Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of		
1982 JUKEBOX ROYALTY DISTRIBUTION PROCEEDINGS	:	Docket No. 83-2
1983 JUKEBOX ROYALTY DISTRIBUTION PROCEEDINGS	:	Docket No. 84-2-83JD

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF ASCAP, BMI AND SESAC

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October 17, 1985

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1. The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. (collectively, "A/B/S"), having reached voluntary agreements for division of the 1982 and 1983 jukebox royalty funds, submit these joint proposed findings of fact and conclusions of law in accordance with the Copyright Royalty Tribunal's rules, 37 C.F.R. § 301.54, and order in these consolidated proceedings, 50 Fed. Reg. 31,645 (August 5, 1985.).

I. INTRODUCTION

2. Based upon the evidentiary record, ASCAP, BMI and SESAC have proven entitlement to the entire 1982 and 1983 jukebox royalty funds, with the exception of the award to Italian Book Co. to which all claimants have stipulated; the

Asociacion de Compositores y Editores de Musica Latino Americana ("ACEMLA") is not a "performing rights society" as defined by 17 U.S.C. § 116(e)(3); because ACEMLA's sole claim is as a "performing rights society," it is not entitled to any award; and, if ACEMLA had claimed as a "copyright owner," it would be entitled to an award between $36.60 and $564 for 1982 and between $47.50 and $555 for 1983.[1]

II. THE BACKGROUND OF THESE PROCEEDINGS

3. The Copyright Act of 1976 requires the Tribunal to distribute annually compulsory license fees paid by jukebox "operators" for the privilege of performing publicly copyrighted musical compositions on "coin-operated phonorecord players." 17 U.S.C. § 116; the quoted terms are defined in 17 U.S.C. § 116(e).

4. The law specifies a two-stage process for such distribution. First, the Tribunal is to assess the claims of, and make any appropriate award to, "every copyright owner [claimant] not affiliated with a performing rights society." 17 U.S.C. § 116(c)(4)(A). Second, the remainder is to be distributed to the "performing rights societies." 17 U.S.C. § 116(c)(4)(B). The law defines a "performing rights

[1] An initial point of considerable importance must also be made: We discuss the ASCAP and BMI distribution systems and surveys at some length. Given the competitive posture of ASCAP, BMI and SESAC, this filing may not be taken as an endorsement of or comment upon any society's survey of performed works or its distribution system by the other societies.

society." 17 U.S.C. § 116(e)(3).[2] The law also allows and encourages claimants to reach voluntary agreements so as to obviate the need for Tribunal proceedings in whole or in part. 17 U.S.C. §§ 116(c)(2), 116(c)(4)(B).

A. The Prior 1982 Proceedings

5. Nine persons or entities filed claims in the 1982 proceedings: the three statutorily-identified performing rights societies, ASCAP, BMI and SESAC, appearing jointly; three copyright owners unaffiliated with any performing rights society, Italian Book Co., Sammy Belcher, and Michael Walsh; and three entities whose status is at issue, Latin American Music, Latin American Music, Inc., and Asociacion de Compositores y Editores de Musica Latino Americana ("ACEMLA") (collectively, "LAM"). In their initial filings and representations to the Tribunal, each individual LAM claimant alleged that it was a "performing rights society" under the statute.

6. Pursuant to its statutory mandate, on December 13, 1983, the Tribunal published a notice declaring a controversy concerning distribution of the 1982 jukebox royalties. 48 Fed. Reg. 55,497. On the same date, a partial

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[2] "A 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc."

distribution of 90% of the 1982 fund was ordered. Id. (Subsequently, another 5% was distributed as an amount not in controversy. 49 Fed. Reg. 41,269 (October 22, 1984).)

7. The Tribunal took evidence on papers. After review of the record, the Tribunal issued its decision. 49 Fed. Reg. 34,555 (August 31, 1984).

8. The Tribunal determined that neither the LAM claimants, nor Mr. Belcher, nor Mr. Walsh were entitled to any royalties.[3] LAM appealed to the United States Court of Appeals for the Second Circuit.

