th Cong., 2d Sess., 117 (1978).

The First Proceeding Before the Copyright Royalty Tribunal

that, from public broadcasting's point of view, one issue had overriding importance: the amount of money to be paid in license fees. This, of course, is what the copyright owners had argued before Congress in opposing the compulsory license—that the compulsory license was merely an attempt to get a cheap license.

It is ironic that, at least for the first license term, the compulsory license had the opposite result. The Tribunal's decision is less favorable to public broadcasting than a voluntary license agreement would have been. The initial fees are 25% higher than the fees ASCAP offered to the public broadcasters under a voluntary arrangement.

Further, one of the reasons public broadcasting repeatedly cited to Congress for a compulsory license was ease of recordkeeping. Yet the reporting requirements¹⁷⁶ of the CRT decision are more burdensome for public broadcasting than voluntary licensing would have entailed.

Thus, there is a serious question as to the value and effectiveness to public broadcasting of the compulsory license it fought so hard to get. The Tribunal has recognized that question and stated its intention to examine it and make recommendations to Congress, perhaps for the elimination of the public broadcasting compulsory license.

Similar problems may be seen in the other compulsory licenses enacted by the new law—the jukebox compulsory license and the cable television compulsory license. In those areas, procedural problems have arisen—the compulsory licenses which were thought to make acquisition of necessary rights simple for users of copyrighted works have had exactly the opposite effect. The recordkeeping, registration and filing requirements under the compulsory licenses are far greater than would have been required under voluntary license agreements.

In our society, the seizure of property without permission of the owner is repugnant—even more so when, as in the case of compulsory licensing, that seizure does not accomplish the end intended. The compulsory rate-making procedures under the first copyright statute, the Statute of Anne, were repealed twenty-nine years after enactment, for they had not been effective.¹⁷⁶ It is not too late to learn from history—and there is no need to wait twenty-nine years to do so.

175. 37 CFR §§304.3 (e), 304.4 (c), 304.7 (e), 304.8 (d) and (e) (1978).

176. Act. of 12 George II (1739), cited in H. Ransom, *The First Copyright Statute*, 107, n. 13 (1956).

APPENDIX 5



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D. C. 20006

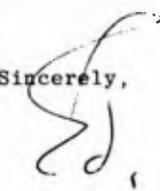
April 23, 1979

EDWARD COOPER
VICE PRESIDENT

Dear Bruce:

We ask that the attached Memorandum from the Motion Picture Association of America, Inc., proposing specific amendments to the General Revision of the Copyright Act (Public Law 94-553; 90 Stat. 2547) be included in the record of the Subcommittee's oversight hearing on the Copyright Act generally. Attached to the Memorandum are drafts of three specific amendments labeled A, B, and C. No's. A and B are different legislative approaches to accomplish the same objective while C is a modification of that objective.

Sincerely,

A handwritten signature in dark ink, appearing to be 'E. Cooper', is written over the word 'Sincerely,'.

Enclosure

Bruce Lehman, Esquire
Counsel
House Subcommittee on Courts,
Civil Liberties and
Administration of Justice
Suite 2137
Rayburn House Office Building
Washington, D.C. 20515



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D. C. 20006

COPYRIGHT ACT REVISION

The Motion Picture Association of America, Inc., a trade association of the larger American producers of film and program material used by cable television systems, urges the revision of Sections 111(d)(3), 111(d)(5)(B), and 116(c)(1) of the General Revision of the Copyright Act of 1976 to eliminate those provisions which require a deduction from compulsory license fees of certain administrative expenses incurred by the Copyright Office and the Copyright Royalty Tribunal. This deduction is patently unfair, unjust, and inequitable because it further increases the subsidy which copyright owners are compelled to contribute to cable systems. Moreover the operation deduction diminishes royalty payments which by congressional fiat have no meaningful relation to the market value of the program material used by cable systems. Attached hereto are two proposed amendments (labeled A and B) that would accomplish that purpose.

JUSTIFICATION FOR AMENDMENT

1. The present language of the Act employs the phrases "after deducting the reasonable costs incurred by the Copyright Office" and "after deducting its reasonable administrative costs...." We believe this language lends itself to imprecise and inaccurate interpretation of the specific costs which may be fairly and appropriately charged to and deducted from the copyright pool. The word "reasonable" itself may be variously interpreted according to the subjective view of the interpreter. In the case of the Copyright Office particularly, where a large number of employees are engaged in many aspects of work related generally to copyright matters, and indeed to certain aspects of work related to but not directly involving specific administrative tasks dealing with the royalty pool, it is difficult to allocate fairly the salaries and other related costs to the various functions.

We believe that Congress intended that the foregoing provisions should be narrowly interpreted in the context that it had already imposed extremely low royalty rates yielding minimum returns to copyright owners. There is also reason to believe that, in the absence of more specific and restrictive language in the statute, administrators in the

Copyright Office will continue to interpret the Act as requiring administrative costs to be assessed as a charge against copyright royalty funds.

2. The compulsory license established by Section 111 of the Act is a special privilege granted by the Congress for the benefit of cable television systems. It gives cable systems the right to use copyrighted material broadcast by television stations without the permission of the owners of that material. It denies the copyright owner control of his property that is retransmitted to cable systems. Copyright owners were compelled by Congress to make program material available to cable television systems and at a price fixed by Congress for use of the program. Cable systems alone were made the beneficiaries of this policy. Other users of television program material must negotiate in the marketplace for what they can use and what they must pay for what they use.

Certainly, Congress can justifiably contend that the grant of the compulsory license to cable was predicated upon the public interest based on the assumption that the public would benefit from the largess it granted to cable systems. But, it should be noted that this special concession handed to cable television systems is at the expense of the copyright owners. In short, Congress

established a subsidy for cable but ordered the copyright owners to pay the subsidy.

In essence, the creation of the Copyright Royalty Tribunal and the establishment of machinery in the Copyright Office to administer, collect, and disburse copyright payments were mechanisms to permit cable systems to by-pass the marketplace and obtain program material that is essential to their operation.

To add insult to injury, Congress through the provisions of Section 111 of the Copyright Act, imposed an additional burden on copyright owners by requiring them to bear the cost of what appears certain to be lengthy, complex, and expensive proceedings to be conducted by the Copyright Royalty Tribunal. These expenses are additional to and over and above the costs of the administrative machinery, including personnel, in the Copyright Office that may be involved in collecting the copyright payments.

Ironically, the cost of operating the administrative machinery must be paid by copyright owners from bargain royalty payments they are forced to accept from cable systems. Clearly, logic and fairness suggest that if any private party is to bear these administrative costs, it should be the beneficiary of the compulsory license -- the cable systems.

As pointed out in (1) above, the statute establishes no limit on the amount that may be deducted from the royalty fees which would otherwise be paid to copyright owners, nor does it provide a means by which the Copyright Office and the Copyright Royalty Tribunal can be required to justify the costs of their respective operations.

We submit, therefore, that equity, fairness, and public policy require that copyright owners should not be compelled to bear the administrative costs that flow from the compulsory license requirement imposed upon them. The license was imposed for the benefit of the cable systems and presumably for the public they serve. We strongly believe that if the public is in fact the ultimate beneficiary of this policy, the costs of administering the compulsory license is a proper charge against the public and should be paid from the general revenues of the Government.

3. If copyright owners are compelled to continue to bear the administrative costs of the compulsory license subsidy granted cable systems, the existing wide-open method of charging costs against the royalty payments should be subjected to reasonable restraint. Congress could meet this objective by providing, through amendment to the Copyright Act, some meaningful assurances that the administrative

costs to be deducted from the royalty payments must be justified through Congressional oversight now imposed upon all government agencies and specific monitoring by the appropriations process. This could be accomplished by requiring the Copyright Office and the Copyright Royalty Tribunal to publicly justify in detail their expenses for this item to the appropriate committees of the Congress. An amendment (labeled C) that would accomplish this purpose is attached herewith.

A B I L L

To amend the General Revision of the Copyright act, and for other purposes.

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

That this Act may be cited as the "Copyright Royalty Amendments of 1979".

Section 1. Section 111 (d) (3) of Public Law 94-553 (90 Stat. 2547) is amended as follows:

That in the first sentence of said paragraph immediately after the words "The Register of Copyrights shall receive all fees deposited under this section" the following language is deleted: "after deducting the reasonable costs incurred by the Copyright Office under this section,".

Section 2. Section 111 (d) (5) (B) of Public Law 94-553 (90 Stat. 2547) is amended as follows:

That in the second sentence of said paragraph immediately after the words and phrases "If the Tribunal determines that no such controversy exists, it shall" the following language is deleted: "after deducting its reasonable administrative costs under this section,".

Section 3. Section 116 (c) (1) of Public Law 94-553 (90 Stat. 2547) is amended as follows:

That in the first sentence of said paragraph immediately after the words and phrases "The Register of Copyrights shall receive all fees deposited under this section, and" the following language is deleted: "after deducting the reasonable costs incurred by the Copyright Office under this section,".

A B I L L

To amend the General Revision of Copyright Law,
and for other purposes.

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

That this Act may be cited as the "Copyright Royalty Amendments of 1979".

