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UNITED STATES GENERAL ACCOUNTING OFFICE

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STATEMENT OF
WILBUR D. CAMPBELL
DEPUTY DIRECTOR, ACCOUNTING AND
FINANCIAL MANAGEMENT DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE
HOUSE OF REPRESENTATIVES

ON

THE OPERATION OF THE COPYRIGHT ROYALTY TRIBUNAL

Mr. Chairman and members of the subcommittee:

We are pleased to appear before you today to discuss the results of our brief examination of the operation of the Copyright Royalty Tribunal.

In your March 30, 1981, letter, you asked GAO to examine

--how well the Copyright Royalty Tribunal is performing its assigned functions,

--the effect of the Tribunal's activities on the parties related to its operations, and

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--what alternatives to the Tribunal's current role and/or organizational structure may improve the use of copyrighted material and the effect such alternatives may have on interested parties.

In order to comply with your request, we had to complete our examination in 9 weeks. As a result, our review was narrow in scope and was directed to the specific questions asked. We are not addressing the broad policy questions of the merit of copyright compulsory licenses or the reasonableness of compulsory license rates set by the Tribunal.

In the course of our review, we examined the Tribunal's legislative history and its proceedings and procedures. We interviewed the Tribunal commissioners, met with representatives of 18 organizations affected by the Tribunal's operations, and met with other key individuals in and out of Government knowledgeable about the Tribunal and the compulsory licenses it oversees. We also examined the structure and authority of six other Federal rate setting and adjudicatory agencies to see how they compared to the Tribunal. A more detailed discussion of our objectives, scope, and methodology is attached as appendix I.

Before discussing our findings regarding the operation of the Tribunal, we will first briefly explain the development of compulsory licenses, and then the Tribunal's responsibilities and funding.

The Copyright Royalty Tribunal Was Created To Oversee The Compulsory Licenses Provided By The 1976 Copyright Act

The Copyright Royalty Tribunal was established by the 1976 Copyright Act as an independent agency in the legislative branch to administer and adjust the compulsory licenses set forth in the act. A compulsory license permits the use of copyrighted material under certain circumstances without the permission of the copyright owner, provided a Government-set payment is made to the copyright owner.

Prior to 1976, there was only one copyright compulsory license; the so-called "mechanical license" established by the 1909 Copyright Act relating to the use of copyrighted materials used in coin-operated music machines. The royalty rate was set at two cents per song sold. This two-cent rate was also applied to the sale of phonograph records.

From 1909 to 1976, there were numerous unsuccessful efforts to expand the use of compulsory license to other areas as well as to eliminate the mechanical compulsory license. The 1976 Copyright Act expanded the use of compulsory licenses to three new areas and modified the original compulsory license. The new licenses were for

--retransmissions by cable systems of distant broadcast signals by television stations,

--the use of musical records in jukeboxes for profit, and

--the use of music and certain other creations by noncommercial broadcasters.

The act set fees for each of the three new compulsory licenses and modified the mechanical license by increasing the royalty rate and adding a length-of-song factor.

The Copyright Royalty Tribunal was given six responsibilities with regard to these four compulsory licenses.

1. Adjust the compulsory license rate paid to the Register of Copyrights for retransmission by cable systems of distant, non-network broadcasts by television stations (section 111).
2. Determine the distribution of fees deposited with the Government by cable systems (section 111).
3. Determine the compulsory license rate paid to the Register of Copyrights for performance of nondramatic musical compositions by jukeboxes (section 116).
4. Determine the distribution of fees deposited with the Government by jukebox owners (section 116).
5. Adjust the mechanical compulsory license rate on the sale of nondramatic musical works embodied in phonorecords (section 115). These fees are paid to copyright owners without Government involvement.
6. Determine reasonable terms and rates for public broadcasting entities' use of musical, pictorial, graphic, and sculptural works (section 118). These fees are paid directly to copyright owners without Government involvement.

The Tribunal is composed of five commissioners appointed by the President with the advice and consent of the Senate for 7-year terms. Two of the original five commissioners were appointed for 5-year terms so that commissioner turnover would be staggered.

The commissioners are compensated at the highest rate of the General Schedule pay rates. No selection guidance is provided in the act regarding the qualifications or backgrounds of the commissioners. The commissioners elected their first chairperson for a 1-year term. Each year thereafter a new chairperson is selected based on seniority.

The Tribunal now consists of four commissioners and four secretaries. One commissioner resigned on May 1, 1981. The Tribunal is authorized to appoint employees who may be needed to carry out its responsibilities on a permanent or temporary basis. No such staff, other than the commissioners' secretaries, has ever been appointed. Funds for additional staff support were appropriated in fiscal 1978, 1979, and 1981.

The Tribunal's budget has been small since its inception. The Tribunal was appropriated $471,000 in fiscal 1980, and $447,000 in fiscal 1981. Funds appropriated and expended by the Tribunal since fiscal 1977 are shown in Table 1 on p. 6.

Two aspects of the Tribunal's work are carried out by the Library of Congress. First, the Library of Congress provides administrative support to the Tribunal by handling its payroll, travel vouchers, and other administrative matters. The Tribunal reimburses the Library for this service; the cost in fiscal 1980 was $15,595.

Table 1

Copyright Royalty Tribunal Annual Budget Appropriation

Year	Amount Appropriated	Amount Expended
FY 1977	$276,000	$ 32,351*
FY 1978	726,000	469,775
FY 1979	805,000	485,979
FY 1980	471,000	461,196
FY 1981	447,000	-
FY 1982 (est.)	500,000	-

* for 10 month period

Second, cable and jukebox royalties are paid directly to the Copyright Office of the Library of Congress where a staff of 21 receives and distributes the royalty payments. This staff reviews each payment calculation for accuracy, deposits the payments with the U.S. Treasury where they accrue interest, and distributes the royalty payments to copyright owners or their representatives in accordance with Tribunal rulings. As required by the Copyright Act, the cost for this operation, along with the cost of the Tribunal's Royalty distribution proceedings, is deducted from the royalty pool. A total of $562,850 (including the $27,429 for the Tribunal's cable distribution proceeding) was deducted from the combined 1978 cable and jukebox royalty pool of $16,814,829.

