THE COPYRIGHT ROYALTY TRIBUNAL AND THE STATUTORY MECHANICAL ROYALTY: HISTORY AND PROSPECT

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INTRODUCTION

The Copyright Royalty Tribunal was created by the Copyright Revision Act of 1976.[1] It adjusts royalty rates under the four compulsory license provisions of the 1976 Act,[2] and distributes royalties collected under two of those provisions. The rates which it adjusts are the statutory mechanical royalty rate under section 115 of the Act, the cable royalty rate under section 111, the jukebox royalty rate under section 116, and the educational broadcasting rate under section 118. The Tribunal distributes the fees collected under the cable and jukebox provisions.

The statutory mechanical royalty rate sets a ceiling on the royalties (called "mechanical royalties") paid by record companies[3] to

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[1] 17 U.S.C. §§ 101-810 (Supp. IV 1980).

[2] *See infra* text accompanying note 14.

[3] Where possible in this article, we use colloquial terms. Record companies are also called "recording" companies. We use the term "records" to include phonograph records, tapes and newer and older gadgets which record sounds for electrical or mechanical reproduction. In the 1976 Copyright Act, these are called "phonorecords." It should also be noted that the statutory mechanical license and royalty apply only to nondramatic music.

owners of copyright in the musical works they record. Having originated in the 1909 Copyright Act,[4] it is the oldest royalty rate subject to the Tribunal's authority. It is also the one with the greatest dollar effect; mechanical royalties in the United States for 1979 were estimated to total $118 million, which is about five times the combined amounts of the other three royalties administered by the Tribunal.[5]

The Copyright Royalty Tribunal is certainly one of the smallest agencies in the Federal Government, but its decisions have a major impact on musical authors and composers, particularly popular songwriters. The Tribunal's powers, structure, and composition are now being reexamined in Congress, and the result of that reexamination may have a significant impact on the royalties it regulates. The authors believe (or hope) that it may be useful to those affected by the Tribunal and to those deciding upon its future to have available a history of the Tribunal and of the mechanical royalty rate, the most significant royalty it regulates. In addition, this history has some interest in its own right as an example of the interplay of legislation, adjudication, administrative regulation, and politics.

In setting out the Tribunal's legislative history, the authors have found it necessary to discuss at some length the history of the other two principal compulsory licenses created by the 1976 Copyright Revision Act, the cable retransmission and jukebox licenses.[6] Important aspects of the Tribunal resulted from the formulation of these two licenses, and in turn, their further development was governed by the evolution of the mechanical license and the establishment of the Tribunal.

This article begins with a discussion of the history leading up to the Tribunal's adoption in 1976. It then discusses the proceedings which took place in 1980 to adjust the mechanical royalty rate. Included in this discussion is an analysis of the subsequent appeal and proceedings on remand. Finally, we conclude with a discussion of other proceedings and subsequent events concerning the Tribunal, and some observations on its future prospects.

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[4] Ch. 320, § 1(e), 35 Stat. 1075.

The 1909 Act described what are now called "phonorecords" or simply "records" as "parts of instruments serving to reproduce mechanically the musical work." Hence, the terms "mechanical license" and "mechanical royalty," which continue in use.

[5] Joint Appendix at A987, Recording Industry Ass'n of Am. (RIAA) v. Copyright Royalty Tribunal (CRT), 662 F.2d 1 (D.C. Cir. 1981) (estimate of Cambridge Research Institute on behalf of RIAA) [hereinafter cited as CRT Appeal Record]. Comparable totals for the other compulsory license royalties are given at *infra* note 320.

[6] The fourth compulsory license administered by the Tribunal, the public or non-commercial broadcasting license under § 118, had no significant effect on the Tribunal or the other licenses, and we have generally relegated it to footnotes.

Some General Observations

This article was conceived as an historical account rather than an effort to establish any thesis. However, it has led the authors to several conclusions, some of them unanticipated:

- Although the three principal compulsory licenses (with the possible exception of the cable license) are difficult to justify theoretically, all three appear to be the only practical political solutions to the problems they are intended to resolve.[7]
- Some agency in the nature of the Copyright Royalty Tribunal is essential to set and maintain fair rates for the compulsory licenses. In addition, such an agency appears unavoidable to meet the practical problems of distributing royalties under the cable and jukebox licenses.[8]
- The legislative history of the creation of the mechanical and cable licenses demonstrates that in the legislative struggles created by new technologies, the representatives of the new technologies have shown consistent tactical superiority over their more established opponents among the copyright owners.[9]
- The proceedings of the Copyright Royalty Tribunal under voluntarily adopted formal rulemaking procedures have proved far superior to legislative hearings as a means of establishing the factual foundations of policy decisions.[10]
- The Copyright Royalty Tribunal is effectively subject to no judicially enforced substantive restraints in its setting of royalty rate (other than cable), except a requirement of consistency with its previous decisions.[11]
- In the absence of substantial change in the Tribunal's structure, which may be considered by the next Congress, the appointments to the Tribunal during the next two years will have a crucial effect upon all the industries affected by the Tribunal.[12]

We turn now to the history of the compulsory mechanical license and the statutory mechanical royalty rate.

I. The Compulsory Mechanical License—1905 to 1955

The compulsory mechanical license provides that once a recording of a copyrighted nondramatic composition has been publicly dis-

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[7] *See infra* pp. 14-15, 21, 25-27, 32-35, 48-49, 79-83.
[8] *See infra* pp. 21, 25-26, 32-34, 48-49, 54-55.
[9] *See infra* pp. 6-10, 31-32, 34-35, 40-42, 48-49.
[10] *See infra* pp. 65-67.
[11] *See infra* text accompanying notes 393-98, 434-38.
[12] *See infra* pp. 81-82, 85-87.

tributed with the permission of the copyright owner, any other person may record the composition and sell the records without the copyright owner's permission, merely by paying the copyright owner a certain royalty and by complying with certain formalities.[13] The compulsory mechanical license was created by the 1909 Copyright Act, at which time the royalty per composition was set at 2¢ per each recording manufactured.[14]

The drafting of the 1909 Act began with conferences before the Librarian of Congress in 1905 and 1906, and continued with heated congressional hearings in June and December 1906 before the Joint Committees on Patents, picking up with even greater animus in 1908. The compulsory mechanical license and the statutory royalty rate emerged as a compromise from these legislative battles, the intensity of which is little appreciated today but which set a pattern that still governs the music business throughout the world.

Underlying these battles was an economic struggle created by the popularity of player pianos at the turn of the century, and by the rapid growth of the more recently invented phonograph recordings. Manufacturers of both devices paid no royalties whatever to the publishers and composers of the music they reproduced. The publishers and composers not only regarded the unpaid use of their copyrighted music as piracy, but also feared that mechanical reproduction was replacing live performances.[15]

Until the time of the 1906 hearings, it was uncertain whether copyright in music included the right to control the manufacture and sale of piano rolls, phonograph records, and other mechanical devices which reproduced the sound of a composition.[16] The lower courts

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[13] If the copyright owner consents, the record producer may of course pay a rate lower than the statutory rate, and such consent is common. *See infra* text accompanying notes 50-56. For this reason, one must always distinguish between the statutory rate and the rate actually paid, which may or may not be the same for a particular recording.

The compulsory license does not apply to soundtracks of motion pictures or to sounds fixed as part of other audiovisual devices, all of which are excluded from the statutory definition of "phonorecords." 17 U.S.C. § 101 (Supp. IV 1980).

[14] Ch. 320 §§ 1(e), 25(e), 35 Stat. 1075, 1081 (1909). The current version, as amended by the 1976 Copyright Act, is 17 U.S.C. § 115 (Supp. IV 1980).

[15] *Arguments on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comm. on Patents, Conjointly*, 59th Cong., 1st Sess., 24-25 (testimony of John Philip Sousa), 32, 203 (1906), *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. H, at 24-25, 32, 203 (1976) [hereinafter cited as *June 1906 Hearings*].

[16] The existing statute, so far as pertinent, gave to authors and copyright owners only "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending" the copyrighted work. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212.

had previously held that it did not,[17] and a few days before the 1906 congressional hearings began, the Second Circuit had concurred in *White-Smith Music Publishing Co. v. Apollo Co.*[18] Certiorari was being sought.

The political lineup before and during the hearings had on one side the music publishers, some composers, and the leading player piano manufacturer, all of whom sought to have copyright protection extended to mechanical reproduction. Opposed to them were all the other player piano manufacturers and the newly emerging phonograph record companies. Charges of monopolization, price-fixing, piracy and deceit were made by both sides and often proved. Reputations and tempers were damaged. The congressional committees that heard the dispute understated the situation when they reported that the compulsory license provision "has been the subject of more discussion and has taken more of the time of the committee than any other provision in the bill."[19]

The Second Circuit's decision in the *White-Smith* case had provided an overture to the hearings, with dicta that virtually invited Congress to reverse the decision's effect. While holding that the copyright law must be "strictly construed" because it was "a creature of statute," the court of appeals had added that "the reasons which led to the passage of [the copyright] statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant."[20] The bill before the committees, which had been drafted by the Copyright Office, accepted the invitation by granting copyright owners the exclusive right "to make, sell, distribute, or let for hire any device . . . especially adapted in any manner whatsoever to reproduce to the ear . . . any work published and copyrighted after this Act shall have gone into effect . . . ."[21]

Beginning on the third day of hearings, it became apparent that one side of the lineup had long since anticipated judicial or legislative expansion of copyright protection to include mechanical reproduction

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[17] Stern v. Rosey, 17 App. D.C. 562 (1901); Kennedy v. McTammany, 33 F. 584 (C.C.D. Mass. 1888), *appeal dismissed*, 145 U.S. 643 (1892).

[18] 147 F. 226 (2d Cir. 1906), *aff'd*, 209 U.S. 1 (1908).

[19] H.R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. S, at S4 (1976) [hereinafter cited as FEBRUARY 1909 REPORT].

[20] *White-Smith*, 147 F. at 227.

[21] S. 6330, H.R. 19853, 59th Cong., 1st Sess. § 1(g) (1906), *reprinted in* 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. B, at 9 (1976).

of music. Ample evidence was presented to the committees that the Aeolian Company, the leading United States manufacturer of player pianos and piano rolls, had agreed in advance with virtually all the major music publishers to attempt to monopolize the supply of music on piano rolls, when and if Congress or the courts made piano rolls subject to copyright. In 1902, the publishers had granted Aeolian thirty-five year exclusive licenses on their entire catalogs, conditioned on extension of copyright to piano rolls. In return, Aeolian was paying the legal costs of the plaintiff publishers in *White-Smith.*[22]

The idea of the compulsory license was suggested very early, and by a key legislator. Soon after the first witness for the player piano interests began to accuse Aeolian and the music publishers of monopolization, Representative Currier, Chairman of the House Patent Committee, asked him: "Would you object to paying a reasonable royalty to a musical author or the proprietor of the copyright if all companies would get the right to use that piece of copyrighted music upon the same terms?"[23] Senator Smoot, a member of the Senate Patent Committee who became its chairman, asked substantially the same question a few minutes later.[24]

The Aeolian Co. never testified or submitted a statement on this issue to Congress. Its silence was naturally construed against its allies, the music publishers and composers, who favored extension of copyright to mechanical reproduction and opposed any form of compulsory license.

The other manufacturers of music rolls and phonograph records initially opposed the extension of copyright, but quickly agreed to accept the suggestion of what became the compulsory license.[25] The publishers, however, continued to oppose every form of the compulsory license, relenting only in the final minutes of the hearing in March 1908.[26]

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[22] *June 1906 Hearings, supra* note 15, at 97-134, 202-06; *Copyright Hearing, December 7 to 11, 1906: Arguments on the Bills S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comm. on Patents, Conjointly,* 59th Cong., 1st Sess. 239-41, 245-47, 298-309, 355-57 (1906), *reprinted in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. J, at 239-41, 245-47, 298-309, 355-57 (1976) [hereinafter cited as *December 1906 Hearings*].

Copies of some of the license agreements were submitted to the committees. *June 1906 Hearings, supra* note 15, at 112-14, 127-30; *December 1906 Hearings, supra,* at 299-304.

[23] *June 1906 Hearings, supra* note 15, at 104.

[24] *Id.* at 108.

[25] *Id.* at 104, 106; *December 1906 Hearings, supra* note 22, at 291, 319, 367, 419.

[26] *Revision of Copyright Laws: Hearings on Pending Bills to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comm. on Patents,* 60th Cong., 1st Sess. 191,

During the hearings, the publishers also continued to defend their relationship with Aeolian, arguing that it was their only available method of defeating "piracy" by manufacturers of piano rolls and phonograph records.[27]

These positions apparently antagonized several members of the committee, particularly the two chairmen, Senator Smoot and Representative Currier. The following exchange between Mr. Pound, a witness representing an Aeolian competitor, and several Congressmen occurred very near the end of the 1908 hearings. It gives some idea of the intensity of the prevailing feelings.

> Mr. POUND.
>
> But we have a right to ask who these people are who come here and tell you that we must close up our 625 factories and throw out of employment 35,220 men. We have men whom we have trained for years in this work, and I say we have a right to direct your attention to the attitude of the parties who come here seeking legislation after crushing defeat in the courts, and to ask you to see whether they are themselves consistent.
>
> . . . .
>
> Representative BARCHFELD. You do not come before this committee with the statement that if we pass this bill there are 624 or 625 companies whose establishments are to be closed by the action of this committee?
>
> . . . .
>
> Mr. POUND. I do, most decidedly. Your bill would.
>
> Representative BARCHFELD. Then you are imposing, sir, upon our intelligence.
>
> Mr. POUND. Not at all, sir. Intelligence, however, is a relative term, and it does not always exist.
>
> Representative CURRIER. It may be as well to state that there are others who are not 'imposed' upon. Mr. Pound is right.
>
> Mr. POUND. Here are people [i.e., publishers] who last year stood before the committee and admitted that they had 'a bushel' of these contracts and had every man in the United States but one, and possibly two, in the business tied up in those contracts and that they would have us all crawling on our bellies.
>
> Now, if they have all those contracts for thirty-five years and seventy-seven years and a hundred and two years, what are we going to do? We can not sell our instruments without the music.

233, 245 (1908), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. K, at 191, 233, 245 (1976) [hereinafter cited as *1908 Hearings*].

[27] *June 1906 Hearings, supra* note 15, at 202-06; *December 1906 Hearings, supra* note 22, at 239-40, 245-47; *1908 Hearings, supra* note 26, at 218-28, 231-32.

> How are we going to get the music when the Aeolian Company control it all?
>
> . . . .
>
> The CHAIRMAN [Sen. Smoot]. This is the way I look at this matter: There is no question but what if this monopoly was created these people would have to go out of business. It is asked, Would not other composers equally great arise? Well, judging from the history of America in the past, we know that they do not arise every year nor every five years, nor do they come in bunches. And suppose that by the time every establishment is closed up, and this great monopoly has fastened its grip on the business of the mechanical reproduction of music in the United States, suppose that then another Victor Herbert arises, to whom is the poor fellow to go with his music—to the Aeolian Company, this monopoly made possible by our act? There is nobody else in this country to whom he can take his music, for all others would be crushed out. And, mind you, if there was one manufacturer so bold as to dream of success and start a new business, bearing in mind the millions of dollars that this company controls, I think you will agree with me that the newcomer would stand no chance on earth against the gigantic monopoly. [Applause in the hall.][28]

A. *Persistent Issues: the Form and Level of the Rate*

The imposition of a compulsory license appears to have been a foregone conclusion from the first hearing. The crucial question, in retrospect, was what form the royalty rate would take: a flat rate or a percentage.

At the December 1906 hearings, one of the piano roll manufacturers first proposed a specific rate—a flat rate of 2¢ per recording. Although his suggestion was destined to be law for almost seven decades, its economic support was less than exhaustive. His "associates," he testified, had computed that the average royalty to all composers on sheet music was approximately 1½¢ per sheet and, "for the purposes of this suggestion I have computed it at 2¢, merely as furnishing some criterion to go by."[29]

The alternative, a royalty fixed as a percentage of the record price, has the advantage (to copyright owners, at least) of fluctuating in proportion to the revenues received by the copyright user, and thereby also adjusting for inflation and deflation. It was first mentioned in the 1908 hearings, which took place about one month after

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[28] *1908 Hearings, supra* note 26, at 351-53.

[29] *December 1906 Hearings, supra* note 22, at 319. The 2¢ figure was freely bandied about for the remainder of that hearing. *Id.* at 344, 367, 419.

the Supreme Court had affirmed the Second Circuit's decision in *White-Smith Music Publishing Co. v. Apollo Co.*[30] During this hearing, Senator Smoot and Representative Currier repeatedly pressed publishers and composers to accept a compulsory license with a royalty fixed as a percentage of the selling price of the recording.[31]

The publishers and composers, with one exception, consistently rejected the proposal.[32] The representative of G. Schirmer, for instance, bluntly stated, "We want a good bill or no bill at all."[33]

The adamant approach of publishers and composers generated no sympathy and may have contributed to the anger of the speeches quoted above,[34] which occurred later that day. Only after those speeches did Nathan Burkan, on behalf of the publishers, agree to accept a compulsory license (if the royalty was reasonable) and to attempt to negotiate such a provision with his opponents.[35]

Thereafter, between May 1908 and January 1909, at least seven bills were introduced which would have created a compulsory license. Most of the bills provided for a royalty of 10% of the retail price, of 2¢ per recording, or of 10% of retail with a minimum of 2¢.[36] The final bill, introduced on February 15, 1909, by Representative Currier,[37] set the royalty at 2¢ with no percentage.[38] It was passed by both houses without substantive amendment[39] on March 3, 1909, the last day of that Congress, and signed by President Theodore Roosevelt on the next day, his last day in office.[40]

The legislative history contains no explanation of why the percentage royalty was eliminated at this final stage.

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[30] 209 U.S. 1 (1908).

[31] *1908 Hearings*, *supra* note 26, at 191, 232, 245.

[32] *Id.* The exception was the representative of a group of popular songwriters. *Id.* at 247-48.

[33] *Id.* at 245.

[34] *See supra* text accompanying note 28.

[35] *1908 Hearings*, *supra* note 26, at 367-68.

[36] The various bills are described in detail by Henn, *The Compulsory License Provisions of the U.S. Copyright Law*, in SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STUDIES PURSUANT TO S. RES. 53 5-10 (Comm. Print 1960) (1956) [hereinafter cited as HENN STUDY], *reprinted in* 2 STUDIES ON COPYRIGHT, at 877, 883-88 (Arthur Fischer Memorial ed. 1963).

[37] H.R. 28192, 60th Cong., 2d Sess. (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. S, at 522 (1976).

[38] The bill was referred to the Committee on Patents and reported out unanimously without amendment on February 22, 1909. FEBRUARY 1909 REPORT, *supra* note 19, at 1; 43 CONG. REC. 3744 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M104.

[39] There were some typographical corrections. 43 CONG. REC. 3705 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M104 (1976).

[40] 43 CONG. REC. 3832, 3769 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M121 (1976). Copyright reform seems to be the product of lame-duck sessions. The 1976 Act was passed two days before the 94th Congress adjourned. Apparently impending dissolution also concentrates the collective mind wonderfully.

The 2¢ rate, which originated with the superbly casual statement that it was "some criterion to go by," lasted from 1909 to 1978. No evidence was introduced to support it, other than informal and undisclosed calculations of an average royalty on all sheet music.[41] In the final debate on the floor of the House, Representative Currier justified the 2¢ rate by saying, "it amounts to about 5 per cent probably on the selling price, covering the whole field."[42] The unexplained choice of a flat rate rather than a percentage came to have fateful consequences.

In the heated debates that produced the compulsory license and 2¢ royalty rate, surprisingly little attention was given to what ultimately became their most important consequence, the setting of a price ceiling. The publishers and composers had concentrated before the committees on constitutional questions and on the composer's right to choose whom he would deal with and his ability to control the quality of recorded renditions.[43] Only in the short final debate on the floor of the House was the issue of a price ceiling raised, when one opponent of the provision asked: "Does the gentleman know of any other national statute which requires any man who invents anything or composes anything to dispose of it at a price fixed by Congress under the law?"[44] While it received comparatively little attention, the ceiling price effect thus appears to have been contemplated by the Congress which created the compulsory license.

B. *The Compulsory License in Operation*

Actual practice under the compulsory license developed in a different form than had been contemplated by Congress. Mechanical recording rights, having been defined in the statute as part of a bundle of rights constituting a copyright,[45] were universally assigned by composers to their publishers. In a few cases, the assignments were made for lump sums, usually under employment for hire agreements.[46]

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[41] *See supra* text accompanying note 29.

[42] 43 CONG. REC. 3766 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M110 (1976). The reference apparently was to the retail price. Evidence in the 1980 mechanical royalty proceeding before the Copyright Royalty Tribunal established that the retail price of phonograph cylinders and discs in 1909 was around 40¢ per composition, which would produce precisely the 5% relationship stated by Representative Currier. *See infra* text accompanying note 376.

[43] *December 1906 Hearings*, *supra* note 22, at 226, 312; *1908 Hearings*, *supra* note 26, at 191, 232-37, 244-47.

[44] 43 CONG. REC. 3765 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M110 (1976).

[45] 1909 Copyright Act, ch. 320, § 1, 35 Stat. 1075.

[46] *See* Klein, *Protective Societies for Authors and Creators*, in 1953 COPYRIGHT PROBLEMS ANALYZED 33 (T. Kupferman ed. 1953); HENN STUDY, *supra* note 36, at 47, *reprinted in* 2 STUDIES ON COPYRIGHT, at 925.

More commonly, the publishing agreements provided that publisher and composer would divide the mechanical royalties. The terms of such division were often extremely unfavorable to writers. Prior to 1932, the writer commonly received only 10-33⅓% of the mechanical royalties on his work.[47] If there were two or more authors of a song, for example two composers and a lyricist, they further divided the writer's share among themselves.

In 1932, the newly created Songwriters Protective Association[48] issued and recommended a standard songwriter's agreement form which suggested a minimum songwriters' share of 33⅓%. A revision of this form in 1939 increased the songwriter's minimum share to 50%. The writer's share continues to be divided, usually in equal amounts, among all the authors of a composition.[49]

The compulsory license made it unnecessary for any record producer to pay more than the 2¢ statutory royalty, but it remained possible for the record producer to negotiate a lower rate with the publisher. Such lower rates became common, in two forms.

First, it became standard practice to charge less than the statutory rate on lower priced recordings, and standard schedules of such reduced rates developed in the industry.[50]

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[47] Klein, *supra* note 46, at 38.

[48] The name was changed in 1958 to the American Guild of Authors and Composers.

[49] Klein, *supra* note 46, at 34-36.

[50] From approximately 1932 until the late 1940's, for instance, the following schedule was standard:

Retail Record Price	Royalty Rate Per Side
35¢	1¼¢
50¢	1½¢
60¢	1¾¢
75¢	2¢

HENN STUDY, *supra* note 36, at 35, *reprinted in* 2 STUDIES ON COPYRIGHT, at 913.

At that time, there was only one common type of phonograph record, which spun at 78 revolutions per minute (r.p.m.). By 1956, when long-playing 33⅓ r.p.m. records (LP's) had become common, standard rates on 78 r.p.m. records had increased slightly, and a new schedule for LP's had become industry practice, as follows:

78 r.p.m.:
- 35¢ or less ..... 1¼¢ per side.
- 36 to 50¢ ..... 1½¢ per side.
- 51 to 60¢ ..... 1¾¢ per side.
- More than 60¢ ..... Statutory rate.

LP's:
- $2.85 or less ..... 1½¢ per selection, per side.
- $2.86 to $3 ..... 1¾¢ per selection, per side.
- More than $3 ..... Statutory rate per selection, per side.

HENN STUDY, *supra* note 36, at 50, *reprinted in* 2 STUDIES ON COPYRIGHT, at 928.

Second, discounts were often negotiated for individual records, even if they were to be sold at standard prices. The amounts of such reductions depended on the comparative popularity of the song or the songwriter versus that of the performer(s), and on the bargaining skills of the publisher and record producer.[51] Such discounts were particularly common on the first recording of a song.[52] The first recording was crucial to the success of any song once phonograph records became the dominant medium through which music was heard.

The statutory form of the compulsory license was in fact used very rarely.[53] The statutory formalities proved inconvenient. On the other hand, a central clearing house for licensing, negotiating rates, and payment of royalties proved to be an enormous convenience.[54] These functions came to be performed by The Harry Fox Agency, which initially had been a sole proprietorship and subsequently became a corporate subsidiary of the National Music Publishers' Association (NMPA).[55]

It also became common practice (at least in recent decades) for record companies to obtain licenses after a recording was completed, rather than beforehand.[56] Because record producers know that a

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[51] *See* CRT Appeal Record, *supra* note 5, at A2053-56.

[52] The compulsory license does not, by its terms, apply to the first recording of a work. However, because it applies to all subsequent recordings of the work, the producer of the first recording never pays more than the statutory rate.

[53] Walter Yetnikoff, who joined CBS as a lawyer in 1962 and is now President of the CBS records group, testified that in his entire career at CBS, he had only once seen a statutory compulsory license. That was in his days as an attorney, when he was asked to find out how to obtain a statutory license because no one at CBS (the largest record company in the United States) knew how to do it. CRT Appeal Record, *supra* note 5, at A1426, A1467.

