In the Matter of	**}**	
	}	
Distribution of 1990, 1991	**}**	**Docket No. 94-3 CARP-CD 90-92**
and 1992 Cable Royalty Funds	**}**	
	}	

ORDER

Background

In accordance with the Order published on March 21, 1995, 60 FR 14971, the Copyright Office established the precontroversy discovery schedule for the 1990-1992 consolidated cable royalty distribution proceeding. The Office directed the parties to exchange underlying documents to their written direct cases in accordance with the prescribed schedule, and to file their motions to compel document production by September 22, 1995. The parties have filed such motions, along with the respective oppositions and replies, and the Copyright Office has ruled on these motions in a separate order. See Order dated October 30, 1995.

In addition to discovery motions, the Office also directed the parties in the precontroversy discovery Order to file "all other motions, petitions and objections" by October 2, 1995. The Order did not describe what constituted "all other motions, petitions and objections," and the rules only describe some of these motions, petitions and objections. See §251.45(b) (petitions to dispense with formal hearings under §251.45(b), and objections to arbitrators appearing on the arbitrator list under §251.4). Thus, on October 2, 1995, the Office received a wide range of motions from the parties, including motions to strike testimony, motions to limit testimony, objections to testimony, and motions requesting rulings on specific issues. For the reasons stated below, the Office is ruling on some of these motions, and is designating the remainder for resolution by the CARP.

Disposition of Motions

Section 251.45(c)(2) of the rules provides that:

> After the filing of written cases with a CARP, any party may file with a CARP objections to any portion of another party's written case on any proper ground including, without limitation, relevance, competency, and failure to provide underlying documents. If an objection is apparent from the face of a written case, that objection must be raised or the party may thereafter be precluded from raising such an objection.

Although the rule only discusses the filing of objections to written direct cases with a CARP, and not the Copyright Office, the Office has nonetheless received a number of objections. We attribute the filing of these objections to some parties' lack of certainty with the new distribution format and a concern that they may risk waiving their objections to the written direct cases if they did not file them with the Office by the October 2 deadline for "all other motions, petitions and objections." 60 FR at 14976.

The simplest way of disposing with the filed objections would be to turn them over to the CARP for resolution. We believe, however, that there was sufficient ambiguity in the rules and the March 21, 1995, scheduling order that prompted at least some of the parties to file their objections with the Office. The scheduling order did state that October 2, 1995, was the time period for filing "all other motions, petitions and objections," and we did not specify what kind of objections had to be filed with the Office by that date. We also believe that at least some of the objections we received were properly submitted to the Copyright Office, as opposed to the CARP, and that it is therefore appropriate for the Office to rule on those objections.

The objections fall into three general categories: 1) objections to testimony on the grounds of relevance and competency; 2) objections for failure to provide underlying documents; and 3)

objections to testimony for failure to comply with the procedural rules for properly filing written direct testimony.

With respect to the first category -- relevance and competency objections -- we are designating all objections which fall into this category to the CARP. Any objection which seeks to strike a party's direct case testimony for lack of relevance or competency of the witness, or otherwise seeks to limit the testimony or the weight attached to it, strikes at the heart of the evidence to be considered by the CARP. It is within the purview of the CARP to decide what evidence is relevant or supportable for its consideration, and what weight, if any, should be attached to such evidence.

With respect to the second category -- objections for failure to provide underlying documents -- we believe that there are circumstances where it is proper for the Office to issue a ruling. Our decision is based on the fact that this category of objections implicates the precontroversy discovery period to which, by operation of the rules, the Office has sole jurisdiction. Thus, we are ruling on motions to strike testimony where the Office has previously ruled that the underlying documents are not producible, and on motions seeking to strike testimony where a motion to compel production of underlying documents was not previously lodged with the Copyright Office. In circumstances where the Office has previously ruled that the underlying documents are producible, we are designating motions to strike the related testimony to the CARP in the event that the party from whom production is sought fails to comply with our Order of October 30, 1995.