Given this background, I would like now to turn to the operations of the Tribunal.

The Tribunal Has Operated According To Its Legislative Mandate

The Copyright Royalty Tribunal has followed its legislative mandate. It has followed acceptable procedures and has made determinations required to date. Moreover, with certain exceptions it

is now generally recognized by the affected interests as a competent body, although some disagree with its legislated mission and some are appealing its rulings.

The Tribunal is required to conduct its proceedings in accordance with the provisions of the Administrative Procedures Act, the Government in the Sunshine Act, and the Freedom of Information Act. Other Federal regulatory bodies are also required to follow these acts. The rules of procedure adopted by the Tribunal (37 C.F.R. 301) appear from our review to be in accordance with the Administrative Procedures Act. In a limited review of Tribunal transcripts and decisions, we did not find any clear violations of procedure.

While most interest group representatives we spoke with could point to problems they had with the Tribunal's interpretation of procedures, some qualified this criticism by saying they regularly have similar problems in court rooms.

Although we did not specifically check for compliance with the Sunshine and Freedom of Information Acts, we did not note any non-complying actions in the proceedings we reviewed.

The Tribunal has held all proceedings required by statute on schedule

The 1976 Copyright Act prescribes for certain proceedings to be held at specified times and for others to be held only when private agreements cannot be reached. The rate setting proceedings for cable television, phonorecords, jukeboxes, and public broadcasting must be held at specific intervals. The royalty distribution proceedings for cable television and jukeboxes must, after the initial determination, be held annually if private agreements for distribution cannot be reached. The frequency of the proceed-

ings is shown in Table 2 on p. 9. All proceedings have been held as required. The first jukebox fee distribution was made privately without a proceeding. Lacking private agreements for distributing the 1979 fees, the Tribunal began its first proceeding for distribution of jukebox fees on May 22, 1981. Since the cable royalty fee claimants are again unable to reach a private agreement, the Tribunal plans to hold its second cable distribution proceeding this year. The first final cable royalty distribution was announced September 23, 1980.

Four Of The Tribunal's Five Key Decisions Have Been Appealed

It is difficult to assess the results of the Tribunal's work since four of its five key decisions are being appealed in the courts.

The Copyright Royalty Tribunal has issued 19 final rules, determinations, and orders. Most of these were procedural rulings on the validity of claims to the royalty pool. The Tribunal has made five key rate and distribution decisions. One was the 1978 cable royalty distribution determination and the other four were adjustments to the compulsory license rates for cable television, jukebokes, phonorecords, and public broadcasting. As indicated in Table 3 on p. 11, four of these decisions are being appealed by the affected interests. Only the public broadcasting rate determination was not appealed.

The appeals of the Tribunal's decisions allege that the Tribunal did not properly distribute royalty funds, made decisions not supported by the record, established fees not authorized by the Copyright Act, and was inconsistent in the admission of evidence to the hearings. The five key decisions, the issues

Table 2

Types and Frequency of Proceedings of
The Copyright Royalty Tribunal

Type	Date initial proceedings commenced	Frequency
1. Rate setting		
Cable television (sec. 111)	1/2/80	1980 by statute, every 5th year thereafter by petition
Mechanical (sec. 115)	1/2/80	1980 by statute, 1987 & every 10th year thereafter by petition
Jukebox (sec. 116)	1/2/80	1980 by statute, every 10th year thereafter by petition
Public broadcasting (sec. 118)	12/8/77	1977 & 1982 by statute, every 5th year thereafter by statute
2. Royalty distribution		
Cable television (sec. 111)	9/12/79	Annually if there is a controversy
Jukebox (sec. 116)	5/22/81 1/	Annually if there is a controversy

1/Proceeding to distribute 1979 royalty pool. The 1978 jukebox distribution was made privately without a controversy.

involved, the criteria upon which the decisions were based and the resulting appeals appear in appendix III.

These appeals do not necessarily reflect poorly on the Tribunal since it is in the interest of those affected by the Tribunal's decisions to challenge them, particularly the early ones. Millions of dollars already collected as well as the potential for millions more in the future depend on the precedents set now.

The fact that there is no agreed method of determining the value of a creation outside of the marketplace contributes to the likelihood that Tribunal decisions will be appealed.

Removing Organizational Limitations Could Improve The Tribunal's Operational Effectiveness

The Tribunal's operational effectiveness could be improved by ensuring that future appointed commissioners possess experience and expertise and by removing organizational limitations that result from the lack of legal counsel; access to objective, expert opinion; subpoena power; and clear criteria on which to base its decisions. Most of these organizational limitations are not imposed on other Federal rate setting or adjudicatory commissions.

Only one of the five commissioners has a background in copyright related issues

Of the five presidentially appointed commissioners, only one had any significant background in copyright issues. Also, only one had any substantive financial or economic background. None had experience in rate setting or regulatory work.

Most of the interest groups we spoke with mentioned that it took a year or two before the commissioners (excluding the one with

Table 3

Status of Key Final Rules of the Copyright Royalty Tribunal On Royalty Rate Setting and Distribution

Final rule	Date	Status of Decision
1978 setting of the noncommercial broadcasting royalty rate	6/8/78	Final, was not appealed.
1978 cable royalty distribution determination	9/23/80	Under appeal by National Association of Broadcasters, National Public Radio, Major League Baseball, National Basketball Association, National Hockey League, North American Soccer League, Canadian Broadcasting Corporation, and American Society of Composers, Authors, and Publishers, D.C. Circuit Court, Docket No. 80-2273.
1980 adjustment of the royalty rate for cable systems	1/5/81	Under appeal by National Cable Television Association, American Society of Composers, Authors, and Performers, Broadcast Music, Inc., Joint Sports Claimants, and Motion Picture Association of America, D.C. Circuit Court, Docket No. 81-1005.
1980 adjustment of the royalty rate for jukeboxes	1/5/81	Under appeal by the Amusement and Music Operators Association, and American Society of Composers, Authors, and Publishers, Seventh Circuit Court, Docket No. 80-2837
Adjustment of royalty payment payable under compulsory license for making and distributing phonorecords	1/5/81	Under appeal by the Recording Industry Association of America, National Music Publishers Association, American Guild of Authors and Composers, and Nashville Songwriters Association International, D.C. Circuit Court, Docket No. 80-2540

copyright experience) got up to speed with their work. This impression was confirmed in our discussions with the commissioners themselves who said that the initial year or so involved a difficult learning process.