[54] Mechanical royalties on each recording are paid by the record producer to the copyright owner, directly or through an agent such as The Harry Fox Agency. By contrast, the jukebox and cable royalties under the 1976 Act are paid to the Register of Copyrights.

[55] There are at least two other agencies of this kind, but they are far smaller, in toto, than the Fox Agency.

As agent for several thousand music publishers, the Fox Agency issues a form of compulsory license in which the royalty rate may be less than the statutory rate and in which some of the statutory formalities are involved. Royalties are paid and accounted for quarterly rather than monthly as required by the statute, and the record company need not serve or file the statutory notice of intention. In addition, while the 1909 Act required royalties to be paid on the number of recordings "manufactured," the Fox Agency license based the royalty upon the number "made and distributed."

Despite these variations, the Fox license has repeatedly been held to be a form of compulsory license, rather than a "private licensing agreement." Joy Music, Inc. v. Seeco Records, Inc., 166 F. Supp. 549 (S.D.N.Y. 1958); Shapiro, Bernstein & Co. v. Gabor, 266 F. Supp. 613 (S.D.N.Y. 1966); Leo Feist, Inc. v. Derby Records, Inc., Civ. No. 95-227 (S.D.N.Y. Apr. 22, 1955); Gershwin Publishing Co. v. Charlie Parker Record Corp., Civ. No. 63-768 (S.D.N.Y. Feb. 11, 1964).

[56] 1980 Mechanical Royalty Adjustment Proceeding; Final Rule Findings, 46 Fed. Reg. 10,466, 10,482 (1981) [hereinafter cited as CRT Findings].

compulsory license is available for any song that has previously been recorded, they are free to record any such song without obtaining the publisher's permission; often the publisher's identity is unknown to them at the time the recording is made.[57]

Thus the compulsory license, although practically never invoked in its statutory form, had two great effects. First, compositions once recorded were freely available to all other performers for additional recordings. Often it was a subsequent recording, rather than the initial recording, which gave the greatest popularity to a song. When the song did become a hit, a flock of additional recordings (called "cover" records) would appear shortly afterwards.

The second effect was simple. The statutory rate was the ceiling rate,[58] and, because a flat rate had been chosen, it was rigid.

Surprisingly, the statutory rate remained reasonably satisfactory through the 1940's. It was only in the inflation which began in the 1960's that the 2¢ ceiling began to pinch hard. Throughout the 1940's and much of the 1950's, negotiated rates well below the statutory rate were common.[59] By 1970, however, the only common sub-statutory royalty was a customary rate of 1½¢ on so-called "budget label" reissues of existing recordings.[60]

II. Revision of the Copyright Laws—1955 to 1969

A. *The Mechanical License*

In this setting, Congress began the revision process which eventually produced the 1976 Act. The first step was a series of studies by the Copyright Office between 1955 and 1960, two of which related to the compulsory license.[61] Based on the series of studies, the Register of

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[57] U.S. Copyright Office for the House Committee on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 218, 230 (Comm. Print 1964) (testimony of William M. Kaplan, Gen. Att'y for ABC—Paramount Records, and Walter Yetnikoff of Columbia Records), *reprinted in* 3 Omnibus Copyright Revision Legislative History, 1961-64, at 218, 230 (1976) [hereinafter cited as Copyright Law Revision Part 3].

[58] One exception did develop in industry practice after LP records became dominant, and its principle was codified in the 1976 Act. Recordings of classical compositions which exceeded eight minutes often carried a royalty of ¼¢ per minute. Henn Study, *supra* note 36, at 51, *reprinted in* 2 Studies on Copyright at 929.

[59] *See supra* notes 50-51 and accompanying text.

[60] *Copyright Law Revision: 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. 1493-1519 (1975), *reprinted in* 14-16 Omnibus Copyright Revision Legislative History, 1975, at 1493-1519 (1977) [hereinafter cited as *1975 Hearings*].

[61] Blaisdell, *The Economic Aspects of the Compulsory License*, in Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Studies Pursuant to Res. 53 (Comm. Print 1960), *reprinted in* 2 Studies on Copyright, at 937 (Arthur Fischer Memorial ed. 1963); Henn Study, *supra* note 36.

Copyrights issued a comprehensive report in 1961.[62] His recommendation as to the mechanical license was simple: eliminate it.[63]

There followed three years of comments and conferences conducted by the Register of Copyrights.[64] The recording industry opposed the elimination of the compulsory license, arguing, among other things, that repeal would encourage "monopolistic practices."[65] Publishers and composers, on the other hand, were neither so forceful nor so unanimous in seeking to eliminate the compulsory license. As a result, the Register's Supplemental Report in 1965 abandoned the recommendation to abolish the compulsory license, stating that, "there seemed to be a feeling that people in the industry generally would rather bear those ills they have than fly to others that they know not of."[66]

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[62] U.S. COPYRIGHT C FICE FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1961-64 (1976) [hereinafter cited as COPYRIGHT LAW REVISION PART 1].

[63] *Id.* at 36, 151.

[64] *See* U.S. COPYRIGHT OFFICE FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1963), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1961-64 (1976); COPYRIGHT LAW REVISION PART 3, *supra* note 56; U.S. COPYRIGHT OFFICE FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 88TH CONG., 2D SESS., COPYRIGHT LAW REVISION PART 4: FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW (Comm. Print 1964), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1961-64 (1976) [hereinafter cited as COPYRIGHT LAW REVISION PART 4]; U.S. COPYRIGHT OFFICE FOR THE HOUSE COMMITTEE ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS (Comm. Print 1965), *reprinted in* 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1964, 1965 (1976).

[65] COPYRIGHT LAW REVISION PART 4, *supra* note 53, at 413-48. Represented by Thurman Arnold, the Recording Industry Ass'n of America submitted a lengthy printed statement that began:

> The RIAA position, in essence, is that eliminations of the statutory license provisions would require such fundamental changes in the operation of the phonograph record business that the continued existence of many manufacturers would be threatened; and that it would tend to encourage the growth of monopolistic practices which would undermine the economic health of the entire music industry and be contrary to the public interest.

Id. at 414, *reprinted in Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Bills for the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes, Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 668 (1965), *and in* 5-7 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1965, at 668 (1976) [hereinafter cited as *1965 House Hearings*].

[66] U.S. COPYRIGHT OFFICE FOR THE HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 54 (Comm. Print 1965), *reprinted in* 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1965, at 54 (1976) [hereinafter cited as COPYRIGHT LAW REVISION PART 6].

There was no further serious effort to eliminate the compulsory license. The battle instead shifted to the form and amount of the rate. The Register, while noting the "inflexibility" of a flat rate, rejected a percentage royalty, "partly because of the opportunities for abuse and subterfuge that it would offer, and partly because in the United States pricing in the record industry has been so disorganized that this alternative would be impractical."[67] On the amount of the rate, the Register stated:

> It should be borne in mind that exercise of the compulsory license is entirely optional with the record producer, being compulsory only on the copyright owner. The alternative of bargaining with the copyright owner for a negotiated license is always open to the record producer. Consequently the statutory royalty rate operates as a ceiling: the record producer can bargain for a lower rate, but the copyright owner can never bargain for a higher one. The vast majority of recording licenses in the United States have been negotiated and, at various times in the past, record producers have obtained negotiated licenses at less than the existing statutory rate of 2 cents. If the present 2-cent ceiling is raised, licenses could still be negotiated at 2 cents or less if current market conditions did not justify more; and if a higher ceiling resulted in negotiated licenses at more than 2 cents, it could well be argued that a 2-cent ceiling had proved to be too low. As we see it, the statutory rate should be at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time. It should not be so high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.[68]

The Register gave the most accurate summary in the legislative history of the parties' principal positions, and it applies equally well to later positions:

> During the discussions following issuance of the *Report*, it became apparent that record producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination. Moreover, while still opposing the provision in principle, some copyright owners implied that ultimately there might be advantages in ameliorating the harsh and burdensome effects of the compulsory license rather than doing away with it altogether; a number of publishers and some authors now have ties with record companies, and it was suggested that the compulsory license continues to have a favorable impact on competition by fostering the easy entry and growth of small companies within the industry. Moreover, although there appears to have been a trend away from "cover records" because of the type of music most popular at the moment, copyright owners also find advantages in having more than one recorded version of a song available to the public; frequently the first recording is not the hit that makes the song popular.

Id. at 53-54.

[67] *Id.* at 57-58.

[68] *Id.* at 58.

The Register recommended a royalty rate of 3¢. In addition, he recommended that for longer recordings of a composition, an "overtime" rate of 1¢ per minute should apply.[69]

1. The House

The Register's report included a draft bill, which was introduced in the House, and a House Judiciary subcommittee held hearings on it from May to September 1965.[70] The testimony at these hearings followed the pattern described by the Register. Composers and publishers attacked the compulsory license in principle, but concentrated their efforts on supporting the 3¢ rate in the bill.[71] The record industry, represented by the Recording Industry Association of America (RIAA), successfully repeated its arguments that the compulsory license was still needed,[72] but devoted its greatest efforts to holding down the rate, to 2¢ if possible.[73]

The lineup of the parties was probably the most striking aspect of these hearings. The authors and composers, those whom copyright is intended to encourage, took little part. The burden of representing them was carried by music publishers, represented by the National Music Publishers' Association. As a consequence, the committee naturally tended to view the interests of all copyright owners as synonymous with those of publishers. For example, the committee's report entitled the principle issue, *"The need for an increase by music publishers."*[74]

The publishers' prominent role also made them a more rewarding target for the record industry than they would have been if authors and composers had been more active. The record industry was able to argue effectively that music publishers no longer performed important functions and were overpaid.[75] There was no evidence as to the economic conditions of authors and composers, who were largely ignored.

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[69] *Id.* at 57. This overtime proposal followed occasional industry practice, *see supra* note 58, but greatly increased the overtime rate.

[70] *1965 House Hearings, supra* note 65.

[71] *1965 House Hearings, supra* note 65, at 25, 234-36, 260, 277-80, 286-96, 302, 305; H.R. REP. No. 83, 90th Cong., 1st Sess. 66, 70-72 (1967), *reprinted in* 11 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1966-67, at 66, 70-72 (1976) [hereinafter cited as 1967 HOUSE REPORT].

[72] *1965 House Hearings, supra* note 65, at 663-768, 909-10, 935; 1967 HOUSE REPORT, *supra* note 71, at 66-67.

[73] 1967 HOUSE REPORT, *supra* note 71, at 69-72; *see infra* notes 77-81, 84, 89-90.

[74] 1967 HOUSE REPORT, *supra* note 71, at 69.

[75] *1965 House Hearings, supra* note 65, 928, 931-32, 938, 944-45, 947-50.

Many of the issues and arguments in the 1965 hearings were repeated over the next eleven years before both houses of Congress and in 1980 before the Copyright Royalty Tribunal. Among them were these:

1. *The copyright owners' basic argument was that their position had deteriorated since 1909 because inflation had cut 2¢ to less than a third of its 1909 value.*[76]

The record companies countered that the effect of inflation was "meaningless when viewed in light of the tremendous increase in the volume of records sold, the great decrease in record prices, [and] the introduction of longplaying records containing 12 selections . . . ."[77] The record companies introduced a financial study, based on a survey of record companies, which asserted that total mechanical royalties were not only greater in dollars than ever before, but were larger than payments to performing artists or than net profits of record companies.[78]

The record companies also relied on a statement in one of the Copyright Office studies,[79] plus their own testimony as to 1909 record prices,[80] to assert that "the 1909 statute was designed to give copyright owners about 5 percent of the manufacturer's *wholesale* selling price, while the share today is around 15 percent."[81] Although there was a five percent relation between some record "selling price" and the 2¢ rate in 1909, the claim that the percentage related to wholesale rather than retail prices was an error that was not challenged, much less corrected, until the 1980 Tribunal proceeding on the mechanical royalty.[82] The difference was major. The suggested retail prices of records in recent decades have been at least twice wholesale prices,[83] and there is no reason to believe the difference was less in 1909.

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[76] *1965 House Hearings*, *supra* note 65, at 1737-39; 1967 HOUSE REPORT, *supra* note 71, at 70.

[77] 1967 HOUSE REPORT, *supra* note 71, at 70.

[78] *1965 House Hearings*, *supra* note 65, at 805-11, 872-73, 895-97. The study was conducted by Cambridge Research Institute, which later conducted two similar studies introduced before Congress in 1975 and before the Tribunal in 1980. *See infra* text accompanying notes 241-46, 372-73; *see also* 1967 HOUSE REPORT, *supra* note 71, at 70.

[79] "The 2-cent flat royalty was considered the then [in 1909] equivalent of five percent on the manufacturer's price." HENN STUDY, *supra* note 36, at 54-55, *reprinted in* 2 STUDIES ON COPYRIGHT, at 932-933. Prof. Henn cited no authority for his statement. The only apparent source is Rep. Currier's statement that two cents represented "about 5 percent probably on the selling price." 43 CONG. REC. 3766 (1909), *reprinted in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, pt. M, at M110 (1976).

[80] *1965 House Hearings*, *supra* note 65, at 931 (testimony of Goddard Lieberson, President, Columbia Records).

[81] 1967 HOUSE REPORT, *supra* note 71, at 70 (emphasis added); *see also 1965 House Hearings*, *supra* note 65, at 661, 822-24, 827, 889, 901, 916, 931.

[82] *See infra* text accompanying note 376.

[83] *1965 House Hearings*, *supra* note 65, at 821.

2. *The record companies' basic argument was that an increase to 3¢ would be a disaster for them. Their financial study asserted that their profits and return on net assets were already too low.*[84]

To these arguments the publishers responded that it was impossible to determine the true profits or return on assets of the major record companies because of intracorporate transactions (principally with distribution affiliates) within the conglomerates to which most belonged.[85] The publishers also asserted that mechanical royalty payments could not be compared with net profits because the royalties were gross revenues, out of which publishers paid composers' royalties, operating expenses, and taxes.[86] The record companies logically responded that the publishers should present financial data showing their own net profits.[87] This the publishers declined to do.[88]

3. *Another issue was whether the statutory rate would be a ceiling or the established rate. Essentially this was a question of whether it was possible or practical for record producers to reduce royalties on some recordings below the statutory rate, by bargaining with music publishers.*

Each side hurled its own survey, and the result apparently depended upon what one measured. Publishers claimed that about two-thirds of all records issued were licensed at less than the statutory rate, while the record companies claimed that only about one-quarter of the selections recorded were licensed at such lower rates. The record companies also argued that any reductions below the statutory rate were stereotyped, industry-wide variations, not the results of bargaining, and that practical business requirements made it impossible to bargain over rates on individual recordings.[89]

The issue had two implications: whether copyright owners were simply seeking more freedom to bargain or were attempting to exploit monopoly control and, on a more practical level, what would be the economic effect of an increase.

4. *A final issue was the impact on consumers. The positions of the parties on this issue built on the positions taken on the two previous issues.*

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[84] *1965 House Hearings*, *supra* note 65, at 803, 896-97; 1967 HOUSE REPORT, *supra* note 71, at 71.

[85] 1967 HOUSE REPORT, *supra* note 71, at 71.

[86] *1965 House Hearings*, *supra* note 65, at 286-88, 292, 891, 1743-44; 1967 HOUSE REPORT, *supra* note 71, at 71.

[87] *1965 House Hearings*, *supra* note 65, at 920, 924, 928; 1967 HOUSE REPORT, *supra* note 71, at 71.

[88] 1967 HOUSE REPORT, *supra* note 71, at 71.

[89] *1965 House Hearings*, *supra* note 65, at 291, 831-33, 835, 902-94, 911-13; 1967 HOUSE REPORT, *supra* note 71, at 72.

The record companies asserted that if the statutory rate were increased, actual rates paid to the publishers would increase by the same amount. They further argued that the record companies would be unable to absorb any part of such an increase and that it would be passed on and magnified by the distributors' markups, so that on a typical popular LP containing twelve selections, the 12¢ increase in the statutory rate would become a 20¢ increase in the price to customers.[90]

The publishers responded that record companies could probably absorb the increase, and in any event, it was impossible to predict what effect, if any, a rate increase would produce on retail record prices.[91]

The House committee recommended a rate of 2½¢, with the following elaborate conclusions:

> 1. Though it would be surprising if exactly the same amount found appropriate for the statutory royalty in 1909 were found still to be appropriate in 1966, this result is not impossible. The sharp decrease in the value of money in the past half century has undoubtedly been counteracted to a significant extent by the drop in the per composition cost of records and the much greater sales volumes involved. On the other hand, the committee is not prepared to say, even on the basis of the record industry's own figures, that no increase is justified.
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> 2. The record producers have effectively supported their argument that, as of the time of the hearings, an increase of 1 cent in all copyright royalties actually paid could have had a substantial adverse impact on the industry. At least in some cases relatively high risks and small profit margins could force companies to pass the increase on to consumers, and could set up pressures that would result in some business failures and restructuring within the industry.
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> . . . .
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> 4. In the significant debate over whether the statutory fee is a ceiling or a rate there appears to be some validity to the arguments on both sides. The fee is certainly a ceiling in the sense that no higher amounts are ever paid, but the record producers may well be right in asserting that the statutory fee establishes a base, with stereotyped variations downward, that for practical business reasons is used as the rate in most written agreements. In this sense there may be relatively few "negotiated" agreements; but this does not necessarily mean that, if the statutory maximum were in-

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[90] *1965 House Hearings, supra* note 65, at 816-21, 897-900; 1967 HOUSE REPORT, *supra* note 71, at 71-72.

[91] *1965 House Hearings, supra* note 65, at 1741-44; 1967 HOUSE REPORT, *supra* note 71, at 71-72.

> creased somewhat, the prevailing fee structure would immediately be increased to the maximum without negotiations.
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> 5. . . . The committee is setting a statutory rate at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at the time, but one that is not so high as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.
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> 6. Applying these principles to the specific issue facing it, the committee concluded that the present 2-cent rate is too low and that the proposed 3-cent rate is too high. In adopting a rate halfway between the two, the committee does not suggest that 2½ cents should necessarily constitute the prevailing rate now or in the future. The half cent increase is intended merely to widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers.[92]

The more cynical could and did conclude that the committee could have reached the same conclusion by simple-mindedly splitting the difference. The House passed the committee's bill without any further changes in the mechanical royalty.[93]

2. The Senate

Two weeks after the House committee report, but before the House had passed the bill, the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights, chaired by Senator McClellan, began hearings on the mechanical royalty, as part of extensive hearings on copyright law revision.[94] In these hearings, the players, their positions, and their arguments changed little.[95]

There were, however, three significant developments. First, Leonard Feist, then Executive Secretary of NMPA, planted the seed from which the Tribunal developed.[96] He testified: "We urge that, under any circumstances, a provision be written into the law to

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[92] 1967 HOUSE REPORT, *supra* note 71, at 72-74.

[93] H.R. Res. 2512, 90th Cong., 1st Sess., 113 CONG. REC. 9022 (1967). There were major changes in the jukebox and cable sections, which are discussed below, *see infra* text accompanying notes 119-21, 157-59.

[94] *Copyright Law Revision: Hearings on S.597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967), *reprinted in* 9-10 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1967 (1976) [hereinafter cited as *1967 Senate Hearings*].

[95] *Id.* at 370-451, 453, 546, 857-99, 1090-1104.

[96] Interview with Commissioner Thomas C. Brennan in Washington, D.C. (Dec. 15, 1981). Commissioner Brennan was Chief Counsel to the Senate Subcommittee on Patents, Trademarks, and Copyrights throughout the entire copyright revision process.

provide that the established statutory royalty be subject to reexamination at periodic intervals."[97] The economist Robert Nathan elaborated on the suggestion:

> There surely is no reason for concluding that the 1909 Congress intended the 2-cent rate to be fixed forever. Yet there is now no provision for some kind of a regulatory vehicle or mechanism along the lines of a public utility commission which would have the staff to do the essential analysis and would conduct full-scale hearings from time to time to permit the upward or downward adjustment of royalty rates based on objectives and standards set forth in legislation, and no such proposals are made by the record industry.[98]

Second, Thurman Arnold, counsel for RIAA, analogized music publishers to public utilities, and the statutory rate to a utility rate. He continued:

> The accepted standards of statutory ratemaking are the following: (1) the rate should be uniform so that no party who needs the service can get a competitive advantage over his competitors by rebate, quantity discount, or superior bargaining power; (2) the minimum rate should be one that insures the party against whom it is imposed a reasonable return on his investment; and (3) the optimum rate should be one that divides the rewards for the respective creative contributions of the record producers and the copyright owners of the lead tune equitably between them.[99]

Mr. Nathan responded for the publishers:

> As far as the second so-called standard of statutory rate making is concerned, I ask the committee how anyone could possibly determine a royalty rate which would provide "a reasonable rate of return on his investment" for music publishers and composers. This is a personal service industry. There is no large physical plant and large-scale fixed investment as characterizes most public utilities. I am confident that the members of this committee would never even try to fix a rate of return on investment for writing songs and lyrics and for publishing music.[100]

Although the committee never did try to fix a rate of return on the investment in writing a song, it ultimately acquiesced in an instruc-

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[97] *1967 Senate Hearings, supra* note 94, at 373, 377.

[98] *Id.* at 1091; *see also id.* at 1094.

[99] *Id.* at 469.

[100] *Id.* at 1093.

tion that the Copyright Royalty Tribunal do something very similar.[101]

Third, the record industry renewed its challenge to the publishers to reveal their profits and related financial data.[102] This challenge prompted Senator McClellan to write to seventy music publishers demanding specific information as to income, expenses and profits of publishers.[103] He stated during hearings the next day: "I imagine the committee will obtain what it wants if [the publishers] want their position considered."[104]

Notwithstanding Senator McClellan's clear threat, only eight publishers supplied any of the data he requested.[105]

Because of the cable impasse discussed below,[106] the Senate committee made no report during the 90th Congress. With respect to the mechanical royalty, however, the committee asked the Legislative Reference Service of the Library of Congress to analyze the available economic data. On June 30, 1969, Edward Knight of the Service's economics division rendered a report, in which he, like Messrs. Feist and Nathan, foreshadowed the Copyright Royalty Tribunal:

> [T]hough the Congress has gained some useful insights into the controversy, it has not yet been provided the type of economic information which it will need to render a fair and equitable judgment on this highly controversial issue.
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> Hence, if Congress is unable to successfully arbitrate the dispute based on the information presented to date, it will have to resort to additional factfinding. The type of factfinding would have to be determined by the appropriate Congressional committees themselves. However, the Congress is afforded a number of options, including, for example, further study and investigation by committee staff. . .; the establishment of an independent *ad hoc* study group by the Congress; and/or the reopening of hearings by one or both of the committees having jurisdiction over this question.[107]

The compulsory mechanical license was only one of several strands which wove together in 1969 to prompt the first proposal for a Copyright Royalty Tribunal. Among the others were the jukebox

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[101] *See infra* text accompanying notes 296-97, 303-04, 331-37.

[102] *1967 Senate Hearings*, *supra* note 94, at 458-59.

[103] *Id.* at 1098; E. Knight, The Mechanical Royalty Rate on Sound Recordings: Survey of Issues Before the Judiciary Committees of the Congress 90-92 (June 30, 1969) (available in the Library of Congress) [hereinafter cited as Knight Report].

[104] *1967 Senate Hearings*, *supra* note 94, at 1099.

[105] Knight Report, *supra* note 103, at 92.

[106] *See infra* pp. 26-35.

[107] Knight Report, *supra* note 103, at 97-98.

provision and the complex cable TV problems. At this point, it is necessary to pick up those strands.

B. *The Jukebox Issue*

Section 1(e) of the 1909 Act, while clarifying that performance by mechanical reproduction was included in the exclusive right to publicly perform a musical work, exempted jukebox performances: "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

The only explanation of the exemption appeared in the committee report which accompanied the final version of the bill: "The exception . . . is understood to be satisfactory to the composers and proprietors of musical copyrights. A representative of one of the largest musical publishing houses in the country stated that the publisher finds the so-called 'penny parlor' of first assistance as an advertising medium."[108]

"Penny parlor" soon became an utterly inadequate description of the jukebox industry. In 1965 industry revenues approximated half a billion dollars.[109] Beginning in the 1920's, authors, composers, publishers, performing rights societies,[110] and innumerable sympathizers, had made repeated, unsuccessful efforts to eliminate the jukebox exemption.[111] The efforts continued more successfully in the revision process that led to the 1976 Act. The Register of Copyrights began by recommending that the exemption either be abolished entirely or be replaced by a requirement that jukebox operators pay reasonable license fees.[112]

At the 1965 hearings, the advocates of repeal clearly had the upper hand in a favorable forum. The only serious arguments advanced by the jukebox operators were that their industry was in decline, that sudden imposition of full copyright liability would be

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[108] FEBRUARY 1909 REPORT, *supra* note 19, at 9. The exemption was not included in any prior bill.

[109] 1967 HOUSE REPORT, *supra* note 71, at 76.

[110] The performing rights societies in the U.S. are ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.), and SESAC, Inc. (formerly Society of European Stage Authors and Composers). On behalf of their author, composer, and publisher members, they license broadcasters, musicians, public accommodations, background music services, and others, to give non-dramatic performances of the works of their members.