Section 1. Section 111 (d) (3) of Public Law 94-553 (90 Stat. 2547) is amended in its entirety to read as follows:

The Register of Copyrights shall receive all fees deposited under this section and shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided in this title. The Register shall submit to the Copyright Royalty Tribunal, on a semi-annual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

Section 2. Section 111 (d) (5) (B) of Public Law 94-553 (90 Stat. 2547) is amended in its entirety to read as follows:

After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

Section 3. Section 116 (c) (1) of Public Law 94-553 (90 Stat. 2547) is amended in its entirety to read as follows:

Distribution of Royalties. - -

(1) The Register of Copyrights shall receive all fees deposited under this section and shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-

bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).

A B I L L

To amend sections 111(d), 116(c)(1), and 807 of title 17, United States Code, relating to copyrights, to provide for legislative oversight of certain administrative costs incurred by the Copyright Office and by the Copyright Royalty Tribunal.

Be it enacted etc., That section 111(d) of title 17, United States Code, is amended--

(1) by striking out the first sentence of paragraph (3) and inserting in lieu thereof the following: "The Register of Copyrights shall receive all fees deposited under this section and shall deposit them in the Treasury of the United States in such manner as the Secretary of the Treasury directs. There are authorized to be appropriated to the Copyright Office, from amounts deposited in the Treasury under the preceding sentence, such amounts as may be specified annually in appropriation Acts for payment of the reasonable administrative costs incurred by the Copyright Office under this section."; and

(2) by striking out the second sentence of paragraph (5)(B) and inserting in lieu thereof the following: "If the Tribunal determines that no such controversy exists, it shall distribute such fees to the copyright owners entitled, or to their designated agents. There are authorized to be appropriated to the Tribunal, from royalty fees deposited in the Treasury under paragraph (3) of this subsection, such

amounts as may be specified annually in appropriation Acts for payment of the reasonable administrative costs incurred by the Tribunal under this section."

Sec. 2. Section 116(c)(1) of such title 17 is amended by striking out the first sentence and inserting in lieu thereof the following: "The Register of Copyrights shall receive all fees deposited under this section and shall deposit them in the Treasury of the United States in such manner as the Secretary of the Treasury directs. There are authorized to be appropriated to the Copyright Office, from amounts deposited in the Treasury under the preceding sentence, such amounts as may be specified annually in appropriation Acts for payment of the reasonable administrative costs incurred by the Copyright Office under this section."

Sec. 3.(a) Section 807 of such title 17 is amended to read as follows: ~~§~~807. Appropriation for certain costs of Tribunal

"There are authorized to be appropriated to the Tribunal, from royalty fees deposited in the Treasury under sections 111 and 116, such amounts as may be specified annually in appropriation Acts for payment of the reasonable^{administrative} costs incurred by the Tribunal in the conduct of proceedings under section 801 (b)(3)."

(b) The table of sections for chapter 8 of such title 17, immediately preceding section 801, is amended by striking out--
 "807. Deduction for costs of proceedings."
 and inserting in lieu thereof--
 "807. Appropriation for certain costs of Tribunal."

APPENDIX 6

TAD CRAWFORD
 ATTORNEY AT LAW
 804 EAST 17TH STREET, APT 804
 NEW YORK, NEW YORK 10003
 AREA CODE 212 777-8396

May 31, 1979

Honorable Robert W. Kaetermeier
 Chairman, Subcommittee on Courts, Civil
 Liberties and the Administration of Justice
 House Office Building
 Washington, D.C. 20515

Dear Representative Kaetermeier:

On June 26, 1978 I wrote on behalf of the Graphic Artists Guild with respect to the work-for-hire contracts being used by publishers under the new copyright law. That letter extensively documented this practice. It also expressed the Guild's belief that artists doing an assignment should be able to negotiate as to what rights are sold, rather than being offered a work-for-hire contract on a take-it or leave-it basis.

This situation has in no way improved. To the best of my knowledge the companies listed in the letter of June 26, 1978 are still using work-for-hire contracts. Attached hereto is a press release dated April 23, 1979 from the Guild which shows its continuing concern in this area.

We would welcome any consideration that the Subcommittee can give to this matter. It is our hope that the work-for-hire provisions of the copyright law could be amended by deleting "contributions to collective works" and "supplementary works" as categories that can be work for hire.

Respectfully submitted,


 Tad Crawford
 General Counsel
 Graphic Artists Guild

cc: Bruce Lehman, Esq.
 Barbara Ringer, Register of Copyrights
 Jon Baumgarten, General Counsel, Copyright Office
 Bernard Dietz, Copyright Office, Arts Section, Examining Division
 Robert Wade, General Counsel, National Endowment for the Arts
 Congressman Robert F. Drinan



Graphic Artists Guild
30 East 20 Street, Room 405
New York, N.Y. 10003
(212) 982 9298

FOR
IMMEDIATE
RELEASE

GRAPHIC ARTISTS GUILD CONDEMNS WORK-FOR-HIRE CONTRACTS

The Graphic Artists Guild, a national organization of more than 1,500 professional illustrators and graphic artists, has announced its strong opposition to the use of work-for-hire contracts for the purchase of freelance artwork by magazines, newspapers, and book publishers.

Gerald McConnell, president of the Guild, explained that a work-for-hire contract makes the publisher the creative artist for purposes of the copyright law. The actual artist gives up all right in the creative work. "Since this is not only contrary to prior practice in the field but also to the intent of the new copyright law," Mr. McConnell stated, "the Guild must at this time register a strong protest against this practice."

The new law that took effect on January 1, 1978 provides that unless there has been an express transfer of more, the publisher of a magazine acquires only the rights to publish and reprint a contribution in the specific magazine to which it had been sold. The legislative history concludes, "This is fully consistent with present law and practice and represents a fair balancing of equities."

"The practice of publishers in demanding work-for-hire contracts in all possible situations is contrary to the spirit of the law," Mr. McConnell continued, "Moreover, when work-for-hire contracts are forced on individual free-lance artists by magazines affiliated with large conglomerates, the result is an overreaching the Guild considers destructive of fair commercial practice and the opportunity to enter into freely bargained contracts."

The sale of one-time magazine rights in the United States and Canada was the prevalent practice prior to passage of the new copyright law. If greater rights were sold, publishers paid higher prices for them. "How ironic it would be," Mr. McConnell concluded, "if a law intended to benefit the creators of art were to work to their detriment through such a loophole."

For further information, contact Kathleen McLaughlin at the Guild.

(April 23, 1979)

LAD CRAWFORD
ATTORNEY AT LAW
804 EAST 177TH STREET, APT 86J
NEW YORK, NEW YORK 10003
—
AREA CODE 212 880-7187

June 26, 1978

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
House Office Building
Washington, D.C. 20515

Dear Representative Kastenmeier:

I am writing on behalf of the Graphic Artists Guild, a professional organization with a membership of more than 1,500 commercial artists who frequently supply art to book and magazine publishers.

The Guild is extremely concerned about the treatment of its members under the "work for hire" provisions of the new copyright law. In the hearings representatives of publishers indicated that work for hire should be applicable to contributions to collective works and supplementary works because, in certain cases, the publisher exercises close supervision in composing a finished work out of many discrete parts. Many members of the Guild, however, find that they are facing work for hire contracts across the board on assignments that are done in their own style, in their own studio, by a deadline, and without special supervision. Most of these assignments do not, in fact, form a small part of a large work put together by the publisher from many sources. Some publishers have gone so far as to demand that artists sign "lifetime" work for hire contracts. To make matters more difficult, artists are unable to negotiate on equal terms with the publishers which, frequently, are merely an arm of a far larger conglomerate. If the artist refuses to do the work, the publisher simply goes elsewhere to hire a different artist.

Bad as this situation is for artists today, the Guild fears that it will become worse in the future as more publishers exercise their disproportionate strength in negotiations and seize all the rights that the copyright law vests initially in the creator of the art. The publishers do not merely purchase the rights they intend to exercise in such cases, but for the same fee purchase all the creator's rights even though these rights may never be exploited.

To document these practices, the Guild has supplied me with a sampling of contracts that are appended to this letter. These include work for hire contracts issued by the following publishing houses: Rand McNally & Company (App. A), McGraw-Hill (App.B), Ziff-Davis (App.C), Harcourt Brace Jovanovich (App.D), Bantam Books (App.E), Dell Publishing Company (App.F), Readers Digest Association (App.G), McCormick-Mathers Publishing Company (a division of Litton Educational Publishing, App.H), Marvel Comics Group (a division of Cadence Industries Corp., App.I), Meredith Corporation (App.J), Robert A. Becker Advertising (App.K), and Parents Magazine Enterprises (App.L). The contracts from Meredith Corporation and Robert A. Becker Advertising (Apps.J and K) are "lifetime" contracts in that they apply to all future assignments given the artist, not only to the immediate assignment. The contract from Marvel Comics Group (App.I) is written on the back of a check, so it clearly comes after rather than before the assignment. One example of the artist's inability to negotiate on a par with the publishers is shown by the artist's letter in Appendix G stating that Designs for Medicine, Inc., refused to hire him when he would not sign a work for hire contract, although he had previously done three books for the same company.

In addition, many publishers are relying on their bargaining position to extract "all rights" contracts from artists. These include Random House, Knopf, Pantheon, Vintage, Ballantine (App.M, Graphic Arts Purchase Order for all the foregoing publishers), North American Publishing Company (App.N), Pocket Books (App.O), Times Mirror Magazines (App.P), Franklin Philatelic Society (App.Q), and Redbook Publishing Company (App.R).

