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The Copyright Royalty Tribunal: Achieving Equilibrium between Cable and Copyright Interests

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THE COPYRIGHT ROYALTY TRIBUNAL: ACHIEVING EQUILIBRIUM BETWEEN CABLE AND COPYRIGHT INTERESTS

I. INTRODUCTION

The Copyright Royalty Tribunal ["CRT", "Tribunal"] is one of the most unusual federal agencies ever created. It is a regulatory authority with a total staff of ten people and a mandate from Congress in Section 111 of the Copyright Act of 1976, to distribute millions of dollars generated by cable television systems' compulsory license fees to copyright owners. To fulfill this mandate the CRT has just concluded its first cycle of cable royalty distribution proceedings.


One of the major limitations on the rights of the copyright owner is the imposition of the compulsory license, which will eliminate the market place determination of royalty payments for the cable industry. The mechanism requires the granting of a license in exchange for royalty payments as determined by a fee schedule. Accordingly, a copyright owner cannot withhold his material from a cable system so long as the system complies with the requirements for the license. To this extent, the compulsory license severely limits the copyright owner's control of his material and effectively removes the licensing process from the marketplace of supply and demand. The use of a compulsory license was instituted for practical reasons. The House Report recognized the impracticality of requiring every cable system to negotiate with every copyright owner whose work was distributed by a cable system. A compulsory license will be granted "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC." (H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 89 (1976)). Specifically, the Copyright Act focuses on cable system liability for the use of distant signal programs which most severely affect the program distribution market.

Id. at 281-82 (footnotes omitted other than inserted citation in n.75).

5. See note 3 supra. The CRT regulates key elements of three other compulsory licenses as well: a "mechanical" compulsory license for making recordings of copyrighted musical compositions, § 115; a jukebox compulsory license for performance of nondramatic musical works, § 116; and an educational broadcasting compulsory license for performance and recordings of published nondramatic musical compositions and displays of pictorial,
The new agency is the result of a compromise between the cable industry and copyright owners over the bitterly contested issue of copyright liability of cable television for its retransmission of copyrighted broadcast programming.\(^6\)

The battle is not over. Unanticipated technological and regulatory changes in the cable field\(^7\) since the passage of the Act will again force the cable-copyright issue before Congress.\(^8\) As the debate recurs, it will be imperative to know how well the CRT has functioned under the scheme set forth in the Act.

This comment will briefly trace the communications developments that led to creation of the CRT. It will then assess the workings of the Tribunal with discussion of five areas\(^9\) of needed change in the cable-copyright area, in the hope of stimulating legislative "fine tuning" to mitigate these perceived weaknesses.

graphic and sculptural works, § 118. See generally, 3 M. Nimmer, Nimmer on Copyright § 14.11 (rev. perm. ed. 1980). Given that prices fixed by statute, although viewed as equitable at the time a law is passed, may be seen as unfair to one member of the agreement or the other when economic change occurs, some means of reviewing and changing the compulsory license is necessary. Congress created the CRT to fulfill this purpose and also to settle disputes concerning the distribution of cable and jukebox royalties. See Korman & Koenigsberg, The First Proceeding Before the Copyright Royalty Tribunal, 1 COM. AND L. 15, 17 (1979) [hereinafter Korman].

Of the four compulsory licenses regulated by the CRT, this comment focuses only on those CRT proceedings concerning the compulsory license of cable television systems for secondary transmissions. The first cable television distribution determination proceeding concerning distribution of cable royalty fees for secondary transmissions was announced on September 23, 1980. See 45 Fed. Reg. 63,026 (1980).


Throughout the 23-year process leading to enactment of the new copyright law of the United States, the single most difficult issue was the question of the copyright liability of cable television systems for their retransmission of copyrighted broadcast programming. Congress was called upon to chart an entirely unexplored course through a complex maze of controversial, complex, and volatile copyright and communications issues. To have enacted any legislation that has proved to be coherent and workable was an achievement of historic proportions. Id. at 17.

7. Ringer, supra note 6, at 22. See also, FCC Now All But Out of Cable Business, BROADCASTING, Jul. 28, 1980; The State of the Superstations, BROADCASTING, July 23, 1979; Brotman, Cable Television and Copyright: Legislation and the Marketplace Model, 2 COMM/ENT 477, 480 (1980); and text accompanying notes 48-51 infra.