[111] 1967 HOUSE REPORT, *supra* note 71, at 75.

[112] COPYRIGHT LAW REVISION PART 1, *supra* note 62, at 31-32; COPYRIGHT LAW REVISION PART 6, *supra* note 66, at 59-61.

enormously disruptive, and that most of them were small enterprises which could not bargain or even litigate fairly with the performing rights societies.[113]

Because of this inequality in bargaining power, the committee favored creating another compulsory license, this one to replace the jukebox exemption. The issue became the fee, which in turn divided into two issues: the form and the amount.

The most obvious form was a fixed fee per jukebox. A bill previously considered in 1963 would have imposed a fee of $5 per jukebox per year.[114]

The Judiciary Committee rejected this approach in its 1967 Report, stating:

> At first glance this plan would seem to offer the simplest kind of compulsory licensing in the jukebox field, since it would establish a uniform rate, would permit the operator to make a single payment without making separate accountings, and might avoid some policing of individual boxes by copyright owners. However, the plan was opposed by both sides at the 1963 hearings, and on examination it proved to have serious drawbacks. It would have required centralized payment which, under a statutory scheme, would necessarily require a Government body either to collect the money or to establish and regulate a quasi-governmental collection agency. Even more serious, the proposal would have been virtually unworkable because it would have required disbursement among various copyright owners or agents, on the basis of a factual finding of relative numbers of performances, which would have required extensive and costly hearings, surveys, reports, appeals, and litigation. Costs of administration would eat up the receipts unless the fee were quite high, the funds collected would be tied up until final adjudication of every claim, and private negotiations could be effectively prevented.[115]

The committee concluded that this method would be "administratively unworkable."[116]

The committee sought to avoid these problems by a complex fee system under which the jukebox operator would pay a quarterly royalty on each record in his box directly to the copyright owners.[117]

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[113] 1967 HOUSE REPORT, *supra* note 71, at 76-77.

[114] *Id.* at 77.

[115] 1967 HOUSE REPORT, *supra* note 71, at 77-78. The Committee's prophetic statement of objections followed the testimony of Sidney Kaye, chairman and general counsel of BMI. *1965 House Hearings, supra* note 65, at 214.

[116] 1967 HOUSE REPORT, *supra* note 71, at 79.

[117] *Id.* at 78-79, 81, 83.

The committee estimated that the license fee paid by an average jukebox would be approximately $19 per year.[118]

Jukeboxes may have been a declining industry, but they were multitudinous, widely distributed, and apparently well loved in many congressional districts. When the committee's bill reached the floor, those representatives who supported jukeboxes and resented performing rights societies staged a battle which, together with the growing cable problem, threatened to defeat the bill entirely.[119]

After demonstrating their strength in the initial floor debate, the jukebox supporters reached a compromise with the managers of the bill. The form of royalty was changed to a fixed annual amount per box paid to the Register of Copyrights, and the amount was set at $8 per year.[120] Distribution would have been handled by the United States District Court for the District of Columbia. Each year it would hear an interpleader suit among the performing rights societies and unaffiliated copyright owners to distribute the accumulated royalties in "the pro rata shares to which such performing rights societies [and owners] prove their entitlement."[121]

With this amended jukebox provision, the bill was passed by the House. In essence, the House passed the provision which its judiciary committee had declared to be "administratively unworkable," and delivered to the Senate the problem of making it work. As the House committee had predicted, that task would require a "quasi-governmental collecting [and distributing] agency."[122] The formal proposal for such an agency, however, had to await developments on the cable problem.

C. *The Cable Snarl*

Cable retransmission[123] of television programs played much the same role in the 1976 Act that mechanical reproduction of music played in the 1909 Act. Cable was a new and rapidly growing technology. Cable operators used works created by others and paid noth-

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[118] *Id.* at 83.

[119] *See* 113 CONG. REC. 8444-45, 8581-83, 8586, 8588-90, 8592, 8594-95, 8609-11 (1967).

[120] *Id.* at 8992.

[121] *Id.* This language became the criterion governing jukebox royalty distributions by the Copyright Royalty Tribunal. 17 U.S.C. § 116(c)(4) (Supp. IV 1980). The Tribunal's experience under it is discussed at *infra* notes 461-67.

[122] *See supra* text accompanying note 115.

[123] The statutory language is "secondary transmission of a primary transmission embodying a performance or display of a work." 17 U.S.C. § 111(a) (Supp. IV 1980). Cable transmission of television signals is also known as "CATV," which originally was an acronym for "community antenna television."

ing for them. When the copyright revision process began, it was unclear whether such use constituted infringement under existing law. Supreme Court decisions during the revision process settled the question and drastically affected the final legislation.[124] Cable operators claimed throughout that if they were subject to copyright liability, they would be faced with monopolistic control by combinations of copyright owners. The resulting struggles delayed revision of the Copyright Act for at least nine years, from 1967 to 1976. Finally, an overconfident position taken by copyright owners cost them dearly, just as it did in the process leading up to the 1909 Act.[125]

The history of cable regulation by the Federal Government is complicated by the fact that two nominally separate areas of the law were involved, each subject to separate congressional committees and agencies. One was "communications" or "regulation" under the jurisdiction of the FCC and the Commerce Committee; the other was copyright under the jurisdiction of the Judiciary Committees and the Copyright Office. In fact, the same results could be, and at various times were, achieved under either rubric. Throughout the process, the ingenuity of various draftsmen demonstrated how many ways the same cat could be skinned; at times, however, it became difficult to tell who was skinning and who was holding the leg.[126]

The struggle pitted copyright owners or "program syndicators" (principally motion picture producers), broadcasters, and sports broadcasters against the cable operators. The copyright owners and broadcasters primarily wanted to obtain payment and to maintain "exclusivity," i.e., control over when and where their more perishable works (e.g., sports broadcasts and new motion pictures) would be shown.

The cable operators relied on predictable political arguments. At the outset they claimed, with some justification, to be an infant industry composed of "Mom and Pop" operators in shaky financial condition. By the end of the struggle in 1976, the industry had grown so that its opponents felt that Ma Bell was a more appropriate parental image. The cable operators' political power was at all times formidable. Their principal opponents, the motion picture producers, were concentrated in Southern California, while cable systems operated in most congressional districts. A particularly effective tactic of the cable operators, which even broadcasters could not match, was to include

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[124] *See infra* notes 146, 198.

[125] *See supra* text accompanying notes 31-34.

[126] *See* BENJAMIN P. THOMAS, ABRAHAM LINCOLN 420 (1952).

in monthly bills to their subscribers a warning that proposed copyright legislation would raise rates to cable viewers.

The more technical arguments of the cable operators rested on a set of interrelated technological, commercial, and legal conditions, among which were the following:

1. When a cable system retransmits a broadcast signal it has little control over the content. It can only "black out" programs or, given sufficient notice, substitute a different signal.

2. The number of owners or licensees of copyrights in the material broadcast by one station over any extended period of time is enormous. A single program may use materials whose copyrights are owned or licensed by several different entities.

3. There did not and does not now exist any central agency, like the performing rights societies, which could license the retransmission of all copyrighted materials performed by one or several television stations.[127]

4. The creation of such a central licensing agency would require agreement among multitudinous copyright owners and thereby raise antitrust problems similar to those created by the performing rights societies.[128]

5. Compensation for the use of copyrighted materials in broadcast or "free" television is not paid directly by the viewers, but by advertisers. Retransmission may have very different effects on the compensation ultimately received by copyright owners, depending upon how the retransmission affects the advertiser.

Three different retransmission situations came to be distinguished. First is the retransmission of a signal within the area in which it is normally received and in which its local advertisers have their markets. Second is the retransmission of a program originating with one of the national networks, whose advertisers generally have national markets. Third is the retransmission of the signal of a non-network station into an area outside its normal broadcast range, where its local advertisers may have no customers. It is generally conceded that in the last situation (a "distant signal"), retransmission

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[127] *See* COPYRIGHT LAW REVISION PART 6, *supra* note 66, at 42; *Oversight of the Copyright Act of 1976 (Cable Television): Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 31 (1981) (testimony of former Register Ringer) [hereinafter cited as *1981 Senate Oversight Hearings*].

[128] *See* Garner, *U.S. v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPR. SOC'Y 119 (1976); Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948); M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), *on remand sub nom.* CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980).

is more damaging to the copyright owners and program originators than in the first two situations. A local advertiser derives less (if any) benefit from distant cable viewers and therefore is willing to pay less or nothing to reach them. The extent of this damage was and is the subject of much debate.[129]

When the copyright revision process began in 1955, there were only approximately four hundred cable systems, mostly in small cities and rural areas, with about 150,000 subscribers.[130] None of the Copyright Office studies had discussed the problem of cable retransmission, nor did the Register's initial report in 1961. In the beginning, the Federal Communications Commission was equally unconcerned. In 1959 it found that cable retransmission was unlikely to have any significant adverse effect upon local broadcasting services and the public interest.[131] Furthermore, the FCC concluded that it had no jurisdiction over cable systems because they were neither common carriers nor broadcasters, and the Commission did not believe that the impact of cable on broadcasting gave the Commission jurisdiction to regulate cable.[132]

By 1965, when the Register's Supplementary Report[133] was issued and when both houses of Congress had begun hearings on copyright revision, the number of cable systems had grown to approximately 1,300, with approximately 1,300,000 subscribers,[134] and the Register foresaw that the cable issue would be "one of the most hotly debated issues in the entire revision program."[135]

The Register concluded:

> A particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clear-

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[129] *Compare* H.R. REP. No. 1476, 94th Cong., 2d Sess. 90 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659 (pages 2-46 of the report omitted), *and in* 17 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1976 at 90 (1977) (transmission of distant non-network programming damages copyright holders by distributing programs in an area beyond which the program has been licensed and thereby injures the copyright owner's ability to exploit the work in the distant market) [hereinafter cited as 1976 REPORT], *with* Teleprompter Corp. v. CBS, 415 U.S. 394, 412-13 (1974) (broadcasters whose reception ranges have been extended by means of distant cable retransmission will merely have a different and larger market on which to base their advertising fees, with this affecting the amount the broadcasters are willing to pay copyright owners), *and* Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW AND CONTEMPORARY PROBLEMS 77, 112-17 (1981) (retransmission of broadcast signals has not injured television broadcasters in any observable fashion).

[130] TELEVISION FACTBOOK 83a (48th ed. 1979), *quoted in* Besen & Crandall, *supra* note 129, at 80.

[131] CATV and TV Repeater Services, 26 F.C.C. 403, 415, 421-22, 435-38 (1959).

[132] *Id.* at 427-29.

[133] COPYRIGHT LAW REVISION PART 6, *supra* note 66.

[134] TELEVISION FACTBOOK, *supra* note 130, at 83a.

[135] COPYRIGHT LAW REVISION PART 6, *supra* note 66, at 40.

> ances for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.
>
> On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work.[136]

In 1965, the issue of whether cable retransmission was a performance under the 1909 Act had not yet been decided by any court. In the 1965 House hearings, the interested parties took diametrically opposed positions, the copyright owners and their allies contending that any retransmission was a performance and should carry full liability, and the cable operators arguing for complete exemption.[137]

Meanwhile, the FCC was executing a swift about-face and advancing into the fray. In a series of decisions and rules issued between 1962 and 1965, it determined that it did have jurisdiction over cable retransmissions and it began imposing progressively more stringent restrictions on cable operators.[138] These culminated in a set of rules adopted in 1966 and commonly called "the freeze."[139] The principal refrigerating device was a prohibition against carrying a distant signal by cable into any one of the hundred largest television markets,[140] unless the cable system first established in an evidentiary hearing that such carriage "would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service."[141] An exception was made for existing cable retransmission arrangements, which were grandfathered.[142]

The Commission stated its basic rationales as follows:

> Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry

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[136] *Id.* at 42.

[137] *See, e.g., 1965 House Hearings, supra* note 65, at 1227-28, 1245, 1264-65.

[138] *E.g.*, Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963); Rules re Microwave-Served CATV, 38 F.C.C. 683 (1965); CATV, 2 F.C.C.2d 725, 745 (1966).

[139] CATV, 2 F.C.C.2d at 745-69; REGISTER OF COPYRIGHTS, SECOND SUPPLEMENTARY REPORT ON THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, ch. V, at 5 (1975), *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 170, 174 [hereinafter cited as SECOND SUPPLEMENTARY REPORT].

[140] These markets contained approximately 90% of the nation's television homes. CATV, 2 F.C.C.2d at 783.

[141] *Id.* at 782. Only one such hearing was ever completed, and in that proceeding the Commission reversed its hearing examiner and restricted the carriage of distant signals. Midwest Television Inc., 13 RAD. REG. (P & F) 698 (1968).

[142] CATV, 2 F.C.C.2d at 784. The FCC's authority over cable systems was upheld in United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

> local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV, and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential.[143]

The FCC had, in short, gone into the copyright business. "Unfair competition" has often served, in areas outside the Copyright Act, as a rubric to render the same protection as copyright provides.[144] The Commission's general counsel at the time of the Second Report has since stated that the report "can best be understood as a holding action until [the copyright] issue was definitely resolved in the courts."[145]

The lay of the land shifted drastically within three months, when Judge Herlands rendered the first decision in *United Artists Television v. Fortnightly Corp.* and held that cable retransmission was performance of a work within the meaning of the 1909 Act.[146]

The cable operators naturally became more conciliatory. In August 1966, the president of the National Community Television Association (NCTA) proposed a compromise to the Senate Judiciary Committee, under which retransmitted signals would have been divided into three categories:

1. No copyright liability would attach nor would authorization be required for retransmission of local signals.

2. A compulsory license "on a reasonable fee basis defined by statute," would cover retransmission of a distant signal into an area that was not "adequately served," *i.e.*, one which was not served by at least the three networks plus one independent station.

3. As to retransmission of a distant signal into an "adequately served" area, NCTA said, "there should be no objection to requiring CATV systems to obtain a license from the copyright owners for each and every copyrighted program obtained from a distant station," although industrywide bargaining should be permissible.[147]

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[143] CATV, 2 F.C.C.2d at 736.

[144] *E.g.*, International News Serv. v. Associated Press, 248 U.S. 215 (1918); Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47, 58-59 (D. Idaho 1962), *rev'd*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1964); *see* Sears, Roebuck & Co. v. Stiffell Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); 1 NIMMER ON COPYRIGHT § 1.01(B)(1) (rev. ed. 1978).

[145] Besen & Crandall, *supra* note 129, at 91 (Henry Geller, Gen. Counsel).

[146] 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968).

[147] *Copyright Law Revision—CATV: Hearings on S.1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 86-88 (1966) (testimony of Frederick W. Ford, President, NCTA), *reprinted in* 8 OMNIBUS COPYRIGHT

In a further submission to the Senate Judiciary Subcommittee the following month, NCTA explained what it meant by a "reasonable fee . . . defined by statute." In the first place, the fee should not be a flat sum like the mechanical royalty under the 1909 Act. Said NCTA, "Events have long since outstripped the two-cent royalty." Instead, the royalty should be "a percentage of gross revenues resulting from CATV operations," so that "as the CATV industry expands and its receipts increase, so will the revenues of copyright owners."[148]

The cable operators went on to suggest much of the Senate's proposed version of the Copyright Royalty Tribunal:[149]

> NCTA suggests a procedure whereby a percentage figure can be adjusted every five years. In order to accomplish this objective, NCTA recommends that Congress by statute provide that every five years the Register of Copyrights should appoint a panel of three experts for the purpose of considering revisions in the percentages paid by CATV operators under compulsory license. In making his appointments, the Register would be required to select one member from a group nominated by the copyright owners, a second from a group nominated by CATV operators, and the third would be a representative of the public designated by the Register of Copyrights.[150]

Two months later, on October 12, 1966, the House Judiciary Committee reported out a revision bill[151] which adopted substantially the same tripartite division suggested by NCTA,[152] except that "adequate service" was defined as receiving more than half the programs of each of the major networks.[153]

For the second category of the tripartite division—retransmission of a distant signal into an area not "adequately served"—the committee proposed a sort of compulsory license. It was phrased as a limita-

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REVISION LEGISLATIVE HISTORY, 1965-66, at 86-88 (1976) [hereinafter cited as *Copyright Law Revision—CATV*] Due to the number and complexity of the cable proposals in the history of the 1976 Act, we have oversimplified the descriptions of this and succeeding cable proposals. NCTA's proposal also included exclusivity provisions and restrictions upon copyrights in music.

[148] *Id.* at 105.

[149] *See infra* text accompanying notes 169-77.

[150] *Copyright Law Revision—CATV*, *supra* note 147, at 105-06.

[151] H. R. REP. No. 2237, 89th Cong., 2d Sess. 1 (1966), *reprinted in* 11 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1966, 1967, at 1 (1976); 1967 HOUSE REPORT, *supra* note 61, at 48-59, 170-77. The bill was not acted upon in the 89th Congress and the bill reported out in 1967 was substantially identical.

[152] *See supra* text accompanying note 147.

[153] In addition to full copyright liability for retransmitting distant signals into "adequately served" areas, cable operators would have been fully liable in several other situations, including where a local broadcaster acquired exclusive rights to a program and so notified the cable system. 1967 HOUSE REPORT, *supra* note 71, at 55-58, 172-75.

tion on damages for infringement to "recovery of a reasonable license fee, as found by the court under the circumstances of the case."[154] The committee anticipated that most retransmissions would be covered by licenses negotiated between program originators and cable operators. In order to encourage such negotiation, courts would have been empowered to penalize any cable operator or copyright owner whom they found had refused a demand or tender, as the case may be, of a reasonable fee.[155]

The committee's proposal of individual licensing rather than a blanket compulsory license (as suggested by NCTA) was not an oversight. The committee specifically considered and rejected blanket compulsory licensing schemes, for reasons which, like the committee's position on the jukebox license, became ironic as revision proceeded:

> In various discussions of compromise solutions to the CATV problem, proposals have been advanced for a compulsory licensing system based on payment of a fixed percentage of an operator's gross receipts rather than of a "reasonable license fee." Aside from the obvious difficulties of determining what the proper percentage would be and of allocating payments among an indefinite number of owners of copyrighted works of different types and values, it would be difficult to collect and distribute royalties equitably without establishing unacceptable Government controls or administration. The committee is opposed to any such system, and sees no need for it. It is to be hoped that negotiated agreements can be worked out without litigation; but, even if test cases are necessary, the appointment by the courts of experienced masters who can take account of prevailing license rates in analogous fields should provide guidelines as to what constitutes a "reasonable license fee" in particular situations.[156]

When the Judiciary Committee's bill reached the floor of the House later in 1967, it encountered a major jurisdictional struggle with the Commerce Committee, which had jurisdiction over communications and over the FCC.[157] Another difficulty was that the Justice Department had previously testified in 1966 before the Senate that subjecting cable systems to copyright liability would raise "possibilities of harmful anti-competitive consequences." It recommended that regulation of cable be left to the FCC.[158]

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[154] *Id.* at 58, 175.
[155] *Id.* at 58-59, 175-76.
[156] *Id.* at 59.
[157] 113 CONG. REC. 8598-8603, 8617-21 (1967).
[158] *Copyright Law Revision—CATV*, *supra* note 147, at 211-15.

To avoid the jurisdictional struggle and to save the remainder of the revision bill, the Judiciary Committee agreed to delete the cable provision entirely.[159] It was made abundantly clear to the House that the effect of such a deletion under the district court's decision in *Fortnightly* would be to impose full copyright liability on all cable retransmissions; furthermore, the House was advised that "the parties do not anticipate that [*Fortnightly*] would be overturned."[160] On that understanding, the bill was passed by the House without any cable provision and with the amended jukebox provision described above.[161]

The Senate Judiciary Committee did not report out a revision bill. But all was not quiet on the copyright front. In June 1968 the Supreme Court confounded the general expectation and reversed the lower courts in *Fortnightly*. The Court's analysis was simple:

> Broadcasters perform. Viewers do not perform . . . .
>
> When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals . . . . [T]he basic function the [CATV] equipment serves is little different from that served by the equipment generally furnished by a television viewer.[162]

What the Supreme Court gave, the FCC did its best to take away. On December 12, 1968, the Commission announced that it was abandoning its hearing procedure on authorizations to import distant signals into the top 100 markets. Instead, it would authorize importation of distant signals into those markets only if a cable operator obtained permission from the distant broadcaster to retransmit each of its programs.[163] These "retransmission consents" had to be given for individual programs or series; a blanket "quitclaim" authorization by the station would not do. Since the broadcasters generally had not received from the copyright owners and program originators the power to give such authorizations, the effect was to require individual copyright licenses, and to intensify the freeze.[164]

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[159] 113 CONG. REC. 8990-91.

[160] *Id.* at 8991-92.

[161] *Id.* at 8992, 9021; *see supra* text accompanying notes 120-22.

[162] *Fortnightly*, 392 U.S. at 398-99.

[163] CATV, 15 F.C.C.2d 417, 428 (1968).

[164] SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 9-10, *reprinted in 1981 Senate Oversight Hearings*, *supra* note 127, at 177-78; Botein, *The FCC's Cable Television Regulations — Round Four*, 1971-72 ANN. SURV. AM. L. 577, 579 (1972).

Throughout the long history of cable regulation, negotiations among the parties were almost continuous. In May 1969, the attorneys for the National Association of Broadcasters (NAB) and for NCTA agreed on a compromise, soon to be known as "the abortive staff agreement." It called for combined copyright legislation and FCC action to create a compulsory license for retransmission of local signals and for retransmission of the nearest available distant signals needed to provide "adequate service." As an example of rising expectations, however, "adequate service" was now defined as the three networks and *three* independent stations. Other provisions called for full copyright liability under some circumstances, and, in addition, they covered grandfathering, original entertainment programming, and interconnection of cable systems.[165]

It is apparent that the Supreme Court's decision in *Fortnightly* had changed the balance of bargaining strength as seen by the attorneys. Their view, however, was not fully shared by their principals. The cable operators accepted the agreement, but the board of directors of NAB turned it down, and in the fall of 1969 progress once more ground to a halt.[166]

III. Revision of the Copyright Laws—1969 to 1976

A. *The December 1969 Senate Bill*

At this point Senator McClellan and his subcommittee took the initiative with a new revision bill.[167] As the subcommittee commenced drafting, it was apparent that any revision bill would contain at least three compulsory licenses: the old mechanical license, the license for jukebox performance of music, and a license for cable retransmission.

In connection with each of these licenses, suggestions had been made earlier that an administrative body should be created, or might have to be created, to set the rates, to adjust them periodically, to distribute the royalties, or all three.[168] The subcommittee's response was contained in a bill which it reported out on December 10, 1969.[169] The bill proposed a Copyright Royalty Tribunal which

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[165] Second Supplementary Report, *supra* note 139, at 11-12, *reprinted in 1981 Senate Oversight Hearings, supra* note 139, at 178-79.

[166] Second Supplementary Report, *supra* note 139, at 12, *reprinted in 1981 Senate Oversight Hearings, supra* note 139, at 179.

[167] Second Supplementary Report, *supra* note 139, at 12-13, *reprinted in 1981 Senate Oversight Hearings, supra* note 129, at 179-80.

[168] *See supra* text accompanying notes 99-101, 107, 114-22, 150, 154-59.

[169] S. 543, 91st Cong., 1st Sess. (1969).

would administer the three compulsory licenses. By making the Tribunal a series of ad hoc arbitration tribunals rather than a continuing body, the bill respected the House Judiciary Committee's expressed dislike of a permanent agency,[170] and the Knight Report's suggestion of an ad hoc body.[171]

Under the bill, the Tribunal would "(1) . . . make determinations concerning the adjustment of the copyright [compulsory] royalty rates . . .[172] so as to assure that such rates continue to be reasonable, and (2) . . . determine . . . the distribution of [such] royalty fees deposited with the Register of Copyrights . . . ."[173] Rate adjustment proceedings would be held at five-year intervals, on petition of an affected copyright owner or user.[174] Royalty distribution proceedings would be held each year if there was a controversy among claimants. A separate panel would be nominated by the American Arbitration Association for each proceeding, with the Register deciding any challenges for cause.[175]

Either house of Congress would have veto power over royalty adjustments, but the bill made no provision for review of royalty distribution determinations.[176] The Tribunal was to be given full subpoena powers.[177]

The Senate bill made no material changes in the mechanical license and royalty provisions that had been passed by the House in 1967;[178] the rate remained at 2½¢ (plus overtime).[179]

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[170] *See supra* notes 115-16 and accompanying text.

[171] *See supra* text accompanying note 107.

[172] The bill would also have created a performance right in sound recordings and a compulsory license for the exercise of such right. The Tribunal would have adjusted the royalty rate for this compulsory license and distributed the proceeds in the same manner and on the same schedule as the cable compulsory license and royalty. S.543, 91st Cong., 1st Sess. §§ 114, 801-03 (1969). The performance right in sound recordings and the related compulsory license were eliminated by the Senate in 1974, 120 CONG. REC. 30,484, and do not appear in the 1976 Revision Act. The record industry has continued its efforts to create a performance right in sound recordings and subsequent bills have included a related compulsory license whose royalty would be administered by the Copyright Royalty Tribunal. *See, e.g.*, H.R. 1805, 97th Cong., 1st Sess., *reprinted in* 2 COPYRIGHT L. REP. (CCH) ¶ 20,101 (Feb. 6, 1981). The question of performance right and royalty in sound recordings will be mentioned hereafter only so far as needed to clarify the changes in the Tribunal and related provisions.