Finally, with respect to the third category -- objections for failure to comply with our rules -- we are ruling on all of these objections because they directly implicate our rules regarding the

proper filing of written direct cases. Thus, we are ruling on motions that seek to strike testimony for failure to provide a sponsoring witness and for failure to properly designate testimony from prior proceedings because it is within our authority to assure that the written direct cases meet all procedural filing requirements.

Rulings

I. Program Suppliers

Program Suppliers filed objections to the testimony of the Public Broadcasting Service, the Canadian Claimants, the National Association of Broadcasters, the Devotional Claimants and the Joint Sports Claimants.

A. **Public Broadcasting Service (PBS)**

Program Suppliers filed the following motions to the direct case testimony of PBS:

1. To strike Volume III of PBS's direct case which contains copies of PBS's testimony from prior proceedings for failure to properly designate.

2. To strike as irrelevant the reference to the 1989 Bortz study on page 4 of John Fuller's testimony.

3. To strike as irrelevant the reference to Richard Loftus' 1983 testimony on page 11 of Mr. Fuller's testimony.

4. To strike as irrelevant Mr. Fuller's reference to his 1989 testimony on pages 15-16 of his testimony.

5. To strike as hearsay the reference to a 1990 study on page 17 of Mr. Fuller's testimony.

6. To strike as irrelevant the reference to the Hecht study and Kagan study on pages 24-25 of Mr. Fuller's testimony.

7. To strike Mr. Fuller's references to his 1989 testimony on pages 35-36 of his testimony if no cross-examination of Mr. Fuller on the cited 1989 testimony is allowed.

8. To strike M. Peter Downey's testimony on the harm to PBS stations from distant signal programming for failure to provide lists of all programming offered to PBS member stations and the programming licensing fees paid by those stations.

9. To strike Mr. Downey's testimony on the subject of lost fund-raising from audience diversion for failure to produce documentation of yearly contributions to PBS stations.

> **RULING**: Motions 2 though 6 are designated to the CARP for resolution. Motion 7 is moot because PBS asserts that Mr. Fuller will be available for cross-examination on the passages he cites from his 1989 testimony. Motions 8 and 9 are denied because the request for documentation corresponding to the motions have previously been denied. See Order dated October 30, 1995. Motion 1 is resolved below.

Discussion of Motion 1: Program Suppliers object to the steps PBS has taken to incorporate testimony from prior proceedings into its current direct case. Rather than designate prior testimony and incorporate it by reference, PBS has reprinted the entire direct testimony and pages of the transcript from prior proceedings of certain of its witnesses and made them Volume 3 of its current direct case. PBS has also included a written summary of the testimony. Program Suppliers argue that the rules, specifically §251.43(c), do not contemplate this practice, and that PBS's prior testimony must now have a sponsoring witness. Failure to have a sponsoring witness is prejudicial to Program Suppliers because they cannot show the CARP that the prior testimony is irrelevant and outdated through cross-examination, and because the witnesses from the past proceedings are not available for cross-examination. Program Suppliers therefore move to strike Volume 3 of PBS's testimony.

PBS responds that the rules do not require prior designated testimony to have a sponsoring witness and that it has attached copies of the prior testimony for the convenience of the CARP. The summary of the testimony contained in Volume 3 is not being offered as evidence but is effectively a narrative table of contents intended to ease the burden of the CARP in reviewing the testimony, and therefore does not require a sponsoring witness.

In reply, Program Suppliers renew their objection.

> **RULING**: Program Suppliers motion to strike Volume III of PBS's testimony is denied in part and granted in part. It is denied with respect to all of the reprinted pages of testimony and transcripts from prior testimony. Section 251.43(c) of the rules does not preclude a party from reprinting prior testimony and exhibits in its designation of the prior testimony, provided that complete testimony is reprinted. Program Suppliers' motion to strike is granted with respect to the summary of the prior testimony included in the beginning of Volume III because it does not have a sponsoring witness as required by §251.43(e).