8. See note 3 supra.

9. See note 63 and accompanying text infra.
II. HISTORICAL DEVELOPMENT IN MASS COMMUNICATIONS LEADING TO THE CREATION OF THE COPYRIGHT ROYALTY TRIBUNAL

Broadcast forces were successful for years in convincing the Federal Communications Commission (FCC) that cable transmission posed a potential threat to the viewing public because it might dilute the network's signal.10 Under the belief that it was carrying out the mandate of the Communications Act of 1934 to protect the viewing public,11 the FCC seriously curtailed cable development.12

The Supreme Court removed these constraints in two important cases, Fortnightly Corp. v. United Artists Television, Inc.,13 and Teleprompter Corp. v. CBS, Inc.14 In both of these cases, the Court held cable systems free from copyright liability for network programs they retransmitted, stating that retransmission lacked originality and therefore cable was serving as a mere passive conduit for rebroadcast.15


In February 1972, the Commission adopted the Cable Television Report and Order, 36 F.C.C. 2d 143 (1972), a comprehensive regulatory program for cable television intended to permit one group of consumers, cable subscribers, to receive additional services through the relatively new technological medium of cable television without subjecting other consumers of video and information services, off-the-air television viewers, to unacceptably high risks of decreased local television broadcast service which, we feared, might follow from the unrestricted importation of distant television broadcast signals by cable systems. Among the restrictions adopted by the Commission in that decision were cable television syndicated program exclusivity rules which provided protection for the nonnetwork programming of television stations in the major markets. The rationale for their adoption was that they were necessary "to protect local broadcasters and to insure the continued supply of television programming."

Id. at 951-52.


12. Id. at 949.


15. Id. at 405; see also, Greene, supra note 4, at 263-64.

Copyright law is founded upon the premise that, for a limited period of time, authors and creators of intellectual works have the exclusive right to their products. This right can be sold or distributed as the creators wish, and those seeking use of copyrighted material must negotiate a satisfactory royalty payment with the copyright owner. As a result of judicial interpretations of the Copyright Act of 1909, [in the Fortnightly and Teleprompter decisions] the cable television industry was not obligated to make royalty payments to copyright owners for the privilege of carrying their programs to subscribers in other television markets. For twenty-five years, the cable industry has flourished by picking up broadcast signals from distant television markets and retransmitting them by wire to subscribers who pay a monthly fee for this service. Historically, the cable industry has been almost entirely dependent upon the retransmission of broadcast signals for its service, and it is this carriage of distant broadcast signals which is at the center of the ongoing cable-copyright controversy. (footnotes omitted).
Since these decisions cable has been steadily growing.\(^{16}\)

In 1972, after a four year freeze on cable development by the FCC,\(^{17}\) the cable industry was allowed to continue its growth, though strictly saddled with special rules to prevent its infringement of the broadcasters' domain.\(^{18}\) The FCC rules of 1972 and several copyright revision bills between 1974 and 1976 were based on the expectation that cable operators would be required to pay copyright royalties. Great controversy surrounded this agreement to pay royalties. In April, 1976, a compromise was reached between the "two industries most directly affected by the establishment of copyright royalties for cable television systems,"\(^{19}\) the National Cable Television Association [NCTA] and the Motion Picture Association of America [MPAA]. The provisions dealing with cable television in the Copyright Act of 1976 are based on this compromise agreement.\(^{20}\)

A fundamental change in the new Copyright Act, effective January 1, 1978, is the requirement of compulsory license fees for all cable systems.\(^{21}\) The compulsory license for cable systems in Section 111 of the Act is a statutory device imposing prescribed royalties, payable to the Copyright Office, in exchange for permitting cable retransmission of copyrighted material without consent of the copyright owner.\(^{22}\)

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\(^{16}\) See Botein, The New Copyright Act and Cable Television—A Signal of Change, 24 BULL. COPYRIGHT SOC'Y 1 (1976). See also Greene, supra note 4, at 270.

\(^{17}\) Id.; see also Ringer, supra note 6 at 18, 28. See also D. Le Duc, CABLE TELEVISION AND THE FCC (1973); and Greene, supra note 4, at 274.

\(^{18}\) See 36 F.C.C. 2d at 284-86. The FCC initiated the syndicated program exclusivity rules. "They are . . . the most complex, least understood, and most controversial provisions of the cable rules." Greene, supra note 4, at 277.


\(^{20}\) Ringer, supra note 6 at 18. See also Temple, supra note 1 at 268-273.

\(^{21}\) The compulsory license is perhaps the most controversial aspect of the new copyright law. It undercuts the basic constitutional principle of vesting exclusive rights in the creator of an original expression. With the compulsory license, users are guaranteed access to an entire body of available work without individual negotiation, provided they pay for a general license. Congress believed that as regards use by cable television stations of distant signal programming, there was simply no time for individual negotiation. The compulsory license solution was conceived to balance the competing claims of the owners of copyrighted materials and the cable users of these works. See Greene, supra note 4. See also Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 U.C.L.A. L. REV. 1107 (1977).

\(^{22}\) Id.; There are strong arguments against the compulsory license as a means of compensation to the copyright owner. Because direct returns based on individual program
Congress needed a mechanism for managing the fees and distributing them to copyright owners, therefore, it created a new legal entity, the Copyright Royalty Tribunal. Given the importance of compulsory licenses and the impact the CRT's decisions may have in other areas, the CRT immediately became "a major force in the copyright world."