Four of the five commissioners were appointed to the Tribunal from work in national politics, tax law, and public accounting. One had been counsel to the Senate Judiciary Subcommittee that helped draft the 1976 Copyright Act. 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.

The Tribunal lacks a general counsel

The Tribunal performs many adjudicatory functions which require legal expertise. Yet it has not had a general counsel to provide the commissioners with technical legal advice during hearings and while writing opinions. It happened that two of the original commissioners were attorneys and were thus able to provide legal advice to the Tribunal. Now only one of four commissioners is an attorney. Although it is not necessary that commissioners have a legal background, they should have access to legal advice.

In reviewing the Tribunal's decisions and hearing transcripts, we noted numerous instances where the Tribunal performed tasks requiring a significant degree of legal interpretation. For example, the Tribunal:

--reviewed court decisions cited by claimants in order to interpret the First Amendment and its application to copyright law,

--considered contracts entered into between television stations and sports teams in order to determine the validity and extent of royalty distribution agreements,

--reviewed common law principles relating to competing claimants, and,

--examined the legislative history of the Copyright Act to establish congressional intent.

Additionally, it has already been noted that the Tribunal was expected to develop its own administrative procedures consistent with the Administrative Procedures Act.

A panel of laypersons should not be expected to make interpretations of law that can be the subject of court appeals without access to a general counsel.

A general counsel would provide the commissioners with technical advice on the admissibility of evidence and other procedural matters and thus ensure greater consistency. A general counsel could also aid commissioners in writing decisions, and represent the Tribunal in initial judicial appeals. Since the Tribunal does not have a general counsel, the Department of Justice assigns attorneys to handle all aspects of the appeals.

Most of the interest groups we interviewed felt the Tribunal would be improved by having a general counsel. Four of the original five commissioners also support this idea, although when the Tribunal was initially organized, they did not believe a general counsel was needed.

We are not aware of any other commission or regulatory body in the Federal Government that does not have access to expert legal advice. The fact that one of the Tribunal's commissioners happens to be familiar with copyright law is not a sound argument against the need for a general counsel to advise and assist all the commissioners.

An alternative to hiring a general counsel for the Tribunal may be to allow an attorney from the Copyright Office to serve as counsel to the Tribunal in addition to that individual's Copyright Office responsibilities.

The Tribunal lacks access to objective, expert opinion

Many of the issues raised in the Tribunal's hearings on rate adjustments and royalty distribution are based on economic analysis. For example, the Tribunal must determine reasonable royalty rates for the mechanical license that adequately compensate copyright owners and publishers, but do not impose excessive burdens on the recording industry. The competing interest groups hire leading economists as well as attorneys to develop their arguments and support their views on these subjects. In a number of cases, economic studies and justifications have been submitted to the Tribunal. The Tribunal should have access to objective, expert opinion to review these economic analyses when it considers such a review necessary.

Although the Tribunal has authority to hire outside consultants, it has not had sufficient funding to do this during the past two fiscal years.

The Tribunal lacks subpoena power

Although the Copyright Royalty Tribunal's decisions have a significant financial impact on the interest groups affected by compulsory licenses, it is dependent on the information provided by those groups in making its decisions. The Tribunal can be denied access to data it considers necessary and essential because it lacks subpoena power. In recent testimony before the Senate Judiciary Committee, one Tribunal commissioner stated:

> "The commissioners found it most unsatisfactory during 1980 royalty adjustment proceedings to be placed in the position of receiving only the evidence which the parties chose to present."

Subpoena power is also important since appeals of Tribunal decisions are based "on the record." In other words, an appeals court only reviews the material the Tribunal had before it and the decision is based on this material. The court does not subpoena new evidence in such a review. Subpoena power would ensure that both the Tribunal and the appeals court have all the information needed to make a decision. Because of the legal complexities subpoena power involves, it should be granted only if a general counsel is appointed.

A number of interest groups we spoke with do not believe subpoena power is needed. They maintain that since Tribunal hearings are adversarial and include cross-examination, the weaknesses in any group's claims can be exposed. However, cross-examination is not a sufficient substitute for subpoena power since it is limited to evidence previously submitted. We have also found that it is highly unusual for a regulatory or rate setting organization such as the Tribunal to lack subpoena power.

The Tribunal lacks clear criteria on which to base its decisions

The Tribunal was not given clear legislative criteria for determining royalty distribution and rate setting for each relevant compulsory license. Unlike the criteria commonly used by rate setting bodies--such as cost plus a rate of return on investment or a guaranteed profit margin--the Tribunal must adjust rates and distribute royalties on the basis of such criteria as

--reflecting the relative roles of the copyright owner and the copyright user in the product made available to the public,

--maximizing the availability of creative works to the public,

--affording copyright owners a fair return for their creative work, and

--changes in the inflation rate.

It is obvious that these are not clear criteria to work with. Even the seemingly simple criterion of changes in the inflation rate prompted two hearing days devoted to discussing what inflation is and how to measure it. Other proceedings presented commissioners with the difficult task of reviewing various economic and equity arguments and then developing a fair ruling that is not disruptive to the affected industries. Unfortunately, no hard data exists to demonstrate the relative roles of copyright owners and users in making products available to the public or for determining a fair rate of return for the use of copyrighted material.

The current appeals of key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions. Since there

is no way to measure the value of a creation outside of the marketplace, it is virtually impossible to develop clear criteria that would be acceptable to copyright owners and users. If the Congress were to try to specify new criteria, the result would likely be new problems and controversies.