B. **Canadian Claimants**

Program Suppliers filed the following motions to the direct case testimony of Canadian Claimants:

1. To strike as irrelevant the results and analyses of the report entitled "The Value of Canadian Programming to Cable Systems in the United States: 1991-1994" for the years 1993 and 1994.

2. To require Canadian Claimants to actually designate prior testimony and exhibits rather than allow them to reserve the right of designation.

3. To strike the statement on page 4 of Claude Bedard's testimony regarding the harm resulting from the carriage of French Canadian signals for failure to produce the underlying documents which Mr. Bedard relied upon to support his statement.

RULING: Motions 1 and 3 are designated to the CARP for resolution. Motion 2 is denied as moot because Canadian Claimants have made their designations.

C. **National Association of Broadcasters (NAB)**

Program Suppliers filed the following motions to the direct case testimony of NAB:

1. To strike as impermissible the reference to a WTBS study on page 10 of Richard Ducey's testimony.

2. To strike as impermissible the portions of Mr. Ducey's testimony which refer to the testimony of Robert Seiber in the 1990 distribution proceeding.

3. To strike as irrelevant Exhibits 1 and 2 of Mr. Ducey's testimony, which seek to introduce 1983 attitudinal studies and NAB's 1983 projections of the Nielsen numbers.

4. To strike the testimony on pages 8-10 of Mr. Ducey's testimony regarding the NAB Operator Survey for failure to produce documents identifying the respondents of cable systems contacted as part of the survey.

5. To strike reference to two books cited by Mr. Ducey at page 2 of Exhibit A for failure to produce the books.

6. To strike all letters from WGN introduced by NAB, and all of Mr. Ducey's testimony that uses WGN as an example of viewer avidity towards news programming, for failure to produce all letters received by WGN from distant signal cable subscribers.

7. To strike Mr. Ducey's statement on page 32 of his testimony that cable households have more children than non-cable households, along with his resultant conclusion that children's programming contributes to the value of cable service, for failure to produce underlying documentation.

8. To strike Exhibit 34, a graph of population growth trends, and Exhibit 35, graphics depicting total Form 3 distant signal carriage of commercial stations and carriage of 3.75% distant signals, for failure to produce underlying documentation.

9. To strike the reference to Video Economics in the testimony of Steven Wildman for failure to produce the book.

10. To strike reference to elaborations on Steiner's Model in the first full paragraph on page 11 of Mr. Wildman's testimony for failure to produce documentation of all elaborations on the Model.

11. To reserve the right to strike unsubstantiated portions of Laurence DeFranco's testimony on distance analysis for failure to comply fully with discovery requests.

12. To strike as irrelevant the second full paragraph on page 3, the first and second paragraphs on page 4, related Exhibits 38 and 39, and the first three pages of Exhibit 40 of the testimony of Caroline Chang. In addition, to strike lines 5 through 7 of the first full paragraph on page 14 of Mr. Ducey's testimony which refers to these portions of Ms. Chang's testimony.

> **RULING**: Motions 3,8,11 and 12 are designated to the CARP for resolution. Motions 4,6,7, and 10 are denied because the Copyright Office has previously denied Program Suppliers' motions to compel production of documents corresponding to the motions. See Order dated October 30, 1995. Motions 5 and 9 are denied as moot because the requested books have been produced. The remaining two motions are resolved below.

Discussion of Motions 1 & 2: Program Suppliers argue that Mr. Ducey's reference to the WTBS cable subscriber survey, and Robert Sieber's testimony about the study which was introduced by Program Suppliers in the 1990 aborted distribution proceeding, cannot serve as support for positions taken in the present proceeding. They note that the Copyright Office has

taken the position that all Copyright Royalty Tribunal proceedings terminated with the enactment of the CRT Reform Act, 59 FR at 23965-66, and conclude that this prevents introduction of such prior testimony. Program Suppliers further argue that it is unfair to allow such prior testimony because only their witnesses were cross-examined before the proceeding was terminated.