[173] S. 543, 91st Cong., 1st Sess. § 801(b) (1969).

[174] *Id.* § 802.

[175] *Id.* § 803(a).

[176] *Id.* § 807.

[177] *Id.* § 804(c).

[178] *See supra* text accompanying notes 92-93.

[179] S. 543, 91st Cong., 1st Sess. § 115(c)(2) (1969). The subcommittee implicitly rejected an amendment proposed in August 1969 by Senator Hart, which would have set the rate at 8% of suggested retail price, prorated according to the playing time of the selections on each record. 115 CONG. REC. 23,532, 23,695-96 (1969).

There was also little change in the jukebox license and royalty, save for transferring the distribution function from the courts to the Copyright Royalty Tribunal.[180] The rate remained essentially $8 per jukebox per year.[181]

Simplicity ceased, as usual, with the cable provisions. In general, they straightforwardly accepted blanket compulsory licensing, they demonstrated that Congress could achieve substantially similar results by either "copyright" or "communications" legislation, and they evidenced the deterioration of the copyright owners' and broadcasters' bargaining position since 1966, a process which continued throughout the revision process.

The central cable provision of the Senate bill was a compulsory license for retransmission of (1) all local signals;[182] (2) distant signals into areas which did not otherwise receive "adequate service,"[183] and (3) "grandfathering" of signals properly retransmitted as of December 31, 1970.[184] The level of service defined as "adequate" had risen to require not only the three major networks (as in 1967),[185] but also one non-commercial educational station, plus (a) in the top 50 markets, three independent commercial stations, and (b) in the other markets, two independent commercial stations.[186]

Full copyright liability would be imposed in those markets meeting the new definitions of "adequate service" and in some situations where a local station had exclusive rights to a work.[187]

The royalty fee for the compulsory license would be a variable percentage of all gross receipts from cable subscribers. The percentage would be 1% on quarterly gross receipts under $40,000, 2% on additional gross receipts up to a quarterly total of $80,000, and in similar steps increasing to 5% of any quarterly gross receipts over $160,000. An additional 1% would have been charged for each grandfathered channel.[188]

The concept of a Copyright Royalty Tribunal was generally accepted from its first appearance in December 1969,[189] although its

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[180] *Id.* § 116(c)(2).

[181] There was an additional $1 per year for the performance right in sound recordings. *Id.* §§ 116(b)(1)(A), (c)(3)(A).

[182] *Id.* § 111(c)(1)(B).

[183] *Id.* § 111(c)(2)(A). They were to be the nearest available signals of the types needed to provide "adequate service."

[184] *Id.* § 111(c)(2)(B).

[185] *See supra* text accompanying note 153.

[186] S. 543, 91st Cong., 1st Sess. § 111(c)(3) (1969).

[187] *Id.* § 111(c)(4)(B). Full copyright liability was also imposed for live sports broadcasts into a "blacked out" area. *Id.* § 111(c)(4)(C).

[188] *Id.* § 111(d)(2)(B).

[189] *See supra* note 169.

composition changed substantially and its jurisdiction expanded. The 1969 bill, however, made no further progress because of the cable controversy, and was not even acted upon by the full Senate Judiciary Committee in the 91st Congress.

Copyright owners and broadcasters fought the bill because they considered the cable provisions too favorable to cable operators. The FCC objected to the cable provisions as an infringement of its jurisdiction.[190] Both of these positions, like so many others taken during the history of the cable provisions, became ironic.[191]

B. *Cable from 1969 to 1973*

The 1969 Senate bill did succeed in prodding the FCC (whose freeze continued) into further action.[192] The White House Office of Telecommunications Policy was also prodding both the parties and the FCC. As Professor Botein has elegantly described the situation, by the end of 1971 the FCC "had one suspended set of rules, two discredited sets of proposed rules, and one informally announced proposal."[193] By putting a take-it-or-leave-it proposal to the parties and demanding a response within nine days, the Office of Telecommunications Policy and the FCC obtained the parties' acquiescence to a so-called "consensus agreement" on Armistice Day, November 11, 1971.[194]

As might be expected under the circumstances, the consensus proved to be neither universal nor long-lasting. Its principal consequence was to thaw the FCC's freeze. Its principal provisions were these:

1. Cable systems could import as may distant signals as needed to make up the following totals (now called "minimum service");

   a. in the top 50 markets: 3 network and 3 independent stations;

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[190] SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 11, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 180.

[191] *See supra* text accompanying notes 131-32, 143, 147-50, 156, 160; *infra* text accompanying notes 259-69, 273-83, 476.

[192] According to Comm'r Brennan, formerly Chief Counsel to Sen. McClellan's Subcommittee on Patents, Trademarks, and Copyrights, this was the principal purpose of the bill. *Copyright: Slicing the Pie*, CABLEVISION, Feb. 9, 1981, at 103 (interview with Comm'r Brennan) [hereinafter cited as CABLEVISION].

[193] Botein, *The New Copyright Act and Cable Television—A Signal of Change*, 24 BULL. COPR. SOC'Y 4 (1976).

[194] Some cable operators later claimed that they acquiesced only under a White House threat of a "blood bath;" others that they never acquiesced. *1975 Hearings, supra* note 60, at 658, 671-74 (testimony of George J. Barco, Gen. Couns., Pa. Cable TV Ass'n, and William J. Bresnan, President, Cable TV Div. of Teleprompter Corp.).

b. in markets 51-100: 3 network and 2 independent stations;

c. in small markets: 3 network stations and 1 independent station.

In the largest markets, if local stations already supplied "minimum service," the cable system could carry only two distant signals.

2. Cable systems would be required to carry all local signals, but they could carry distant foreign language and non-commercial educational signals, without restriction.

3. Exclusivity provisions were complex, as usual.

4. Existing retransmission arrangements were "grandfathered" and would be exempt from the new exclusivity requirements.

5. All local signals and all distant signals described above would be subject to compulsory license, but if the copyright owners and cable operators could not agree on a schedule of fees or other payment mechanism, the fees would be set by compulsory arbitration.

6. The FCC could authorize cable systems to carry additional distant signals, but they would be subject to full copyright liability, not to compulsory license.

7. All parties agreed to support copyright legislation incorporating the last three provisions, "and to seek its early passage."[195]

The FCC implemented the "communications" part of the consensus agreement in a new set of rules in 1972.[196] As a result, from 1972 through 1974 the number of CATV subscribers grew at a rate not seen before or since.[197]

While these events were taking place, a second major lawsuit on the copyright status of cable retransmission, *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*,[198] was making its way through

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[195] SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 16-20, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 182-85; *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess., 307-08 (1973), *reprinted in* 12 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1973 at 307-08 (1977) [hereinafter cited as *1973 Hearings*].

[196] Cable Television Report and Order, 36 F.C.C.2d 143, 241 (1972). The document runs to approximately 500 pages. Its provisions are summarized in varying ways in, SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 22-24, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 187-89; Besen & Crandall, *supra* note 129, at 95-96; Botein, *supra* note 193, at 5-10. Those who have attempted to summarize the rules describe them in exasperated terms; Besen and Crandall call them "baroque"; the Register described one portion of them as "unbelievably labyrinthine and hopeless to summarize." SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 24, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 189; Besen & Crandall, *supra* note 129, at 95.

[197] TELEVISION FACTBOOK, *supra* note 130.

[198] 355 F. Supp. 618 (S.D.N.Y. 1972), *rev'd*, 476 F.2d 338 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974).

the federal courts. The broadcasters, relying upon the Supreme Court's view of CATV in *Fortnightly* as no more than an "efficient connection" to "a well-located antenna," such as one on a hilltop near the viewer,[199] sought a ruling that importation of distant signals was different and constituted "performance" under the 1909 Act. The district court's opinion in May 1972 was unfavorable to the broadcasters, but in March 1973 the Court of Appeals for the Second Circuit reversed the lower court and accepted the broadcasters' position as to distant signals.

In March 1973, Senator McClellan reintroduced the revision bill without substantial change, and six months later his subcommittee held hearings on cable royalty fees. It was apparent that the parties had not been able to reach agreement on a fee schedule.[200] Although the "consensus agreement" called for arbitration if the parties could not agree, the cable operators now urged that a schedule should first be set in the statute "with arbitration or a statutory tribunal . . . coming into play at a time when we have evidence to deal with."[201]

The motion picture producers argued that the cable operators had gotten the FCC to lift its freeze by accepting the consensus agreement, and that they were now reneging upon a crucial provision.[202] Speaking through Jack Valenti, president of the Motion Picture Association of America, Inc. (MPAA), they asserted that the fee schedule in the pending bill would produce an effective rate of only 1.9%, that the fee schedule was unreasonable and unsupported by evidence, that setting a reasonable fee schedule would be complex and would require analyzing much evidence, and that fees should therefore be set by arbitration in the first instance, not by Congress.[203] Senator McClellan then grilled him in the following terms:

> Senator McCLELLAN. Have you submitted in your document here a schedule of fees that you think proper?
>
> Mr. VALENTI. No, sir. We have not.
>
> . . . .
>
> Senator McCLELLAN. Somebody is going to have to look at some proposals, whether we do it or arbitrators or somebody else.
>
> Mr. VALENTI. Mr. Chairman, may I tell you very honestly the reason why we did not. This has been examined, and I must say I looked on it with some favor; but to be perfectly honest, we

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[199] *Fortnightly*, 392 U.S. at 399.

[200] *See 1973 Hearings*, *supra* note 195, at 279-80, 398-99 (testimony of Jack Valenti, President, Motion Picture Ass'n of America, and David Foster, President, Nat'l Cable TV Ass'n).

[201] *Id.* at 399, 420-21 (testimony of David Foster).

[202] *Id.* at 278-80 (testimony of Jack Valenti).

[203] *Id.* at 280-83.

determined not to submit a specific fee schedule because of the result of our negotiations with Cable Systems. That schedule that we would submit to you then would become the floor or the ceiling, whichever one you choose to call it, from which new negotiations would begin.

. . . .

Senator McCLELLAN. It seems to me if both sides take the position that they do not want to submit anything for our consideration, for us to evaluate, it seems to me that we are going to be left here, if we do undertake to fix fees, just to take something out of the air that appeals to us.

And I do not think after we do that, if we are not given the assistance, cooperation from those who are suggesting relief they want, if they do not give us something concrete to base it on, I do not think you have much justification for complaint.

Mr. VALENTI. Mr. Chairman, responding to that, of course our contention has been that we have already submitted a proposal, and indeed, a proposal that was agreed upon at an earlier time by the cable systems; and that is, the insertion of the arbitration tribunal at the outset. That is really what the controversy has been about.

Senator McCLELLAN. Well, that is one issue, and I am not excluding that issue. I am going to point out though that if the committee does undertake—I am not saying they will—but if they should undertake to establish fees, or temporary fees until arbitrators or some board, proper tribunal, could make a thorough investigation about what you suggest—until then, it would be well if we had some suggestions and reasonable basis for us to evaluate it.

I am not at the moment—I am not insisting that you do it. I am leaving it largely up to you.[204]

The cable operators, in contrast, responded directly to Senator McClellan's request for an alternative schedule. They urged the subcommittee to cut the bill's fee schedule in half.[205]

C. *1974: The Court Disposes; The Senate Proposes Again*

The Senate subcommittee took no further action until after the Supreme Court decided *Teleprompter* in March 1974, and rendered

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[204] *Id.* at 283-85. It seems clear that Mr. Valenti, who is not exactly a political neophyte, was not expressing his personal position, and that Senator McClellan knew it. A few seconds after the dialogue quoted above, Senator McClellan quipped to Mr. Valenti, with respect to another topic, "Jack . . . . Maybe you can be helpful on this." *Id.* at 285.

[205] *Id.* at 397-98, 423, 466-67 (testimony and statement of David Foster, and submission by Dr. Bridget M. Mitchell, Economist).

another blow to the copyright owners. The Court held that neither the distance of the signal retransmitted, nor the cable operators' selection of particular signals for retransmission, justified any exception to its prior position that cable retransmission was not "performance" under the 1909 Act.[206]

Once the FCC had lifted the cable freeze in 1972 and the Supreme Court had decided *Teleprompter* in 1974, it became more reasonable to hope that the cable issues might be resolved and a comprehensive copyright revision might be enacted. The major remaining issues, so far as relevant here, were the rates of the various compulsory licenses and the extent of the Tribunal's power to revise them. The final resolution involved several trade-offs between the levels of rates and the Tribunal's powers.

The first of these trade-offs was embodied in the Senate Judiciary Committee's new revision bill, reported out on July 3, 1974.[207] The bill's cable provisions made two major changes from those of prior Senate bills, both adverse to copyright owners.

The first change concerned the royalty fee schedule. The graduated percentages were cut precisely in half, as the cable operators had requested. The bill completely eliminated the additional 1% royalty for each "grandfathered" channel that a cable system was allowed to carry. As a result, the maximum royalty rate was cut from 5% plus 1% for each grandfathered channel, to a flat 2½%.[208]

Thomas Brennan[209] has stated, with apparent reference to this reduction and to the 1976 negotiations:[210] "[I]f the motion picture industry and the program producers had been willing at decisive moments to support the cable television royalty formula adopted by the Senate subcommittee, copyright owners could now look forward to receiving substantially higher royalties than will be obtained under the version which they ultimately accepted."[211]

The second change was that the Senate committee simply replaced the previous limitations on numbers of retransmitted signals and the previous exclusivity requirements with an incorporation of the

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[206] *Teleprompter*, 415 U.S. 394, 408-10 (1974).

[207] S. REP. No. 983, 93rd Cong., 2d Sess. (1974), *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1977) [hereinafter cited as 1974 REPORT]. On September 5, 1974, the bill was introduced for consideration. S. 1361, 93rd Cong., 2d Sess., 120 CONG. REC. 30,341.

[208] S. REP. No. 983, *supra* note 207, at 19; *see supra* text accompanying notes 188, 205.

[209] *See supra* note 97.

[210] *See infra* text accompanying notes 259-64.

[211] Brennan, *Some Observations on the Revision of the Copyright Law From the Legislative Point of View*, 24 BULL. COPR. SOC'Y 151, 152 (1976).

FCC's rules. *Any* retransmission permitted by the FCC, then or in the future, would be subject to compulsory license.[212]

As to the compulsory mechanical royalty, the only change was an increase in the rate. In December 1972, Mr. Brennan had written to various music and recording associations that the subcommittee was considering an increase of approximately 26% in the royalty rate, in proportion to the increase in the Consumer Price Index since 1967.[213] That increase was embodied in the revised bill, which proposed to raise the rate from 2½¢ to 3¢ per recording. The overtime rate would be increased to ¾¢ per minute of playing time.[214]

The jukebox compulsory license provisions contained no significant change.[215]

The Copyright Royalty Tribunal provisions were amended in one major respect, which to some extent would have offset the cable rate cuts. Whereas the 1969 bill had authorized the Tribunal to adjust compulsory royalty rates only "so as to assure that such rates *continue to be* reasonable,"[216] the 1974 bill directed the Tribunal to adjust them "so as to assure that such rates *are* reasonable."[217] This change had been suggested by the motion picture producers, with respect to the cable royalty, at the 1973 hearings.[218] The committee not only adopted the suggestion, but applied it to all the rates subject to the Tribunal's adjustment. The committee's report stated: "The committee does not intend that the rates in this legislation shall be regarded as precedents in future proceedings of the Tribunal."[219]

The Senate committee also retained both the five-year intervals between the Tribunal's adjustments of royalty rates and the congressional veto of rate adjustments.[220] Royalty distributions by the Tribunal were to be subject to extremely limited judicial review, modelled on the Federal Arbitration Act.[221] According to the Senate commit-

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[212] 1974 REPORT, *supra* note 207, at 17, 131-32.

[213] CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION: COMPARATIVE ANALYSIS OF THE ISSUE 80 (1973).

[214] 1974 REPORT, *supra* note 207, at 31, 149.

[215] The total royalty was reduced to $8 per box, the precise compromise agreed upon by the House in 1967. One-eighth of the total royalties was to be paid in respect of the performance right in sound recordings, which was still included in this bill. 1974 REPORT, *supra* note 207, at 32-35, 153-54.

[216] S. 543, 91st Cong., 1st Sess. § 801(b)(1) (1969) (emphasis added).

[217] 1974 REPORT, *supra* note 207, at 75, 203 (emphasis added).

[218] *1973 Hearings*, *supra* note 195, at 283.

[219] 1974 REPORT, *supra* note 207, at 203.

[220] *Id.* at 75-76, 203, 205.

[221] *Id.* at 79, 205-06.

tee, "no useful purpose would be served by providing for a general review of such determinations by the Federal courts."[222]

The revision bill was first referred to the Senate Committee on Commerce, primarily to avoid any further jurisdictional fights concerning cable. The Commerce Committee proposed no significant amendments to the cable provisions,[223] but it did demonstrate a remarkable fondness for jukeboxes. It recommended stripping the Copyright Royalty Tribunal of power to adjust the jukebox royalty, and the Senate concurred.[224] After this second demonstration of the political clout of the jukebox operators,[225] the bill passed.[226]

D. *1975—Once More Unto the Breach*

The 93rd Congress took no further action on the revision bill, but in January 1975 Senator McClellan reintroduced it as most recently passed by the Senate. The Senate Judiciary Committee, to which it was referred, amended it once again to restore the Tribunal's power to adjust the jukebox royalty.[227]

The committee also reduced the mechanical royalty rate from 3¢ back to 2½¢.[228] The reduction was caused by a masterful lobbying campaign on the part of the record industry, in which it induced the Consumer Federation of America to intervene on behalf of record companies against songwriters and music publishers.[229] The Consumer Federation, the musicians' union, and the Senate Judiciary Committee accepted RIAA's argument that not only would the full amount of an increase in the statutory rate be passed on to consumers, but that the increase would be doubled by distributors and retail-

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[222] *Id.* at 205. These provisions had first been proposed in 1971. *See* S. 644, 92d Cong., 1st Sess., 117 CONG. REC. 2001 (1971). In essence, the courts would have been able to revise a distribution determination by the Tribunal only if they found that the determination had been procured by corruption, fraud, undue means, evident partiality, or misconduct.

[223] The Commerce Committee proposed a few minor amendments, most of which were rejected or withdrawn on the floor. 120 CONG. REC. 30,484-91 (1974).

[224] *Id.* at 30,494-96. Senator McClellan deliberately did not ask for a roll call, to avoid freezing the position of Senators who voted in favor of the jukebox owners at this time. As a result, before the next floor vote on this issue in 1975, "it was possible to explain the issue to senators and to develop support for the subcommittee position." Letter from Thomas C. Brennan to the authors (Mar. 4, 1982); *see infra* text accompanying note 252.

[225] *See supra* text accompanying notes 118-20.

[226] 120 CONG. REC. 30,498 (1974). The performing right for sound recordings was eliminated on the Senate floor during this debate. *Id.* at 30,484.

[227] S. REP. No. 473, 94th Cong., 1st Sess. 99 (1975), *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, 1974, 1975, 99 (1977) [hereinafter cited as 1975 REPORT].

[228] The overtime rate was also reduced to 2¢ per minute. *Id.* at 94.

[229] Brennan, *Legislative History and Chapter 1 of S. 22*, 22 N.Y.L. SCH. L. REV., 193, 206 (1976).

ers.[230] In mitigation, the committee said: "In any event, the publishers and composers will have the opportunity to present their case to the Copyright Royalty Tribunal, an expert body qualified to review the economic evidence in detail."[231]

The committee also extended the intervals between the Tribunal's adjustments of royalty rates, from five to ten years.[232]

Beginning in May 1975, the House Judiciary Subcommittee also resumed work on copyright revision, holding 18 days of hearings throughout the remainder of that year.[233] Much of the testimony in these hearings reploughed old ground.[234] With respect to the Tribunal, however, the subcommittee made substantial changes that would have been hard to anticipate.

In general, copyright users sought to restrict the Tribunal's powers, and copyright owners sought to preserve or expand them. The jukebox operators sought to prevent the Tribunal from reviewing the jukebox royalty rate in any way, arguing that a flat, unreviewable rate of $8 per box was a part of the compromise under which they had agreed to surrender their total exemption.[235] The cable operators, led by Teleprompter, also sought to prevent the Tribunal from adjusting the cable royalty rates.[236]

In support of their position, the cable operators introduced a memorandum from Professor Ernest Gellhorn of the University of Virginia[237] which argued that the Tribunal, as it appeared in the

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[230] The Senate Judiciary Committee explained the reduction as follows:

> The economic evidence presented by the record manufacturers shows that, at the two-cent rate, publisher and composer income from mechanical royalty payments — in the aggregate, and on a per tune basis — has more than doubled over the last ten years. Their statistics also show that a three-cent rate would increase mechanical royalty payments by nearly $50 million which could add nearly $100 million a year to consumer record costs.

1975 REPORT, *supra* note 227, at 94.

[231] *Id.*

[232] *Id.* at 36, 156. At this stage the committee added the noncommercial broadcasting compulsory license of section 118. *Id.* at 100-03.

[233] *1975 Hearings, supra* note 60.

[234] Senator McClellan, who insisted that it was necessary for "Congress to fully enact the revision bill rather than to seek the complete solution to every problem," prevailed on the Copyright Office not to present different or new positions at these hearings. Letter from Senator McClellan to Commissioner Brennan (Nov. 23, 1977); Letter from Commissioner Brennan to the authors (Mar. 4, 1982).

[235] 1975 REPORT, *supra* note 227, at 411-13, 415, 420, 424, 426, 429-30; *see supra* text accompanying note 120.

[236] 1975 REPORT, *supra* note 227, at 1919, 2049. Many cable operators also opposed the imposition of any royalties whatever, relying upon the *Teleprompter* decision. *Id.* at 628-34, 637-40, 657-81.

[237] *1975 Hearings, supra* note 60, at 1921-25.

Senate bill, was vulnerable to constitutional attack under the non-delegation doctrine[238] because the legislation set no standards for the Tribunal. Professor Gellhorn argued that the constitutional problems were compounded by the ad hoc nature of the Tribunal panels, which would prevent the Tribunal from developing its own standards, and by the absence of judicial review of the Tribunal's rate adjustments.[239]

The Copyright Office took the position that the proposed Tribunal was probably constitutional but could be improved. It recommended:

1. In order to provide "continuity," the Tribunal should have a permanent staff of experts "to compile and make preliminary analyses of" information for the various panels.

2. The individual Tribunal panels should remain ad hoc: "[W]e doubt if a fairer method of choosing panel membership [than initial selection by the American Arbitration Association] can be found at present."

3. Specific standards should be set for the Tribunal with respect to the royalty under each compulsory license.

4. There should be full judicial review of rate adjustments, rather than a legislative veto.[240]

The subcommittee was treated to a full replay of testimony and documentary evidence on the mechanical royalty rate. The recording industry submitted a second updated economic study by the Cambridge Research Institute.[241] The approach and the conclusions were similar to those of the earlier study: no increase was needed and any increase would injure the public interest.[242] The study argued again that there was no need for a rate increase because the rate had been 5% of the wholesale price of records in 1909[243] and had risen to 7.4% in 1974,[244] that total mechanical royalties had more than doubled in

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[238] The doctrine continues to outlive premature obituaries. *See* Industrial Union Dep't. AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

[239] *1975 Hearings, supra* note 60, at 1921-25. The motion picture producers submitted a contrary memorandum from Professor Louis Pollak of the University of Pennsylvania asserting that the proposed Tribunal was "distinctly constitutional" and would be an improvement over the rigid statutory rate that had prevailed since 1909 in the mechanical royalty. *Id.* at 1956-60.

[240] *Id.* at 1914-15 (testimony of Register Ringer); SECOND SUPPLEMENTARY REPORT, *supra* note 139, at 30-32, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 192-94.

[241] *1975 Hearings, supra* note 60, at 1401-1570. The first such study had been introduced in 1965. *See supra* note 78.

[242] *1975 Hearings, supra* note 60, at 1398-99, 1431; *see also, 1965 House Hearings, supra* note 65, at 889.

[243] *See supra* note 79.

[244] *1975 Hearings, supra* note 60, at 1407-08, 1435-37, 1566. Implicit in this comparison was the fact that the wholesale price of records per composition had doubled since 1965, thereby

the last decade because of growth in the volume of records, and that publishers still refused to disclose their profits.[245] As to the public interest, the study argued that a rate increase to 3¢ would either virtually wipe out the profits from domestic sales of the entire record industry or would burden consumers with an increase of $100 million per year. The study also argued that a rate increase would force record companies to reduce the number of recordings (particularly of more experimental artists and music) and to reduce employment of musicians and employees.[246]

Once again, the burden of representing copyright owners was carried primarily by the music publishers,[247] which gave prominence to the record industry's argument that music publishers no longer performed important or creative functions but were primarily administrative "conduits" between record companies and songwriters.[248] Once again the publishers argued that the compulsory license was unnecessary, but that if it was to be retained it should be raised sufficiently to allow substantial bargaining over royalty rates between individual recording companies and publishers. Inflation in record prices, they argued, would require an increase to approximately 5¢ in order to maintain the effect of the 2½¢ figure approved by the House in 1967.[249]

Two eminent songwriters testified briefly in support of increasing the rate. However, when asked whether they would like to see the compulsory license eliminated entirely, they said that they would not.[250]

E. *1976—Over the Top*

While the House Judiciary Committee was digesting its own lengthy hearings and drafting its own revision bill, the Senate passed a revision bill virtually identical with that recommended by its judiciary

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cutting in half the statutory rate's percentage of the wholesale price (from 15% to 7.4%). *See supra* text accompanying note 79.