9. The Court remanded the case to the Tribunal for further proceedings. ACEMLA v. CRT, 763 F.2d 101 (2d Cir. 1985). The Court stated that, because the Tribunal had not made explicit findings on whether each of the LAM claimants was a "performing rights society," it would assume for purposes of the appeal that each entity held such status.[4] The Court noted, however, that this assumption was made, "without foreclosing further examination of this issue by the CRT on remand." 763 F.2d at 108.

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[3] Neither Mr. Belcher nor Mr. Walsh appealed that decision and it is therefore final. 17 U.S.C. § 809. The Italian Book Co. reached a voluntary settlement with ASCAP, BMI and SESAC and its claim was not part of the "controversy" over the claims of ASCAP, BMI and SESAC and LAM. Accordingly, the Tribunal's 1982 award to Italian Book Co., in the agreed-upon amount, is final as well.

[4] Each LAM claimant represented to the Court, as it had to the Tribunal, that it was a "performing rights society."

10. Given this assumption, the Court concluded that the Tribunal had made an error of law: After focusing first on LAM, and concluding that it was not entitled to any award, the Tribunal did not consider the affirmative evidence placed in the record by ASCAP, BMI and SESAC. Rather, the Tribunal simply awarded the fund to them in accordance with their voluntary agreement. This, the Court said, was error. The Court held that absent agreement among all performing rights societies, the Tribunal must weigh the entitlement of each, including the agreeing group. 763 F.2d 101 (2d Cir. 1985).[5]

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[5] The Second Circuit's holding on this point squarely conflicts with the more recent holding of the District of Columbia Circuit in the appeal of the 1982 Cable Royalty Distribution Proceedings. There, all claimants except the Devotional Claimants had made a voluntary settlement agreement. The Tribunal required only the Devotional Claimants to prove their entitlement, and the Devotionals challenged this requirement on the same basis as LAM challenged the Tribunal here. Although the District of Columbia Circuit was aware of the Second Circuit's decision, it nevertheless found the argument "without merit":

> "The Devotionals maintain that the Tribunal should not have distributed funds to the Settling Parties unless those parties had proved their entitlement to the percentages agreed upon in the settlement.
>
> This argument is without merit. As we previously observed, the Copyright Act anticipates that parties may settle their claims.... We would effectively eliminate the likelihood for settlements if we accepted the Devotionals' contention that when one claimant -- no matter how modest that claimant's likely share under even the most sanguine view -- chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required. Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart."

(footnote continued)

The Court therefore remanded the case to the Tribunal with instructions to consider claims of all competing parties.

B. The Prior 1983 Proceedings

11. Seven claimants appeared in the 1983 distribution proceedings:[6] the three statutorily-identified performing rights societies, ASCAP, BMI and SESAC, appearing jointly; Italian Book Co., a copyright owner; and the three LAM entities, Latin American Music, Latin American Music, Inc., and ACEMLA, whose status is at issue. Again, ASCAP, BMI, SESAC and Italian Book Co. reached a voluntary settlement among themselves.[7] The Tribunal went forward with the 1983 proceedings while the appeal of the 1982 proceeding was pending.

12. On November 5, 1984, the Tribunal declared that a controversy existed with respect to the distribution of the 1983 jukebox royalty fund. 49 Fed. Reg. 44,231. On November 26, 1984, the Tribunal made a partial distribution of 95% to

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(footnote continued from previous page)

National Association of Broadcasters v. CRT, No. 84-1230 (D.C. Cir. 1985), slip op. at 34.

We suggest that the District of Columbia Circuit's view is the better one. Here, however, the Second Circuit's decision is the law of the case, and the Tribunal must be bound by it, at least for the 1982 remanded proceedings.

[6] An eighth individual, Michael Walsh, failed to comply with the Tribunal's procedural requirements and so is not a claimant.

[7] All claimants have now agreed to a stipulation of an award to Italian Book Co. in the 1983 proceedings.

the 1983 jukebox royalty fund to those claimants who had received royalties in previous jukebox royalty distributions. 49 Fed. Reg. 46,458.