NAB responds that Program Suppliers are taking the Copyright Office's statement out of context and have failed to reveal that the Office also made it clear that parties to terminated proceedings could refile their cases and evidence "as they see fit." 59 FR at 23966 n. 4. NAB also argues that Program Suppliers' fairness argument is misplaced because the offered testimony comes from a Program Supplier witness, whom Program Suppliers had the opportunity to examine on redirect, and not from any of NAB's witnesses. NAB concludes that the lack of opportunity to cross-examine its witnesses is therefore irrelevant.

Program Suppliers reply that while the Copyright Office directed parties to terminated CRT proceedings to refile "as they see fit," the cases can only be supported by evidence "as if there had never been a proceeding before the CRT." 59 FR at 23966. Program Suppliers also contend that Mr. Ducey only refers to a portion of Mr. Sieber's testimony thereby contravening the requirement of §251.43(c) that entire testimony (i.e. direct and cross-examination) be referenced.

> **RULING**: Program Suppliers' motions to strike are denied. The Copyright Office's pronouncements regarding the status of CRT proceedings were made in its consideration of the precedential effect of CRT rulings in terminated proceedings. The Office did not discuss the status of evidence introduced and testimony elicited in terminated proceedings, and such evidence and testimony are not rendered null and void by termination of the proceeding. It is therefore permissible for parties to introduce or refer to testimony from terminated CRT proceedings. NAB must, however, comply with the terms of §251.45(c) in its record designations. NAB is, therefore, directed to amend its direct case to include record designations of the complete testimony of Mr. Sieber referred to in Mr. Ducey's testimony.

D. **Devotional Claimants**

Program Suppliers filed the following motions to the direct case testimony of Devotional Claimants:

1. To limit the testimony of Pat Robertson only to programming identified in his written direct case for failure to produce documentation identifying all of the programs claimed by Devotional Claimants.

2. To strike Mr. Robertson's testimony regarding religious programming carried on the Family Channel for failure to identify the dates and times such programming appeared on the Family Channel.

3. To strike as hearsay Mr. Robertson's reference on page 7 of his testimony to the 1990 testimony of David Kirchheimer, because Mr. Kirchheimer's testimony comes from the terminated 1990 distribution proceeding.

4. To strike the testimony regarding the conversation between President Clinton and Robert Schuller on page 2 of Rev. Schuller's testimony because it is hearsay and irrelevant.

5. To strike Rev. Schuller's estimate of 20 million viewer's to his Sunday service program for failure to provide valid supporting documentation.

6. To strike David Clark's testimony regarding marketplace value and the benefit of devotional programming on pages 2-4 and 7-14 of his testimony for failure to produce all source material used by Mr. Clark in conducting his seminars in audience research.

7. To strike as irrelevant Mr. Clark's assertion on page 3 of his testimony that the Bortz survey is superior to any other measure of value.

8. To strike as irrelevant Mr. Clark's testimony on page 11 concerning "other corroborating evidence" regarding the value of religious programming.

9. To strike as irrelevant Mr. Clark's incorporation of his own testimony from the 1983 and 1989 proceedings on page 11, footnote 15 of his testimony.

10. To strike as hearsay the statement of Michael Nason on page 2 of his testimony concerning the conversation Rev. Schuller had with President Clinton.

11. To strike Mr. Nason's statement on page 4 of his testimony that a major donor had threatened to stop contributing because of multiple airings of the Hour of Power for failure to identify the donor.

12. To strike the entire testimony of Michael Salinger as irrelevant.

13. To strike pages 2-5 of Thomas Larson's testimony for failure to provide specialty station affidavits and their appropriate categorization.

14. To strike all references to Milestone Media Management, Inc. and/or Milestone Communications, Inc. and the accompanying testimony of Thomas Engel, for failure to identify the cable systems acquired by Milestone.

15. To strike Exhibit 9, entitled "Cable Operator Allocation of Budget: Distant Signal Program Type, 1989-1993," for lack of proper foundation.