Most of the Tribunal's organizational limitations are not shared by other Federal commissions

While the Copyright Royalty Tribunal is certainly an unusual organization within the Federal Government, it is nevertheless a presidentially appointed commission with the basic objective to resolve disputes and determine rates--an objective that is common among other commissions. Yet the Tribunal has organizational limitations not shared by others. We compared the Tribunal with six other Federal rate setting and adjudicatory organizations to see how their structure and authority compares with the Tribunal's. We do not claim that these six are necessarily a representative sample of Federal commissions, but they do include different types of commissions, some with broad and far ranging responsibilities and others with narrow and very limited responsibilities.

As shown in Table 4 on p. 18, the number of commissioners varied from 3 to 11, with members' terms ranging from 3 to 7 years. In all cases the chairperson of the commission was designated by the President and serves at the President's pleasure for the full term of the appointment. In only one case does the legislation creating the commission specify criteria for the President's selection of commissioners. Nevertheless, in most cases the appointed commissioners are experts or are experienced in issues the commissions

Table 4

Selected Features of the Copyright Royalty Tribunal and Six Other Federal Commissions

Organization	Commissioners	Commissioners experienced in work of the Commission	Criteria for commissioner selection in law	Term of commissioner	Selection and term of chairperson	Office of general counsel	Commissioners have access to expert staff	Subpoena power
Copyright Royalty Tribunal	5	1 of 5	No	7 years	Rotated annually	No	No	No
Federal Communications Commission	7	3 of 7	No	7 years	Selected by President for full term	Yes	Yes	Yes
Federal Maritime Commission	5	Most have some experience	No	5 years	Selected by President for full term	Yes	Yes	Yes
Federal Trade Commission	5	Most have some experience	No	7 years	Selected by President for full term	Yes	Yes	Yes
Foreign Claims Settlement Commission	3*	2 of 3	No	3 years	Selected by President for full term	Yes	Yes	Yes
Interstate Commerce Commission	11	4 of 5 (6 vacancies)	No	7 years	Selected by President for full term	Yes	Yes	Yes
Occupational Safety and Health Review Commission	3	All are experienced	Yes	6 years	Selected by President for full term	Yes	Yes	Yes

* Only the Chairperson is full time. Other commissioners serve on an as-needed basis.

deal with. Significantly, each of the commissions has a general counsel, subpoena power, and ready access to expert opinion.

Royalty Funds Held By The Government Are Not Distributed Promptly

The royalty rates set for the four compulsory licenses were designed to compensate copyright owners for certain uses of their creative works and all are set by the Tribunal. Royalties paid under the cable and jukebox compulsory licenses are held by the Government and are distributed according to Tribunal decisions. Except for distribution of 1978 jukebox fees, no distributions were made from the royalty pools controlled by the Tribunal until May of this year. The delay was largely due to the copyright owners' legal challenges of the Tribunal's recommended distribution.

The distribution proceeding for 1978 1/ cable royalty fees was instituted on September 12, 1979. The Tribunal announced its final determination on September 23, 1980, after a long series of hearings. The recommended distribution was immediately appealed by the claimants. Pending judicial review, the royalty fees were held by the U. S. Treasury. In May 1981, the Tribunal's order to distribute one-half of the 1978 cable royalty pool to copyright owners according to its September 1980 determination was effected. The balance of about $8 million will be held until the completion of judicial appeal. The additional royalty payments collected for 1979 and 1980 amount to about $36 million, not including interest.

1/Because relevant provisions of the 1976 Act were not effective until January 1, 1978, 1978 was the first year for which compulsory license royalty payments were collected.

The Tribunal recently completed a private distribution of the 1978 jukebox royalty pool amounting to about $1.1 million. A distribution hearing commenced on June 2, 1981, to determine distribution of the 1979 pool.

The delay in distributions is largely due to the requirement in the Copyright Act that royalty funds be withheld pending appeals. If, as expressed in section 809 of the act, the Congress intended royalties to be distributed within 30 days of a Tribunal ruling, it could change the law to require partial or full distribution payments regardless of appeals. Naturally, copyright owners would have to realize the possibility that the appeal process could result in a change in their royalty payments. We believe the problems posed by this possibility are outweighed by the desirability of prompt royalty payments.

Alternatively, the Congress could revise the law to make Tribunal decisions final, subject to reversal only by a Senate or House resolution. This was considered before enactment of the 1976 Copyright Act. Appeals to the courts could then be limited to questions of fraud, corruption, or impropriety in the decision-making process.

The merit of the current appeals can be better determined after the courts have made their final rulings.

Tribunal Commissioners Are Underutilized High Level Officials

Each of the Tribunal commissioners is paid at the top of the Federal pay schedule. This is the pay rate for directors and administrators of major Federal agencies and programs. The Tribunal commissioners, however, have a staff limited to their secretaries,

TABLE 5

Copyright Royalty Tribunal's Actual and Estimated Annual Proceeding Days, Fiscal 1978 - 1985

	1978	1979	1980	1981 estimated	1982 estimated	1983 estimated	1984 estimated	1985 estimated
Section 111, cable								
Rate setting	-	-	1	7	-	-	-	7
Distribution	-	2	23	23	17	12	7	2
Section 115, mechanical								
Rate setting	-	-	41	10	25	5	-	-
Section 116, jukebox								
Rate setting	2	-	8	-	-	-	-	-
Distribution	-	-	-	11	8	6	4	2
Section 118, public broadcasting								
Rate setting	11	-	-	-	15	-	-	-
Multipurpose proceedings	-	1	2	1	1	1	1	1
Other	4	-	-	-	-	-	-	-
Total days	17	3	75	52	66	24	12	12
Number of proceedings	3	2	5	5	5	4	3	4

and a workload that, by their own estimate, will consume only somewhat more than half of their work time.