13. The Tribunal held a prehearing conference on January 7, 1985, and requested the claimants to file comments on suggested criteria to be used to determine entitlement. Such comments were submitted on February 15, 1985.

14. The Tribunal subsequently engaged in fact-finding, requesting each claimant to submit certain information relating to the appropriate indicia of "performing rights society" status, and the criteria the Tribunal should apply in the absence of a valid scientific survey of jukebox performances. Such comments were filed on June 25, June 27, August 9 and September 3, 1985.

C. The Consolidated 1982 and 1983 Proceeding

15. After the remand of the 1982 decision, LAM filed a letter with the Tribunal, dated June 20, 1985, withdrawing all claims on the part of Latin American Music and Latin American Music, Inc., which it now identified as "copyright owners" and not "performing rights societies," and lodging all claims in ACEMLA, which it claimed was a "performing rights society."

16. The Tribunal subsequently issued a procedural order consolidating the 1982 and 1983 proceedings. 50 Fed. Reg. 31,645 (August 5, 1985). The Tribunal: (1) ordered an

evidentiary hearing on the merits; (2) required any claimant alleging that it was a "performing rights society," but not identified as such in the statute, to prove its claim to such status; (3) required all claimants to prove their entitlements to the funds; (4) set forth certain criteria by which claimants could prove entitlement; (5) set forth procedural dates; and (6) ordered that the written direct case of claimants who were not statutorily identified as "performing rights societies" contain certain information on alleged "performing rights society" status. Id.

17. Pursuant to the Tribunal's order, ASCAP, BMI and SESAC, and LAM, exchanged lists of their most-performed Spanish-language works on August 9, 1985.[8] On September 3, 1985, ASCAP, BMI and SESAC submitted an analysis of the performance record of those LAM works in the ASCAP and BMI distribution systems and surveys for calendar years 1982 and 1983, again pursuant to the Tribunal's order. The written direct cases of ASCAP, BMI and SESAC, jointly, and LAM, were filed on September 13, 1985.

18. The Tribunal conducted three days of evidentiary hearings. On September 30, 1985, the Tribunal heard the ASCAP, BMI and SESAC joint case, presented through four witnesses: ASCAP's Managing Director, Gloria Messinger; BMI's Vice President, California, Ron Anton; ASCAP's Director of Membership, Paul S. Adler; and BMI's Vice President, Admini-

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[8] LAM's filing is dated August 7, 1985.

stration, Alan H. Smith. On October 2, 1985, the Tribunal heard LAM's witness, L. Raul Bernard. Also on that day, the Tribunal heard a sponsoring witness for an A/B/S cross-examination exhibit, ASCAP's Director of National Sales for General Licensing, L. Barry Knittel. On October 3, 1985, at the request of LAM, the Tribunal heard two other sponsoring witnesses for that exhibit, ASCAP's New York General Licensing District Manager, John Sloate, and field representative Michael Brady.

III. PROPOSED FINDINGS OF FACT

A. The Amounts In Controversy

19. At the outset, the portions of the funds in controversy should be specified. LAM has not challenged ASCAP, BMI and SESAC's entitlement to all jukebox royalties for all non-Spanish-language music. The Second Circuit has endorsed the Tribunal's partial distribution of those portions of the 1982 fund not in controversy, and its reasoning should apply equally to the 1983 fund. 763 F.2d at 108.

20. The Tribunal's procedural order, 50 Fed. Reg. 31,645 (August 5, 1985) dealt with the amounts in controversy and the necessity for proving entitlement. For the 1982 fund, the Tribunal required ASCAP, BMI and SESAC to prove entitlement only to the 5% of the fund claimed by both LAM and ASCAP, BMI and SESAC for Spanish-language music. For the 1983 fund however, the Tribunal required ASCAP, BMI and SESAC to prove entitlement to 100% of the fund. We believe that we

should only be required in the 1983 proceeding to prove entitlement to that portion of the fund which is in controversy -- the 5% claimed on the one hand by LAM and on the other by ASCAP, BMI and SESAC.[9] However, we have placed evidence in the record to justify an award to ASCAP, BMI and SESAC for 100% of the fund (less the stipulated award to Italian Book Co.) for both 1982 and 1983.