III. THE FORMATIVE STAGES OF THE COPYRIGHT ROYALTY TRIBUNAL

The CRT's structure was shaped by three distinct political realities in Congress:

1. Cable had become a potent political lobby, with nationwide grassroots support. Additionally, cable forces were successful in

worth are not possible, the compulsory license may lessen the incentive to produce diverse, high quality programming. The Senate Subcommittee holding hearings on the new copyright bill determined, however, that the concept of full copyright liability was unworkable and that the compulsory license was preferable. S. Bezen, W. Manning Jr. & B. Mitchell, Copyright Liability for Cable Television: Is Compulsory Licensing the Solution? (1977). See History, supra note 6, at 196. See also Schaffer, Are the Compulsory License Provisions of the Copyright Law Unconstitutional?, 2 COM. AND L. 1 (1980).


24. Korman, supra note 5 at 15, 16 (1979); Brennan, Some Observations on Revision of the Copyright Law From the Legislative Point of View, 24 BULL. COPYRIGHT SOC'Y 151, 153 (1977) [hereinafter Observations].

25. See Observations, supra note 24, at 151-52. See also, Brennan, infra note 42.

[T]he cable industry has tremendous political influence . . .

. . . The new development in Congress is that one of the channels available on a cable system is "cable span" and this . . . allows the live proceedings of the House of Representatives to be made available in most congressional districts. This has been a development of the past three years that started with a limited number of Congressional districts. The service now extends into well over half the congressional districts.

Each time they add a new district, the first day the service is in operation . . ., the local members of Congress from that area get up and make a speech praising the cable television industry for making it possible to bring [in the] live proceedings of the House . . .

'Try to balance cable's political power off against the movie companies' and the broadcasters'. How many movie companies are there in Kansas? . . . [Y]ou only have two, three or four broadcasters in the average congressional district and you have thousands of cable subscribers. Whenever anything [goes] badly for cable, as in the early seventies when decisions were being made about rights to sporting events, a cable operator [comes] on at the end of the television show and say[s], "We have just transmitted this sporting event. We hope to be allowed to continue to do so. There is now pending in Congress bill S. . . . This bill would interfere with our ability to do so and if you are concerned . . . please write your members of Congress and let them know how you feel . . .

. . . The political influence of cable in Congress is absolutely . . . great . . .
greatly reducing the cable industry's royalty fee from what had been initially proposed\(^\text{26}\), as well as wresting full jurisdiction over rate schedules from the CRT. Thus the CRT cannot alter the basic cable television fee schedule once it is established by Congress,\(^\text{27}\) unlike its \textit{carte blanche} authority to determine fee schedules in other areas where it regulates.\(^\text{28}\) Congressional amendment is necessary before the cable industry's statutory royalty fee schedule can be adjusted.\(^\text{29}\)

\textit{Id.}\(^\text{26}\). \textit{Hearings on Proposed Adoption of the Communications Act of 1979: Hearings on H.R. 3333 Before the Subcommittee on Communications, of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (June 12, 1979) (statement of Thomas C. Brennan) [hereinafter Testimony].}

\textit{Id.} at 65.\(^\text{27}\).


The original intent of the sponsor of the copyright revision bill for an early objective review, and possible adjustment, of the cable rates does not survive in the enacted legislation. In all the other statutory licenses, the Tribunal has full jurisdiction to review and possibly adjust the rates based on the record developed during the Tribunal’s proceedings. The cable industry successfully persuaded the Congress that if the Tribunal could review the basic schedule it would result in financial institutions declining to make loans for the development of the cable industry. Since copyright fees will always remain one of the smaller operating costs of a cable system, I found this argument much less persuasive than the Congress apparently did.

\textit{Id.}\(^\text{29}\). There is a dearth of Congressional reporting concerning formation of the CRT. \textit{See} notes 36-37 and accompanying text infra. \textit{See also} \textit{Cambridge Research Institute, Omnibus Copyright Revision: Comparative Analysis of the Issues} (1973), for an explanation on lack of legislative material on the CRT prior to the 94th Congress.

There was no comparable provision to a Copyright Royalty Tribunal in the 1909 Act and none was included in the bill passed by the House of Representatives in 1967. The proposal to create a Copyright Royalty Tribunal was first introduced in December, 1969, when the Senate Subcommittee on Patents, Trademarks, and Copyrights reported out an amended version of the House-passed bill \[S. 543, 91st Cong., 1st Sess. (1969)\]. Since the full Senate Committee never approved the Subcommittee text, there was no committee report on the measure. Thus, while the bill (with the tribunal) was reintroduced in the 93rd Congress as S. 1361, the record does not show the Committee's intent in establishing the tribunal. An analysis of the pertinent provisions of the tribunal must be drawn, therefore, from the text of the bill itself . . . .

\textit{Id.} at 157.

The 94th Congress did not significantly augment the available body of legislative data on the CRT, and almost no mention appears on the Tribunal in the Committee Reports. The version of the Copyright Revision bill which the Senate finally passed on February 19, 1979 simply included the CRT in the same essential form in which it was initially conceived \[\textit{See} S. 22, 94th Cong., 1st Sess. (1976)\].