While the commissioners had a fairly busy and demanding year in 1980, the Tribunal should have only about 21 proceedings in the next 5 years. Unless the Tribunal's legislative charter is changed, there should never be another year as busy as 1980, and most should require much less time.

As shown in Table 5 on p. 21, the commissioners have had 1 year with only 3 days of hearings and another with 75. Based on experience, statutorily required proceedings, and discussions with the commissioners, we project that between now and fiscal 1986 there will be 1 year with 66 hearing days and 2 years with only 12. While the individual proceedings require preparation and decision writing, and there is some additional administrative work, the workload is not full time.

Conclusions, Recommendations, And Matters For The Congress To Consider

The Copyright Royalty Tribunal is a relatively new agency with a short track record, and most of its major decisions are now under appeal. It is thus difficult to draw any final conclusions on its performance. It is clear the Tribunal was given a very difficult task with no technical support and minimal authority with which to work. The Tribunal has done what it was mandated to do. With some exceptions, it is now generally recognized by the affected interests as a competent body, although some disagree with the Tribunal's legislated mission.

Although most of its decisions are being challenged in the courts, this almost always occurs when an independent body makes precedent-setting rules.

The question of whether or not the Copyright Royalty Tribunal is to be maintained, and if so, in what organizational structure, is a basic policy question that must be decided by the Congress. If it is to be retained, we believe its organizational limitations should be removed.

Recommendations To The Congress

We recommend that the Congress amend the Copyright Act of 1976 (P.L. 94-553) and appropriate additional funds to improve the operations of the Copyright Royalty Tribunal. Specifically, we recommend that the Congress:

--Require full distribution of royalty payments as decided by the Tribunal within 30 days of the decision unless a claimant can satisfy the requirements for obtaining a court injunction.

--Provide the Tribunal with access to a general counsel.

--Provide the Tribunal with subpoena power.

--Provide the Tribunal with adequate funding to obtain objective, expert opinion when needed.

--Require that future commissioners be knowledgeable in matters related to copyright.

Matters For The Congress To Consider

In examining the last problem area we identified--underutilization of high level officials--we believe corrective action should be taken but find the evidence does not clearly support one particular course of action. The available options include:

--Reduce the size of the Tribunal from five to three commissioners. This would reduce the annual costs of the Tribunal but would not fully address the problem of low workload.

--Restructure the Tribunal with a single, full-time chairperson and general counsel and a number of part-time commissioners who would convene for hearings. The commissioners would be presidential appointees who would be paid only during hearings. The part-time commissioners could be distinguished copyright attorneys, law professors, retired experts in copyright-related areas, and other qualified individuals willing to serve several weeks a year for such important and prestigious service. If the workload seems too great for part-time commissioners, it could be arranged that only some of them would serve with the chairperson at any given time, thus halving the part-time service.

--Transfer the Copyright Royalty Tribunal to the Department of Commerce. This alternative has been discussed occasionally and generally calls for placing the Tribunal and the Copyright Office with the Patent and Trademark Office under an Assistant Secretary for Intellectual Property. While this approach could resolve many of the problems we identified in our study, it raises a policy issue that is beyond the scope of our review; namely, whether copyright registration and regulation belongs in the executive branch.

--Eliminate the Copyright Royalty Tribunal. This is by far the most controversial alternative to the current operation of the Tribunal and could involve either maintaining or

eliminating the compulsory licenses. If maintained, rates would then have to be periodically set by the Congress or tied to a self-adjusting index. Government collected royalties could be distributed to claimants based on private agreements or, if these fail, binding arbitration among the claimants or through court rulings. If compulsory licenses are eliminated, all rates would be set privately and paid privately. Since this approach would likely cause some disruption in the affected industries, a transition period should be provided. There are pros and cons for eliminating each of the compulsory licenses; the views of various parties regarding such actions are discussed in appendix IV.

--Restructure the Tribunal as a part-time, ad hoc body with presidentially appointed commissioners convened by the Register of Copyrights. Petitions to convene the Tribunal for rate adjustments or due to distribution controversies would be made to the Register. The Register's role would be limited to convening the Tribunal when petitioned and providing staff support, including a general counsel, on an as-needed basis.

If the Tribunal is to be maintained, this alternative would have the advantage of resolving many of the problems we identified, while drawing on the existing expertise of the Copyright Office. We do not believe this approach violates the doctrine of separation of powers, or the Supreme Court's holding in Buckley v. Valeo, 424 U.S. (1976), since the Register will be limited to convening presidentially

appointed commissioners--a non-discretionary duty not involving appointments. As in a previous alternative, the commissioners could be distinguished individuals knowledgeable in copyright-related matters.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of this review were to examine

--how well the Copyright Royalty Tribunal performs its assigned functions,

--the effect of the Tribunal's activities on the parties related to its operations, and

--what alternatives to the Tribunal's current role and/or organizational structure may improve the use of copyrighted material, and the effect such alternatives may have on interested parties.

In accordance with the subcommittee chairman's request, our review was limited to 9 weeks. As a result, our review was narrow in scope and was directed to the questions asked by the chairman. We did not address the broad policy questions of the merit of compulsory licenses or the reasonableness of the compulsory licenses rates set by the Tribunal.

This review was conducted in Washington, D.C. and New York, New York. We examined the legislative history of the 1976 Copyright Act (P.L. 94-553) and materials related to the establishment and operation of the Copyright Royalty Tribunal. We reviewed selected transcripts of Tribunal hearings and the five key decisions it has made to date. We interviewed the five Tribunal commissioners as well as top officials knowledgeable of the Tribunal and its operations at (1) the Copyright Office, Library of Congress; (2) National Telecommunications and Information Agency, Department of Commerce; and (3) the Cable Television Bureau, Federal Communications Commission. The purpose of these interviews was to obtain

information on the Tribunal's effect on copyright law and the affected industries.

We also interviewed key private sector representatives that are directly affected by the Tribunal's rate setting and distribution authority. These representatives were from 18 organizations and were selected because they are affected by at least one of the four compulsory licenses and have appeared at or been represented at Tribunal hearings. (See app. II.) This sample includes all the major parties affected by the Tribunal.