B. ASCAP, BMI and SESAC's Affirmative Proof

21. ASCAP, BMI and SESAC submitted substantial information about their joint entitlement to 100% of the 1982 and 1983 jukebox royalty funds. The affirmative proof of entitlement submitted by ASCAP, BMI and SESAC was essentially the same for both 1982 and 1983. We shall first deal with ASCAP, BMI and SESAC's affirmative proof of entitlement to the entire fund -- that is, English-language music, and other-language music as well, performed on jukeboxes. We shall then turn to ASCAP, BMI and SESAC's affirmative proof of entitlement to the portion of the entire fund attributable to the performance of Spanish-language music on jukeboxes.

[9] That portion of the fund relates only to the performance of Spanish-language works on licensed jukeboxes. Whether 5% is the appropriate quantification for the share of the total jukebox fund attributable to performances of Spanish-language works is unknown on the record.

1. The Strength of the ASCAP, BMI and SESAC Repertoires Generally

22. The four ASCAP, BMI and SESAC witnesses appearing before the Tribunal had a total of 79 years experience in the field of musical performing rights licensing. GM 1; RA 1, A/B/S Exh. 8; PSA 1, Tr. 105; AHS 1, A/B/S Exh. 5.[10] Their testimony, based on that experience, was that virtually no significantly performed copyrighted works belong to copyright owners unaffiliated with ASCAP, BMI or SESAC.

23. Thus, Gloria Messinger testified that ASCAP, BMI and SESAC "license all but the most minute fraction of a percentage point of all performances." GM 2. The combined repertories of ASCAP, BMI and SESAC include not only virtually all American music, but virtually all foreign music as well -- the world's repertory. Tr. 26-28. As a result, it is "extraordinary" for a copyright owner not to belong to one of the three organizations; there would be no way for that owner to license public performances of his works on a nationwide and worldwide basis without the facilities of ASCAP, BMI or SESAC. GM 2; Tr. 28. Membership in ASCAP, BMI or SESAC is therefore logical to allow creators and copyright owners to reap the economic return Congress intended. GM 3.

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[10] References to witnesses' direct written statements will be by the witness' initials and page number (GM = Gloria Messinger; RA = Ron Anton; PSA = Paul S. Adler; AHS = Alan H. Smith); references to exhibits by exhibit number; references to testimony by transcript page number (Tr. _).

24. Alan H. Smith testified to this point as well, in response to a question from the Tribunal. Tr. 150-151. His testimony was that only ASCAP, BMI and SESAC have the resources to represent properly creators and copyright owners, as "performing rights societies." Indeed, in his many years' experience, he has never encountered any other such organizations. Id.

25. The overwhelmingly-dominant position of ASCAP, BMI and SESAC is shown by contrasting their combined annual performing rights licensing revenues in 1982 and 1983 -- about $350 million each year -- with that of LAM -- $0. GM 3; Tr. 27; Tr. 183-184; Tr. 229-230.

26. Indeed, these facts can form the basis for the administrative notice suggested by the Second Circuit of ASCAP, BMI and SESAC's dominant position in licensing performing rights. 763 F.2d at 108; GM 3.

27. Paul S. Adler testified that he had 18 years' experience in the ASCAP membership and distribution areas, which included virtually constant monitoring of ASCAP's survey of performances. PSA 2-3. Based on that experience, his expert testimony was that "there are virtually no performed copyrighted musical works which are not in the ASCAP, BMI or SESAC repertories." PSA 3; see also Tr. 114.