When the Senate bill reached the House, several major structural changes were made in the Tribunal, primarily in changing it from a temporary body with a series of panels that would convene only when necessary, to a permanent agency. But the House Report does not comment on this change \[\textit{See} H.R. REP. No. 1476, 94th Cong., 2d Sess. 174 (1976)\]. The Conference Committee report adopts the House structure for the Tribunal as a permanent
(2) Congress was opposed to creating a large or more complex regulatory structure. The CRT was to have a "bare bones" construction that avoided waste, frills, drawn out studies, or the "bigness" which characterizes the FCC and its highly intricate regulations.

The royalty fee distribution was not regarded by Congress as similar to a rate hearing, where due process requirements would apply, but rather as a gift to copyright proprietors. There is a spartan, almost simplistic tone in the legislative language that inherently requires frugality.

This implicit policy is reflected in a notable absence of guidelines regarding how the Copyright Royalty Tribunal is to function. Little comment appears in the congressional committee reports and no hearings on its creation or operation were held. The lack of explicit provisions was apparently based on the hope that no governmental intervention on the part of the CRT would be required, presumably since Congress anticipated industry formation of a cooperative or representative organization.

The Act encourages private agreements among the copyright owners regarding distribution of royalty fees by inclusion of a statutory antitrust exemption which allows parties to negotiate a private agreement. But, should a controversy exist concerning royalty fee distributions, the CRT determines the formula. Furthermore, if the Tribunal must re-

agency within the Legislative Branch and makes additional changes, but adds no explanatory background on congressional intent in establishing the CRT. [See H.R. REP. NO. 1733, 94th Cong., 2d Sess. (1976)].

The author has supplemented the sparse available body of Congressional reporting as regards creation of the Tribunal by conducting interviews with key "insiders." See infra, Fong, note 32, Johnson, note 34, Brennan, note 42, and Lehman, note 83.

30. 17 U.S.C. § 801(b)(2)(B) and (C) (1976). Adjustment of the royalty rates is permitted at an earlier time if the FCC amends its rules, as has recently occurred.

31. See Observations, supra note 24, at 153.

32. Interview with Hiram L. Fong, former United States Senator from Hawaii, and Manager on the Part of the Senate for P.L. 94-553, General Revision of the Copyright Law, in Honolulu, Hawaii (Dec. 31, 1980).


35. Id. "Here is the pot (of money). Here are ten staffers. This is your whole agency. Make a decision within one year on how to distribute the proceeds." Id.

36. Brylawski, supra note 1, at 1265.

37. Id. See also Grossman, supra note 19 at 1824-29, 1834, 1886-87, for discussion on the CRT that did occur.

38. Brylawski, supra note 1 at 1265.

solve a controversy between claimants regarding distribution of funds, the cost of the proceeding will first be deducted from the royalty proceeds in dispute.\(^{40}\)

(3) A potential separation of powers problem\(^ {41}\) confronted Congress as a result of the original Senate version of the Copyright Royalty Tribunal. The Senate bill had called for an ad hoc system of panelists temporarily appointed by the Register of Copyrights for the duration of each proceeding.\(^ {42}\) Based on the quasi-executive powers of the Tribunal, members of the House subcommittee dealing with copyright were concerned\(^ {43}\) that appointment of Tribunal members by the Register of Copyrights was to risk reversal by a court for violation of the separation of powers doctrine.\(^ {44}\)

A permanent membership for the Tribunal was chosen instead,\(^ {45}\) with nominations by the President and approval by the Senate, resulting in a completely self-sustaining agency. The Copyright Royalty Tribunal is outside the domain of the Executive Branch or any other agency.\(^ {46}\) In fact, precisely because of its complete independence, the CRT is "somewhat vulnerable."\(^ {47}\)

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\(^{40}\) Testimony, supra note 26 at 7. "The full cost of any ... distribution proceeding must be deducted by the Tribunal ... ."

\(^{41}\) See Buckley v. Valeo, 424 U.S. 1 (1976). The legislative branch may not exercise executive authority by retaining power to appoint those who execute its laws, or it violates Article II, section 2, clause 2 of the Constitution. The Supreme Court reaffirmed this principle in Buckley by holding that Congress had violated Article II in providing that the President pro tem of the Senate and the Speaker of the House were to appoint a majority of the voting members of the Federal Election Commission. The Court held that Commission members could not exercise the executive-like functions of administering the law, since they had not been appointed by the President in accordance with the power granted the President under Article II. See also J. Nowak, R. Rotunda & J. Young, Constitutional Law 213 (1977).

\(^{42}\) See S. 543, 91st Cong., 1st Sess. § 802 (1969); Interview with Thomas C. Brennan, Senior Commissioner, Copyright Royalty Tribunal; Former Chief Counsel to the Subcommittee on Patents, Trademarks and Copyrights which processed the copyright revision bill; Brennan drafted much of the final language of the 1976 Copyright Act; in Washington, D.C. (Aug. 22, 1980) [hereinafter Brennan].

\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Korman, supra note 5, at 23.


\(^{47}\) Ringer, supra note 6 at 38.

Mr. [George E.] Danielson [California]. How about the independence of the CRT? Does it have sufficient independence so far as you can observe?