[245] *1975 Hearings*, *supra* note 60, at 1394, 1409-10, 1438-41 (statements of Stanley M. Gortikov, President, RIAA, and John D. Glover, Director, CRI).

[246] *Id.* at 1416-21, 1464-80, 1568-69 (statement and testimony of John D. Glover).

[247] *See supra* notes 74-75 and accompanying text.

[248] *1975 Hearings*, *supra* note 60, at 1395, 1400 (statement and testimony of Stanley M. Gortikov); *see id.* at 1650 (remark of Rep. Wiggins).

[249] *Id.* at 1580-85, 1634-35 (testimony of Robert R. Nathan, President, Robert R. Nathan Assoc., and joint statement of Am. Guild of Authors and Composers and Nat'l Music Publishers Assoc.).

[250] *Id.* at 1647-49 (testimony of Marvin Hamlisch and Eubie Blake).

committee.[251] During the debate preceding the bill's passage, the Senate rejected an amendment which would have denied the Tribunal power to adjust the jukebox royalty.[252]

The Senate also rejected two amendments which would have reduced, from ten years to seven or eight years, the intervals between Tribunal rate adjustments.[253] Although the amendments covered all Tribunal rate adjustments, the debate focused only on the cable royalty. Ironically, future developments made the Senate's decision inapplicable to cable, but it remained relevant to the mechanical and jukebox rates.[254]

The Senate's passage at this time was probably essential for enactment in 1976. Since the Senate had sent a similar bill to the House during the previous Congress in 1974, the usual practice would have been for the Senate to await House action in this Congress, to amend the House bill, and then to go to conference. By again sending its own bill to the House in this Congress, the Senate eliminated one step from the timetable, which turned out to have no time to spare.[255]

The other event which probably made enactment possible in 1976 occurred outside Congress. In April 1976, the National Cable Television Association (NCTA) and the Motion Picture Association of America (MPAA) reached a compromise on the cable license.[256] The genesis of the compromise apparently was Teleprompter's proposal in October 1975 that the royalty rate, as a percentage of a cable system's gross revenues, should be based upon the number of distant signals retransmitted and upon the market shares (in their original markets) of those distant signals.[257] Teleprompter's formula was criticized, with some justification, as unduly complicated,[258] and the compromise adopted a simpler version of its principle.

The heart of the compromise was the following basic royalty schedule:

• 0.6%[259] of "basic subscriber revenues,"[260] for the first distant signal equivalent;

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[251] S.22, 94th Cong., 2d Sess., 122 CONG. REC. 3841 (1976).

[252] 122 CONG. REC. 3824-28 (1976).

[253] *Id.* at 3146-50, 3821-24.

[254] *See infra* text accompanying notes 263, 405.

[255] Letter from Commissioner Brennan to the authors (Mar. 4, 1982).

[256] *1975 Hearings, supra* note 60, at 2188-90 (memorandum of Robert L. Schmidt, President, NCTA, and Jack Valenti, President, MPAA).

[257] *Id.* at 1917-21, 2049-51.

[258] *Id.* at 1951-52, 1969-70.

[259] This figure was later increased to 0.675%. *See infra* text accompanying note 265.

[260] *See infra* note 265.

• 0.425% of such revenues for each of the next three distant signal equivalents; and

• 0.2% of such revenues for each additional distant signal equivalent.[261]

A cable system which imported no distant signals would still pay a minimum royalty rate of 0.6% for the "privilege" of being able to import distant signals. In calculating "equivalents," network signals and noncommercial educational stations counted as one-quarter of a full signal.[262]

In addition, the compromise called for a sharp limitation on the Copyright Royalty Tribunal's power to adjust cable royalty rates. Unless the FCC changed its regulations concerning the maximum number of distant signals or its exclusivity rules, the Tribunal could adjust the statutory royalty rates only "to reflect changes, in terms of constant dollars, in the average basic [cable] subscriber rate," and only at five year intervals.[263] If the FCC should increase the maximum allowable number of distant signals or should change its exclusivity rules, the Tribunal could adjust the statutory rates only insofar as they related to cable systems and signals affected by the change. Finally, Tribunal decisions would be subject to judicial, but not congressional, review.[264]

The House Judiciary Committee adopted this compromise with only one major change. The initial rate was increased from 0.6% to 0.675%, and a simpler, lower rate schedule was added for cable systems whose semi-annual revenues were less than $160,000.[265]

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[261] 1975 *Hearings*, *supra* note 60, at 2188-89 (memorandum of Robert L. Schmidt and Jack Valenti).

[262] *Id.* at 2189.

[263] *Id.* at 2189-90. Adopting a five year review schedule made the Senate's insistence on a ten-year schedule irrelevant to cable, but it remained relevant to the other compulsory license rates, which the Senate had not discussed. *See* RIAA v. CRT, 662 F.2d at 15-16; *supra* text accompanying notes 253-54.

[264] *1975 Hearings*, *supra* note 60, at 2190 (memorandum of Robert L. Schmidt, and Jack Valenti).

[265] 1976 REPORT, *supra* note 129, at 10-14, 96-97, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5710-12; 122 CONG. REC. 31979, 31984 (1976). The revenues to which these percentages are applied were called "basic subscriber revenues" in the compromise; in the committee report and in the 1976 Act they are called "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111 (d)(2)(B) (Supp. IV 1980). For brevity, we use the original term.

The Tribunal's power to adjust the cable royalty rates was also expanded slightly. 17 U.S.C. § 801 (b)(2) (Supp. IV 1980); 1976 REPORT, *supra* note 129, at 41-42, 175, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5791.

The final royalty rate schedule was a drastic reduction from earlier proposals.[266] The FCC rules in 1976[267] seldom allowed retransmission of more than three distant signal equivalents, which would produce a royalty rate of approximately 1.5%. In comparison, the maximum rate in the 1974 Senate bill had been 2.5%; the maximum rate in the December 1969 Senate bill had been over 5%; and in 1966 the cable operators had offered to accept full copyright liability on all distant signals retransmitted into any area which was served by the three networks plus one independent station.[268]

The actual results of the royalty bear out the comparison. In 1979, the operators of the largest category of cable systems, which accounted for 90% of cable royalties, paid an average royalty rate of only approximately 1.3%.[269]

The House Judiciary Committee reported out its revision of the bill on September 3, 1976,[270] and proposed substantial changes in the Copyright Royalty Tribunal.[271] Perhaps because the Tribunal provisions were the last major section of the bill, some of the committee's revisions appear to have been done under considerable pressure.[272]

The House changed the Tribunal from a group of ad hoc panels to a permanent body of three members appointed for five-year terms. The staff was to be limited to clerical personnel. The committee stated: "Members of the [Tribunal] are expected to perform all profes-

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[266] *1981 Senate Oversight Hearings, supra* note 127, at 198 (statement of Jack Valenti).

[267] These were essentially the 1972 rules. *See supra* text accompanying notes 194-96.

[268] *See supra* text accompanying notes 147-50, 188, 208.

[269] In 1979, cable systems with semiannual basic subscriber revenues over $160,000 paid total royalties of $14.3 million and reported $1.08 billion of basic subscriber revenues. These figures were compiled by Larson Associates of Washington, D.C., at the authors' request, from a data base containing fees, revenues, and other data from all forms CS/SA 3, filed with the Copyright Office for the two semiannual periods in 1979. Such forms were filed by cable systems whose semiannual gross receipts for secondary transmissions totalled $160,000 or more, and which therefore paid royalties at the full scale stated in the text. 37 C.F.R. § 201.17(d)(2)(1980). The limit of $160,000 was increased by the Tribunal in 1980. *See infra* text accompanying note 443.

On the other hand, the cable compulsory license has produced slightly more revenue than was anticipated in 1976. The House Judiciary Committee reported in 1976 that interested groups had estimated that cable royalties under the Act should total $8.7 million per year. 1976 REPORT, *supra* note 129, at 91, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5705. Between 1976 and 1978, when the 1976 Act went into effect, the number of cable subscribers increased by 20.4% and average cable subscription rates by approximately 6.5%. *See* Besen & Crandall, *supra* note 129, at 80; 46 Fed. Reg. 892, 897 (1981). The 1976 estimate would therefore lead one to expect total royalties of approximately $11 million in 1978. In fact, they totalled $12,853,000, indicating that the copyright owners have done about 17% better than was anticipated in 1976. *1981 Senate Oversight Hearings, supra* note 127, at 111.

[270] 1976 REPORT, *supra* note 129, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659.

[271] In the House bill it was called a "Commission". *Id.* at 173, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5789. We have ignored this temporary change.

[272] *See infra* text accompanying notes 285-92.

sional responsibilities themselves, except where it is necessary to employ outside experts on a consulting basis."[273] The committee further stated: "The Committee expects that the President shall appoint members of the [Tribunal] from among persons who have demonstrated professional competence in the field of copyright policy."[274]

The committee thus adopted the general suggestion of Professor Gellhorn and the Register that the Tribunal have greater continuity, but it precisely reversed the Register's suggestion on how to accomplish this.[275]

The House committee also shifted the power of appointing Tribunal members from the Register to the President because of "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."[276] While the committee did not specify the constitutional problem, apparently it was concerned about the Supreme Court's decision in *Buckley v. Valeo*.[277] *Buckley*, decided in January 1976, held that the exercise of administrative powers by the Federal Election Commission violated the appointments clause[278] because, among other reasons, a majority of the Federal Election Commissioners had been appointed by Congress.[279]

The House committee also designated the Tribunal an "independent authority,"[280] rather than an entity in the Library of Congress as the Senate bill had provided.[281] No explanation was given, but apparently the change was prompted to some extent by an argument of E. Fulton Brylawski that delegating a legislative power such as ratemaking "to a Congressional subdivision" violated the constitutional requirement of separation of powers.[282]

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[273] 1976 REPORT, *supra* note 129, at 42, 174, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5790.

[274] *Id.* at 174-75, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5790-91.

[275] *See supra* text accompanying notes 239-40.

[276] 1976 REPORT, *supra* note 129, at 174, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5790.

[277] 424 U.S. 1 (1976).

[278] U.S. CONST. art. II, § 2, cl. 2.

[279] *Buckley*, 424 U.S. at 118-41.

[280] 1976 REPORT, *supra* note 129, at 174, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5790.

[281] 1975 REPORT, *supra* note 227, § 801(a), at 35, 155.

[282] *1975 Hearings*, *supra* note 60, at 462. Mr. Brylawski was chairman of the Copyright Committee of the District of Columbia Bar Association. He also argued that such functions of the Copyright Office as promulgating interpretive regulations and making decisions as to copyrightability also violated the separation of powers requirement. *Id.* at 461-66. This contention was subsequently rejected by a court of appeals in Eltra Corp. v. Ringer, 579 F.2d 294, 298-301 (4th Cir. 1978).

The House committee eliminated the legislative veto of rate adjustments and the limitations on judicial review of royalty distributions. Instead, the committee proposed that all Tribunal determinations be reviewed under the usual provisions of the Administrative Procedure Act.[283]

By these changes, the House committee was forced to take a further step away from its 1967 position that compulsory licenses should not require creating a new agency, with the expense and delay inherent in most agencies.[284] By providing that all the intellectual work of the Tribunal should be done by its commissioners, the House committee did what it could to restrain the growth of bureaucracy.

Two revisions by the House committee have caused substantial problems in Tribunal proceedings. The first was an apparently unintentional omission of subpoena power. All previous bills proposing to create a Tribunal had given it subpoena power, in a section which spelled out several aspects of Tribunal procedures.[285] The House committee substituted a simple reference to the Administrative Procedure Act for the more detailed procedural section of the earlier bills, apparently without realizing that the APA itself does not confer subpoena power, but only regulates its exercise.[286]

The second revision concerned the effective date of the Tribunal's rate adjustments. The Senate version, which had subjected rate adjustments to legislative veto, would have made them effective ninety days after the time for veto expired, without provision for judicial review or stay. Royalty distribution determinations, which were subject to very limited judicial review in the Senate bill, were to become effective thirty days after the determination unless appealed within that time; amounts not affected by an appeal were to be distributed at the end of the thirty days.[287] The House committee, in substituting judicial review for legislative veto of rate adjustments, also broadened the provision on the effective date of distributions to apply to rate adjustments as well.[288] The House committee's revision of this provision was accepted in the bill as enacted.[289]

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[283] 1976 REPORT, *supra* note 129, at 44, 174, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5795. These changes followed the NCTA-MPAA compromise, as well as the recommendations of Prof. Gellhorn and Register Ringer. *See supra* text accompanying notes 239, 240, 264.

[284] *See supra* text accompanying notes 115, 156.

[285] *E.g.*, 1975 REPORT, *supra* note 227, § 804(c), at 36.

[286] 1976 REPORT, *supra* note 129, at 43; 5 U.S.C. §§ 555(d), 556(b)(2) (1976); *1981 Senate Oversight Hearings*, *supra* note 127, at 16 (testimony of Comm'r Brennan).

[287] 1975 REPORT, *supra* note 227, § 808, at 37, 158.

[288] 1976 REPORT, *supra* note 129, at 44.

[289] H.R. REP. No. 1733, 94th Cong., 2d Sess. § 809, at 64, 81-82 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5810, 5822-23 (pages 1-68 omitted), *and in* 17 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY § 809, at 64, 81-82 (1977) [hereinafter cited as CONF. REP.].

The 1976 Act consequently provides that rate adjustments become effective thirty days after they are published in the Federal Register unless an appeal is taken within that period; but it does not go on to say what happens if an appeal is taken.[290] Copyright users appealing from a Tribunal rate increase can, therefore, be expected to argue that the statute imposes an automatic stay until the appeal is finally determined,[291] and they have done so.[292]

The final set of revisions by the House committee concerned three interrelated issues as to each compulsory license: the rate to be set in the statute, the Tribunal's power to change the statutory rate, and the standards to be applied by the Tribunal.

For the cable license, the committee "in large measure" accepted the entire package agreed to by NCTA and MPAA.[293]

The committee grouped the mechanical and jukebox rates together in certain respects. It proposed to increase the mechanical rate to 2¾¢, with an overtime rate of 0.6¢ per minute; the jukebox rate was to be left at $8 per box.[294] The Tribunal, however, would not be able to reexamine those rates, but would be limited to adjusting them "based upon relevant factors occurring subsequent to the date of enactment of this Act."[295]

The House committee also purported to follow the Register and Professor Gellhorn[296] in proposing standards to be applied by the Tribunal in adjusting the mechanical and jukebox rates.[297] The proposed standards drew heavily upon the "accepted standards of statutory ratemaking" propounded by Thurman Arnold in 1966.[298] The content and effect, if any, of these standards as enacted are discussed below.[299]

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[290] 17 U.S.C. § 809 (Supp. IV 1980).

[291] Comparision with other federal statutes indicates that the failure to specify the effective date in case of an appeal is consistent with either the imposition or the denial of an automatic stay. *Cf.* 19 U.S.C. § 81r(c) (1976); 20 U.S.C. §§ 1234b(d), c(d); 33 U.S.C. § 921 (1976). The Education Department considers that the cited sections of Title 20, which are similar to 17 U.S.C. § 809 (Supp. IV 1980), do not create an automatic stay pending appeal. Conversation with Richard Arnot, Esq., of the General Counsel's Office of the Department of Education (Apr. 21, 1981); Letter from William L. Ward of the U.S. Department of Education to New Jersey Deputy Attorney General M. Kathleen Duncan (July 23, 1980).

[292] *See infra* text accompanying note 415.

[293] *See supra* text accompanying notes 256-65; 1976 REPORT, *supra* note 129, at 41-42, 173.

[294] 1976 REPORT, *supra* note 129, at 16-17.

[295] *Id.* at 41.

[296] *See supra* notes 239-40.

[297] 1976 REPORT, *supra* note 129, at 173-74, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5789-90.

[298] *See supra* text accompanying note 99.

[299] *See infra* text accompanying notes 331-38, 393-98, 434-38.

The House passed its committee's recommendations without significant changes. The House-Senate conference, in turn, substantially accepted the cable provisions embodied in the House bill. It also accepted most of the House changes in the nature of the Tribunal. The size of the Tribunal, however, was increased to five commissioners, whose terms were increased to seven years (with staggered expirations); their nominations were made subject to Senate approval,[300] and the Tribunal's location on organizational charts was placed "in the legislative branch."[301] The conference also revised the schedule of Tribunal rate adjustments slightly so as to spread out the Tribunal's workload after 1980.[302]

The conference's major change concerned the Tribunal's power to adjust the mechanical and jukebox royalty rates. The conference deleted from the House version of the bill the sentence which would have restricted the Tribunal to making adjustments based only on events after passage of the Act,[303] and replaced it with a set of statutory criteria derived from the proposed criteria in the House committee report.[304] The effect was to restore the Tribunal's plenary power to adjust the mechanical and jukebox rates.

The conference also combined the House's basic mechanical royalty rate of 2¾¢ per composition, with the Senate's overtime rate of ½¢ per minute.[305] The overtime rate was the very last issue to be resolved. As the conferees were signing the conference report, the Senate conferee who held the balance of power on this issue switched between the House and Senate positions twice in one day, ultimately choosing the Senate's lower rate.[306]

With these changes, the Copyright Revision Act was passed by both houses in the closing days of the Ninety-Fourth Congress and then signed into law by President Ford.[307]

This tortuous history demonstrates that the Copyright Royalty Tribunal was one of the essential compromises that made possible a

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[300] 17 U.S.C. § 802 (Supp. IV 1980); CONF. REP., *supra* note 289, at 82, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5810, 5823.

[301] 17 U.S.C. § 801(a) (Supp. IV 1980). It remained "an independent agency," as in the House bill, rather than a part of the Library of Congress, as in the Senate bill. *See supra* text accompanying notes 280-82.

[302] 17 U.S.C. § 804(a) (Supp. IV 1980); CONF. REP., *supra* note 289, at 62-63.

[303] *See supra* text accompanying note 295.

[304] 17 U.S.C. § 801(b)(1) (Supp. IV 1980); CONF. REP., *supra* note 289, at 82, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5810, 5823.

[305] 17 U.S.C. § 115(c)(2) (Supp. IV 1980); CONF. REP., *supra* note 289, at 24, 77, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5810, 5818.

[306] Letter from Commissioner Brennan to the authors (Mar. 4, 1982).

[307] 17 U.S.C. § 801 (Supp. IV 1980); *see supra* note 24 and accompanying text.

comprehensive revision of the Copyright Act. A decade and a half of legislative battles demonstrated that three issues could not be resolved without compulsory licenses: "mechanical" reproduction of music, jukebox performances, and cable retransmission. Once one accepts the need for these licenses, it is hard to see how they could operate without some such agency as the Tribunal, for several reasons.

1. Changing economic conditions, particularly inflation, require adjustment of the royalty rates at frequent intervals.[308] To rely on congressional action for such adjustments would invite both delay and lobbying pressures.[309]

2. As Mr. Feist and Mr. Nathan pointed out in 1966,[310] setting a fair rate requires that some entity examine economic evidence. As the subsequent proceedings before the Tribunal demonstrated, Congressional committees are less suited for such inquiries; they lack both time and adversary procedures.[311]

3. Of the four compulsory licenses, only the mechanical and educational broadcasting licenses allow payment direct from the user to the copyright owner. The cable and jukebox licenses require licensing by and payment to a single entity because of the multiplicity of copyright owners and the users' lack of control over the works performed. If such an entity were a private organization, it would raise substantial antitrust problems and would have to be administered under judicial supervision, as are ASCAP and BMI at the present time.[312]

The Copyright Royalty Tribunal was Congress' solution to these problems. Although other solutions are theoretically possible, it is difficult to envision how they could have been enacted.

IV. The Tribunal in Operation

The first Tribunal Commissioners were appointed by President Carter in 1977. Only one had any substantial experience in copyright

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[308] A royalty fixed as a percentage of user revenues avoids this problem to some extent, but a percentage rate for the mechanical license was rejected by the Register, by Congress, and by the Copyright Royalty Tribunal. *See supra* text accompanying notes 67, 179; *infra* text accompanying notes 340-53. A percentage rate would be utterly impractical for jukeboxes, *see infra* text accompanying notes 449-51, and has never been suggested.

[309] After enactment, Senator McClellan wrote that one of his purposes in proposing the Tribunal was "to assure the continued viability of the statutory compulsory licenses." Letter from Senator McClellan to Commissioner Brennan (Nov. 23, 1977).

[310] *See supra* text accompanying notes 96-98.

[311] *See infra* text accompanying notes 372-88.

[312] *See supra* note 128.

matters, namely Commissioner Brennan, who had been chief counsel to the Senate Subcommittee on Patents, Trademarks and Copyrights throughout the entire copyright revision process. The other four commissioners included a manager of a radio station, an author, an attorney, and an accountant.[313] Three had campaigned for President Carter.

The Tribunal followed the direction of the House Judiciary Committee and restricted its staff to five personal assistants or secretaries. Although it had been appropriated funds for eight additional positions, it chose not to fill them, and turned back the funds.[314] Through 1980, the Tribunal did not hire any consultants.[315]

The Tribunal is unusual in another respect. Although not required to do so, it has chosen to adopt formal rulemaking procedures patterned on section 556 of the Administrative Procedure Act.[316] In particular, both rate adjustment proceedings and royalty distribution proceedings are conducted as formal hearings, in which every party has "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."[317]

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[313] *Legislative Branch Appropriations for Fiscal Year 1982: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, Part 1*, 97th Cong., 1st Sess. 654-60 (1981) (biographical data submitted by Comm'rs Burg, Coulter, Garcia, and James).

[314] *Legislative Branch Appropriations for 1982: Hearings Before a Subcomm. of the House Comm. on Appropriations, Part 2*, 97th Cong., 1st Sess. 844 (1981) [hereinafter cited as *1981 House Appropriation Hearing*]; U.S. General Accounting Office, The Operation of the Copyright Royalty Tribunal 6 (June 11, 1981) (statement of Wilbur D. Campbell before the Comm. on the Judiciary) [hereinafter cited as GAO Report].

[315] *1981 House Appropriation Hearings, supra* note 314, at 851. The GAO's comment on this subject demonstrates one reason why it is so difficult to reduce government expenses. Rep. Kastenmeier noted that the Appropriations Committee had refused to appropriate money for expert consultants when they were needed in 1980 because the Tribunal had failed to use money appropriated for that purpose in 1978 and 1979. The GAO spokesman then commented, "That is a common problem. One could say it was an error in strategy from the beginning." *Copyright Office, the U.S. Patent and Trademark Office, and the Copyright Royalty Tribunal: Oversight Hearings on Copyright Office, the U.S. Patent and Trademark Office, and the Copyright Royalty Tribunal Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 130 (1981) [hereinafter cited as *1981 House Oversight Hearings*].

[316] 5 U.S.C. § 556 (1976).

17 U.S.C. § 803(a) (Supp. IV 1980), allows the Tribunal to adopt any procedural regulations consistent with the Administrative Procedure Act, which allows informal notice-and-comment rulemaking, 5 U.S.C. § 553 (1976), as well as formal rulemaking under 5 U.S.C. § 556 (1976).

[317] 37 C.F.R. §§ 301.41(a), .51(1) (1981).

A. *The Mechanical Royalty Adjustment Proceeding*

1. Introduction

The Tribunal's 1980 proceeding to adjust the statutory mechanical royalty rate is its most important proceeding to date. Its financial impact is greater than that of all other Tribunal proceedings combined.[318]

In its initial decision, the Tribunal increased the statutory rate, effective July 1, 1981, from 2¾¢ per composition or ½¢ per minute, to 4¢ per composition or ¾¢ per minute.[319] The Recording Industry Association of America has estimated that this will increase total mechanical royalties paid by record companies by at least $55 million per year.[320]

The Tribunal's initial decision also proposed a mechanism for annual adjustments in the statutory rate between 1980 and 1987. On appeal, this mechanism was set aside for jurisdictional reasons.[321] On remand, the Tribunal promulgated a set of predetermined stepped increases which had been suggested by the parties as a compromise. The final "step," effective January 1, 1986, will increase the rate to 5¢ per composition, or .95¢ per minute.[322]

The impact of the proceeding was matched by its length. The Tribunal held forty-five days of evidentiary hearings, which were generally attended by all the commissioners. As a consequence, those

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[318] *See infra* note 320.

[319] 37 C.F.R. § 307.2 (1981). More precisely, the royalty payable upon each phonorecord made and distributed on or after July 1, 1981, "[w]ith respect to each work embodied in the phonorecord," is "either four cents or three-quarters of one cent per minute of playing time or fraction thereof, whichever amount is larger . . . ." *Id.*

[320] CRT Appeal Record, *supra* note 5, at A842. RIAA's estimate of the increase is based upon RIAA's estimate that total mechanical royalties in 1979 were $118 million. *Id.* at A987. The authors believe RIAA's estimate is inflated because it assumes actual payments will rise in direct proportion to the increase in the statutory rate. Since virtually no recordings are made under statutory license without modification, the only payments which are certain to rise in this way are those under Harry Fox or similar licenses issued before July 1981, which set the rate as "statutory" or a percentage thereof. The Fox Agency began writing licenses in this form in December 1976. *Id.* at A2212-14.