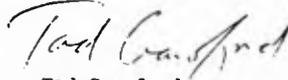
Finally, some publishers are using work for hire contracts but assigning back to the artist certain limited rights. This tactic has mainly been used by publications of Time-Life, including Fortune (App.S), Sports Illustrated (App.T), and Time (App.U).

Other groups representing artists and writers are also becoming concerned about this matter. For example, the American Society of Journalists and Authors have taken a firm public position in opposition to publishers' use of such work for hire contracts (App.V, article from the New York Times, April 28, 1978, p.C21). In addition, an Ad Hoc Committee to Preserve Creators Rights has now been formed to express the concern of the member groups about the effect of work for hire contracts on the rights of artists and writers. In addition to the Graphic Artists Guild and the American Society of Journalists and Authors, the members of the Ad Hoc Committee include the Society of

Magazine Photographers, Cartoonists Guild, Comic Book Creators Guild, National Cartoonists Society, Screen Cartoonists Local 841, Society of Illustrators, the Association of Science Fiction Artists, the Association of American Editorial Cartoonists, Artists Equity of New York, the Foundation for the Community of Artists, and Boston Visual Artists Union.

The Guild appreciates the sensitivity you have exhibited to the copyright concerns of artists in the past. Please advise me if any further information will be of assistance to the Subcommittee in reviewing this matter.

Respectfully submitted,



Tad Crawford

cc: Bruce Lehman, Esq.
 Barbara Ringer, Register of Copyrights
 Jon Baumgarten, General Counsel, Copyright Office
 Bernard Dietz, Copyright Office, Arts Section, Examining Division
 Robert Wade, General Counsel, National Endowment for the Arts
 Ed Williams, Subcommittee on Criminal Laws and Procedures
 Congressman Robert F. Drinan
 Gustave Harrow, New York State Attorney General's Office



Appendix C

Ziff-Davis Publishing Company One Park Avenue, New York, N.Y. 10016 (212) 725 3500

Circle Address
ZIFF DAVIS NEW YORK

5/8/78

Dear Ken Dallison:

We have specially commissioned you to illustrate
DC-3 and control tower in clouds for use as a
contribution to the Magazine Flying.

In order to comply with the new Copyright Law's
technical requirements, please sign and return the enclosed
copy of this letter to signify your agreement that this
contribution will be considered a "work made for hire,"
which means that we own all right, title and interest in it
throughout the world, and that you have received \$ 1,367.95
in full payment of your services in writing this contribution.

Very truly yours,

ZIFF-DAVIS PUBLISHING COMPANY

By: J. Canell

ACCEPTED AND AGREED TO:

*Ken: Please sign and return
to me, your check will be mailed
as soon as we receive this back*



Appendix D

*An attached the pertinent part
of a contract concerning an*

If requested by the Publisher, the Artist agrees to prepare additional drawings for the Work and the Publisher shall compensate the Artist proportionately, and such additional drawings shall be covered under the terms of this Agreement.

The Artist represents and warrants that all artwork prepared under the terms of this Agreement shall be original and shall not violate any copyright, proprietary right or other right.

All artwork prepared under this Agreement shall be work-for-hire of which the Publisher is author-at-law and the Publisher shall be the exclusive owner of all rights in the original artwork and reproductions thereof, including all copyrights, extensions of copyright, and renewals. The Publisher shall, at its sole discretion, have the right to use the artwork in the Work and in any other materials or publications, including but not limited to the exclusive right to print, publish, film, display, record, broadcast, transmit, and otherwise reproduce and exploit the Work in its original or adapted form in all languages and formats, in audio-visual form and in all other forms, media and systems, including information storage and retrieval systems, or by any other process now known or hereafter developed.

This instrument, which shall be construed and governed by the laws of the State of New York, constitutes the whole Agreement between the Artist and the Publisher and any variations therefrom shall be valid only if incorporated on the reverse hereof and signed by both parties. The Artist acknowledges that the Publisher may publish works and materials dealing with subject matter similar to that contained in the Work, and nothing contained in this Agreement shall bar the Publisher from publishing such other works and materials. Nothing in this Agreement shall be construed to require the Publisher to act as a trustee for the benefit of the Artist or otherwise to act as a fiduciary.

HARCOURT BRACE JOVANOVICH, INC.

ANITA GREEN-REPRESENTING ARTISTS

155 EAST 38 STREET, NEW YORK, NEW YORK 10006 (212) 697-6700

Appendix E



220 FIFTH AVE., NEW YORK 10019 • TELEPHONE 212 765 8500
 CABLE ADDRESSES: BANTAMBOOKS - SHIRAZIARHS; BANTAM BOOKS OF CANADA LTD.
 TRANSWORLD PUBLISHERS, LTD. (TORONTO) • CONNIE BURNS, LTD. (LONDON)

Sanford Rossin

This will confirm that we have hired you to prepare the artwork to be used as an adjunct to *The Settlers* as the illustration for the cover of our edition. We reserve the right to accept, request or make our own revisions, and/or reject the final artwork for publication within one week of delivery by you.

You represent and warrant that you are the creator of the art to be submitted hereunder, that the art will in no way infringe on the rights or copyright of any person; and that if you use a likeness of a living person, you will have obtained and hold an appropriate release.

It is understood that the art created is a work for hire and that we shall be the sole owners of the original artwork and all rights including reproduction for any and all purposes.

For this work we have agreed to pay you as your full compensation \$ for the preparation of a preliminary sketch and, upon its approval, the final artwork.

Please sign and return the enclosed copy of this letter to indicate your agreement to these arrangements.

AGREED TO AND ACCEPTED BY:

Sincerely

Leonard Lenne
 Vice President & Art Director

Appendix F, p.1

DELL PUBLISHING CO., INC. • 1 DAG NAMMARSKJOLD PLAZA • 345 EAST 47 STREET • NEW YORK, N.Y. 10017 • TEL. (212) 832-783

 Dear

This letter confirms our understanding with respect to the work which you are hereby engaged to do for us (and/or our assigns), which has been specially ordered or commissioned by us as a supplementary work (illustrations) and which we expressly agree shall be considered a work for hire, which is to consist of:

← (Number of DRAWINGS, NAME OF BOOK, NAME OF AUTHOR)

1. You hereby undertake to deliver this work in form and content acceptable to us by DATE. If you fail to so deliver, you agree, upon our written request, to repay to us any advance payment made to you hereunder.
2. You hereby grant to us all your right, title, interest and estate in and to the work, including copyright.
3. As full consideration for the grants made and services to be rendered, we agree to pay you the following:

A one-time fee of payable on the signing of this letter agreement; and on acceptance by us of the completed artwork.

- ~~4. You agree to read, revise, correct and return promptly all proof sheets of the Work and agree that alterations in the proof made at your request, the cost of which exceeds ten percent (10%) of the original cost of composition, exclusive of the cost of correction printer's errors, shall be paid by you.~~
5. You represent and warrant that the work that you shall deliver to us will be original with you, not subject to any prior liens or encumbrances; will not violate any statutory or common law copyright; will contain no plagiarized passage or statements nor violate any right of privacy nor contain any libelous, obscene or other matter contrary to law. You agree to indemnify and hold us harmless against any loss or expense occasioned by your breach of this agreement or any of your warranties and representations hereunder.
6. We agree to furnish you with five (5) complimentary copies of the Work upon publication.

Appendix F. p.2

7. We agree to return the original art to you as soon after publication as possible, and said original art shall remain your property. Should new printings, or sublicense granted by Dell make it necessary, you agree to lend such original art to Dell upon request.

8. This agreement may not be assigned by you and shall be binding upon your heirs, executors, administrators and assigns.

~~_____~~
If this letter conforms with your understanding of our agreement, please sign and return the enclosed copies to us.

ACCEPTED AND AGREED:

DELL PUBLISHING COMPANY, INC.

~~_____~~
Donald W. Braunstein, Vice-President



THE READERS DIGEST



ASSOCIATION, INC.

CONTRACT

FOR SPECIALLY COMMISSIONED WORK

Date: _____

Agreement with: _____

Address: _____

Telephone: _____

It is agreed between you and The Reader's Digest Association, Inc. (RDA) that you shall create and execute the following original Work as specially ordered by and prepared under the supervision of RDA for use as a supplementary work or as a contribution to a compilation:

Upon delivery of the completed Work to RDA's sole satisfaction you will be paid the following amount as payment in full: \$

It is agreed between the parties hereto that the Work shall be deemed a "work made for hire" within the meaning of the applicable United States copyright laws and that RDA shall own all the rights comprised in the copyright of the Work, including but not limited to all reproduction, exhibition and adaptation rights, in any media, throughout the world, for any and all copyright terms, extensions, renewals or reversions thereof.

Use shall be at RDA's discretion. You warrant and represent that the Work prepared and submitted by you to RDA is wholly original and does not infringe upon or violate any copyright, common law right, or any other right of anyone else.