Officials at participating private organizations were assured, when they so requested, that any of their comments that may affect their future dealings with the Tribunal would be kept confidential. Such a pledge of confidentiality was considered necessary since these organizations appear before the Tribunal in rate setting and adjudicatory proceedings.

In order to better place the Copyright Royalty Tribunal in perspective with other Federal rate setting and adjudicatory organizations, we briefly examined six other such organizations. The six were selected to compare different types of collegial bodies of various sizes and organizational structures. These organizations included the Federal Communications Commission, the Federal Maritime Commission, the Federal Trade Commission, the Foreign Claims Settlement Commission, the Interstate Commerce Commission, and the Occupational Safety and Health Review Commission. We interviewed key officials at each of these agencies and reviewed official publications that discussed the organizations' purposes and structures.

APPENDIX II

PRIVATE ORGANIZATIONS INTERVIEWED BY GAO DURING REVIEW OF COPYRIGHT ROYALTY TRIBUNAL

American Guild of Authors and Composers

American Society of Composers, Authors, and Publishers

Amusement and Music Operators Association

Association of Independent Television Owners

Broadcast Music, Inc.

Christian Broadcasting Network

Community Antenna Television Association

Joint Sports Claimants

Motion Picture Association of America

National Association of Broadcasters

National Cable Television Association

National Collegiate Athletic Association

National Music Publishers Association

National Public Radio

Program Producers and Syndicators

Public Broadcasting Service

Recording Industry Association of America

SESAC, Inc.

KEY RATE SETTING AND DISTRIBUTION DECISIONS BY THE COPYRIGHT ROYALTY TRIBUNAL

The Copyright Royalty Tribunal has made five key royalty rate setting and distribution decisions. These include:

--setting a royalty payment under the compulsory license for public broadcasting,

--the 1978 cable royalty distribution determination,

--the 1980 adjustment of the royalty rate for cable systems,

--the 1980 adjustment of the royalty rate for coin-operated phonorecord players, and

--the adjustment of royalty payment payable under the compulsory license for phonorecords.

All except the public broadcasting decision are now under appeal.

The five key decisions, the issues involved, the criteria upon which the decisions were based, and the resulting appeals are as follows.

Setting The Royalty Payment Under The Compulsory License For Public Broadcasting

The Copyright Royalty Tribunal issued its first final rule setting the royalty payment payable under the public broadcasting compulsory license on June 8, 1978 (43 Fed. Reg. 25068). The criteria used in setting this rate was obtained both from the statute and the legislative history. The criteria included

--consideration of rates for comparable circumstances under voluntary license agreements,

--ensuring that the rate reflects the fair value of the materials used and does not result in copyright owners subsidizing public broadcasting, and

--encouraging the growth of public broadcasting.

Other factors considered by the Tribunal in formulating the schedule of rates included:

--the size and nature of public broadcasting audiences,

--the sources of public broadcasting funding, and

--public broadcasting program practices.

The Tribunal ruled that an annual payment of $1,250,000 per year is a reasonable royalty fee for the performance of ASCAP (American Society of Composers, Authors and Performers) music by the Public Broadcasting System, National Public Radio, and their member stations. Public broadcasting had already reached voluntary agreements with the two other major performing rights societies.

The Tribunal also determined that local and regional programing of public broadcasting entities should be subject to copyright liability in addition to national programing. The Tribunal rejected public broadcasting's argument that only national public broadcasting programs be held liable.

The Tribunal ordered that all public broadcasting rates be adjusted annually according to changes in the Consumer Price Index.

The Tribunal's final ruling was not appealed.

1978 Cable Royalty Distribution Determination

The Copyright Royalty Tribunal issued its final determination for a cable royalty distribution on September 23, 1980 (45 Fed. Reg. 63026). In this determination, the Tribunal specified how much of the cable royalty payments collected in 1978 would go to which claimants. The Tribunal allocated the roughly $15 million royalty pool as follows:

1. Motion Picture Association of America, Christian Broadcasting Network, and other program syndicators--75 percent.
2. Joint Sports Claimants and the National Collegiate Athletics Association--12 percent.
3. Public Broadcasting Service--5.25 percent.
4. Music Performing Rights Societies--4.5 percent.
5. U.S. and Canadian Television Broadcasters--3.25 percent.

The Tribunal based its allocation on the following key criteria:

--The harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems.

--The benefit derived by cable systems from secondary transmission of certain copyrighted works.

--The marketplace value of the works transmitted.

Secondary criteria included the quality of copyrighted material and the amount of time claimants' works were aired.

Actual distribution of these funds was withheld by the Tribunal pending outcome of an appeal made by claimants in each category. According to a later Tribunal order, distribution of 50 percent of the royalty pool was made on May 8, 1981. The remaining funds will be withheld until after the appeals.

The appeals of the distribution are based on claimants assertions that they are entitled to a greater percentage of the royalty pool than that ordered by the Tribunal. Some of the specific arguments before the court include:

--The Tribunal erroneously interpreted the Copyright Act which requires distribution of royalty fees to all copyright owners of works included in distant non-network secondary transmissions.

--The Tribunal's award based on "marketplace value" factors should be set aside since it is inconsistent with the purposes of compulsory licenses.

1980 Adjustment of the Royalty Rate For Cable Systems

The Copyright Royalty Tribunal issued its first final rule on the adjustment of the royalty rate for cable systems on January 5, 1981 (46 Fed.Reg. 892). In this rule, the Tribunal revised the cable royalty rate using legislated criteria that these rates be adjusted to reflect (1) national monetary inflation or deflation or (2) changes in average rates charged cable subscribers for the basic service of providing secondary transmissions. The adjustments were to maintain the real constant dollar level of the royalty fee per subscriber which existed when the Copyright Act was enacted.

This proceeding required the Tribunal to rule on an appropriate measure of inflation as well as determine constant dollar changes in the level of the royalty fee per cable subscriber of basic service. The Tribunal ruled that

--cable royalty rates for rebroadcast of independent distant signals be increased 21 percent and

--the gross recipients limitation for compulsory license liability be increased 33.81 percent rounded to the nearest one hundred dollars.