By comparison with mechanical royalties, total cable royalties received in 1980 under section 111 were approximately $19 million. Ladd, Schrader, Leibowitz & Oler, *Copyright, Cable, The Compulsory License: A Second Chance,* 3 COM. L. 3, 16 (1981) [hereinafter cited as Ladd]. Total jukebox royalties have been approximately $1 million per year. *1981 House Appropriations Hearings, supra* note 314, at 841. A total for educational broadcasting royalties under § 118 has not been reported, but, based on the payments by Public Broadcasting System and National Public Radio to ASCAP, 37 C.F.R. § 304.3 (1981), the total is probably less than $4 million per year.

[321] RIAA v. CRT, 662 F.2d at 14-18; *see infra* text accompanying notes 401-07.

[322] 37 C.F.R. § 307.3 (1981); *see infra* text accompanying notes 408-13.

who decided had also heard.[323] The record of the proceeding totalled over 6,000 pages of transcripts, plus well over 1,000 pages of exhibits.[324]

In many respects the proceedings before the Tribunal rehashed issues that had been discussed in Congress and the Copyright Office for at least fifteen years;[325] some of the issues had been heard by Congress in 1908.[326] There were two major differences now that the issues were before the Tribunal. The first, which we have already mentioned, was the Tribunal's ability as an administrative agency, under formal procedures, to get to the bottom of subsidiary issues which had been repeatedly heard but never resolved by Congress. The second was the decision of two organizations of songwriters, the American Guild of Authors and Composers and the Nashville Songwriters Association International, to participate fully before the Tribunal, rather than simply cheering on the publishers. As a result, while Congress had seen the basic conflict of interest as between music publishers and record companies (with the latter supported by consumer and labor organizations)[327] the Tribunal saw the conflict as songwriters and their publishers versus record companies.

2. The Statutory Requirements

The mechanical royalty proceeding was conducted under several statutory restrictions. The statute required that the proceeding be commenced on January 1, 1980, and that the Tribunal render its final decision within a year.[328] The next adjustment proceedings cannot be held until 1987, and thereafter at ten-year intervals.[329] The statute also requires the Tribunal to support its final determinations with detailed findings.[330]

The statute sets forth criteria for the Tribunal's rate adjustments, as follows:

> The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:
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> (A) To maximize the availability of creative works to the public;

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[323] *See generally* Morgan v. United States, 298 U.S. 468, 481 (1936).

[324] CRT Findings, *supra* note 56, at 10,487.

[325] *See supra* text accompanying notes 67-68, 75-91, 95, 102-07, 228-30, 241-49.

[326] *See supra* text accompanying note 31.

[327] *See supra* note 74 and accompanying text.

[328] 17 U.S.C. § 804(a), (e) (Supp. IV 1980). The Tribunal issued its final decision at a meeting on December 21, 1980, but published its findings on February 3, 1981. 46 Fed. Reg. 10,466 (1981).

[329] 17 U.S.C. § 804(a)(2)(B) (Supp. IV 1980).

[330] 17 U.S.C. § 803(b) (Supp. IV 1980).

> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[331]

As previously noted,[332] these criteria were added to prevent attacks on the Tribunal's constitutionality. The second and third standards obviously draw rather heavily upon Thurman Arnold's 1966 suggestions.[333] The second standard, in essence, requires the Tribunal to do what Mr. Nathan in 1966 had predicted the Senate Judiciary Committee itself would never do.[334]

The most significant elements of the statutory criteria may be what they omit. They do not include any explicit mention of the standard urged by the Register of Copyrights and adopted by the House Judiciary Committee in 1967, that the statutory rate should be "at the high end of a range within which the parties can negotiate . . . for actual payment of a rate that reflects market values . . . . It should not be so high . . . as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail."[335] In the 1980 mechanical royalty proceeding it became a major issue whether this standard, called variously the "bargaining room" and "bargaining range" standard or theory, had any continuing validity.[336]

The statutory criteria also omit a criterion which had been present in the House Judiciary Committee's 1976 report, namely, that the rate "should not jeopardize the ability of the copyright user . . . to charge the consumer a reasonable price . . . ."[337] Although this omis-

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[331] 17 U.S.C. § 801(b) (Supp. IV 1980).

[332] *See supra* text accompanying notes 238-40, 296-98.

[333] *See supra* text accompanying note 96.

[334] *See supra* text accompanying note 97.

[335] COPYRIGHT LAW REVISION PART 6, *supra* note 66, at 58; 1967 HOUSE REPORT, *supra* note 71, at 74.

[336] RIAA v. CRT, 662 F.2d at 11-13.

[337] 1976 REPORT, *supra* note 129, at 74, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5790.

sion might be taken as a congressional decision that mechanical royalties were not to be held down in order to benefit the purchasers of phonorecords, it has received little attention.[338]

We turn now to the issues presented to the Tribunal.

3. The Percentage Royalty: Always a Bridesmaid, Never a Bride

A great deal of evidence and argument was presented on an old issue: whether the statutory rate should be set as a percentage of the price of phonorecords, rather than as a fixed monetary amount. The question had been discussed in Congress before any of the participants in the Tribunal proceedings were born, and up to as recently as 1975,[339] but Congress has never adopted a percentage royalty.

Before the Tribunal, the songwriters recommended that the statutory rate be set at 8% of the suggested retail price of each phonorecord, while the music publishers urged that it be set at 6%.[340] Since the average suggested retail price of the most popular LP albums in January 1980 was approximately $8.90, and each contained an average of ten compositions,[341] these percentages were equivalent to average royalty rates of 7.1¢ and 5.4¢, respectively. The record industry opposed any increase above the existing 2.75¢ level, and argued that, in any event, the rate should be set as a flat monetary amount, not as a percentage of price.[342]

Before evidentiary hearings began, the record industry argued that the Tribunal lacked power under the Copyright Act to adopt a percentage rate, but the Tribunal quickly rejected that contention.[343]

As already discussed,[344] the great advantage of a percentage royalty (at least to copyright owners) is that it preserves a ratio between mechanical royalties and recording company revenues, and to that extent adjusts for inflation automatically, without requiring any further legislative or administrative adjustment. Indeed, a rate fixed in this manner might eliminate the need for any future adjustment of the mechanical royalty rate by the Tribunal. In the view of copyright users, of course, this is the principal defect of such a rate.

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[338] CRT Findings, *supra* note 56, at 10,484-85; RIAA v. CRT, 662 F.2d at 11.

[339] *See supra* notes 31-37, 67, 179 and accompanying text; *see also 1975 Hearings*, *supra* note 60, at 1648-50 (testimony of Marvin Hamlisch and Eubie Blake).

[340] CRT Findings, *supra* note 56, at 10,467.

[341] CRT Appeal Record, *supra* note 5, at A882.

[342] CRT Findings, *supra* note 56, at 10,473-74.

[343] *Id.* at 10,466-67.

[344] *See supra* text accompanying note 30.

The evidence before the Tribunal indicated a number of problems with a percentage royalty system. The first was the price to which the percentage should be applied. The songwriters and publishers urged the Tribunal to use suggested retail prices, which have been common in the industry since before 1909. In the last two decades, however, there has been much price competition among record retailers, and records and tapes are now universally sold at substantial and widely varying discounts from suggested prices.[345] Although there is an obvious potential for manipulation of suggested retail prices, the songwriters and publishers said they would take the risk.[346] In opposition to the use of suggested retail prices, the record industry also argued that some companies might abandon use of such prices entirely, and after the Tribunal proceeding ended, CBS (the largest U.S. record company) in fact did so.[347]

Wholesale prices presented a different difficulty. Several of the largest record companies distribute through affiliates, while the smaller record companies sell to unaffiliated distributors.[348] The "wholesale" prices of the largest companies are, therefore, not the result of arm's length transactions, and the prices of the first arm's length sales are often not comparable between different companies.

Another problem with a percentage royalty is the need to allocate the mechanical royalty on an LP record or a tape among all the compositions recorded on the record or tape. The "overtime" rate provision added in the 1976 Act[349] recognized that the length of a recording should, to some extent, affect the statutory royalty. Current phonorecords, both popular and classical, contain selections of widely varying lengths. A single popular work may now run twenty minutes; at the other extreme, a work incorporated in a medley may consist of a simple statement of the theme, running less than thirty seconds. Any percentage royalty system must include a method of allocating the total royalty on the phonorecord among all the compositions on the record.

The record industry also argued that a percentage royalty would be more difficult to administer than a flat royalty. There was much evidence and argument as to whether the increased difficulties would be prohibitively expensive, trivial, or something in between. Witnesses with varying degrees of expertise as to computer systems and

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[345] CRT Appeal Record, *supra* note 5, at A1438.
[346] *Id.* at A2078.
[347] Billboard, May 23, 1981, at 1, col. 3.
[348] CRT Appeal Record, *supra* note 5, at A2045-46.
[349] 17 U.S.C. § 115(c)(2) (Supp. IV 1980).

programming had an opportunity to demonstrate what can be done to abolish the distinction between nouns and verbs, and generally to mystify their auditors.[350]

A final difficulty was the varying impact which a percentage royalty would have on individual authors and composers, depending upon the prices at which their recordings were sold. Some proposed percentages, although increasing average royalties, would have actually reduced royalties paid on "budget-price" recordings.[351] Reissues of older recordings and re-recordings of older popular compositions of continued popularity (so-called "evergreens" or "standards") tend to be in the budget category, and a percentage royalty might actually injure older composers and their heirs.

The Tribunal gave serious consideration to a percentage royalty down to the last days of the proceeding. On December 11, 1980, the two commissioners who were generally thought to constitute the "swing" votes, requested the parties to comment on two different proposals: a percentage royalty, and a flat rate with provision for annual adjustments by the Tribunal.[352] Nevertheless, the Tribunal finally elected to fix the statutory rate as a flat rate, without explanation.[353] In the appeals from the Tribunal's decision, no issue was raised over the Tribunal's rejection of the percentage royalty.

4. The Bargaining Range Standard

The songwriters and music publishers argued to the Tribunal that it should fix the statutory rate in accordance with the bargaining range standard.[354] They argued that reference to this standard was necessary in order to give a definite meaning to the statutory criterion, "to afford the copyright owner a fair return for his creative work."[355] They also argued that because rates were set by agreement between individual copyright owners and record companies, and because it was impossible for any agency to determine the value of an individual song or the fair return on it, the only statutory rate which would "afford the copyright owner a fair return" on each composition would be one which allowed the actual rate on each song to be set by bargaining.[356]

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[350] CRT Appeal Record, *supra* note 5, at A1689-90, A2019-38, A2226.

[351] Letter from Linden and Deutsch, counsel to AGAC, to Commissioners Brennan and Coulter 10-11 (Dec. 14, 1980).

[352] CRT Appeal Record, *supra* note 5, at A33-34 (letter from Comm'rs Brennan and Coulter to Morris B. Abram, Esq., Dec. 11, 1980).

[353] CRT Findings, *supra* note 56, at 10,477.

[354] *See supra* text accompanying notes 68, 92.

[355] 17 U.S.C. § 801(b)(1)(B) (Supp. IV 1980).

[356] 46 Fed. Reg. 10,466-71.

The record industry responded that the omission of the bargaining range standard from the statutory criteria, and from the conclusions of every congressional committee report after 1967,[357] indicated that Congress had rejected the standard.[358] They also argued, as they had before Congress,[359] that because of the number of compositions recorded, and because of a need for artistic flexibility in designing and producing recordings, it is impossible as a practical matter for record companies to negotiate royalty fees on individual compositions before a recording is made. After a recording has been made, of course, the investment in the recording makes it impossible for the record company to bargain effectively with the copyright owner.[360]

The Tribunal rejected the factual assertion of the record industry, but accepted its legal conclusion. On the factual issue, the Tribunal stated: "The evidence shows that there is nothing in the process of recording albums that makes it impossible to decide upon a group of compositions in advance of recording, and to bargain with copyright owners for the most favorable rates on those compositions."[361] The court of appeals sustained this finding as supported by substantial evidence.[362]

On the legal issue, after noting RIAA's position that adoption of the bargaining range standard would be "contrary to law," the Tribunal stated:

> We adopt the view of RIAA that: *A rate that is deliberately fixed above the level that the market can bear—so that a lower rate can be negotiated in the marketplace—cannot be 'reasonable.'* Such a rate would yield *more* than the 'fair return' to copyright owners mandated by the statute.
>
> In adjusting the mechanical rate, we excluded any consideration of the 'bargaining room' theory.[363]

The court of appeals affirmed this conclusion, but on the ground that it was a "policy determination." The court implicitly rejected the contention that the conclusion was required by the statute, stating:

> The Tribunal's decision that the royalty rate must be reasonable as set, and must not yield an unfairly large return, is based on a reasonable interpretation of the statutory language and is entitled

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[357] RIAA v. CRT, 662 F.2d at 12-13.

[358] CRT Appeal Record, *supra* note 5, at A600-02, A696.

[359] *See supra* note 66 and accompanying text.

[360] CRT Appeal Record, *supra* note 5, at A603-15, A697-700.

[361] CRT Findings, *supra* note 56, at 10,482.

[362] RIAA v. CRT, 662 F.2d at 12 n.27.

[363] CRT Findings, *supra* note 56, at 10,478 (footnote omitted).

> to the deference of this court. Congress established a permanent tribunal, in part, to assure the development of a consistent royalty policy. The copyright owners have not shown that this policy determination should be reversed.[364]

It may reasonably be anticipated that in 1987 copyright owners will urge the Tribunal to reconsider this "policy determination."

5. The Songwriters' Economic Evidence

The Tribunal proceedings produced the first evidence on the economic condition of authors and composers in all the discussions of the mechanical royalty since 1905. The songwriters organizations submitted a survey of their memberships conducted by an economic consulting firm.[365] The survey showed that in 1979 about three-quarters of the responding songwriters received $11,500 or less from all music related sources of income (i.e., performance royalties through the performing rights societies, mechanical royalties, personal performance income, and other sources, usually in that order of magnitude).[366] When mechanical royalties alone were isolated and analyzed in terms of the numbers of recorded compositions released during the year in question, they showed that the top 4% of the songwriter respondents, who had over fifteen compositions commercially released during that year, received median mechanical royalties of approximately $17,000; the next 6% of respondents, who had eleven to fifteen compositions recorded in that period, had a median mechanical income of approximately $2,500. The rest of the respondents received substantially less.[367]

The songwriters' survey evidence was supplemented by testimony concerning the individual financial experiences of five songwriters ranging from a neophyte to a highly successful writer.[368] As a result, the Tribunal's inquiry into the situation of copyright owners was not exclusively concerned with publishers, as those of Congress had been, but was a joint examination of publishers[369] and writers.

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[364] RIAA v. CRT, 662 F.2d at 13 (footnotes omitted).

[365] Rinfret Associates, Inc., An Economic Analysis of the Merits of the Mechanical Royalty Rate, Volume I (Apr. 7, 1980) (consultant's study), *reprinted in* CRT Appeal Record, *supra* note 5, at A931.

[366] CRT Findings, *supra* note 56, at 10,475. The survey included all income from foreign sources. Other evidence indicated that many songwriters earned more mechanical royalties abroad than in the United States because of the higher mechanical royalty rates in most foreign countries. *Id.* at 10,483-84.

[367] CRT Appeal Record, *supra* note 5, at A2180.

[368] *Id.* at A1099-1157.

[369] NMPA also conducted a survey of the finances of music publishers, after the Tribunal demanded it. The survey showed that conventional publishers averaged from 5% to 8.5% return

6. Economic Evidence of the Record Industry

The record industry's economic evidence before the Tribunal was similar to that which it had submitted to the House Judiciary Committee in 1965 and 1975, but updated through 1979. The Tribunal's handling of the evidence remarkably demonstrated the fact finding superiority of an administrative inquiry under formal rulemaking procedures,[370] compared to a legislative inquiry.

One example of this superiority is the treatment before the Tribunal of testimony of individual record company executives, the tenor of which was that economic conditions in the record industry were so difficult that an increase in the statutory royalty rates would be disastrous.[371] Similar testimony had previously been introduced before Congress.[372] Before the Tribunal, however, the witnesses were confronted on cross-examination or rebuttal by other statements from their companies. The Tribunal then found:

> [T]he testimony was contradicted by equally optimistic statements issued by the same companies (and in one instance by the same individual) to other audiences, such as stockholders, securities analysts and trade groups. We note that it is not unknown for corporations to plead poverty to regulatory agencies while simultaneously making optimistic profit projections to their shareholders.[373]

Cross-examination of some of the same witnesses also demonstrated that the statutory rate increase in 1978 from 2¢ to 2¾¢ had produced none of the adverse effects previously predicted.[374]

Another example was the record industry contention, made through its principal economic witness, that any increase in the statutory rate would cause a proportionate increase in actual record company expenses. These costs, the record companies contended, would in turn have to be passed on to the distributors, who, along with the retailers, would multiply these increases by their usual markups and then pass the total on to consumers. Such contentions had been made successfully to various congressional committees and had induced the Senate Judiciary Committee to reduce the proposed rate from 3¢ to 2½¢ in 1975.[375] However, comparison of the data introduced by the

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on worldwide revenues. The Tribunal then rejected the study for what it considered methodological defects. CRT Findings, *supra* note 56, at 10,475-76, 10,483.

[370] *See supra* text accompanying notes 316-17.

[371] *E.g.*, CRT Appeal Record, *supra* note 5, at A1444-45, A1519-22.

[372] *1965 House Hearings*, *supra* note 65, at 944, 947 (testimony of David Kapp and statement of Alan W. Livingston).

[373] CRT Findings, *supra* note 56, at 10,482 (footnote omitted).

[374] CRT Findings, *supra* note 56, at 10,485.

[375] *See supra* text accompanying notes 227-30, 246.

record industry before Congress in 1965 with that introduced before the Tribunal in 1980 showed "that since 1965, record companies have been able to absorb or pass on other cost increases totaling $1.49 per LP—during a time when mechanical royalties per LP records increased only 3.5 cents . . . ."[376] As a result of cross-examination of the record industry's principal economic witness, the Tribunal also rejected the concept of the "multiplier." It found: "The evidence shows that [distributors' and retailers'] operating expenses are principally labor and space charges, which do not change as the price of their goods increase."[377] The court of appeals affirmed these findings.[378]

A third example was the Tribunal's evaluation of a financial study for the U.S. record industry. This study was based upon an estimate of industry-wide net sales by RIAA and upon a survey of approximately a dozen record companies. Similar studies, conducted by the same research organization using the same methods, had been submitted to Congress in 1965 and 1975.[379] Cross-examination of the economist who prepared the study revealed that the net sales figure, upon which all other figures were based, included an adjustment in an unknown amount fixed by a committee within RIAA. When RIAA refused to disclose the amount of the adjustment, the Tribunal concluded that the entire study "was subject to such deficiencies [sic] that it does not provide full data concerning the revenues, return on investment and the level of profit of the record industry."[380] The court of appeals affirmed.[381]

A final example was the level of record prices in 1909. Record industry witnesses had repeatedly asserted to Congress that *wholesale* prices were in the vicinity of 40¢ per recorded composition in 1909.[382] Actual Edison cylinders from around 1909 were displayed to the Tribunal, together with CBS' earliest existing price list, from 1915, which was produced at the request of the Tribunal's chairman. They demonstrated that it had been the retail price which was approximately 40¢ in 1909, and that the statutory royalty was originally 5% of the retail, not wholesale, price.[383]

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[376] CRT Findings, *supra* note 56, at 10,484.

[377] *Id.*

[378] RIAA v. CRT, 622 F.2d at 11 n.26.

[379] *See supra* notes 84, 241.

[380] CRT Findings, *supra* note 56, at 10,482.

[381] RIAA v. CRT, 662 F.2d at 10 n.23.

[382] *See supra* text accompanying notes 79-81, 243.

[383] Record at 56, Compulsory License for Making & Distributing Phonorecords, Royalty Adjustment Proceeding (Mechanical), C.R.T. No. 80-2 (June 24, 1980) (testimony of Walter Yetnikoff); Exhibit 40, Compulsory License for Making & Distributing Phonorecords, Royalty

7. A Brief Digression on Rulemaking Procedures [384]

The creation of an administrative tribunal and the Tribunal's adoption of formal rulemaking procedures made it possible to clear up factual misconceptions which had been accepted by Congress for over a decade. It is very doubtful that any such clarification could have been accomplished under informal or "notice and comment" procedure,[385] which does not provide an opportunity to question witnesses as to the sources of their data and their assumptions, or an opportunity to confront them directly with contradictory statements.

The Administrative Conference and Professor Kenneth Davis have "emphatically" recommended that "trial-type" procedures, and especially cross-examination, "should never be required for rulemaking except to resolve issues of specific fact."[386] Facts about an entire industry are not "specific," but "legislative;" indeed, the Conference assumes that in rulemaking, no facts are "specific."[387]

The Tribunal's mechanical royalty proceeding demonstrates, on the contrary, that there are no substitutes for cross-examination, rebuttal, and sequential briefing and argument to resolve sharply contested factual issues, whether those issues be called specific fact, legislative fact, or policy.

This conclusion is not affected by the Tribunal's lack of staff. If the Tribunal had a staff, it would be little better able to resolve these issues under notice and comment procedures than were the congressional committee staffs during the copyright revision process. If the Tribunal added a staff and adopted notice and comment procedures, it would merely delegate some of its decision making to the staff, as so often happens at conventional agencies.[388]

Adjustment Proceeding (Mechanical), C.R.T. No. 80-2 (1980) (submitted by NMPA); Exhibit SS, Compulsory License for Making & Distributing Phonorecords, Royalty Adjustment Proceeding (Mechanical), C.R.T. No. 80-2 (1980) (submitted by RIAA). The cylinders, containing one composition apiece, carried retail prices from 35 cents to 50 cents. The catalog showed two-sided popular records priced from 65 cents to $1.00, and two-sided classical records from 75 cents to $1.50.

[384] Those readers not interested in administrative law can skip this digression. The Tribunal's reexamination of facts previously presented to Congress, however, provides an unusual opportunity to compare formal rulemaking procedures with legislative investigations.

[385] 5 U.S.C. § 553 (1976).

[386] 1 C.F.R. §§ 305.72-5, .76-3 (1981); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:8 (2d ed. 1979). Setting a rate is rulemaking. 5 U.S.C. § 551(4) (1976).

[387] 2 K. DAVIS, *supra* note 386, §§ 12:4, :8.

[388] *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 51-59 (1975).

8. The Issue of Data Underlying Evidence and the Tribunal's Lack of Subpoena Power

The industry-wide financial study submitted by the record industry highlighted the Tribunal's lack of subpoena power.[389] That study was based in part upon a survey of approximately a dozen record companies. Only aggregate data were submitted to the Tribunal. In response to a motion by the music publishers, the Tribunal requested RIAA to submit the input data of individual companies, but it refused, alleging that the data were confidential.[390] The songwriters then moved to strike the study, and the Tribunal denied the motion, stating that the failure to disclose the input data went to the weight of the evidence, not to its admissibility.[391] The court of appeals affirmed, in part because of the Tribunal's finding that the study was unreliable.[392]

It thus remains an open question whether the Tribunal has any effective sanction to obtain data underlying evidence submitted to it. It has no way at all to obtain other data, if the parties do not choose to offer it.

9. The Setting of the Rate and the Standard of Review

A principal issue on review was the adequacy of the Tribunal's explanation of the rate which it had set. The Tribunal's findings analyzed at considerable length the extent to which both the existing 2¾¢ rate and the new 4¢ rate met the statutory criteria.[393] The Tribunal also considered other factors, such as comparison with foreign royalty rates and effects on consumers.[394] It did not, however, explain how the figure of 4¢ had been reached.

The court of appeals determined that, since the Tribunal was not required by statute to follow formal rulemaking procedures, the standard on review was the "arbitrary and capricious" standard applicable to informal rulemaking.[395] It then listed three factors which required the court to give unusual deference to the Tribunal's conclusions:

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[389] *See supra* text accompanying notes 285-86.

[390] CRT Findings, *supra* note 56, at 10,467.

[391] *Id.* at 10,478.

[392] RIAA v. CRT, 662 F.2d at 13 n.32; *see supra* text accompanying note 380.

[393] CRT Findings, *supra* note 56, at 10,479-83. A preliminary question was whether the Tribunal was authorized to examine the adequacy of the 2¾ cent rate, or only to adjust that rate based on events after enactment. The Tribunal found, on the basis of the legislative history, described at *supra* notes 217-19, 295, 303-04, that its mandate was to reexamine the existing rate. CRT Findings, *supra* note 56, at 10,478-79. The court of appeals concurred. RIAA v. CRT, 662 F.2d at 4, 5, 9 n.21.

[394] CRT Findings, *supra* note 56, at 10,483-85.

[395] 5 U.S.C. § 706(2)(A) (1976); RIAA v. CRT, 662 F.2d at 7-8.