Preliminary work due: _____ Date

Completed Work due not later than: _____ Date

FOR THE READER'S DIGEST ASSOCIATION, INC.:

Signature and Title _____ Date

AGREED AND ACCEPTED BY:

✓ x

Signature _____ Date



McCORMICK-MATHERS PUBLISHING COMPANY

450 West 33rd Street, New York, New York 10001 212-664-8860

Appendix H, p.1

Dear _____

This letter, when signed by you and returned to us, will confirm our arrangement whereby you have agreed to perform services as an illustrator in connection with a Work tentatively entitled

Individualized Reading^{SEA} by Valmont

- (1) The illustrations specified in EXHIBIT A, attached hereto, shall be delivered by March 23, 1978
- (2) You represent and warrant that you have full power to enter into and make this agreement, that the material you prepare is intended for publication, that the material is original, has not been previously published, is unencumbered, is not in the public domain, and that such material will not violate any copyright or the personal or proprietary rights of any person or entity.
- (3) You grant to us all rights in and to the material and any part thereof throughout the world in all languages, including, but not limited to, the right to print, publish, sell, display, record, broadcast and transmit the material in all formats, media and systems now known or hereafter developed, and to otherwise deal with the material in such manner as we deem appropriate in our sole discretion.
- (4) You agree that all material prepared by you and accepted by us for publication shall be a "work made for hire" and that we shall be the sole and exclusive owner of all rights, title and interest in the material, including the copyright therein.
- (5) We shall not be obligated to publish the material, and, if we publish the material, we shall not be obligated to use your services in connection with any new or revised editions of the Work.
- (6) a. For all of your services hereunder and all rights granted herein, we agree to pay you the sum of (See Exhibit A attached hereto.)
 b. The material you prepare and deliver shall be in form and content satisfactory to us. If you fail to deliver the material by the above date or if the material delivered is not satisfactory, we may terminate this agreement without any obligation to you. Any moneys paid to you in advance of such termination shall be repaid to us upon demand.

MARVEL COMICS GROUP, INC. INCORPORATED IN N.Y.
 DIVISION OF CADENCE INDUSTRIES CORP.
 375 MADISON AVE. NEW YORK, N.Y. 10017

3-21
T18
25026
JUN 17 78

THE FIRST NATIONAL BANK
OF BOSTON
BOSTON, MASS.

PAY
TO
THE
ORDER
OF

EXACTLY **IN** 2000 DOLLARS $\frac{00}{100}$

Sam Vines
 25 West 138th St
 New York, N.Y. 10011

Sam Vines

⑆0110⑉0039⑆509⑉7141⑆

Mr. McConnell:

1 JUNE 1978

Above is a xerox copy of a recent check received for freelance work done for MARVEL COMICS GROUP. As you can see from the reverse (see other side), it is Marvel's practice to stamp the back of each check with a notice that "By acceptance of this check, payee acknowledges... all this work are and shall be considered as works made for hire."

This not only is appropriate to your plea for "WORK-FOR-HIRE" purchase orders, but goes it one further by stating the objectionable phrase AFTER THE FACT: that is, after the work has been done and handed in.

In this particular case, there is at least a possibility of a way out, however. I somewhere read that Neal Adams—a strong opponent of the "work-for-hire" clause—simply crossed out the entire stamped statement before cashing the check. This negates the one-sided "contract," but allows the artist to collect his money. I myself have tried this tactic once or twice successfully (at least, I never heard from Marvel's lawyers or accountants), although I tend to be a bit disinclined to do so. I am not quite as big a name in the field as Mr. Adams, and fear loss of an account.

(over)

Appendix I, p.2

By acceptance and endorsement, check, P.C.T.S. A.
 edged, (b) full sent
 for paper sent
 Co. Inc. sent
 Co. Inc. sent
 Condon Group (b)
 payee. Since I have been
 within the scope of that
 employment, and I that
 all property, including the and
 shall be reported as
 work for hire, the
 property of the same
 management Co., Inc.
 and/or Marvel Comcon
 Group.

I am also including the following statement, which I have been obliged to sign and include with invoices for work done for CONTEMPORARY PERSPECTIVES, INC., 223 E. 48 ST., a publisher of juvenile books. The statement:

"I WARRANT THAT THE WORK COVERED BY THIS INVOICE IS ORIGINAL AND THAT I HAVE FULL OWNERSHIP OF IT. IN CONSIDERATION OF THIS PAYMENT I ASSIGN ALL RIGHT, TITLE, AND INTEREST IN THE WORK TO CONTEMPORARY PERSPECTIVES, INC. AND I AGREE TO EXECUTE ANY INSTRUMENTATION NECESSARY TO EFFECT THIS ASSIGNMENT."

The company first gave me this statement to include with my invoices in January 1978—after the new copyright law went into effect. I have since completed all outstanding work owed the company, and intend to do no further work if such a statement—signing away ALL MY RIGHTS—is insisted upon. It does not refer specifically to the artwork as "done for hire," but the general result is the same, so I thought you might be interested.

I hope this material helps you—and all of us—in your quest for a better deal for artists.

Sincerely,
 SAM VIVIANO

M

DESIGNS FOR MEDICINE, INC.

Appendix J, p.1

Executive Office: 230 East 44th Street, Studio / New York, N.Y. 10017/212-697-0130



May 27, 1978

Gerald McConnell
 President
 Graphic Artists Guild
 30 East 20th Street
 New York City 10003

Dear Gerald:

I received your letter concerning the deliberate attempt by Publishing Industry to circumvent the new copyright laws.

I just had an experience with Meredith Press in which I was promised a new medical book to illustrate, but the enclosed contract dated December 27th ~~was~~^{was} not mailed to me until January 4, 1978, ~~and~~^{AND} ~~was~~ sent to me to sign first. I refused to sign and the book was given to someone else who did sign. I've done three books for them, this would have been my fourth. I'm finishing the third one now and am having lots of family problems with them, all resulting from contract negotiations concerning my rights as an artist. All three of the books I've done were on a contractual basis and I had to give up all rights to get the jobs. This time I held back and they gave it to someone else.

They are, as you can see from the enclosed article from a recent issue of New York Times, also giving the same treatment to writers and photographers.

Sincerely,
 Paul Quilman

MASTER
AGREEMENT

1. MEREDITH
FROM OR MEREDITH

AGREEMENT effective the 27th day of
December, 1977, by and between _____
Paul Zuckerman

NOT
DFM

(DESIGNER") and MEREDITH CORPORATION, 1716 Locust Street, Des Moines
Iowa 50336 ("MEREDITH").

In consideration of the mutual covenants and agreements
hereinafter set forth, MEREDITH and DESIGNER hereby agree as follows:

1. DESIGNER agrees to create for MEREDITH works made for hire
as may be separately agreed to from time to time.

2. MEREDITH shall own all rights, title and interest in the
WORKS hereunder including, but not limited to, all copyrights of any
nature whatsoever, all extensions thereof, all renewals and all
derivative rights.

3. In the event any work prepared hereunder shall be
adjudicated or otherwise shall become a WORK other than a work made
for hire, DESIGNER hereby assigns and transfers all right, title, and
interest in the WORK and any copyright of the WORK to MEREDITH effective
as of the date the WORK was created. DESIGNER further agrees to execute
any assignment or other document and to otherwise cooperate to secure
such ownership rights in MEREDITH.

Appendix J, p.3

4. In the event any assignment of a WORK hereunder is subsequently terminated pursuant to 17 U.S.C. Section 2D3 (Copyright Act of 1976), and the owner of the termination interest in the WORK shall offer to assign, license or otherwise make the WORK or any part thereof available to others, such owner shall offer to MEREDITH the right of first refusal to secure the same interest upon the same terms and conditions as are offered to the others which offer shall be accepted or rejected by MEREDITH within thirty (30) days of such offer by the owner of the termination rights.

5. DESIGNER warrants and represents that any WORK submitted hereunder is original, has not been previously published or, if previously published, that consent to use has been obtained on an unlimited basis; that to the best of DESIGNER's knowledge, all WORK or portions thereof obtained through DESIGNER from third parties are original or, if previously published, that consent to use has been obtained on an unlimited basis; that DESIGNER is the sole owner of all WORK; that DESIGNER has full power and authority to make this agreement; that the WORK prepared by DESIGNER does not contain any scandalous, libelous, or unlawful matter. DESIGNER will hold MEREDITH harmless for breach of this warrant. The WORK shall contain no material from other copyrighted works without MEREDITH's written consent and the written consent of the owner of such copyrighted material. Written consent for any such material submitted by DESIGNER shall be obtained by DESIGNER and filed with MEREDITH.

6. DESIGNER agrees, if requested by MEREDITH, to review final edited manuscript, proofs, and art according to schedules established by MEREDITH. If DESIGNER fails to adhere to such schedules, MEREDITH may procure such work done or do it itself and deduct cost thereof from payments which may become due to DESIGNER under this agreement. The parties agree that MEREDITH is not obligated to publish the WORK.

Appendix J, p.4

7. This agreement may be terminated by either party upon 45 days written notice to the other.

8. This agreement is non-assignable by DESIGNER or MEREDITH during the term hereof except that MEREDITH may upon sale of assets of any division or portion of its business assign its rights hereunder along with sale of such assets.

9. This agreement shall be binding upon the heirs, executors, administrators and successors to any of the DESIGNER's rights including termination rights, and upon the successors or assigns of DESIGNER and of MEREDITH.

10. Both DESIGNER and MEREDITH are and shall continue to be, independent contractors and neither shall be, or represent itself to be, an agent, employee, partner or joint venturer of the other. Neither party has, or should represent itself to have, any power or authority to commit the other party.