Ms. Ringer. Yes, sir, it is somewhat vulnerable because it is so independent, but I do think this decision that your subcommittee made, to make it completely self-sustaining, not put it under any executive branch or other agency, was probably a wise one.

Id. at 38.
IV. KEY CHANGES IN MASS COMMUNICATIONS SINCE CREATION OF THE TRIBUNAL

Two dramatic changes in the cable-copyright equation have occurred since the Copyright Act was signed into law. These include the advent of satellite-distributed television "superstations," and FCC deregulation of its distant signal and syndicated program exclusivity rules. Copyright owners argue that Congress never anticipated such revolutionary events when it arrived at the CRT's schedule of compulsory license fees, and therefore revamping the cable television portions of the Act is essential.

Section 111 provides that a change in FCC rules is one of the situations where the CRT is given authority to adjust the cable royalty rates. This jurisdiction, however, is tied to the current fee schedule established by Congress and must therefore also reflect the judgment Congress made as to what it felt was a reasonable fee schedule. Thus, the statutory grant of jurisdiction in Section 111 may not be an adequate means of compensation to copyright owners.

48. See note 7 supra and accompanying text.
49. Id.; See also Going Super With Ted, NEWSWEEK, Jan. 1, 1979 at 1; Variety, Mar. 7, 1979 at 1; United Video, Inc., 44 RAD. REG. (P&F) 2d 1217 (1978).
51. Id.
53. Greene, supra note 4, at 293; § 801(b)(2)(B) and (C). See also note 55 infra.
54. § 801(b)(2)(B) and (C); Brennan, supra note 42.

The statute provides that if the FCC amends its rules or regulations in regard to distant signal carriage and program exclusivity, then any copyright owner who believes he is adversely affected by these FCC developments may file a petition with the CRT requesting us to conduct a rate proceeding to make an appropriate adjustment in the fee schedule. But there are several limitations and a number of problems . . . .

Let's assume that prior to the recent FCC action a cable operator was allowed to carry two distant signals. If it is not reversed in court, under the new Act he may carry as many distant signals as he thinks is wise in terms of his operation. Assume that he makes a judgment that he only wants to carry one additional signal. He's paying what the broadcasters regard as a very nominal fee for the two signals that he's been carrying for these past years under the new Copyright Act. Could the CRT possibly adopt a fee schedule which would require him to pay more for the one signal than he has been paying for the two that he has been carrying all these years?

Theoretically we are authorized to respond to FCC rule changes . . . but we must reflect the judgment that Congress made as to what it felt was a reasonable fee schedule . . . . Although technically we are allowed to do whatever we feel is justified, as based on the record in our proceedings . . . if the existing schedule has been distorted because of political action in the Congress, the CRT is bound. There are thus deficiencies in this area in the scope of CRT jurisdiction.

55. Interview with Fritz E. Attaway, Vice President, Administrative Affairs, Motion Pic-
The advent of superstations and FCC cable deregulation have increased the polarization on each side of the cable-copyright issue.\textsuperscript{56} Whereas in the past distant signal importation rules might have resulted in importation of two or three signals, cable television systems may now bring in as many signals as they find economically feasible for their markets.\textsuperscript{57} The possibility of greatly increased signal importation means royalty fees drawn into the CRT may increase from the present level of $14 million to upwards of $80 million in as few as five years.\textsuperscript{58} Add to this a possible increase in current rates because of FCC deregulation, and the impact of CRT distribution proceeding decisions becomes clear.\textsuperscript{59} The ten employee Tribunal is emerging as the major counterweight in balancing conflicting interests among key mass communications giants of our age.

V. THE COPYRIGHT ROYALTY TRIBUNAL: HOW IS IT WORKING?

On July 25, 1980, the CRT announced its first copyright royalties distribution decision.\textsuperscript{60} In arriving at this determination, the CRT conducted evidentiary proceedings and received memoranda from all categories of claimants concerning fees to which claimants felt entitled, and a justification for that amount.\textsuperscript{61} The remainder of this article outlines suggestions for improvement in the CRT based in part on evaluation of the Tribunal by these claimants, their duly authorized representatives and communications experts.\textsuperscript{62}

This assessment indicates that the Copyright Royalty Tribunal
should be given: (A) increased authority to carry out its mandate under the Act; (B) the capacity to set rate and fee schedules; (C) subpoena power; (D) authorization and funding for an economic study of the cable-copyright industries, and (E) increased appropriations and staff.63

A. The authority of the CRT should be broadened and strengthened

The CRT was created and directed by Congress to effectively administer the compulsory licensing provisions of the Copyright Act.64 Yet, given the fact that it has no power to alter rate provisions which are “frozen in stone”65 by the statute, the CRT cannot most effectively function in regard to the equation it regulates between cable, programmers and broadcasters.66

Congress apparently sought to create an agency that was deliberately designed to be without structure,67 and did not intend that the

Irene Rypinski, Assistant Professor of Law, former FTC Counsel, in Honolulu, Hawaii, Dec. 20, 1980.
63. These are the key changes consistently suggested by interviewees.
64. §§ 801-810.
65. Brennan, supra note 42.