> First, some of the statutory factors require the Tribunal to estimate the effect of the royalty rate on the future of the music industry . . . . In establishing a permanent Tribunal, Congress expressed its expectation that members would be appointed 'from among persons who have demonstrated professional competence in the field of copyright policy,' and a court must recognize the contributions of this expertise.
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> Second, other statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users . . . . It is evident that the 'fairness' of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service rate-making; a broader inquiry is called for.
>
> Finally, the statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the Tribunal . . . . To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within 'a zone of reasonableness.'[396]

The court concluded that although "the character of the Tribunal's explanation leaves room for improvement," and although its "opinion is structured more as a demonstration that the four cent royalty rate is calculated to achieve the statutory objectives, than as a derivation of a 4.00¢ [sic] numerical figure," it "more than satisfies the statutory directive to state in detail the criteria, factual findings and 'specific reasons for its determination.' " The court added that the copyright users had not shown that the Tribunal's rate was "outside the zone of reasonableness."[397]

As the court noted, the vagueness of such standards as "fair return [to a songwriter] for his creative work" leaves little limit on the rate-setting discretion of the Tribunal. It appears that the only substantive restraint applicable to future rate adjustment determinations of the Tribunal will be consistency with its prior determinations[398] and with such future developments as are relevant under those determinations.

The four-cent rate falls somewhat short of consistency with the 1909 Act itself. The original two-cent rate was understood to be five percent of the retail price in 1909.[399] Five percent of the average

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[396] RIAA v. CRT, 662 F.2d at 8-9 (footnotes & citations omitted).

[397] *Id.* at 10-11 (citation omitted).

[398] *See* RIAA v. CRT, 662 F.2d at 5-6, 18.

suggested retail list price of albums in 1980, divided among the ten compositions usually found on an album,[400] yields a rate of approximately 4.5¢. There is no evidence that this relationship played any part in the Tribunal's decision.

10. The Interim Adjustment Problem and Its Resolution

Section 804 of the 1976 Act authorizes the Tribunal to hold proceedings to adjust the mechanical royalty rate in 1980 and 1987, and the final decision in each proceeding must be rendered within a year after it commences.[401] Because there is no explicit authority for the Tribunal to adjust the rate in intervening years, the Tribunal was obliged to fix a rate in such a manner that it would remain fair for at least seven years. A percentage royalty would have done this automatically, but once the Tribunal rejected that alternative, some other method of interim adjustment became necessary.

The record industry proposed to the Tribunal that the rate should be adjusted at intervals during the interim, in direct proportion to changes in an average of the suggested list prices of the albums which appeared in the "top 200" charts published by three industry magazines.[402] The copyright owners attacked this proposal on the ground that the records so selected might not be representative of industry-wide prices, and that changes in popular tastes, in record configurations, or in technology could render such a selection highly unrepresentative.[403] The Tribunal responded by including in its determination a provision for annual adjustment of the statutory rate in proportion to the annual change in the average suggested retail list price of albums. The Tribunal was to determine this average annually from such surveys or studies as it determined appropriate, including materials submitted to it by the interested parties.[404]

On appeal by the copyright users, the court of appeals found that although the Tribunal's inquiry and determination in the interim years would be more limited than a plenary reconsideration of the rate's fairness, the Tribunal would still have to exercise discretion in choosing the samples and surveys from which it determined average list prices, and "the statute gives the Tribunal no authority to engage in discretionary interim proceedings on [economic conditions] at all."[405]

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[400] CRT Appeal Record, *supra* note 5, at A882.

[401] 17 U.S.C. § 804(a), (e) (Supp. IV 1980).

[402] CRT Appeal Record, *supra* note 5, at A265-94.

[403] *Id.* at A295-301.

[404] 46 Fed. Reg. 891, 892 (1981).

[405] RIAA v. CRT, 662 F.2d at 17-18. The copyright owners had argued to the Tribunal, in

The court suggested alternatives in the following language:

> If economic conditions make it implausible that any numerical rate will remain reasonable over the next seven years, then we see nothing in the statute precluding the Tribunal from adopting a reasonable mechanism for automatic rate changes in interim years. But, whatever the scope of the Tribunal's adjustment powers may be, the mechanism chosen must be well-determined and beyond the Tribunal's discretion, and judicial review of the reasonableness of the chosen mechanism must be available as part of the review of the Tribunal's statutory rate proceeding.[406]

The court of appeals affirmed the Tribunal's determination of the 4¢ rate effective July 1, 1981, but reversed and remanded "for the limited purpose of allowing the Tribunal to consider whether it wishes to adopt an alternative scheme for interim adjustments."[407]

After the remand, the songwriter, publisher and record industry organizations jointly submitted to the Tribunal a proposal that the statutory rate be increased to specific levels at specific dates, the final increase being to 5¢ on January 1, 1986.[408] The proposal recited the Tribunal's previous finding that "it is necessary to set the rate in a manner that will respond to changes in record prices,"[409] and stated that the proposed schedule of rate adjustments is reasonable "[b]ased on data in the record . . . concerning recent trends in record prices."[410]

The Tribunal published the proposed schedule for comments,[411] and subsequently promulgated it.[412] Commissioner Brennan observed that it "accomplishes the objectives of the Tribunal that subsequent interim adjustments be related to increases in record prices."[413]

11. The Problem of the Effective Date

As noted above,[414] section 809 of the 1976 Act states that the decisions of the Tribunal become effective 30 days after publication in

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during the interim years. CRT Appeal Record, *supra* note 5, at A750; Record at 72-74, 168-69, Compulsory License for Making and Distributing Phonorecords, Royalty Adjustment Proceeding (Mechanical), C.R.T. No. 80-2 (Nov. 19, 1980) (oral arguments). They were somewhat less than persuasive in arguing a contrary position to the court of appeals.

[406] *Id.* at 17 (citations omitted).

[407] *Id.* at 18.

[408] 46 Fed. Reg. 55,276, 55,277 (1981). The corresponding overtime rate will be .95¢ per minute. *Id.* at 55,277.

[409] CRT Findings, *supra* note 56, at 10,485.

[410] 46 Fed. Reg. 55,276, 55,277 (1981).

[411] *Id.*

[412] 37 C.F.R. § 307.3 (1981).

[413] Agenda Meeting at 8, Interim Adjustment of Royalty for Distributing Phonorecords, C.R.T. No. 81-4 (1981).

the Federal Register unless an appeal is taken within that time, but does not state when a rate adjustment takes effect if appealed. The record industry has taken the view that this creates an automatic stay until "judicial review is complete."[415]

One consequence of this ambiguity was a race to the courthouse to establish jurisdiction in one of the two available circuits,[416] the Second (favored by copyright owners) and the District of Columbia (favored by copyright users). The basis for the preference was that the D.C. Circuit has a longer average disposition time than the Second Circuit;[417] the result demonstrated the fallacy of applying averages to discrete cases.

The jurisdictional question was resolved in favor of the D.C. Circuit. That court then granted the copyright owners' motion to expedite argument,[418] heard argument on June 18, 1981, rendered its judgment five days later, and issued its mandate forthwith, stating that it had expedited the petitions for review "because the new rates were scheduled to become effective on July 1, 1981."[419]

B. *Other Tribunal Actions*

1. The Jukebox Adjustment

The Tribunal also adjusted the jukebox rate in 1980, after holding seven days of hearings.[420] The jukebox operators' trade organization, the Amusement and Music Operators Association (AMOA), argued to the Tribunal that the burden of proof was on those seeking to increase the rate above the $8 rate set by Congress, and supported its position by supplying a survey and other evidence to prove the industry was declining and could not afford a rate increase.[421]

ASCAP and SESAC[422] jointly argued that a reasonable rate was that which would have been set by bargaining in the absence of a

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[415] Letter from James Fitzpatrick, Esq., to the Copyright Royalty Tribunal (Apr. 24, 1981); *see supra* notes 291-92 and accompanying text.

[416] 28 U.S.C. § 2812(a).

[417] The average time from filing of the record to final disposition, on appeals from agencies of cases terminated between July 1979 and June 30, 1980, was 14 months in the D.C. Circuit and 5.9 months in the Second Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR app. A-11.

[418] RIAA v. CRT, No. 80-2545 (D.C. Cir. Mar. 20, 1981).

[419] RIAA v. CRT, No. 80-2545 (D.C. Cir. June 23, 1981) (judgment and order). Under FED. R. APP. P. 41(a), the mandate issues 21 days after entry of judgment unless the court orders otherwise. Judge Skelly Wright, the presiding judge on the panel, had a few months earlier denounced the "scandal" of delay in administrative proceedings and of judicial contributions to such delay. Wright, *Musings on Administrative Law*, 33 AD. L. REV. 176, 179 (1981).

[420] 46 Fed. Reg. 885 (1981). The statutory criteria for adjusting the jukebox rate are the same as for the mechanical rate. 17 U.S.C. § 801(b) (Supp. IV 1980), *quoted supra* pp. 58-59.

[421] 46 Fed. Reg. 886-87 (1981); *see supra* text accompanying notes 120, 215, 294.

[422] *See supra* note 110. BMI sought an increase to approximately $30, based solely on the

compulsory license.[423] They introduced evidence that negotiated license fees for comparable uses of recorded music from the combined catalogues of all three societies ranged from $70 to $140 per year.[424] They sought an increase to $70 in 1982, with subsequent annual adjustments in proportion to the Consumer Price Index.[425]

The Tribunal rejected AMOA's legal and factual contentions and held that no party bore a burden of proof in the 1980 proceedings.[426] The Tribunal found that marketplace rates provided a "benchmark,"[427] but nevertheless increased the rate by less than what ASCAP and SESAC had urged. It found that a reasonable rate was $50 per year, but scheduled the increase to that rate in two steps: to $25 on January 1, 1982, and to $50 on January 1, 1984.[428] Because the statute schedules no Tribunal jukebox proceeding before 1990,[429] the Tribunal ordered a third step for 1986, which will adjust the $50 rate in direct proportion to the change in the Consumer Price Index from 1981 to 1986.[430]

Two commissioners dissented from this opinion. Commissioner Garcia favored an increase to $30 in 1982 and to $60 in 1984; Commissioner James felt that a reasonable fee was at least $130.[431]

On appeal by both AMOA and ASCAP, the Court of Appeals for the Seventh Circuit affirmed.[432] The opinion contains a number of rulings which may be significant for future Tribunal rate adjustments:

1. The court found that Congress had never found that $8 was a reasonable rate.[433]

2. The Court disposed of AMOA's hardship argument in terms which vitiate almost all such arguments:

> Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase. But to accept the proposition that AMOA may deprive copyright owners of increased remuneration for the exploi-

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[423] 46 Fed. Reg. 885 (1981).

[424] *Id.* at 885-86.

[425] *Id.* at 885.

[426] *Id.* at 887. It followed this conclusion in the mechanical royalty proceeding. CRT Findings, *supra* note 56, at 10,477-78.

[427] 46 Fed. Reg. 888 (1981).

[428] 37 C.F.R. § 306.3 (1981).

[429] 17 U.S.C. § 804(a)(2)(C) (Supp. IV 1980).

[430] 37 C.F.R. § 306.4 (1981).

[431] 46 Fed. Reg. 890-91 (1981).

[432] Amusement and Music Operators' Ass'n v. Copyright Royalty Tribunal, 2 COPYRIGHT LAW REP. (CCH) ¶ 25,384 (7th Cir. Apr. 16, 1982).

[433] *Id.* at 17,219-21.

tation of their works by showing that some jukebox operations will become unprofitable is, we believe, unsound and unjust.[434]

3. The Court approved of the Tribunal's use of ASCAP's "marketplace analogies,"[435] but it rejected ASCAP's contention that they set the perimeter of the "zone of reasonableness."[436] The court stated that the zone was defined not by the evidence, but "by the statutory criteria governing the ratemaking."[437] To demonstrate that any particular rate falls outside such limits will be a challenging exercise for appellate advocates in the future. Reconciling such limits with the non-delegation doctrine[438] can probably best be accomplished by silence.

2. The Cable Royalty Adjustment

The Tribunal also increased the cable royalty rate in 1980. As previously noted, the Tribunal's power to adjust the cable rate is sharply limited; absent a change in the FCC's rules, the change may only compensate for inflation or deflation.[439] Using the Consumer Price Index as the measure of inflation, the Tribunal increased the rate schedule[440] by 21%, calculated as the difference between the increase in the CPI since 1976 and the increase in average cable subscriber rates in that period.[441] The Tribunal also increased the revenue ceiling for the lower small system rates from $160,000 per six-month period[442] to $214,000.[443]

Both cable operators and copyright owners have appealed the Tribunal's decision, and the appeals are pending.[444]

3. The Cable and Jukebox Distribution Proceedings

The Tribunal's distribution proceedings have, to date, fulfilled the pessimistic predictions made by Congress in 1967.[445]

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[434] *Id.* at 17,222.

[435] *Id.* at 17,223-24.

[436] *Id.* at 17,223-24 & n.11.

[437] *Id.* The court also concluded that it made no difference whether the standard of review was called "arbitrary and capricious" or "substantial evidence." *Id.* at 17,216-19.

[438] *See supra* note 238.

[439] 17 U.S.C. §§ 801(b)(2)(A), (D) (Supp. IV 1980).

[440] 17 U.S.C. § 111(d)(2)(B) (Supp. IV 1980); *see supra* text accompanying notes 259-65.

[441] 46 Fed. Reg. 892, 896-97 (1981).

[442] 17 U.S.C. §§ 111(d)(2)(C)-(D) (Supp. IV 1980); *see supra* text accompanying note 265.

[443] 37 C.F.R. § 308.2(b)(2) (1981).

[444] National Cable Television Ass'n v. Copyright Royalty Tribunal, No. 81-1005 (D.C. Cir. filed 1981).

[445] *See supra* text accompanying notes 115, 156.

Separate distribution proceedings are conducted as to the royalties received by the Copyright Office for each year. Cable royalties received for the three years 1978-80 and available for distribution totalled approximately $55,400,000. The Tribunal has made distribution determinations only for the 1978 and 1979 royalties, and of those royalties only about one-quarter, or approximately $8 million, had actually been paid out by May 31, 1982.[446] Payment of the remainder has awaited termination of appeals.[447] Some of the delay was caused by unsuccessful efforts among the copyright owners to reach agreement.[448] The motion picture producers claim that copyright owners will spend approximately $5 million to participate in the 1979 distribution proceedings, although the entire amount of fees to be distributed, including interest, was only approximately $18.6 million as of June 30, 1981.[449]

The Tribunal's distribution of 1978 cable royalties was affirmed by the Court of Appeals for the D.C. Circuit.[450] The Tribunal had awarded 75% of the royalties to motion picture producers and divided the rest among sports leagues, television broadcasters, public television, and the music performing rights societies. All but the motion picture producers appealed. The Court of Appeals once again confirmed the Tribunal's "wide latitude" to make determinations within a "zone of reasonableness," and the "considerable deference" which the courts will grant to its determinations.[451] The court simul-

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[446] Payment was made on May 8, 1981. Ladd, *supra* note 320, at 16; 45 Fed. Reg. 63,026, 63,042 (1980); 46 Fed. Reg. 21,637 (1981); 47 Fed. Reg. 9879 (1982).

As a result of the court of appeals' affirmance of the Tribunal's distribution of all but 0.25% of the 1978 royalties, *see infra* text accompanying notes 450-60, virtually all of the remaining 1978 royalties should be distributed during the summer of 1982.

On May 28, 1982, the Tribunal ordered one-half of the 1979 royalties to be distributed on July 2, 1982, as amounts not subject to pending appeals. 47 Fed. Reg. 24,175 (1982), *stay denied*, 47 Fed. Reg. 24,767 (1982).

[447] *See* National Ass'n of Broadcasters (NAB) v. Copyright Royalty Tribunal (CRT), 675 F.2d 367 (D.C. Cir. 1982).

[448] *See 1981 Senate Oversight Hearings*, *supra* note 127, at 18, 23; *Volume III, The Communications Act of 1979: Hearings on H.R. 3333 Titles II, V and VII Communications Regulatory Commission; Administrative and Judicial Procedures; Penalties; and National Telecommunications Agency Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 62-69 (1979) (testimony of Comm'r Thomas C. Brennan); CABLEVISION, *supra* note 192, at 106. The performing rights societies have recently reached agreement among themselves as to the division of their combined shares, or at least upon a method of making the division without recourse to the Tribunal. *See infra* p. 77.

[449] *1981 Senate Oversight Hearings*, *supra* note 127, at 111, 229 (testimony of Jack Valenti); Ladd, *supra* note 320, at 16. The amount originally received by the Copyright Office (without interest) was $15.8 million. *Id.*

[450] NAB v. CRT, 675 F.2d 367.

[451] *Id.* at 374-76.

taneously rejected an attack on the breadth of delegation to the Tribunal.[452] Although the Act contains no standards for royalty distributions by the Tribunal, and although Congress made clear that such omission was deliberate,[453] the court found that Congress "did provide general guidance to the Tribunal, through specific statements in the legislative history and in the general philosophy of the Act itself."[454]

The court did reverse the Tribunal as to 0.25% of the royalties. The Tribunal had said in a preliminary ruling that it would award this amount to National Public Radio, but then had reconsidered and, in its final determination, had awarded this amount instead to public television, stating only that the record was "inadequate to support any award to NPR."[455] The Tribunal had given the parties no notice that it intended to reconsider its initial decision, and the reconsideration had not taken place at a public hearing. The court held that the Tribunal's reversal may have violated both the Government in the Sunshine Act[456] and the Tribunal's own regulations,[457] which were modeled on the Sunshine Act.[458] It is extremely doubtful that the Sunshine Act applies to organizations in the legislative branch.[459] The decision therefore rests on the binding effect of the Tribunal's own regulations, and on the court's disquiet at the Tribunal's unexplained vacillation.

On remand, the Tribunal again voted to deny any award to National Public Radio.[460] A further appeal is possible, as of the time of writing.

Jukebox royalty distributions have also run a somewhat rocky course. The amounts to be distributed are approximately $1 million per year.[461] The royalties for 1978 were distributed by agreement among the performing rights societies.[462] No agreement could be reached as to the 1979 royalties, and the Tribunal therefore held a

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[452] *Id.* at 376 n.12.

[453] The House Judiciary Committee stated that "it would not be appropriate to specify particular, limiting standards for distribution," but the Tribunal rather "should consider all pertinent data and considerations presented by the claimants." 1976 REPORT, *supra* note 129, at 97.

[454] NAB v. CRT, 675 F.2d at 376 n.12.

[455] *Id.* at 384.

[456] 5 U.S.C. § 552b (1976).

[457] 37 C.F.R. §§ 301.11-.17 (1981).

[458] NAB v. CRT, 675 F.2d at 384.

[459] 5 U.S.C. §§ 551(1)(A), 552b(a)(1), 552(e), (1976); 1 O'REILLY, FEDERAL INFORMATION DISCLOSURE, § 5.02 n.16 (1976). *But see* Petkas v. Staats, 364 F. Supp. 680, 682 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 887 (D.C. Cir. 1974).

[460] 47 Fed. Reg. 24,767 (1982).

[461] *1981 House Appropriation Hearings, supra* note 314, at 841.

[462] *Id.* at 832; *1981 House Oversight Hearings, supra* note 315, at 147.

distribution proceeding, which concluded not by distributing funds, but by knocking heads.

After examining the various bases of distribution suggested by the claimants, the Tribunal concluded in essence that only "a random sample survey of actual performances" in jukeboxes could be a valid basis for distribution.[463] ASCAP had chosen not to conduct such a survey; BMI had conducted a survey which the Tribunal found defective; and the other claimants (SESAC and the Italian Book Corporation)[464] could not afford to conduct surveys. The Tribunal "request[ed] that the parties submit proposals for a joint survey that they would agree to beforehand and whose execution they would supervise jointly."[465] The Tribunal implied that the survey would also govern a distribution of royalties for 1980 and perhaps for 1981 as well.[466]

The withholding of funds apparently lent considerable force to the "request." On January 14, 1982, ASCAP, BMI, and SESAC submitted to the Tribunal an agreement that their combined shares of the jukebox royalties for the years 1978 through 1982 should be paid to a neutral arbiter, who would in turn distribute the royalties among the three claimants according to criteria or shares agreed upon by them, without public disclosure of the shares.[467] Thus, the Tribunal's next jukebox distribution proceeding will probably concern royalties for 1983, at the earliest.

The same agreement among the performing rights societies will also govern distribution of their combined shares of cable royalties for the same years.

The Tribunal has defended its record by pointing out that Congress deliberately gave the Tribunal no criteria whatever for cable royalty distribution,[468] and for jukebox royalties specified only that they should be distributed in the "pro rata share[s]" to which the performing rights societies and other copyright owners proved "entitlement";[469] that the

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[463] 46 Fed. Reg. 58,139, 58,142 (1981).

[464] The Italian Book Corporation owns copyrights in a number of Italian songs. Since "pizza places [are] one of the foremost frequented places where one is likely to discover a jukebox," the Italian Book Corporation claimed a larger share in jukebox royalties than it might claim in other performance royalties. *Id.* at 58,140.

[465] *Id.* at 58,142.

[466] *See id.* at 58,141-42.

[467] Letter of agreement between ASCAP, BMI, and SESAC submitted to the CRT for Nos. 80-4, 80-5, 81-1, 81-4 (Jan. 14, 1982). The remaining claimant, the Italian Book Corporation, sought 1% of the total royalties. The Tribunal, without explanation, awarded it only $1,000 for 1979 and $800 for 1980. 47 Fed. Reg. 18,406 (1982).

[468] 1976 REPORT, *supra* note 129, at 97-98, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5712.

[469] 17 U.S.C. § 116(c)(4) (Supp. IV 1980), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5730. *Cf. supra* text accompanying note 121.

Tribunal, therefore, has had to determine its own criteria for distribution; and that once these criteria have passed judicial scrutiny, subsequent distribution proceedings either should be shorter or should be obviated by agreements among the claimants.[470] In any event, the delay and expense encountered thus far were explicitly anticipated by Congress.[471]

A more serious problem with respect to the jukebox license is that, according to figures submitted by the jukebox operators themselves, the operators are failing to pay royalties on one-half to two-thirds of the jukeboxes in the United States. In the 1980 jukebox rate adjustment proceeding, AMOA submitted a survey estimating that there were between 251,000 and 388,000 jukeboxes operating in the country.[472] At $8 per box, the royalties due on those numbers of jukeboxes were between approximately 2 and 3.1 million dollars. Actual receipts in 1980 were less than $1.1 million.[473]

If the fraction of royalties evaded by jukebox operators remains constant, by 1984 the amount of unpaid jukebox royalties will be running between 5.9 and 12.8 million dollars annually.[474]

C. *Cable Deregulation and Its Impact*

In July 1980, the FCC entirely repealed both its distant signal carriage rules and its syndicated program exclusivity rules.[475] In *Malrite T.V. of N.Y. v. FCC*,[476] the Court of Appeals for the Second Circuit upheld the repeal and rejected arguments that continuation of these rules was either assumed or mandated by Congress in adopting the provisions of section 111. Instead, the court found that the grant of power to the Tribunal to adjust cable royalty rates whenever the FCC altered either the distant signal or syndicated program exclusivity rules implied that Congress had contemplated that the FCC might entirely eliminate both sets of rules.[477]

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[470] *1981 Senate Oversight Hearings*, *supra* note 127, at 23; CABLEVISION, *supra* note 192, at 106. The statute exempts such agreements from the antitrust laws. 17 U.S.C. §§ 111(d)(5)(A), 116(c)(2) (Supp. IV 1980).

[471] *See supra* text accompanying notes 115, 156.

[472] 46 Fed. Reg. 884, 886 (1981). The Tribunal found that this survey "failed to provide reliable data concerning the operating expenses, revenues, or return on investment on [sic] jukebox operators." It made no finding concerning the survey's estimate of the number of jukeboxes. *Id.* at 888.

[473] *1981 House Appropriation Hearing*, *supra* note 314, at 841.

[474] These estimates assume that AMOA's estimate was correct, and that the total number of boxes and the number of those paying royalties remain constant.

[475] 45 Fed. Reg. 60,186 (1980).

[476] 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3547 (U.S. Jan. 12, 1982).

[477] *Malrite*, 652 F.2d at 1147-48.

The Tribunal has commenced a proceeding to adjust the cable royalty rates in response to the FCC's action.[478] The Tribunal has stated, however, that "the rigidity of the current fee schedule may well present problems in fashioning suitable remedies and determining reasonable compensation."[479] Commissioner Brennan has stated, less formally, that while the Tribunal has power to adjust the rate, "where the problem arises is when you get to the point of deciding what is reasonable compensation, you have to look at the existing fee schedule,"[480] for which "there is absolutely no empirical economic justification."[481]

It is scarcely surprising, therefore, that the FCC's deregulation has produced calls to eliminate the cable compulsory license not only from the copyright owners and broadcasters,[482] but also from the Copyright Office,[483] the National Telecommunications and Information Administration of the Department of Commerce,[484] and the chairman of the FCC.[485] Nevertheless, abolition seems unlikely in the extreme.

On May 12, 1981, Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, introduced a bill in response to the FCC's action.[486] The bill would have retained the compulsory license for such retransmission of distant signals as had been permitted under the FCC's now rescinded rules, while entirely eliminating royalties on cable systems with less than 5,000 subscribers, and the Copyright Royalty Tribunal would have been authorized to replace the existing royalty schedule with whatever schedule it determined to be "just and reasonable."[487] The bill would also have required the Tribunal to promulgate new exclusivity rules.[488]

Representative Kastenmeier's bill would also have cured two major defects of the Tribunal provisions in the Copyright Act, first by

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[478] 46 Fed. Reg. 51,631 (1981).