11. Iowa law governs this Agreement as if it were to be performed entirely in Iowa.

12. All notices pursuant to this agreement shall be addressed as follows unless altered by written consent of MEREDITH and DESIGNER

MEREDITH

Editorial Development and Planning Manager
Meredith Corporation
1716 Locust Street
Des Moines, Iowa 50336

DESIGNER

ROBERT A. BECKER INC • ADVERTISING • 622 THIRD AVENUE • NEW YORK, N Y 10017 • (212) 682-3900

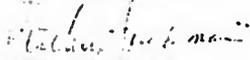
March 31, 1978

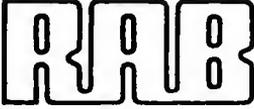
GEORGE SCHWENK, INC.
Rd. #1
Old Logging Road
Yorktown Heights, New York 10598

Prior to January 1, 1978 all work specially ordered or commissioned for use as a contribution to a collective work was automatically classified as a "work for hire". The Federal Copyright Act of 1976 now requires an executed written agreement. In order to avoid having every purchase order signed or having separate agreements executed with each order, we have devised a master agreement which will be applicable to all materials produced in the future. Purchase orders will continue to specify the work to be performed and the price which would have been agreed upon at the time.

Kindly date and execute both copies of this agreement and return one to my attention.

Very truly yours,


Arthur Friedman
Vice President - Finance



WORK FOR HIRE AGREEMENT

AGREEMENT made as of the date indicated below between ROBERT A. BECKER, INC. (hereinafter referred to as RAB) of 622 Third Avenue, New York, New York and

GEORGE SCHWENK, INC. of Rd. #1 Old Logging Road,

Yorktown Heights, New York 10598 (hereinafter referred to as SUPPLIER).

WITNESSETH:

WHEREAS, RAB, as an advertising agency representing various pharmaceutical companies, desires to purchase necessary artwork, photography and other creative property and services; and

WHEREAS, RAB seeks to establish its right to the continued and exclusive use of such property and services; and

WHEREAS, SUPPLIER has the necessary expertise and ability to create or perform the desired result.

NOW, THEREFORE, RAB and SUPPLIER agree as follows:

1. SUPPLIER will furnish specifically commissioned artwork, photography or other property or services which is the subject of an RAB purchase order.
2. All such material hereinafter ordered or commissioned by RAB shall be deemed to be "work for hire" and as such, all copyright ownership shall hereby vest with RAB, its clients, and their assigns and licensees.
3. RAB shall compensate SUPPLIER for all services rendered pursuant to agreement reached at the time each specific service is requested and confirmed by purchase order.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by a duly authorized representative as of the day and year written below.

Dated _____

ROBERT A. BECKER, INC.

By *Stephen Friedman*
Vice-President / Finance

By _____

PARENTS' MAGAZINE ENTERPRISES, INC.

1230 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10020
ESTABLISHED 1914

NOTE FOR FILE

This copy of the magazine is marked
 and has been photographed by illustration
 and the original copy has been scheduled to appear in the
 magazine. The illustration for
 the cover of the magazine is in
 color.

MANUAL

The following information is for
 your information only. It is not
 intended to be used as a guide
 for the operation of the
 equipment. The user should
 refer to the instruction manual
 for complete details. The
 information in this manual is
 subject to change without
 notice. The manufacturer
 assumes no responsibility for
 damage or injury resulting
 from the use of this
 equipment.

PARENTS' MAGAZINE ENTERPRISES, INC.

25 VANDERBILT AVENUE, NEW YORK, N.Y. 10017

TELEPHONE: 475-0715-0000

March 21, 1978

Mr. Birmingham

WORK FOR HIRE

~~South Bay & Tara Loop Studio~~

Dear

We would like to have you write a story (article, filler) for
~~July and Nov. 78~~ ^{at} ~~Parents' Magazine~~ ^{Parents' Projects (July)} Magazine about words in length on the subject of

 . The deadline for the manuscript will be .

For this work, you agree to accept a fee of \$. You recognize
~~Parents' Projects (July)~~ ^{Parents' Projects (July)} and agree that this is a work made for hire and that the copyright and
~~from both copies~~ ^{from both copies} all rights in and to the copyright are in the name of Parents' Magazine
Enterprises, Inc. ~~Parents' Projects (Nov.) from Tara Loop Studio~~ ^{Parents' Projects (Nov.) from Tara Loop Studio}

If these terms are satisfactory to you, please sign the enclosed copies
^{100.00} and return them to us. Please include your Social Security number. One
will be signed by us and returned to you. You will receive our check
in payment for this material within twenty-one (21) days after our re-
ceipt of the finished work.

Robert P. Birmingham
Author's Signature

3/21/78
Date

066186737
Social Security Number

Robert P. Birmingham
For Magazine

3/21/78
Date

WORK HIRE

March 21, 1978

201 EAST 50TH STREET, NEW YORK, N.Y. 10022 (212) 751-3600 GRAPHIC ARTS PURCHASE ORDER

To: Howard Koster
26 Highwood Ave.
East Norwich, N.Y.
11733

ORDER NUMBER J 4872 Appendix M
Our order number and all of the information within this box must appear on your invoice
ADDRESS INVOICE TO ACCOUNTS PAYABLE DEPARTMENT.
DATE 1/27/71 AUTHOR Howard Koster
TITLE DRAWING OF HANDS
BOOK NO. 27737-6 P.TG. NO.
PRODUCT LINE/ACCOUNT CODE 3166-51

This is your authorization to create Graphics to be done to our specifications and satisfaction as described below.

- 1. If you fail to deliver Graphics in accordance with the Delivery Schedule, we will be entitled to resumption of previously paid portions of your fee.
- 2. We will have the right, but not the obligation, to the use of your name in connection with the Graphics.
- 3. You hereby warrant and represent the Graphics are original, do not violate or infringe the right of any third party, including statutory or common law copyright, or rights of privacy, that you will obtain without charge to us a consents needed from models or others depicted in the Graphics, and that you have the full right and authority to perform your obligations and grant the rights herein promised. You hereby indemnify and agree to defend and hold us, our licensee, and any other licensee, from any damages, including attorney's fees, that result out of any claim, action or proceeding based upon or alleged violation of your warranties and agreement.
- 4. Either cross out inapplicable paragraph:
 - (a) We, our assigns and licensees are granted the exclusive assignable right and license to use the Graphics for all reproduction purposes. You shall be entitled to return of the Graphics after manufacture of a "reasonable" and/or "decent" book or other product using the Graphics. It will not be our responsibility to track up the Graphics nor we shall be responsible for loss or damage to the Graphics, except as a result of our own negligence, and six months after manufacture we shall have no responsibility if you have not previously requested return in writing.
 - or,
 - (b) You acknowledge we are purchasing an right, title and interest in the Graphics, including copyright and any renewals, and the complete right to use the Graphics for any purpose.

L. In full consideration we shall pay a fee as follows:
TOTAL FEE: \$1800 + 4% handling fee
PAYMENT SCHEDULE: 100% on 1/27/71

- (1) \$ _____ payable on _____
- (2) \$ _____ payable on approval of first version of the Graphics, or as provided elsewhere.
- (3) \$ _____ payable on approval of the final camera-ready version of the Graphics.

M. The above fee includes all your expenses incurred in completion of your obligations under this contract, except where otherwise agreed in writing.

N. Delivery Schedule:
First version by _____

Revised version by _____
Final version by APRIL 17

- (a) We will be the sole judge of the acceptability of the Graphics. If in our judgment the Graphics require revision to be acceptable, we may request you to make such revisions or at our option employ others and fairly adjust the agreed upon fee you in accordance with the expense of completing the Graphics.
- (b) In case of rejection before submission of the final version your total fee including prior payments will be \$ _____ and in case of rejection of the final version submitted your total fee including previous payments shall be \$ _____

Note: If neither paragraph has been crossed out, paragraph (a) shall be applicable if (a) is applicable; no other fee will be payable and it should not be included in your invoice. Your invoice should then state that it is for rights of reproduction, the Graphics to be returned.

Resale: If in the event the Graphics are used for any purpose listed below, the indicated one-time payment will be due for the listed category. No payments will be due for any other uses in the same category or for any use not specifically listed.

This contract will be subject to New York law, expresses the entire understanding of the parties concerning its subject matter, and may not be modified except by a written instrument signed by both parties. This contract will be binding upon us only if initialed by our authorized signatory. Acceptance of payment by you will constitute your agreement to these terms.

Howard Koster
Accepted by (Artist)
Social Security Number: 122-19-9645
Artist's Certificate: 1/27/71
Accepted by (Art Director, Random House, Inc.)

Appendix N

NORTH AMERICAN CUE BUILDING 848 MADISON AVE., NEW YORK, N.Y. 10022 (212) 371-6800

Dear Contributor:

This letter shall serve to acknowledge the receipt of your contribution to our publication _____:

Title of Item:

Nature of Item: () Article () Illustration () Photo
Other _____

You have agreed to accept from us \$ _____ in consideration for our use of the contribution and for your transfer to us of the sole and exclusive worldwide right to: (i) secure copyrights and all renewals thereof for the contribution, all derivative works and all compilations and collective works in which the contribution may appear; (ii) prepare derivative works based upon the contribution; (iii) reproduce the contribution for any purpose in any form; (iv) perform or display the contribution publicly in any form; and (v) distribute the contribution in any form.

You warrant the originality, authorship and ownership of the contribution, that it has not been heretofore published, and that its publication by us will not infringe upon any copyright proprietary or other right.