16. To strike Exhibit 11, testimony and exhibits from prior proceedings, as irrelevant.

> **RULING**: Motions 2,4,5,7-10,12 and 14-16 are designated to the CARP for resolution. Motions 1 and 6 are denied because the requests for production of documentation corresponding to the motions have previously been denied. See Order dated October 30, 1995. Motion 3 is designated to the CARP for resolution of whether Mr. Roberston's reference to Mr. Kirchheimer's 1990 testimony is hearsay and therefore inadmissible, but Program Suppliers' objection that such testimony is from the terminated

1990 distribution proceeding is denied because inclusion of testimony from that proceeding in the present proceeding is permissible. Motion 11 is denied because Program Suppliers have previously failed to file a motion to compel production of the documents underlying their motion to strike the testimony. Motion 13 is designated to the CARP for resolution; however, the CARP shall only consider the motion on the basis of the documentation for categorizing the specialty station affidavits, which the Copyright Office has previously determined is producible, and not on the basis of the affidavits themselves, which the Office has ruled are not producible. See Order of October 30, 1995 at 36.

E. **Joint Sports Claimants (JSC)**

Program Suppliers filed the following motions to the direct case testimony of JSC.

1. To strike JSC's glossary of terms for failure to have a sponsoring witness.

2. To strike as irrelevant the inclusion in the glossary of the term "Household Viewers Hours or HHVH."

3. To strike pages 21-26 of Exhibit 2, containing selected program schedules of WGN and WWOR, for failure to provide underlying documentation.

4. To strike as irrelevant all testimony of Paul Bortz regarding the 1989 Bortz study.

5. To strike as irrelevant the portions of Section C on pages 35-36 of Mr. Bortz's testimony discussing the Nielsen viewing hours study.

6. To strike as irrelevant Table 1 on pages 10-11 of Mr. Bortz's testimony which presents the 1995 channel guide for Mile Hi Cable Television of Denver.

7. To strike those portions of Mr. Bortz's testimony where he claims to rely on his experience with the cable industry for failure to produce the research studies he has undertaken for members of JSC.

8. To strike Mr. Bortz's testimony concerning the sample selection, including sampling and non-sampling errors, and statistical estimation procedures for the Bortz studies for lack of competency of the witness.

9. To strike sections I, II, III, IV, V, VI, VII and XI along with table 1 (all years except 1990-92), page v, Appendix C and the 1993 portion of Appendix D of JSC's Exhibit 3 for irrelevance and for failure to produce underlying documentation.

10. For a ruling that HHVH viewing data presented in JSC Exhibit 4 addresses viewing information not presented in the current proceeding and is therefore irrelevant.

11. To strike all of Exhibit 4 for failure to produce the underlying annual Kagan special reports about license fees, programming expenses and audience levels.

12. To strike testimony from prior proceedings contained in Tabs F, G, H, I, J, Q, R, and S of JSC's testimony for failure to properly designate prior testimony.

13. To strike JSC Exhibit 5 as irrelevant and for failure to produce underlying documentation.

14. To strike as irrelevant the testimony of Donna Mayo in its entirety.

RULING: Motions 3-10 and 13-14 are designated to the CARP for resolution. Motion 11 is denied because the request for production of documentation corresponding to the motion has previously been denied. See Order dated October 30, 1995. Motions 1,2, and 12 are addressed below.

Discussion of Motions 1 & 2: Program Suppliers object to the inclusion of the glossary of terms, and in particular the term "Household Viewers Hours or HHVH," within JSC's presentation and ask that it be stricken on the grounds that it does not have a sponsoring witness, as required in §251.43(e) of the rules. They argue that although the discussion of each term ends

with a reference to an exhibit or testimony, the testimony references do not define the terms and only reference where they may be found in JSC's written case.

JSC respond that each of the glossary terms reference specific JSC testimony and, where appropriate, are supported by citation to statutory, regulatory, or judicial authority. Because all of the glossary terms appear in the testimony of JSC witnesses, they may be cross-examined as to the accuracy of the definitions. JSC further argue that no sponsoring witness is required under §251.43(e) where the CARP takes official notice, and that the CARP can take official notice of the glossary terms because they are all either quoted from relevant statutory, judicial, and administrative material, or are well known in the industry.