[479] *1981 Senate Oversight Hearings*, *supra* note 127, at 14, 22.

[480] CABLEVISION, *supra* note 192, at 105.

[481] *1981 Senate Oversight Hearings*, *supra* note 127, at 13.

[482] *See id.* at 198, 204-05, 214, 252-58.

[483] *Id.* at 4.

[484] OFFICE OF POLICY ANALYSIS AND DEVELOPMENT, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMIN., U.S. DEP'T OF COMMERCE, CABLE COPYRIGHT ALTERNATIVES TO THE COMPULSORY LICENSE 137-41 (Dec. 1981). NTIA is the successor to the White House Office of Telecommunications, whose earlier role was discussed at *supra* notes 193-95.

[485] N.Y. Times, Mar. 2, 1982, at D5, col. 1.

[486] 127 CONG. REC. 2151 (daily ed. May 12, 1981).

[487] H.R. 3560, 97th Cong., 1st Sess., §§ 1, 3, 127 CONG. REC. 2152-53 (daily ed. May 12, 1981).

[488] *Id.* §§ 2-4, 127 CONG. REC. 2152 (daily ed. May 12, 1981).

granting the Tribunal subpoena power and, second, by making clear that appeals did not automatically stay Tribunal decisions.[489]

Out of the intensive discussions triggered by Representative Kastenmeier's introduction of this bill, yet another compromise proposal has emerged. This one is too complicated to describe in detail.[490] It retains the compulsory license; it adds syndicated exclusivity provisions; it amends the royalty schedule slightly; and it enacts, with some changes, the FCC's existing rules specifying the signals that cable systems are required to transmit (so-called "must carry" rules), anticipating the FCC's rescission of those rules.[491]

The trade press has carried numerous articles indicating some unhappiness by copyright owners and program originators with the bill.[492] In the tradition of all cable legislation, further progress will probably be neither simple nor swift.

Two provisions conspicuously eliminated from the bill are those which would have granted subpoena power to the Tribunal and eliminated the possibility that appeals automatically stay Tribunal decisions.[493] These issues apparently will be treated in separate legislation, if at all.

D. *Betamax and the Proposed Home Taping License*

Another compulsory license has been proposed as a solution to the problems made prominent by the Ninth Circuit's decision in the *Betamax* case,[494] holding that home taping of copyrighted audiovisual materials for private non-commercial use was infringement and not fair use, and that the manufacturer, distributor, and retailers of the video-tape recorders were liable as contributors. Bills have been introduced in the House and Senate[495] which would exempt from infringe-

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[489] *Id.* §§ 6-7, 127 CONG. REC. 2152-53 (daily ed. May 12, 1981).

[490] At present, it runs over 12 printed pages.

[491] Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess., Second Draft of H.R. 3560 (Dec. 15, 1981), *reprinted in* 2 COPYRIGHT L. REP. (CCH) ¶ 20,167 (1982) [hereinafter cited as Second Draft of H.R. 3560]. The bill abandons any further pursuit of platonic abstractions such as copyright versus communications, by containing in one bill amendments to both the Copyright and the Communications Acts; if the bill proceeds further, it will be reviewed in its entirety in both houses by both Judiciary and Commerce Committees and their appropriate subcommittees.

[492] *See, e.g., DBS Points Up Need for Spectrum Management*, NAT'L A. OF BROADCASTERS RADIO/TV HIGHLIGHTS, Dec. 21, 1981, at 1; *Unacceptable Amendments Added to Copyright Bill*, NAT'L A. OF BROADCASTERS RADIO/TV HIGHLIGHTS, Dec. 21, 1981, at 1; *Stumbling Block in Copyright Compromise*, NAT'L A. OF BROADCASTERS RADIO/TV HIGHLIGHTS, Dec. 21, 1981, at 2.

[493] Second Draft of H.R. 3560, *supra* note 491.

[494] Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981).

[495] The Senate bill is an amendment proposed by Senator Mathias to S. 1758, 97th Cong., 1st Sess. (1982); the amendment is reprinted in 2 COPYRIGHT L. REP. (CCH) ¶ 20,164 (1982)

ment individuals who record audio (sound) or audiovisual works at home for their own family's use and which would create compulsory licenses for the manufacture, importation, and distribution of audio and video recording devices and media.[496] The Tribunal, rather than Congress, would set the royalty rates in the first instance, and would adjust them every five years. Under the bills, the Tribunal's rates would be "calculated to afford to copyright owners . . . a fair compensation for use of their creative works."[497] Royalties would be paid to the Register of Copyrights and distributed annually by the Tribunal.[498]

At the time of writing, hearings on these and other home taping bills have been held by both Senate and House subcommittees. Future progress of such legislation will depend not only on the usual political pressures, but also on possible action by the Supreme Court, which has granted certiorari.[499]

E. *Commissioner James' Call for Abolition*

The most startling development in the Tribunal's short history was the call to abolish it, from its then Chairman, Commissioner James. He had consistently been the most favorable towards copyright owners of all the commissioners.[500] On March 2, 1981, at what was expected to be a routine hearing before the House Legislative Appropriations Subcommittee, the subcommittee chairman asked, "Have you at this point no recommendations as to what changes might be made in the statute?" Commissioner James made some effort to avoid the issue but then answered, speaking for himself alone:

> I do not feel there is a need for the Copyright Royalty Tribunal.
>
> I think through statutory revision everything that was accomplished in the original Act can probably be accomplished in a new and modern streamlined Act. I don't think there is a need for the Copyright Royalty Tribunal.[501]

Two days later, at an oversight hearing before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, he explained his views on the mechanical license, as follows:

[hereinafter cited as Mathias Amendment]. The House bill is H.R. 5705, 97th Cong., 2d Sess. (1982), *reprinted in* 2 COPYRIGHT L. REP. (CCH) ¶ 20,165 (1982).

[496] Mathias Amendment, *supra* note 495, §§ 119(a), 120(a); H.R. 5705, *supra* note 495, §§ 119(a), 120(a).

[497] Mathias Amendment, *supra* note 495, §§ 119(c)(2), 120(c)(2); H.R. 5705, *supra* note 495, §§ 119(c)(2), 120(c)(2).

[498] Mathias Amendment, *supra* note 495, §§ 119(b)(3), (5), 120(b)(3), (5); H.R. 5705, *supra* note 495, §§ 119(b)(3), (5), 120(b)(3), (5).

[499] Universal City Studios, Inc. v. Sony Corp. of America, 50 U.S.L.W. 3973 (U.S. 1982).

[500] *See* CABLEVISION, *supra* note 192, at 106-09; *supra* text accompanying note 424.

[501] *1981 House Appropriation Hearing*, *supra* note 314, at 849-50.

> In my opinion the CRT is not needed, or required to make determination concerning the adjustment of reasonable copyright royalty rates as provided in Sections 115 and 116.
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> Under Section 115, history will support that there is possibly an overriding need for a compulsory license for making and distributing phonorecords. However, the continuous and periodic intervention of the Federal Government in adjusting the rate, totally at the taxpayers' expense, in my view is undesirable, unwarranted and unnecessary.
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> . . . .
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> . . . If Congress were to establish a percentage system, it would effectively eliminate the necessity and need for periodic review of royalty rates by any government agency or by Congress. If the price of records goes up or down, the royalty due and payable will also go up or down. Thus by appropriate action of the Congress another function of the CRT can be eliminated.[502]

As to the jukebox license, Commissioner James recommended that it be retained but that Congress set the rate based on marketplace value and further provide for automatic annual adjustment based on the Consumer Price Index or on some other index for the jukebox industry.[503] Finally, he recommended that the cable license be abolished outright.[504]

The other four commissioners, however, took a substantially different position. Testifying before the Senate Judiciary Committee on April 29, 1981, they suggested that changes in the Tribunal necessarily depended upon substantive congressional decisions as to the compulsory licenses and as to the Tribunal's jurisdiction over them.[505] The four commissioners did recommend three changes that could be implemented promptly:

1. The Tribunal could be reduced to three commissioners by simply not appointing new commissioners to replace the two whose terms would expire in 1982.[506]

2. The Committee should review whether the effective date language of section 809 "encourages parties to appeal Tribunal determinations on the assumption that section 809 grants an automatic stay."[507]

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[502] *1981 House Oversight Hearings, supra* note 315, at 69-70; *see also id.* at 53-54. The first CRT function Comm'r James recommended eliminating was the public broadcasting license, which the entire Tribunal had found to be unnecessary, in a 1980 report to Congress. *Id.* at 53, 137-42.

[503] *Id.* at 54, 70.

[504] *Id.* at 55, 71.

[505] *1981 Senate Oversight Hearings, supra* note 127, at 14, 16, 26-27.

[506] *Id.* at 16.

[507] *Id.* at 27.

3. "[T]he Tribunal should be granted subpoena power. [T]he commissioners found it most unsatisfactory during the 1980 royalty adjustment proceedings to be placed in the position of receiving only the evidence which parties chose to present."[508]

As to the mechanical compulsory license, the four commissioners recommended that Congress not amend section 115, but that if it did revisit the issue, it should abolish the compulsory license entirely rather than once more attempt to determine either the form or the amount of the royalty.[509]

As to the cable license, the four commissioners stated:

> The legislative history [of the statutory cable royalty schedule] is clear — there is absolutely no empirical economic justification for the statutory schedule. It was adopted by the Congress to implement an agreement reached between the program syndicators and the cable industry.
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> . . . .
>
> We believe that the absence of any Tribunal jurisdiction to review the basic cable fee schedule and to make such adjustments as may be justified is a very serious defect in the current law and a major cause of dissatisfaction with the cable copyright provisions.[510]

The four commissioners recommended that Congress not reconsider the jukebox royalty. They repeated their prior recommendation that the compulsory noncommercial broadcasting license "is not necessary for the efficient operation of public broadcasting." They concluded, however, that, apart from the cable license, they were "not aware of any disposition in the Congress to revisit the other compulsory licenses."[511]

Two days later, Commissioner James wrote to the Chairman of the Senate Judiciary Committee that he was "in substantial disagreement" with the testimony of the other four commissioners and concluded with this parting shot: "I would sincerely hope that my fellow Commissioners would put aside their pecuniary and proprietary interest in the Tribunal. They could then, I believe, give an objective appraisal of the value of the Tribunal."[512]

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[508] *Id.; see also id.* 16-17. The Register of Copyrights also recommended that the Tribunal be given subpoena power. *Id.* at 11.

[509] *Id.* at 24.

[510] *Id.* at 20-21; *see id.* at 13.

[511] *Id.* at 14; *see id.* at 24-25.

[512] Letter from Commissioner James to Senator Thurmond (May 1, 1981).

The same day, he resigned from the Tribunal, repeating in his letter of resignation the recommendation that the Tribunal be eliminated.[513]

As a result of Commissioner James' testimony, the General Accounting Office was asked to examine the Tribunal's efficacy and alternatives to its current role and structure. Its report on June 11, 1981, concluded that the Tribunal had followed its legislative mandate competently and on schedule, but that it could be improved in a number of respects.[514]

The GAO began by noting that only one of the present commissioners had "any significant background in copyright issues"[515] and that the others had taken about a year to get "up to speed."[516] It recommended: "While the commissioners are now generally regarded as being knowledgeable and capable in their work, we believe the Tribunal could be more effective if future appointed commissioners have some familiarity with copyright issues without being intimately involved with any affected industry."[517]

In the view of the authors, the GAO underestimated the inherent contradiction within its recommendation. The only significant group of persons "who have some familiarity with copyright issues" and "are not intimately involved with any affected industry" are academics. The functions of the Tribunal call for a more pragmatic judgment than is usually fostered by academic life, and the issues that Tribunal commissioners must decide are primarily economic and pragmatic ones, rather than questions of copyright law.[518] If persons of business experience and with interest in the arts are appointed to the majority of positions on the Tribunal, a year's training will be a small price to pay to avoid the hazards of partiality on the one hand and impracticality on the other.

Passing to the problem of the Tribunal's governing criteria, the GAO is unique among those who have publicly considered the issue, in that it faced the problem and squarely admitted defeat. The GAO observed that the present statutory criteria are not "clear;" it noted

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[513] Letter from Commissioner James to President Reagan (May 1, 1981).

[514] GAO Report, *supra* note 314, at 6-10.

[515] *Id.* at 10.

[516] *Id.* at 12.

[517] *Id.*

[518] Only in the cable distribution proceeding have any significant copyright issues been raised, such as whether the sequence of programs broadcast by a station is a "compilation" entitled to copyright, or whether owners of copyright in characters are entitled to share in cable royalties. 45 Fed. Reg. 63,026, 63,031-34 (1980); Koppany, *A Methodology to Their Madness: The First Copyright Royalty Tribunal and Distribution of Cable Royalty Fees*, 1981 BEVERLY HILLS BAR J. 466, 471-72, 474-75.

that the Tribunal's "effectiveness could be improved" by providing clear criteria; and then it admitted that "it is virtually impossible to develop clear criteria that would be acceptable to copyright owners and users" and that a congressional attempt to do so would produce "new problems and controversies."[519]

On two points the GAO concurred with all parties who have expressed themselves publicly: the Tribunal should be given subpoena power, and Congress should make clear that there is no automatic stay of Tribunal decisions pending appeal.[520]

On the basic question of restructuring, the GAO found the Tribunal's commissioners were "underutilized high level officials"[521] but concluded that "the evidence does not clearly support" any particular solution.[522] The GAO contented itself with listing five "options" and stating that one option, changing the Tribunal into "a part-time ad hoc body with presidentially appointed commissioners" would resolve more of the problems identified by the GAO than would the others.[523]

No action has been taken on the GAO's recommendations. Both judiciary committees appear to have accepted the Tribunal's view that Congress should decide what the Tribunal's duties will be, particularly with respect to cable, before deciding whether or how to change the Tribunal's structure or composition. The Tribunal cannot be abolished unless the compulsory licenses themselves are abolished or changed so as to eliminate the need for a Tribunal, and as the Tribunal itself observed, Congress does not appear inclined to abolish any compulsory license nor even to revise any license except cable.

F. *The Ray Nomination*

The one restructuring proposal that did receive a favorable reception in Congress was to cut the number of commissioners to three. The Tribunal advised the President's Assistant for Presidential Personnel in August 1981 that the chairman of the responsible Senate Appropriations subcommittee had recommended such a reduction, and that the House Appropriations Committee had stated that it planned "to begin phasing out the availability of appropriated funds" for the Tribunal. The Tribunal advised that this was the only course it could suggest in response to the President's request for recommendations to cut agency expenditures.[524]

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[519] GAO Report, *supra* note 314, at 10, 16-17.

[520] *Id.* at 23.

[521] *Id.* at 20.

[522] *Id.* at 23.

[523] *Id.* at 25; *1981 House Oversight Hearings*, *supra* note 315, at 129.

[524] Letter from Acting Chairman Brennan to E. Pendleton James, Assistant to the President in charge of the Presidential Personnel Operation (Oct. 6, 1981).

President Reagan nevertheless proceeded to fill the position vacated by former Commissioner James and nominated Edward W. Ray, a former record company executive.[525] In response to inquiries from the Office of Government Ethics, the Tribunal responded to the obvious question of Mr. Ray's impartiality by noting that the Tribunal's jurisdiction was very limited, and stating that it believed that: "[E]ach Commissioner should be in a position to participate in the determination of every issue requiring decision by the Tribunal. The disclosure form suggests that there may be issues where the nominee, according to customary practice, might choose to recuse himself."[526]

Mr. Ray's nomination was approved by the Senate and he took office in February 1982.[527] In an interview after taking office, Commissioner Ray said he did not see how a conflict of interest could arise in his case, although he would recuse himself if it did. He also stated, concerning compulsory licenses in general, "wherever possible, I am in favor of letting the mechanics of the marketplace determine the outcome of the issues."[528]

During the following month, in testimony before a House Appropriations subcommittee, the Tribunal repeated its recommendation that it be reduced to three members.[529] There has been no response from Congress.

V. Prospects for the Compulsory Licenses and the Tribunal

A. *The Basic Framework*

It now seems clear that all the present compulsory licenses will continue, and only the cable license faces significant statutory change. Consequently, it also appears clear that the Tribunal will be continued.

Of the Tribunal's various functions, rate adjustments will remain the most important proceedings. Almost all jukebox royalties are now

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[525] Mr. Ray was an executive of various record companies continuously from 1955 to 1979. He was a vice-president of Capitol Records from 1964 through 1969; the President of RIAA was also an officer of Capitol Records and of its parent corporation throughout that period. Office of the Press Secretary, The White House, Press Release (Oct. 26, 1981); Record at 15-16, Compulsory License for Making & Distributing Phonorecords, Royalty Adjustment Proceeding (Mechanical), C.R.T. No. 80-2 (1980) (testimony of Stanley Gortikov).

[526] Letter from Acting Chairman Brennan to J. Jackson Walter, Director, Office of Government Ethics (Nov. 18, 1981).

[527] 1 Copyright L. Rep. (CCH) No. 44, at 1 (Feb. 25, 1982); [Nov.-Apr.] Pat. Trademark & Copyright J. (BNA) No. 567, at A-23 (Feb. 18, 1982).

[528] *Edward Ray, Newest CRT Member, Favors Free Marketplace Approach*, Cash Box, June 5, 1982, at 10.

[529] *Legislative Branch Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations, Part 2*, 97th Cong., 2d Sess., 495-96, 501 (1982).

being distributed by private agreement. A similar result may be reached for cable royalties, since judicial review and remand of the 1978 cable distributions have been completed, and the principles of distribution are now established.

Of the adjustment proceedings, that for the mechanical royalty will remain the most important by far. The Tribunal's 1980 mechanical royalty adjustment will probably *increase* total annual mechanical royalties by more than is currently paid each year under all the other compulsory licenses combined.[530]

Moreover, the Tribunal's discretion in adjusting all rates save cable is effectively limited only by consistency with its prior decisions. The statutory criteria for the mechanical, jukebox, and noncommercial broadcasting licenses are extremely vague, and judicial review will apparently be limited to consistency with prior Tribunal rulings, procedural improprieties, and whether the rate falls within a "zone of reasonableness," whose boundaries are somewhere beyond the horizon.[531]

The courts of appeals' reliance on the *Permian Basin Area Rate Cases*[532] and their "zone of reasonableness" concept indicates one danger. Under the *Permian Basin* standard, the Federal Power Commission was able to set wellhead gas rates so low as to create a shortage of natural gas.[533] The Tribunal found that in the past, the existing statutory mechanical rate had had a similar effect on songwriting.[534] It is to be hoped that the Tribunal will not use its discretion under the *Permian Basin* standard to produce a similar effect in the future.

The current issues as to changes in the Tribunal fall into two areas: the subpoena and effective date issues, and the interrelated questions of restructuring and appointments.

B. *Subpoena Power and the Effective Date Question*

All those who have publicly expressed themselves have agreed that the 1976 Act should be amended to grant the Tribunal subpoena power and to eliminate any possibility that an appeal automatically

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[530] *See supra* note 320.

[531] *See supra* text accompanying notes 331-38, 395-98, 435-38; 17 U.S.C. § 118(b) (Supp. IV 1980).

[532] 390 U.S. 747 (1968).

[533] Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941, 941-44, 958-76 (1973); Nordhaus, *Producer Regulation and the Natural Gas Policy Act of 1978*, 19 NAT. RESOURCES J. 829, 836-37 (1979); Note, *Natural Gas Regulation: The Conflict in the Application of the Just and Reasonable Standard*, 12 TULSA L. J. 293, 308-09 (1976).

[534] CRT Findings, *supra* note 56, at 10,479.

stays Tribunal determinations.[535] The Tribunal appears to be the only ratesetting agency in any government without subpoena powers, and the omission appears to be unintended.[536] The ambiguity in section 809 concerning the effective date of rate adjustments also appears to be inadvertent,[537] but the possibility of an automatic stay irresistibly tempts copyright users to appeal any rate increase. No one has suggested that the usual discretionary power of the federal courts to stay administrative decisions pending appeal[538] would not adequately protect any party in the event of a reversal.

Although no one has publicly opposed these statutory revisions, their deletion from Rep. Kastenmeier's cable bill in the present Congress indicates that there may be covert opposition. The issue will apparently be determined only after the current cable issues are resolved.[539]

C. *The Tribunal's Structure and Appointments*

Because of the Tribunal's discretion in setting rates under all compulsory licenses,[540] with the present exception of the cable license,[541] the most crucial question concerning the compulsory license is who will sit on the Tribunal in future. This, in turn, depends upon whether there are to be changes in the organization and method of appointment to the Tribunal. In the absence of statutory changes, one can expect that the industries affected by the various compulsory licenses, particularly the mechanical license, will make the usual effort of regulated industries to affect Presidential appointments to the Tribunal.[542] Since the Tribunal's jurisdiction is so narrow, these efforts are unlikely to provoke significant opposition or public attention.

Among the various proposals for restructuring the Tribunal which were suggested to Congress, following former Commissioner

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[535] *See supra* notes 489, 508, 520 and accompanying text.

[536] *See supra* text accompanying notes 285-86.

[537] *See supra* text accompanying notes 287-90.

[538] 5 U.S.C. § 705.

[539] *See supra* pp. 78-80.

[540] *See supra* text accompanying notes 531-34.

[541] *See supra* text accompanying notes 263, 439-43, 480-82. The restrictions on the Tribunal's powers with respect to cable are presently under consideration in Congress. *See supra* text accompanying notes 488, 510.

[542] On the concept of capture of the regulators by the regulated, see, e.g., Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); Stigler, *The Process of Economic Regulation*, 17 ANTITRUST BULL. 207, 230-35 (1972); R.G. NOLL, REFORMING REGULATION; AN EVALUATION OF THE ASH COUNCIL PROPOSALS 42-46 (1971); J.Q. WILSON, THE POLITICS OF REGULATION vii-xii, 357-94 (Wilson ed. 1980).

James' comments, the one apparently most favorably regarded is to convert the Tribunal into a set of ad hoc panels, probably consisting of only three members on each panel. The chair might remain a permanent position. The General Accounting Office weakly recommended this possibility, with the panel members to be appointed by the President.[543]

The change to ad hoc appointments and reduction of the number of commissioners would allow some economy, although economizing on the expenses of the Tribunal apparently is not high on the current administration's priorities.[544] Since in most future years there will be rate adjustment proceedings for only one license or none, a conversion to ad hoc Tribunal membership would only concentrate the pressures over Tribunal appointments by the industries affected by a particular proceeding.

The current trend toward ad hoc appointments is to some extent a reversion to the original Senate proposal. The Senate proposal would also have selected Tribunal members in the first instance, not by presidential appointment, but by a panel selection process within the American Arbitration Association; the Register of Copyrights would then have resolved challenges for cause and made the final appointments.[545] Because of the crucial impact of Tribunal appointments, it is difficult to avoid agreeing with the Copyright Office's statement in 1975: "We doubt if a fairer method of choosing panel membership can be found at present."[546] There would have to be assurance, however, that initial selection by the American Arbitration Association or by any other entity was made randomly from a pool of qualified persons.

Initial selection through a random process by a group such as the American Arbitration Association has the theoretical disadvantage of less careful scrutiny of qualifications than the presidential appointments process would provide. As discussed above,[547] however, the most important requirements for Tribunal members are fairness and impartiality. Second in importance is practical judgment. Legal scholarship and administrative ability, while desirable, are comparatively unimportant. Initial selection by such a group as the American Arbitration Association appears to meet the Tribunal's requirements better than any suggested alternative.

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[543] *See supra* text accompanying note 523.

[544] *See supra* text accompanying notes 524-27.

[545] *See supra* text accompanying note 175.

[546] SECOND SUPPLEMENTARY REPORT, *supra* note 120, at 31, *reprinted in 1981 Senate Oversight Hearings, supra* note 127, at 193.

[547] *See supra* note 518 and accompanying text.

The Senate's initial proposal was changed for two reasons. The first was to provide continuity.[548] Because of the long intervals between rate adjustment proceedings, however, there will be little or no continuity of Tribunal membership between one adjustment proceeding and the next concerning any single license. Whatever continuity develops will come from Tribunal adherence to prior Tribunal decisions, rather than from continuity of membership. The use of ad hoc panels, therefore, would probably have little effect upon continuity.

The other reason for changing the Senate proposal was fear that final selection of Tribunal members by the Register of Copyrights would violate the appointments clause of the Constitution.[549] That issue has been largely laid to rest by the decision in *Eltra Corp. v. Ringer,*[550] which held that the Register could exercise administrative or executive powers even though located within the legislative branch, because she was appointed by the Librarian of Congress who had, in turn, been appointed by the President.

Since the original concept of ad hoc panels is being seriously reconsidered, and since the objections to the Senate's proposed method of selection have been weakened or eliminated, we suggest that the original Senate proposal is worthy of reexamination by Congress. Whatever system is chosen, however, the primary goal should be to assure impartiality.

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[548] *See supra* text accompanying notes 239-40, 275.

[549] *See supra* text accompanying notes 276-78.

[550] 579 F.2d 294, 298-301 (4th Cir. 1978).