28. Mr. Adler also offered as proof of the affirmative ASCAP, BMI and SESAC claim an analysis of the "widely respected" and "generally relied upon" Billboard singles

charts in 1982 and 1983. PSA 3; A/B/S Exhs. 1 and 2. Billboard has four weekly singles charts -- "Hot 100", "Country", "Black", and "Adult Contemporary." PSA 3-4; Tr. 115.[11] During 1982, every song on every chart was licensed by ASCAP, BMI or SESAC. PSA 4; A/B/S Exh. 1; Tr. 117-118. During 1983, every song on the "Hot 100", "Black" and "Adult Contemporary" charts was licensed by ASCAP, BMI or SESAC, and 99.8% of the songs listed on the "Country" charts were licensed by ASCAP, BMI or SESAC.[12] PSA 4; A/B/S Exh. 2; Tr. 118-119.

29. Mr. Adler also introduced an analysis of listings on the three charts published by RePlay, a trade magazine of the jukebox industry. The RePlay charts purport to reflect popular jukebox songs. PSA 4; A/B/S Exhs. 3 and 4; Tr. 119. Every song on every RePlay chart available in 1982 and 1983 was licensed by ASCAP, BMI and SESAC. Id.

30. Mr. Adler summed up the ASCAP, BMI and SESAC affirmative case in this area by saying "there is really nothing of consequence that we don't license, we three performing rights societies." Tr. 120.

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[11] In 1982 and 1983, only one of these charts, the "Hot 100" chart, appeared to have a radio airplay component. Billboard does not indicate whether airplay is a component in their other charts. Tr. 105, 114-115. Therefore, it is difficult to determine whether the majority of the charts are reflective of radio play, much less jukebox play. The evidence does indicate, however, that the four Billboard charts are singles charts and singles are far more likely to receive jukebox play. Tr. 116.

[12] And the remaining 0.2% were not Spanish-language songs, and not in LAM's catalogue. Tr. 118.

2. The Strength of the ASCAP, BMI and SESAC Spanish-Language Repertoires

31. In response to the Tribunal's requests, suggestions and orders, ASCAP, BMI and SESAC introduced voluminous information showing that they license virtually all Spanish-language music.

32. In filings made prior to the hearings, ASCAP, BMI and SESAC introduced detailed and lengthy lists of extremely popular Spanish-language songs in their combined repertories. Joint Statement of ASCAP, BMI and SESAC, March 14, 1984 (1982 list); Joint Evidentiary Statement of ASCAP, BMI and SESAC, December 4, 1984 (1983 list). Those filings also included the names of well-known writers and publishers of Spanish-language music whose works are licensed through ASCAP, BMI and SESAC, Id. Indeed, the Tribunal may take administrative notice of the renown of many, if not most, of those works, creators and copyright owners.

33. In addition, those filings listed the many foreign performing rights societies whose Spanish-language repertories are licensed in the United States by ASCAP, BMI and SESAC. Id.; see also Tr. 29. The world's repertory of Spanish-language music is thus licensed in the United States through ASCAP, BMI and SESAC.

34. Further, in response to the Tribunal's order, ASCAP, BMI and SESAC submitted combined lists of their most-performed Spanish-language works in 1982 and 1983. Response of ASCAP, BMI and SESAC, August 9, 1985, Appendices A and B.

Those lists offer convincing proof of the strength of the ASCAP, BMI and SESAC Spanish-language repertories because of the way in which they were prepared.

35. Ms. Messinger testified that the ASCAP works on the list were derived from ASCAP's survey of performances. GM 4; Tr. 29. That survey, conducted in the normal course of business and not prepared specially for these proceedings, was described in detail in a prior filing. Reply of ASCAP, BMI and SESAC, June 24, 1985.

36. Mr. Smith testified that the BMI works on that list were determined by reference to the database produced by BMI's ongoing logging and survey operations. AHS 3; Tr. 144-145. The list includes songs logged by BMI with more than one million performances on broadcasting stations. AHS 3. BMI's survey, also conducted in the normal course of business and not specifically prepared for these proceedings, was also described in detail in a previous filing. Reply of ASCAP, BMI and SESAC, June 24, 1985.