Program Suppliers reply that the definitions of many of JSC's glossary terms are far from established, and cite as an example the term "Basic Cable or Basic Service," appearing in the glossary, as lacking any clear cut statutory, administrative or judicial interpretation.

> **RULING**: The Copyright Office has determined that the glossary of terms appearing at the beginning of JSC's written direct case does not satisfy the requirements of §251.43(e). JSC's witnesses for the most part make only passing reference to the terms in their testimony, and do not define the terms as they appear in the glossary. It would be inappropriate for the CARP to take official notice of the glossary definitions because they are not quoted from statutes, regulations or judicial rulings, and are certainly open to interpretation. As a result, the glossary of terms is testimony which requires a sponsoring witness. In accordance with §251.45(d), JSC are granted leave to amend their direct case to provide a sponsoring witness for their glossary of terms. If JSC fails to amend to add a sponsoring witness, then the glossary of terms is stricken from JSC's written direct testimony.

Discussion of Motion 12: Program Suppliers object to JSC's inclusion of written direct testimony from prior proceedings in Tabs F, G, H, I, J, Q, R and S of JSC's current testimony. They argue that JSC's reprinting of prior testimony is not for convenience of the CARP but rather

for tactical advantage, because they reprint only favorable direct case testimony and relegate unfavorable cross-examination testimony to a page of citations in their record designations. Program Suppliers conclude that the reprinted testimony must have a sponsoring witness under §251.43(e), and that absence of such a witness would be unduly prejudicial by denying Program Suppliers an opportunity to show the CARP that the prior testimony is outdated and irrelevant.

JSC respond that Program Suppliers' concern that only written direct case testimony has been reprinted for the CARP, and not cross-examination testimony, is meritless because Program Suppliers are free to provide prior cross-examination testimony to the CARP, as well as any other testimony that responds to JSC's prior testimony, as part of its rebuttal case in this proceeding.

In reply, Program Suppliers reject JSC's solution because they argue that by reprinting prior written direct testimony, JSC have erroneously signaled to the CARP that the prior testimony is relevant to the current proceeding, and inclusion of the prior cross-examination testimony will not refute its relevancy for the current proceeding. Program Suppliers argue that the only way they can make clear to the CARP that such prior testimony is irrelevant is by cross-examining a sponsoring witness.

> **RULING**: Program Suppliers motion to strike is denied. Section 251.43(c) provides that "[e]ach party may designate a portion of past records…that it wants included in its direct case." The term "designate" is not merely limited to identifying where the document may be found; reprinting the prior testimony and including it in the direct case is permissible. Section 251.43(c) does require that the designation -- whether by identifying the location of the past records or reprinting it -- must be of the "[c]omplete testimony of each witness…(i.e. direct, cross, and redirect)." JSC have satisfied this requirement by reprinting the complete written direct testimony of several of its witnesses from prior distribution proceedings.
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> Because JSC have properly designated prior testimony within the meaning of §251.43(c), there is no requirement that the prior testimony have

a sponsoring witness in this proceeding. Section 251.43(e) provides that no sponsoring witness is required "in the case of incorporation by reference of past records." The Copyright Office does not read this phrase so narrowly as to permit only incorporation by identifying (or referencing) where the prior testimony is located and may be found. Incorporating the prior testimony by reprinting it is permissible as well, and JSC are not required to have a sponsoring witness for the prior testimony which they have included in their current direct case.

II. Joint Sports Claimants

A. **Program Suppliers**

JSC filed a motion to the direct case testimony of Program Suppliers to dismiss that part of Program Suppliers Phase I claim attributable to programming distributed by Fox Broadcasting Corp.