It is simply not true, as some have contended, that if copyright owners believe they are not receiving adequate compensation, that Congress has already provided a remedy. That was the intention of the original sponsors of the Copyright Act, but in the process through the two houses, [the CRT’s] authority to review the rates has been greatly diluted. We really have no authority to deal with the basic schedule other than the inflation adjustment factor . . . Only if the FCC should modify the rules and allow additional signal carriage, additional program carriage, [do] we have full jurisdiction to conduct a proceeding to establish what payments should be for those purposes . . . [Other than this there is a rigid structure that cannot be changed.]

Id. at 70, 82, 87; See also § 801(b)(2)(B).
67. See, e.g., S. 543, 91st Cong., 1st Sess., § 802 (1969); Korman, supra note 5 at 22; See also, Observations, supra note 24, and accompanying text.
CRT use a scientific approach in its decision making process. However, the repeal of FCC regulations in the cable area means that the CRT assumes vital importance as a stabilizing force in the cable-copyright arena, an importance unforeseen in 1976 when the Act was passed.

B. The CRT Should be Able to Set Rate and Fee Schedules

Distribution of $80 million is inherently more significant in the commercial world than is distribution of $14 million. In addition to the adjustments allowed the CRT where there is an FCC rule change, the CRT may only adjust the statutory rates twice a decade for inflation or deflation. The complete lack of flexibility in the rate setting domain in effect renders the entire CRT effort an "academic exercise." Furthermore, even in those areas delineated above where the Tribunal ostensibly has rate setting autonomy, the statutory rates control.

In November, 1979, Barbara Ringer, the then Register of Copyrights, testified before a House subcommittee in charge of copyright, urging recognition of a strong and effective CRT. She specifically addressed the need for broader Tribunal authority than is presently provided in Sections 801(b)(2)(B) and (C), the Act's FCC related provisions.

Total discretion in rate setting without a statutorily imposed formula of any kind is urged by the MPAA, a major claimant before the CRT. Rate setting responsibility requires an expert agency with the ability to constantly respond to changing economic conditions, "an expertise which Congress does not have."

68. Johnson, supra note 34.
69. FCC Now All But Out of Cable Business, supra note 52.
70. Brennan, supra note 42.
72. § 801(b)(2)(B).
73. § 801(b)(2)(A).
74. Brennan, supra note 42.
75. Id. See also, § 801 supra note 54.
76. Hearings on Copyright Issues: Cable Television and Performance Rights Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess. 28 (1979).
77. Ringer, supra note 6 at 31.
78. Attaway, supra note 55.
79. Id.
Whether Congress in fact lacks the necessary expertise is questionable. But it is unreasonable for Congress to assume the burden of periodic review of statutory cable royalty rates, where these rate reviews require a great deal of expertise but are not of direct interest to most citizens. In addition, Congress' history of attending to the rate adjustment process with an earlier compulsory license—the mechanical compulsory license—is dismal. Until the copyright revision was completed in 1976, the 1909 statutory fee of two cents remained unchanged.

The "protracted and acrimonious history" of the Act explains a professed reticence on the part of many Congressmen to undertake revision of the Copyright Act, so soon after the cable-copyright conflict achieved a long-sought compromise. However, revision of the Act to create a strong and effective Tribunal is in the self-interest of all parties. First, it is in the cable industry's interest to remove the stigma of asserted unfairness that currently characterizes the fees paid by the cable industry. Second, it is in the interest of all broadcast related industries to have an impartial decisionmaker, the CRT, evaluate the rate setting issue that has been buried under a barrage of broadcast and program suppliers' lobbying efforts. These efforts have created the general impression that copyright royalty fees are "scandalously low." The Tribunal must be empowered with sufficient authority to

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80. Korman, supra note 5 at 17.
81. Id.
84. Kachigian, The New Copyright Law and Cable Television, Interpretation and Implications, 7 Performing Arts Rev. 176, 194 (1977). "... [t]he view of cable television as a 'parasite' should end." Id. at 194. See also Attaway, supra note 55; Lloyd, supra note 71.
86. Johnson, supra note 34. William Johnson, Chief of the FCC Cable Television Policy Review Division, indicated that this impression may be without foundation: Broadcasters and the MPAA have persuaded everyone that the [royalty] fees are too low. They state that they pay X% of broadcast revenues for programs while cable pays such a small amount in comparison that it is essentially nothing. But this compares apples and oranges. It is an inappropriate comparison. The cable subscriber fee is not all for distant signal; some parts [of cable subscriber revenues] are for clearer pictures, for the news ticker-tape, or other local services. Only a miniscule amount of subscriber revenues may be for the distant sig-
truly protect the public interest.\textsuperscript{87} To give the public a full range of signals will require fair compensation to copyright owners. If the compulsory license fee is to achieve this end, the Tribunal requires the power to adjust the cable royalty fee schedule.