37. Mr. Anton also testified on the strength of the Spanish-language repertoires of ASCAP, BMI and SESAC. He noted that the many seminal Latin works which created Latin music's popularity in the United States were licensed by ASCAP, BMI and SESAC. RA 2-3; A/B/S Exh. 9; Tr. 85-86. Many of those songs were heavily performed, according to BMI's records. Tr. 89; RA 3. Indeed, in response to the Tribunal's request, further analysis showed that 29 of the songs

mentioned in A/B/S Exh. 9 were among the most-performed Spanish-language works in 1982 and 1983, according to the ASCAP and BMI surveys. Letter of October 16, 1985. (Further, other songs mentioned in A/B/S Exh. 9 may also have been performed, and may have appeared in the ASCAP and BMI surveys, but were not among the "most-performed.")

C. None Of The LAM Claimants Is A "Performing Rights Society"

38. A threshold question the Tribunal must resolve is whether ACEMLA -- or, for that matter, any of the LAM claimants -- is a "performing rights society" as the term is defined in 17 U.S.C. § 116(e)(3). If ACEMLA is not, then neither it nor any LAM claimants are entitled to any award, by their own admission.

39. The original 1982 and 1983 LAM claimants were Latin American Music, Latin American Music, Inc., and ACEMLA.[13] LAM maintained before the Tribunal and the Second Circuit that all three entities were "performing rights societies." However, LAM's counsel subsequently withdrew all claims for Latin American Music and Latin American Music, Inc., which were then identified as "copyright owners." Letter of June 20, 1985. All LAM claims now repose in ACEMLA, which LAM claims is a "performing rights society." Id.

[13] As we discuss below, LAM now states that there is no such entity as "Latin American Music, Inc.," e.g., Tr. 201.

40. Significantly, ACEMLA is claiming only as a "performing rights society." Its counsel so stated on the record in response to a question from the Tribunal:

> "CHAIRMAN RAY: Are all your claims based on being a performing rights society?
>
> "MR. EISEN: Our claim before you is as a performing right society, yes, that's correct. We maintain that ACEMLA is a performing right society, and as a performing right society is entitled under Section 116 to a distribution.
>
> "CHAIRMAN RAY: And you have no claim as a music publishing company?
>
> "MR. EISEN: I don't believe we do, no."

Tr. 290-291.

41. The relevant facts on the record as to ACEMLA's status as a "performing rights society" are as follows.

42. ACEMLA, although using the word "association" in its Spanish title, is simply an assumed name of Latin American Music Co., Inc. LAM Exh. 1; Tr. 181. There is no evidence in the record that ACEMLA possesses any of the attributes of an "association." For example, there is no evidence that it is registered as an unincorporated membership association under New York law, or that it has complied with that law.[14] Id.; Tr. 180-181, 199. Nor is there any evidence that, like any association, it has "members." Tr. 271-276. While its

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[14] E.g., New York law requires that a Certificate of Designation for such associations be filed periodically with the New York Secretary of State. New York General Associations Law, Article 4, Section 18.

"principal," L. Raul Bernard, referred to ACEMLA "members," Tr. 276, none of the documents LAM provided sets forth any proof that there are such "members." Tr. 271-277, LAM Exh. 2.

43. In the words of its "principal," Mr. Bernard, ACEMLA "is not a corporation" either. Tr. 181.

44. ACEMLA does not license anyone to do anything for any purpose. It had no licenses with anyone, let alone for the licensing of performing rights, in 1982 or 1983, nor does it today, by its own admission. E.g., Tr. 183-184; 229-230.

45. There is no evidence in the record that ACEMLA has any written agreements, with any entity, to license performing rights on the other entity's behalf. Tr. 225, 269. Mr. Bernard does not know if such written agreements exist. Id. He does not have copies of any such authorizations. Id.

46. The only entity for which any documentation showing ownership of any copyright rights has been submitted is Latin American Music Co. LAM Exh. 2. Such documentation is in the form of a contract, with riders, between a music publisher and writer. LAM Exh. 2 (second, third and fourth documents); cf. A/B/S Exhs. 11X and 12X. Mr. Bernard admitted that that contract was simply a form of agreement between a music publisher and a composer. Tr. 277. The only document submitted which purports to be between a writer and ACEMLA is, by Mr. Bernard's admission, not a contract, but a mere form

listing basic identifying information. LAM Exh. 2 (first document); Tr. 260. And, Mr. Bernard cannot swear that the form was even used in 1982 or 1983. Tr. 259.