If the foregoing represents our understanding with respect to the contribution, please date and sign the enclosed copy of this letter and return it to us. Your payment will be sent promptly by return mail.

Very truly yours,

North American Publishing Co.

By: _____

Acknowledged and agreed to
this day of 197 .

Author



CUE is New York's
Affluent City Magazine
Established 1932

AFFILIATED MAGAZINES:

Auto
Waste & Metals
American School & University
L&Ward

Newspaper Production

MEMBER OF:
Magazine Publishers Association
North Bureau of Circulation



Appendix O



A Division of Simon & Schuster, Inc.
 Rockefeller Center, 630 Fifth Avenue
 New York, N.Y. 10020
 Telephone 212 Circle 5-6400

ARTIST:

ADDRESS:

ART:

DATE:

DUE DATE:

We hereby commission you as an independent contractor on the terms and conditions herein stated to prepare and deliver to us the artwork (herein referred to as "Artwork"), at your sole cost and expense, in finished form, satisfactory to us. You undertake to execute the commission.

We shall have the right to reject the Artwork so delivered in our sole discretion within six (6) weeks following delivery.

You represent and warrant that the Artwork when delivered will be original and will not violate the copyright, right of privacy or any other right of any person, firm or corporation; and that you will be the sole and exclusive owner of the Artwork and all rights therein with full power to dispose of same.

If the likeness of any individual is depicted by you in the said Artwork, you shall deliver to us, on our request in a form satisfactory to us, release(s) from the individual(s) so depicted allowing use by us and those authorized by us of the said likeness(es) in advertising and for purposes of trade.

You will indemnify us for all loss, damages and expense that we may suffer or incur (including reasonable attorney's fees) by reason of the breach by you of any of the warranties or representations made by you herein.

ASSIGNMENT

FOR VALUABLE CONSIDERATION RECEIVED, I, _____, hereby assign and transfer to Times Mirror Magazines, Inc. (publisher of _____ Magazine), and its licensees, successors, and assigns, all rights for the life of the copyright and any renewals, to all elements of copyright including, without limitation, reproductions and distribution in any form and all languages, throughout the world, in and to the following material:

(Signature)

(Social Security number)

(Date)

ARTIST AGREEMENT

Agreement between Howard Koslow, 26 Highwood Rd., East Norwich, NY 11732 ("the Artist") and The Franklin Philatelic Society ("Franklin"): The Artist, warranting that he has the unrestricted right so to do, agrees to sell to Franklin and Franklin agrees to purchase from the Artist all of the right, title and interest in and to certain original art ("Designs") bearing the Artist's signature or signature mark to be executed by the Artist in accordance with this agreement. Exclusive world-wide rights to reproduce the Design in any form are also included in the purchase price.

TERM AND PAYMENT: Franklin agrees to pay to the Artist an amount of \$ 2,500.00 (U.S.) for each Design. Payment will be made within thirty (30) days of acceptance by Franklin. This agreement will begin on the date the Artist signs this agreement and will extend until Dec. 31, 1977.

SUBJECT AND QUANTITY: This agreement shall cover a series of two (2) or more Designs to be done exclusively for Franklin. The choice of specific subject matter and the general composition of each Design will be approved by Franklin on the basis of a preliminary sketch or sketches to be submitted by the Artist. Each Design must, in the sole and absolute discretion of Franklin, be acceptable as to subject matter, style, general artistic workmanship and in all other respects.

PUBLICATION: All determinations as to production, promotion, edition limits, price, date of issue, whether or not to publish and other business decisions will be at the sole discretion of Franklin.

DELIVERY: The Artist will deliver the Design to Franklin in final form for reproduction not more than thirty-five (35) days after notification by Franklin of the specific subject matter and the general composition of each Design. All preliminary work and sketches will be returned to Franklin at the same time.

COPYRIGHT: The Artist will, upon request, execute the necessary documents to assign all right, title and interest in the copyright to the Designs to Franklin. The Artist agrees not to create other works of art which might be confused with the Designs.

REPRESENTATIONS: The Artist represents that his Designs are original with him and agrees to hold Franklin harmless from any claims of infringement resulting from said Designs.

Page 2.

ENHANCING ARTIST'S REPUTATION: The Artist agrees that Franklin will have the right to use the Artist's name, signature, biographic data, voice and his photograph or likeness in the advertising and promotional materials to be prepared by Franklin in connection with offerings of reproductions of the aforesaid Designs and in catalogs, books and films (if any).

RESERVATION OF RIGHTS: The Artist will continue to be free to paint and sell, except as indicated below, anything the Artist desires to paint or sell beyond the Designs covered by this agreement. Subject to the provisions of this agreement set forth above, during the Initial Period and all renewal periods of this agreement, the Artist will not enter into any formal or informal agreement for the reproduction of any of Artist's works of art on first day covers or philatelic covers of any kind.

RENEWAL PERIOD: At the expiration of the Initial Period, Franklin has the option to renew this agreement for a further period of up to two (2) consecutive years. Notice of renewal shall be given by Franklin in writing no less than sixty (60) days prior to the expiration of the Initial Period. If the Artist declines renewal, then it is understood and agreed that the Artist will not enter into any formal or informal agreement for the reproduction of any of Artist's works of art on first day covers or philatelic covers of any kind for a period of two (2) consecutive years immediately following the expiration of the Initial Period.

MISCELLANEOUS: This agreement may be assigned at any time by Franklin to any of its subsidiaries. Franklin may cancel or defer its performance in the event of strike, lockout, fire, flood, accident, government regulations or like or different causes beyond Franklin's control interfering with the reproduction of the Design.

ENTIRE AGREEMENT: This agreement supersedes any negotiations, discussions and agreements, shall be subject to and construed in accordance with the laws of the Commonwealth of Pennsylvania, and shall become effective upon acceptance by Franklin at Franklin Center, Pennsylvania.

The foregoing has been agreed to
this 30 day of October, 1976.

[Signature]
Artist

Accepted at Franklin Center,
Pennsylvania, this 29th

day of October 1976.

THE FRANKLIN PHILATELIC SOCIETY

By: *[Signature]*

Title: *Director*

REDBOOK

Appendix R, p.1

EDITORIAL/ART AGREEMENT
All Reproduction and Publication Rights
PHOTOGRAPHS/ILLUSTRATIONS

The Redbook Publishing Company
 Redbook Editorial Department
 230 Park Avenue, New York, N.Y. 10017

To: _____	Order	Editorial
_____	Date _____	Job Number _____
_____		Scheduled
		Issue _____
	D/c	Voucher
	Date _____	Number _____

This will confirm our purchase, on the terms and conditions on the face and back hereof, of rights in the Work described herein, as follows:

1. Instructions and/or Description:

2. Purchase Price:

3. Billing: Mail your invoice to Redbook Art Director, The Redbook Publishing Company, 230 Park Avenue, New York, N.Y. 10017. Invoice must show our Editorial Job Number, which you will find at the top of the right hand column above.

4. All reproduction and publication rights to all of the material resulting from their assignment are being purchased. This Agreement is subject to the terms and conditions printed on the reverse side hereof with the same effect as if set forth below.

Your signature under the words "Accepted" below will make the foregoing an Agreement between us.

ACCEPTED

THE REDBOOK PUBLISHING COMPANY

Supplier _____

Date _____

by _____

TERMS AND CONDITIONS

The within purchase of rights is subject to the following terms and conditions, except to the extent that the same may be modified by, or may be inconsistent with, the provisions on the face of this Editorial/Art Agreement (the "Agreement").

1. **Acceptance.** This Agreement will become a binding agreement, subject to the terms and conditions herein contained, when the Supplier accepts same in writing in the space provided on the face hereof. No acknowledgment or other form submitted by Supplier containing terms or conditions in addition to or inconsistent with the terms and conditions herein contained shall have the effect of modifying the terms and conditions of this Agreement. Nor shall reference in this Agreement to a quotation by Supplier imply or constitute acceptance of any terms or conditions in such quotation which are in addition to or inconsistent with the terms and conditions herein contained.

2. **Delivery.** The time of delivery of materials and rendering of services covered by this Agreement is of the essence. All photographs and/or illustrations (herein called the "Work") covered by this Agreement shall be subject to the satisfaction of Redbook. Redbook reserves the right to reject and refuse acceptance of Work which is not in accordance with the instructions, specifications and descriptions, or with the warranties of Supplier expressed or implied, or which is otherwise not satisfactory to Redbook.

3. **Rights Granted.** All reproduction and publication rights, including all rights of copyright, in and to the Work referred to on the face hereof are being purchased and may be exercised by Redbook. If the Work referred to on the face hereof is produced by Supplier for Redbook under a commission therefor, Redbook shall have the rights specified above in all Work produced pursuant to such commission; provided, however, that the Supplier shall have a non-exclusive right to reproduce and/or publish "Out-Takes" outside of the United States and Canada at any time after the expiration of three months from the date of first publication by Redbook of any part of the Work selected by Redbook. "Out-Takes", as that term is used herein, shall mean any parts or portions of the Work not selected by Redbook for reproduction and publication.