\textbf{C. The CRT Should be Given Subpoena Power}

The Senate bill that first conceived of the CRT\textsuperscript{88} included a provision for subpoena power which inadvertently was deleted when the House bill reformulated the CRT provisions.\textsuperscript{89} The House version applied the Administrative Procedure Act (APA) and the authors erroneously assumed that subpoena power was automatically conferred, not realizing that the APA only regulates its exercise if it is present in the organic act itself.\textsuperscript{90} The lack of subpoena power has been a major

\ldots Before we can give copyright owners the money they deserve it must be known \ldots what part of the cable subscription audience is for distant signal.

\textit{Id.}

87. Johnson, \textit{supra} note 34; Interview with Irene Rypinski, Assistant Professor of Law, University of Hawaii School of Law; formerly in the practice of antitrust law with the firm of Bergson, Borkland, Margolis and Adler, Washington, D.C. and counsel in the Federal Trade Commission's Bureau of Competition on the industry-wide investigation of media concentration; in Honolulu, Hawaii (Dec. 20, 1980):

It may once have been, or may still be appropriate (or consistent with the public interest) for broadcasters to subsidize cable in the form of nominal fees and compulsory fees. The equity of this arrangement may derive in part from the fact that cable development has long been constrained in the interest of broadcast. However, once cable congeals and attains stability, the public interest will have less to do with assuring cable viability, than with giving both broadcasters and cable operators the incentive to disseminate diverse, high quality programming.

Copyright fees may have to be raised, and compulsory licensing requirements may have to be eliminated or limited to assure that cable does not merely offer "more of the same," which would make a limited contribution to the public interest, in "the free flow of information from diverse and antagonistic sources" (\textit{Associated Press v. U.S.}, 326 U.S. 1, 20 (1945)). Allowing cable to remain a parasite on broadcast may also simply encourage broadcasters to acquire cable outlets, further reducing the diversity of information sources, and perhaps programming as well.

That the Tribunal’s lack of discretion risks an inadequate response to the public interest as it evolves is at least arguable, based on the difficulties that Congress has had in facing copyright issues. Of course, increasing the Tribunal’s discretion would also create risks; the question of compensation may be addressed in terms of political strength rather than public interest. This danger can be alleviated by establishing standards to govern the Tribunal’s decisions regarding rates.

\textit{Id.}; Interview with Charles Firestone, Adjunct Professor of Law, UCLA School of Law; Director, UCLA Communications Law Program; Faculty Advisor, Federal Communications Law Journal, in Honolulu, Hawaii (Dec. 24, 1980).


89. See H.R. REP. No. 1733, 94th Cong., 2d Sess. 81-82 (1976); Lehman, \textit{supra} note 83; Brennan, \textit{supra} note 42.

90. Brennan, \textit{supra} note 42; 5 U.S.C. §§ 555(d) and 556(c) (1976). "Subject to \textit{published} rules of the agency and within its powers, employees presiding at hearings may \ldots issue subpoenas authorized by law (emphasis added). \textit{Id.} § 556(c).
handicap to the CRT.\footnote{91} Without subpoena power, the Tribunal refuses to direct a party to furnish supporting data to opposing counsel, presumably on the theory that it does not have the power to do so.\footnote{92}

**D. The CRT Should be Given Authorization and Funding for an Economic Study of the Cable-Copyright Industries**

Neither scientific nor empirical data were utilized in creating the copyright royalty fee schedule.\footnote{93} Instead, the schedule was the result of an industry compromise among cable-broadcast and MPAA forces.\footnote{94} Without the data it needs to make impartial decisions, the Tribunal must depend totally on the information provided to it by claimants.\footnote{95} But the cable industry is not a claimant and does not appear before the CRT under its current structure,\footnote{96} thus seriously skewing the Tribunal's perspective. The statute should be revised to vest the CRT with the authority to collect essential empirical data and conduct analysis necessary for equitable decision making.

**E. The CRT Should be Given Increased Appropriations and Staff**

The mandate of the Tribunal inherently requires an adversarial format and knowledge and experience with conducting administrative hearings. For the most part, the Commissioners lack this experience.\footnote{97} Furthermore, because Commissioners do not have staff\footnote{98} or resources

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\footnote{91}{Brennan, supra note 42.}
\footnote{92}{Interview with Arthur Scheiner, Wilner and Scheiner, Counsel for MPAA before the Tribunal, in Washington, D.C. (Aug. 20, 1980) [hereinafter Scheiner]. Arthur Scheiner, an attorney who regularly appears before the CRT objects to its strict interpretation of the oversight.