Discussion of Motion: Section 111(d)(3) provides that only owners of nonnetwork television and radio programs may claim cable royalties. According to JSC, Fox Broadcasting Corp., which launched its effort at establishing a fourth national network in 1986, had attained the status of a network by the years 1990-1992, serving 90% of television households and paying independent producers license fees comparable to that of ABC, CBS and NBC.

JSC, therefore, move to have the programming licensed to Fox television declared as noncompensable network programming and to dismiss those royalty claims represented by Program Suppliers that are for nationally distributed Fox programming.

Program Suppliers oppose JSC's request on the following procedural grounds: (1) motions to dismiss are only appropriate when the requirements of the law are clear and the claimant has not met the requirements, such as a late-filed claim or a claim by a copyright owner such as ABC, CBS or NBC who are clearly networks; (2) where the law is ambiguous and any interpretation of

the law would have future effect, a notice-and-comment procedure should be followed and a rule adopted; and (3) if the motion were styled more in the nature of a request for summary judgment, that request can only be granted where the material facts are not in dispute.

In addition, Program Suppliers offer the following factual assertions to dispute JSC's claim that programming distributed by Fox Broadcasting Corp. is network programming; (1) cable systems paid a full distant signal equivalent (DSE) for stations belonging to the Fox "network" during 1990-1992 and continue to do so today because those stations are not network stations as defined in Section 111; (2) the FCC made rulings that Fox was not a network during 1990-92; (3) Fox does not have the nationwide reach that ABC, CBS and NBC have because their stations are mostly UHF stations with less coverage; (4) less coverage has resulted in lower license fees to programs produced for Fox than for ABC, CBS and NBC; (5) during 1990-92, Fox offered its affiliates between 14 and 23 hours of programs per week, while each of the networks offered more than 90 hours per week; and (6) Fox stations may air Fox programs "in prime time in pattern" or "out of pattern" as opposed to the networks which have uniform program times and dates.

JSC reply that their motion to dismiss is the proper procedure to follow because they are objecting to particular claims represented by Program Suppliers in this proceeding for failure to meet the statutory requirement for receiving royalties, and such a procedure was followed by, among other parties, Program Suppliers, in the 1990 cable royalty distribution proceeding at the Tribunal, when they moved to dismiss BBC's claim for failure to meet the requirement that their works be retransmissions of works originating in the U.S., Canada or Mexico.

Although JSC realize that their motion may have precedential effect, JSC oppose the institution of a rulemaking proceeding, because a rulemaking would only have future effect and

there would be no disposition of the issues raised by JSC against the current claims in the instant proceeding.

JSC believe that the motion can be considered as a matter of law and that there are no material questions of fact because JSC do not dispute Program Suppliers' assertion that stations carrying Fox programs during 1990-92 were not network stations as defined in Sec. 111. JSC argue, rather, that, while Fox stations were not network stations because Fox did not supply a substantial part of those stations' typical broadcast day, the programs that the Fox stations did air were network programs because they had nationwide coverage and the owners of the programs were getting comparable license fees to that of ABC, CBS and NBC shows. Therefore, JSC argue, the programs Fox distributed were network programs regardless of the fact that the stations that aired them were not network stations.

> **RULING**: JSC have filed a motion to dismiss the claims to a number of programs represented by Program Suppliers. The Office believes this is more properly a question for the CARP, because it is an adjudicatory question involving questions of fact that should be weighed and analyzed in the context of a distribution proceeding. Further, CARPs were created by Congress to be the decisional bodies concerning distributions and while the Librarian of Congress has the jurisdiction to make evidentiary and procedural rulings under Sec. 801(c), they should not be made so as to shift the primary locus of where distribution decisions were intended to be made.
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> Therefore, the Office designates to the CARP the following issue: whether programs distributed by the Fox Broadcasting Corp. to its affiliates during 1990-1992 were "nonnetwork programs" within the meaning of Section 111(d)(3). All Phase I parties may amend their direct cases to submit such evidence as they consider relevant by December 15, 1995.

Dated: November 7, 1995

James H. Billington
The Library of Congress