4. **Return of Material.** Redbook will return the negatives, transparencies and/or original art of the Work to the Supplier promptly when they are not longer required by Redbook, provided, however, that Redbook shall at all times have access to such negatives, transparencies and/or original art on reasonable notice to the Supplier for use in the exercise of any rights granted to Redbook hereunder. Except for loss or damage due to its willful act or gross negligence, Redbook shall not be responsible for loss of or damage to any negatives, transparencies or other property of Supplier.

5. **Warranties.** The Supplier warrants that the Supplier is the sole owner of the Work furnished hereunder, that it contains no matter unlawful in content or violative of the rights of any third party, that the rights granted hereunder are free and clear, and that the Supplier has full power to grant such rights.

6. **Miscellaneous.**

- (a) Nothing hereunder contained shall obligate Redbook to use all or any part of the Work.
- (b) This agreement supersedes all prior oral or written dealings between Redbook and the Supplier in respect to the matters here contained.
- (c) This agreement may not be modified, amended or supplemented, except in writing signed by the duly authorized representatives of Redbook and the Supplier.
- (d) Neither this agreement nor any interest under it may be assigned by Supplier without the prior written consent of Redbook.
- (e) This agreement shall be governed by New York Law.

Appendix S, p.1

Libby Watterson
FORTUNE

January 1978

We are enclosing two copies of a letter of agreement between you and FORTUNE, one copy for your files and one copy to be signed and returned to me. The reason for this letter is the passage of the 1978 United States Copyright Law which requires written agreements on work made for hire; in practice, the letter does nothing more than leave things where they have been between you and FORTUNE historically, only in a more formal manner. It is not our intention to do anything different with respect to rights to photographs than we have done in the past.

Regards,



FORTUNE

Time & Life Building
 Rockefeller Center
 New York, New York 10020
 (212) JUlson 6-1212

File 103

Appendix S, p.2

You and FORTUNE Magazine have agreed that FORTUNE may, from time to time, commission you to take photographs for publication as a contribution to FORTUNE. In that event:

1. We expressly agree that all photographs taken by you pursuant to a commission from FORTUNE (the "Photographs") shall be considered work made for hire for FORTUNE under the United States Copyright Law.

2. FORTUNE shall be deemed to have transferred to you, after first publication in FORTUNE of any Photograph taken on a given assignment, all rights in the Photographs taken on such assignment except for the following:

(a) the right to reproduce any published Photograph in advertising and promoting the issue of FORTUNE in which it is published, without additional payment;

(b) the right to reproduce whole pages or parts of pages that include published Photographs, without additional payment;

(c) the right to reproduce in FORTUNE and other publications of Time Inc., its subsidiaries and affiliates, the published Photographs and a limited number of the Photographs that were selected but not published ("Prime Selects"), subject to payment of the publication's then prevailing space rates; and

(d) in the event a Photograph is used on a FORTUNE cover, the right to reproduce said Photograph as a FORTUNE cover for any purpose Time Inc. may choose, without additional payment. In addition, you may not authorize the reproduction of any Photograph that has been used on a FORTUNE cover, or a near duplicate thereof, without FORTUNE's prior consent.

3. You expressly agree that you will perform your services as an independent contractor and not as an employee of FORTUNE.

Please confirm that the foregoing accurately and completely sets forth our understanding on the points covered, which may not be modified except by a writing signed by both parties, by signing and returning the enclosed copies of this agreement.

Sincerely yours,

CONFIRMED AND AGREED TO:

FORTUNE Magazine

 Date: _____

By Lily Bernstein

Sports Illustrated

TIME & LIFE BUILDING
NEW YORK, N. Y. 10020
212 JU 6-1212

Appendix T, p.1

January 1, 1978

Dear Bernard Fuchs:

The new U.S. Copyright Law became effective on January 1, 1978. Attached is a freelance artist agreement for execution by artists who create artwork on commission from SPORTS ILLUSTRATED. Your invoices no longer have to state "full reproduction and promotion rights".

Please return the signed agreement to us as soon as possible. A self-addressed, stamped envelope is enclosed. Many thanks.

Sincerely yours,



Richard Gangel
Art Director

enclosures

Appendix T, p.2
January 1, 1978

Dear Bernard Fuchs :

You and SPORTS ILLUSTRATED Magazine have agreed that SPORTS ILLUSTRATED may, from time to time, commission you to create artwork for publication as a contribution to SPORTS ILLUSTRATED. In that event:

1. We expressly agree that all artwork created by you pursuant to a commission from SPORTS ILLUSTRATED (the "Artwork") shall be considered work made for hire for SPORTS ILLUSTRATED under the United States Copyright Law.

2. SPORTS ILLUSTRATED shall be deemed to have transferred to you, after first publication in SPORTS ILLUSTRATED, all rights in the Artwork except for the following:

(a) the right to reproduce the Artwork in advertising and promoting the issue of SPORTS ILLUSTRATED in which it is published, without additional payment;

(b) the right to reproduce whole pages or parts of pages that include the Artwork, without additional payment;

(c) the right to reproduce the Artwork in SPORTS ILLUSTRATED and other publications of Time Inc., its subsidiaries and affiliates, subject to the payment of prevailing space rates for SPORTS ILLUSTRATED and to a reasonable payment to be negotiated in good faith for other Time Inc. publications;

(d) in the event the Artwork is used on a SPORTS ILLUSTRATED cover, the right to reproduce said Artwork as a SPORTS ILLUSTRATED cover for any purpose Time Inc. may choose, without additional payment. In addition, you may not authorize the reproduction of Artwork that has been used on a SPORTS ILLUSTRATED cover, without SPORTS ILLUSTRATED's prior consent.

(e) The right to approve, and share in any proceeds from, any other subsequent publication of the Artwork, upon terms that shall be mutually agreed upon in each instance.

(f) The right to require a credit designation in any exhibition use of the Artwork.

3. SPORTS ILLUSTRATED shall be deemed to have transferred to you all rights in unpublished Artwork upon the return of said Artwork to you, except that SPORTS ILLUSTRATED shall retain the right to require a credit designation on any subsequent use of said Artwork.

4. You expressly agree that you will perform your services as an independent contractor and not as an employee of SPORTS ILLUSTRATED.

Please confirm that the foregoing accurately and completely sets forth our understanding on the points covered, which may not be modified except by a writing signed by both parties, by signing and returning the enclosed copies of this agreement.

Sincerely yours,

SPORTS ILLUSTRATED Magazine

By  _____

CONFIRMED AND AGREED TO:

Date _____

TIME
THE WORLD NEWSMAGAZINE

TIME & LIFE BUILDING
ROCKEFELLER CENTER
NEW YORK 10020
212 JUDSON 2-1212

_____, 1978

Dear _____:

You and TIME Magazine have agreed that TIME may, from time to time, commission you to create artwork for publication as a contribution to TIME. In that event:

1. We expressly agree that all artwork created by you pursuant to a commission from TIME (the "Artwork") shall be considered work made for hire for TIME under the United States Copyright Law.

2. TIME shall retain all rights in any Artwork that is used as a TIME cover.

3. In the case of non-cover Artwork, TIME shall be deemed to have transferred to you, after first publication in TIME, all rights in the Artwork except for the following:

(a) the right to reproduce the Artwork in advertising and promoting the issue of TIME in which it is published, without additional payment;

(b) the right to reproduce whole pages or parts of pages that include the Artwork, without additional payment;

(c) the right to reproduce the Artwork in TIME and other publications of Time Inc., its subsidiaries and affiliates, subject to payment of the publication's then prevailing space rates; and

(d) in the event a portion of the Artwork is used on a corner of a TIME cover as a "flap," the right to reproduce the portion used as a "flap" whenever the entire cover is reproduced, without additional payment.

4. You expressly agree that you will perform your services as an independent contractor and not as an employee of TIME.

Please confirm that the foregoing accurately and completely sets forth our understanding on the points covered, which may not be modified except by a writing signed by both parties, by signing and returning the enclosed copies of this agreement.

Sincerely yours,

TIME Magazine

By _____

CONFIRMED AND AGREED TO:

Date: _____

N. Y. Times, 4/28/78 p.C21 (Weekend Section)

New Battle Over Copyrights

By HERBERT MITGANG

The American Society of Authors and Journalists, which represents 500 of the major freelance writers of nonfiction, accused some of the nation's magazine publishing chains yesterday of trying to subvert the intention of the new Copyright Act, which went into effect last January, by turning them into hirelings or insisting that they owned no rights to the material they wrote.

In a statement, the society points out that "certain periodical publishers have recently sought to circumvent the clear intent of the law by requiring independent writers, as a condition of article assignment, to sign so-called 'all rights transferred' or 'work for hire' agreements."

Although no specific publications were named in the statement, Ruth Winter, president of the society, said that members reported such practices by the Meredith Corporation, which publishes *Better Homes and Gardens*; Conde Nast, which publishes *Mademoiselle* and *House and Garden*; *Women's Day*, and *Reader's Digest*.

Editors and lawyers for these publications, questioned by the magazine writers, have said that these preconditions of giving up all rights to an article were either necessary or had been understood all along, according to the society.

Comment by Publisher

Thomas Fisher, head of the legal department of Meredith, which also publishes *Apartment Life* and other magazines, said: "What we are trying to do is reinstate the conditions that existed before the new Copyright Act took effect. We have always tried to obtain all rights. The law as now written puts a greater burden on the publisher to define the rights. Unless we have something in writing beforehand, at best all we have is one-time use."

Mr. Fisher was asking if writers who refused to sign themselves on "for hire" would be given assignments.