This decision has been appealed by the National Cable Television Association; the American Society of Composers, Authors, and Performers; Broadcast Music, Inc.; Joint Sports Claimants; and the Motion Picture Association of America.

The key arguments in the appeal are:

--The Tribunal erred by refusing to follow the Copyright Act's directive to simply "maintain the real constant dollar level of the royalty fee per subscriber."

--The Tribunal erred by concluding it had no authority to adopt a rule providing semiannual inflation adjustments in cable rates as a means of effecting the legislative policy to "maintain the real constant dollar level of royalty fee per subscriber."

--The Tribunal failed to provide protection against royalty rate erosion by cable system tiering practices.

1980 Adjustment Of The Royalty Rate For Coin-Operated Phonorecord Players

The Copyright Royalty Tribunal issued its first final rule on royalty rate adjustment for coin-operated phonorecord players (jukeboxes) on January 5, 1981 (46 Fed. Reg. 884).

The Tribunal adjusted this compulsory license rate using the criteria provided by the Copyright Act:

--"Maximize the availability of creative works to the public."

--"Afford the copyright owner a fair return for his creative work."

--"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, capital

investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication."

--"Minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

In this ruling, the Tribunal adjusted the legislated compulsory license fee of $8 per jukebox to $25 in 1982, $50 in 1984 and to an amount adjusted by the Consumer Price Index in 1987. The Tribunal rejected arguments that the copyright owners should have to demonstrate a need for a rate increase and that the recommended adjusted royalty rates would have a disruptive impact on the structure of the jukebox industry.

The Amusement and Music Operators Association, representing jukebox operators, and the American Society of Composers, Authors, and Publishers have appealed this decision. Their key arguments are:

--The Tribunal's determination of rates for the jukebox royalty fee was not supported by the record and does not comply with the guidelines of the statute.

--The Tribunal erred in refusing to accept evidence of (1) need on the part of music composers and publishers for an increase in jukebox royalty fees and (2) the way music performing rights societies distribute such royalty fees to their members and affiliates.

--Periodic adjustments of the jukebox royalty fee as determined by the Tribunal are not justified by the evidence of

record and are not authorized by the provisions of the Copyright Act.

--The Tribunal's $50 determination should be vacated because, using the Tribunal's marketplace approach, the fee should be no lower than $70.

Adjustments Of Royalty Payment Payable Under The Compulsory License For Phonorecords

The Copyright Royalty Tribunal issued its first final rule adjusting the royalty payment payable under the compulsory license for making and distributing phonorecords on January 5, 1981 (46 Fed. Reg. 891). The criteria used for adjusting the so-called "mechanical license" rate are the same as those for the jukebox compulsory license:

--Maximize availability of creative works to the public.

--Afford the copyright owner a fair return for his creative work.

--Reflect the relative roles of the copyright owners and users in making a product available to the public.

--Minimize any disruptive impact on the industries involved.

The Tribunal adjusted the legislated mechanical rate of 2 3/4 cents per song to 4 cents per song with annual adjustments based on changes in the average suggested retail price of records. The Tribunal rejected arguments that the rate should be set as a percentage of a record's suggested retail price and that the flat rate should be set high to serve as a ceiling leaving bargaining room beneath the ceiling rate for copyright owners and the recording industry.

APPENDIX III

This decision has been appealed by the Recording Industry Association of America, the National Music Publishers Association, the American Guild of Authors and Composers, and the Nashville Songwriters Association International. The key arguments before the court are:

--The Tribunal's determination of rate for the mechanical royalty fee was arbitrary and capricious, is not supported by the record, and does not comply with the guidelines of the statute.

--The Tribunal violated the Copyright Act by providing for annual reconsideration of the mechanical royalty rate.

--The Tribunal erred in a matter of law and in statutory interpretation when it excluded any consideration of the range within which there would be marketplace bargaining over actual royalty rates.

PROS AND CONS OF ELIMINATING EACH OF THE FOUR COMPULSORY LICENSES

The compulsory licenses included in the 1976 Copyright Act revision have remained the most controversial aspect of that law. Since enactment of the Copyright Act, each of the four licenses--cable television, mechanical, jukebox, and public broadcasting--have been debated extensively. A summary of the arguments for and against each of these compulsory licenses follows.

The cable compulsory license (sec. 111)

There has been increasing discussion in recent months on eliminating the compulsory license for cable television. It was the subject of two recent hearings before this subcommittee as well as one recent hearing before the Senate Judiciary Committee.

Proponents for eliminating the compulsory license for cable argue that circumstances have changed since 1976, when copyright owners and the cable television industry agreed to the current compulsory license arrangement.

Proponents of what is referred to as the "marketplace approach" argue that:

--Cable negotiates for all its programing needs except rebroadcast of local signals (which are exempt from copyright liability) and imported independent signals which are covered by the compulsory license. Continued access to the compulsory license represents an unnecessary and unfair subsidy to the highly profitable cable industry.

--Compulsory license rate setting is extremely complicated and cannot be reduced to an acceptable formula. An issue as complex as this should be handled only in the marketplace.

--Copyright owners should not be compelled to offer their works to cable operators at a Government-set price.

--Copyright owners should not have to appear in hearings to justify payment for their products.

--The use of distant signals by cable systems is of decreasing importance.

--If a reasonable transition period were set for movement to the marketplace, numerous "middlemen" would spring up to provide cable systems with television programing at a reasonable cost.

Opponents of the "marketplace" alternative argue that changes since the 1976 agreement do not merit a revision of the Copyright Act, and compulsory licenses are needed to continue offering viewers diverse programing. They also argue that:

--Compulsory license is less of a subsidy to cable operators than the Federal license broadcasters have to distribute their products over the airwaves.

--Cable operators could not practicably negotiate with every copyright owner whose work was retransmitted by a cable system.