If the CRT has the power to direct an adversarial proceeding as it obviously does, it also has the clear authority to direct a party to make available whatever underlying evidence and materials are necessary to establish its case.}
\footnote{93}{Testimony, supra note 26 at 2.}
\footnote{94}{See Ringer, supra, note 6 at 18.}
\footnote{95}{468 PAT., T.M. AND COPYRIGHT J. (BNA) A-13 (1980).}
\footnote{96}{Johnson, supra note 34.}
\footnote{97}{Scheiner, supra note 92; Lloyd, supra note 71. Both attorneys explained that Thomas Brennan is highly qualified, but all his experience is “on the Hill” and except for Commissioners Clarence James and Thomas Brennan there are no other attorneys on the CRT. No one except Brennan has prior copyright related experience and none of the individuals are experienced with administrative hearing procedures. \textit{But cf.}, Brennan, supra note 42, where he says that the non-legal backgrounds of some of the Commissioners are useful in providing a variety of viewpoints.

\footnote{98}{Originally the CRT was promised funding to bring in special consultants. When this was not forthcoming, the Chairman made a request for consultant assistance to Congress, but was denied. Brennan, supra note 42.}}
to augment, verify, or analyze data provided by claimants, their decisions suffer. The Tribunal’s determinations have been criticized as being “too cryptic . . . , one-liners . . . , often lacking sufficient explanation or objective foundation . . . .”

Some attorneys who represent clients before the CRT believe its structure should be changed to include an administrative law judge who could hear evidence and write a recommended decision. Parties who wanted to take exception could appeal to the Tribunal and let the full body of commissioners make the decision. But if the CRT’s present structure is going to be maintained, the Tribunal should receive additional funding for consultants or legal advisors on specific, complex matters.

Congress did not anticipate the FCC repeal of its distant signal importation and syndicated exclusivity rules and the likely “crush of work” this will bring to the CRT. The Tribunal is not staffed or equipped to handle the expected onslaught of new claims. Additionally, the CRT suffers more from “across the board” budget cuts than other agencies, because it already functions so “close to the line.”

99. Johnson, supra note 34.
100. Scheiner, supra note 92.

Orders of the CRT are very cryptic . . . [E.g.], after Interim Decision, Phase I, for group claimants . . . only one page was issued . . . with one-line statements of explanation . . . . Terms for determining awards were very subjective: . . . two of the factors applied were “quality of copyrighted program material” . . . and “time-related considerations.” (See 45 Fed. Reg. 63,036 (1980).) What do these terms mean . . . ? Such subjective standards pose serious First Amendment questions. Why not use objective standards like the Nielsen ratings, arbitration and other industry sources . . . ?

Id.

101. Lloyd, supra note 71. A representative of sports claimants before the CRT explained:

It should not be necessary for five members of the Tribunal to sit in a hearing room . . . . They’ve been there more than 72 days this year—that’s three months each of them is out of play for anything else . . . . They need to study position papers and keep informed . . . . It strikes me as a massive waste of time . . . . It would be far more efficient to use an administrative law judge . . . .

Id.

102. Lloyd, supra note 71. “If you are going to have individuals without a strong, working legal knowledge dealing with legal matters, they ought to have the assistance they need . . . .” Id.

103. Brennan, supra note 42.
104. Ringer, supra note 6 at 22-23.
105. Brennan, supra note 42; Second interview with Thomas Brennan by telephone (Dec. 20, 1980). Funds are so tight that CRT Commissioners must think twice before “taking a taxi up to the Hill.” Commissioner Brennan described the lack of funding as severe. It has necessitated terminating discovery and proceedings prematurely. “. . . (W)e had to jeop-
light of these considerations adequate funding and staff should be provided to the Copyright Royalty Tribunal without delay.

VI. CONCLUSION

The Copyright Royalty Tribunal should be given the opportunity to prove that it can perform. Barbara Ringer, former Register of Copyrights, told Congress in testimony before the House subcommittee in charge of copyright:

You created the Copyright Royalty Tribunal . . . . Their crunch is coming . . . in 1980 . . . . We will know a great deal more about whether or not it is able to function, under the constraints it is now given . . . . [Y]ou created this body with the thought of trying to make the adjustments, the fine tuning that was necessary under the cable provisions you adopted . . . . The CRT should be given an opportunity to function . . . .

The Tribunal is ready for appraisal. It is the challenge of Congress to look beyond the highly entrenched and protectionist stances of the cable, program syndication and broadcasting interests in making such an appraisal. For example, what is the capacity of the CRT to respond to change; to protect the public interest; to maintain its independence? Answers to these and other questions ultimately will shape the Tribunal and through it the communications transformations of our age.

The ultimate goal must be the public good. What is needed is a mass communications "community" where both a strong broadcast system and a strong cable system co-exist; where greater cable penetration increases markets for the mutual benefit of broadcast and program supplier industries; where technological growth is rewarded with proper recompense; where the public gains. Hopefully, with additional Congressional attention to the issues noted in this comment, the CRT will produce long term equity among the competing interests its regulates.

Members of the legal community who deal with the CRT expressed amazement at the shoestring operation of the agency. See Johnson, supra note 34. "I called up on the phone . . . and Brennan answered himself! It's like calling the FCC and having Charlie Ferris answer . . . ! They have no assistance . . . ."

106. Ringer, supra note 6 at 31.
The Copyright Royalty Tribunal can achieve this fundamental equilibrium and serve as a vital axis upon which our nation’s media revolution revolves.

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