"We would prefer to work with authors who do sign," he said. "Their work could then be used in our anthologies. They do not receive extra payment. We think they are paid well

up front the first time."

Other publishers were not immediately available for comment on the society's statement.

'North American Rights'

It has long been the established practice of national magazines that a writer conveyed "first North American rights only." This means that after a magazine printed the article once for distribution in the United States and Canada, further rights reverted automatically or upon request to the writer.

Many magazine writers would then sell their articles independently to foreign publications. In addition, if these articles had subsidiary sales—in book anthologies, for television or film, or for use in reprint magazines—the writer would be free to negotiate the agreement and keep the full proceeds. Without the possibility of such extra rights to their material, society members say, they could not survive as writers.

Miss Winter said that *Glamour* magazine had a long statement on the back of its payment check for an article that told the writer that when he endorsed, all rights were "assigned and conveyed to Conde Nast" and its successors and assigns, with "the absolute right to take out and own the copyright . . . in the United States and elsewhere."

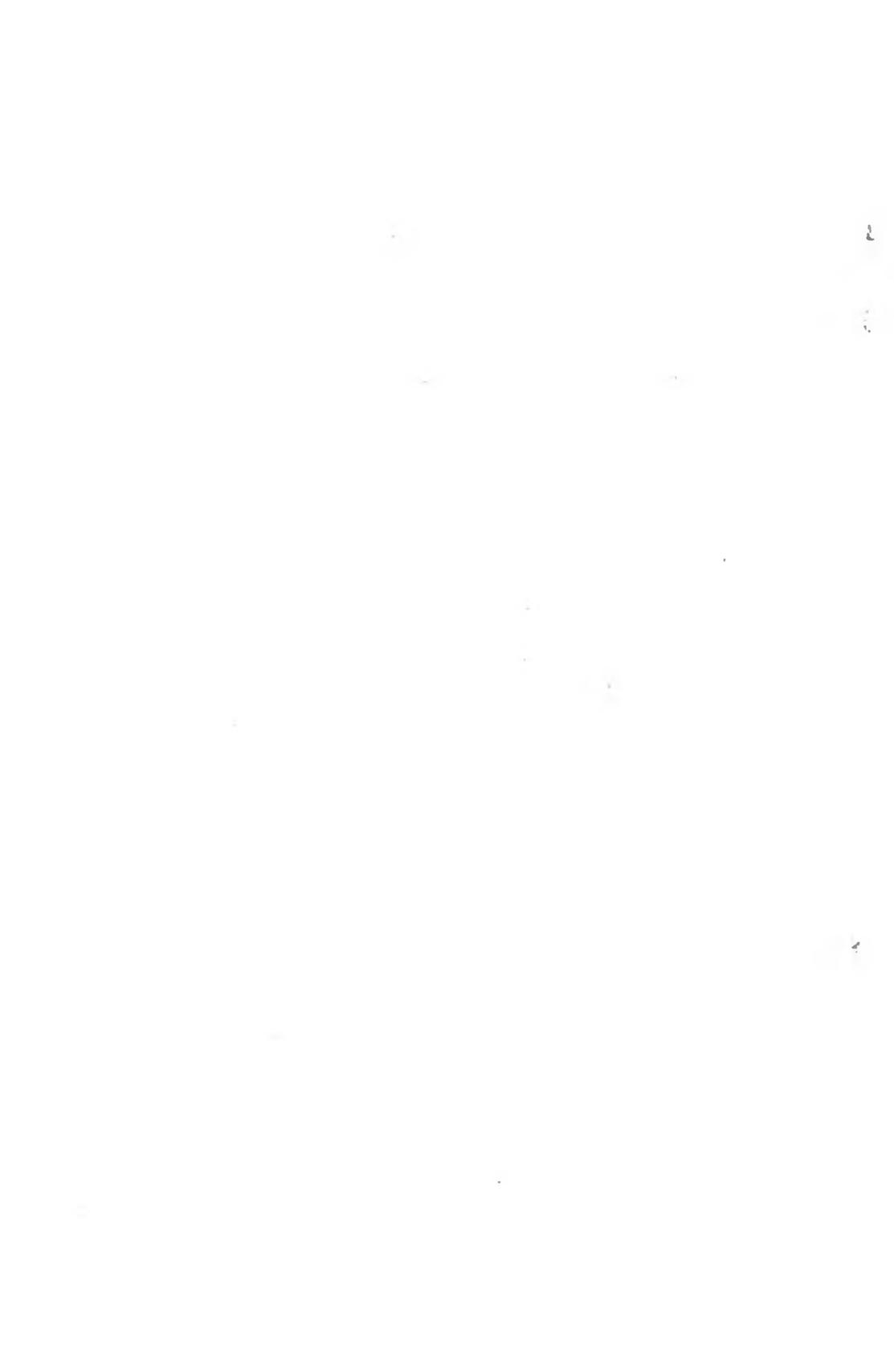
Another society member, Norman Schreiber, said that *Apartment Life* had sent him a three-and-a-half-page contract informing him that what he wrote would be "works for hire." He was informed that if he did not sign away his rights and turn himself, in effect, into an employee, he would not receive further assignments.

"I did not sign," Mr. Schreiber said, "but it will make it tough to continue as a freelance if other magazines try the same thing."

Ethics Code Cited

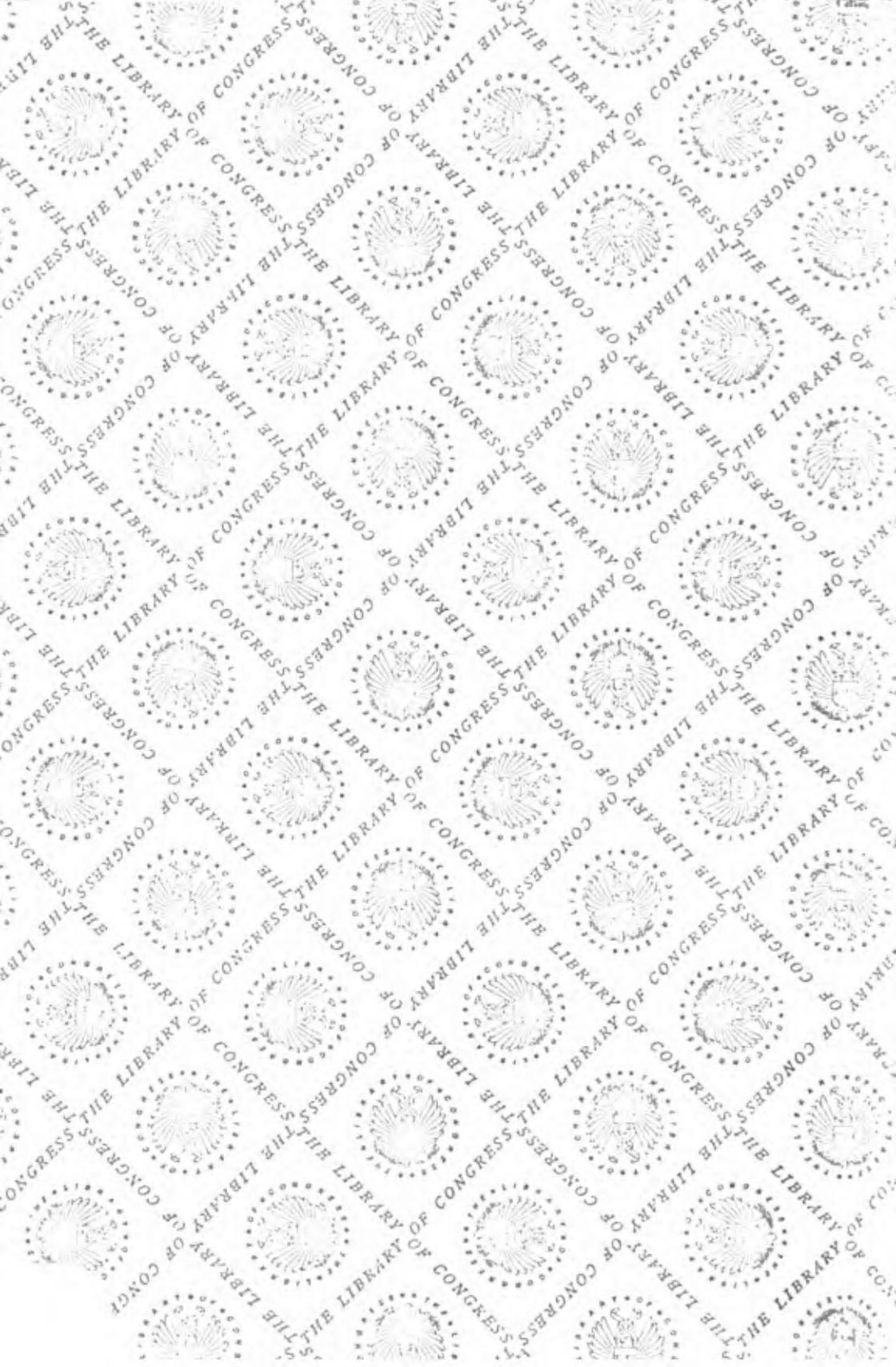
The society statement said that both, under the Copyright Act and their own code of ethics, writers were considered the "creator" and therefore the "owner" of their material.

The society, and other writers' organizations, intends to challenge what it calls "inequitable" practices in the courts.



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