--Cable operators could not compete in the marketplace with major independent broadcasters for the exclusive use of quality programing.

--Since the importation of independent distant signals is of decreasing importance and will be of little importance to large urban cable systems in a few years, the marketplace should be allowed to work its course and largely eliminate

the use of cable compulsory licenses without legislative change.

--Restrictions on cable access to independent programing will limit viewer access to diverse programing, particularly in less densely populated areas.

The mechanical compulsory license (sec. 115)

Of the four compulsory licenses the Tribunal oversees, only the mechanical license predates the Tribunal; it was established under the 1909 Copyright Act. The mechanical license has been contested ever since it was established, but was not significantly modified until the 1976 Copyright Act. The original mechanical royalty was established due to the near monopoly one piano roll firm had obtained over copyrighted material.

The continuing debate, which apparently was not affected by the 1976 Copyright Act, revolves around

--whether a need still exists for a mechanical license,

--music publishers' and authors' alleged need for a royalty rate increase,

--the economic impact of a royalty rate increase on the record industry, and

--the impact of a rate increase on the consumer.

Copyright owners have long argued that changes in the music industry, both recording and publishing, have made the mechanical license unnecessary. They claim that the problem the mechanical license was to resolve no longer exists and could not develop again. Authors and composers have argued, as have owners of other copyrights, that they should be given the exclusive right to control the use of their work and should be able to let the market

determine the value of their compositions. While the recording industry has expressed concern that this would make the cost of compositions overly expensive, copyright owners will earn very little money from their works if they price them above that rate which the recording companies are willing to pay and thus have a clear incentive to negotiate with the recording industry.

Recognizing that the mechanical license is not likely to be eliminated since it has existed for so long, copyright owners have stressed the need for a higher royalty rate under the compulsory license, or a royalty rate based on a percent of suggested retail price.

While the recording industry recognizes that the monopoly threat of 1909 probably no longer exists, they argue that the compulsory license over the years has enabled the record industry to grow larger and more competitive.

It appears that the mechanical license is now largely accepted by both sides of the music business; the question now centers on the rate and how it should be computed.

The copyright owners argue that the two cents per song royalty rate based on the 1909 act should be adjusted upward to current value on the basis of inflation, or that the 2 3/4 cents per song set by the Congress in 1976 should be adjusted annually on the basis of inflation. They argue that the 2 cents or 2 3/4 cents are the key numbers that should be adjusted according to inflation.

The recording industry maintains that the royalty rate is not the key factor, but rather the percent of revenue from a single record going to copyright owners. In 1909, they estimated that

only about 5 percent of revenue went to the copyright owner while today the percent is much higher. The recording industry also points to the increased revenue resulting from the greater sales now made of individual records.

Among the parties affected by the mechanical royalty, there is no strong desire to eliminate the compulsory license. However, there are alternatives to the Tribunal's responsibility for rate adjustment. For example, the Congress could:

--Freeze the current royalty rate and reexamine it again at some future date.

--Set a higher mechanical royalty rate (such as the 8 cents per song recommended by the National Music Publishers Association) to allow negotiation below that ceiling. The ceiling rate could be used if a lower rate cannot be agreed to.

--Determine a reasonable percent of suggested retail (or wholesale) price that should be paid to copyright owners. Once set, this royalty rate would be self-adjusting since part of any increase in record prices would be passed on to copyright owners. This approach was recommended by the former Chairman of the Tribunal earlier this year.

The jukebox compulsory license (sec. 116)

Prior to the 1976 Copyright Act, jukebox operators were not liable for copyright royalty payments from the revenue they obtain by charging to hear copyrighted materials on their jukeboxes. The act established the copyright liability of jukebox operators and created the jukebox compulsory license. The rate for this license in the 1976 act is $8 per jukebox. The Tribunal has adjusted this

rate to $25 in 1982, $50 in 1984, and in 1987, to an amount to be determined by the Tribunal in accordance with changes in the Consumer Price Index.

Jukebox operators contend that the compulsory license for which they are liable amounts to double liability since they pay mechanical royalty fees that are built into the price of every record. The mechanical royalty, however, is the responsibility of the record industry. The jukebox liability was established because in jukeboxes, purchased records are used to make a profit.

Having established the liability of jukebox owners, the Congress could eliminate the compulsory license and allow proprietors to negotiate with the performing rights societies for their use of music on jukeboxes as well as by performers and on stereo systems. Restaurant, bar, and club owners must negotiate with performing rights societies for the use of copyrighted music by performers or over sound systems. Jukebox operators, however, fear that this approach will result in increased costs and will make what they consider to be a marginal business enterprise unprofitable.

Another alternative would be for the Congress to establish a rate for jukebox compulsory license and either index it or reexamine it at appropriate times in the future.

Public broadcasting compulsory license (sec. 118)

The 1976 Copyright Act established under section 118 a copyright compulsory license for certain uses of published, nondramatic musical works and published pictorial, graphic, and sculptural works by noncommercial broadcasting. The main issue here is

public broadcasting's use of copyrighted music. This compulsory license was recommended to the Congress by representatives of public broadcasting who claimed they required such a license because of unique problems in public broadcasting related to the

--special nature of programing,

--repeated use of programs,

--varied type of producing organizations, and

--limited extent of financial resources.

Without this license, public broadcasting would have to negotiate with copyright owners and performing rights societies for the use of all copyrighted works.

In a 1975 letter to Senator John L. McClellan, the Register of Copyrights stated that the proposed public broadcasting compulsory license was not "justified or necessary." The Copyright Royalty Tribunal, in a January 22, 1980, report, found that thousands of other organizations negotiate without difficulty for private copyright licenses, and even public broadcasting effectively negotiates privately for nondramatic literary works used in its television programing. The Tribunal concluded that the public broadcasting compulsory license "is not necessary for the efficient operation of public broadcasting and thus constitutes an inappropriate interference with the traditional functioning of the copyright system and the artistic and economic freedom of those creators whose works are subject to its provisions."

Public broadcasters claim that the compulsory license is still needed and is necessary for their effective operation.