47. ACEMLA does not have any of the attributes of ASCAP, BMI or SESAC which make them "performing rights societies." Cf. Tr. 120-121, 140-141 and 150-151 (setting forth some of the attributes which make ASCAP, BMI and SESAC "performing rights societies") with Tr. 183-184, 229-230 (ACEMLA has no licensees), 209-214, 216-217 (ACEMLA's "employees" are actually employees of both Latin American Music Co., Inc. and OTOAO Records, and number only 4), 219, 373 (ACEMLA not listed in telephone directory), 225 (no written authorizations or grants of rights)[15], 230 (no distributions have been made), 236-238 (monitoring haphazard at best), 238-239, 294, Exh. 3 (no infringement suits brought although possession of evidence of infringement is claimed), 243-244 (no written explanation of distribution "system" exists to inform "members" of the "system"), 293 (no standard rate schedules for licensees), 321 (only indications of performing

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[15] In this regard, Mr. Bernard testified that any alleged grants of performing rights to ACEMLA are always exclusive. Tr. 299. No such written grants were put into the record, and it is doubtful that any exist in writing, if at all. Tr. 225, 269. But under the Copyright Act, exclusive grants of copyright must be in writing and signed by the owner of the rights conveyed or his agent to be valid. 17 U.S.C. § 204(a). This point is discussed more fully below in our proposed conclusions of law.

rights society affiliation with ACEMLA, for licensing and identification purposes, placed on record labels are on those printed by OTOA Records, Mr. Bernard's own company).

V. LAM's Entitlement

48. As discussed in our conclusions of law, below, ACEMLA, the sole LAM claimant, is not a "performing rights society." Because it claims only as a "performing rights society" and not as a "copyright owner," it is therefore not entitled to an award. However, we proceed with an analysis of what LAM's entitlement would be if it had properly claimed to be a "copyright owner." Of course, if LAM had claimed as a "copyright owner," it would have been required to prove entitlement before any proof was required from ASCAP, BMI and SESAC, the "performing rights societies." And, whatever its proof and award might have been, ASCAP, BMI and SESAC would not have had to prove their entitlement, given their voluntary agreement and the statutory procedure which requires "copyright owners" to prove entitlement first, and "performing rights societies" second, and then only if they do not agree voluntarily. 17 U.S.C. § 116(c)(4).

1. The Credibility of LAM'S Case

49. The credibility of much -- indeed, most -- of LAM's case is suspect. Turning first to its written case, we find that many of the documents LAM submitted are either incomplete, unreliable, irrelevant, or contradictory on their face.

50. Only one side of the certificate of assumed name for ACEMLA was submitted. LAM Exh. 1. That there are two sides is evident from numbered item 6 on the side submitted. Id.; Tr. 207. The document was filed in 1984. Id.; Tr. 207. No such document was filed in 1982 or 1983, the years at issue here. Tr. 208. Thus, the only proof that ACEMLA existed in 1982 and 1983 is Mr. Bernard's unsupported claim that it did.

51. The claim before the Tribunal in 1981 was made by "Latin American Music Co." and filed by Mr. Bernard pro se; in 1982 claims were made by "Latin American Music" "Latin American Music, Inc.," and "ACEMLA", and filed by counsel; and in 1983 claims were made by "Latin American Music," "Latin American Music, Inc.," and "ACEMLA", and filed by counsel.[16] According to Mr. Bernard, the only entities in existence besides ACEMLA are "Latin American Music" and "Latin American Music Co., Inc." E.g. Tr. 194. All other references to entities are "miswritings," Tr. 194, "typographical errors," Tr. 196, "misspelled," Tr. 196, errors of "technicality," Tr. 201,

[16] Although Mr. Bernard claimed ACEMLA came into existence in 1980, Tr. 176, no claim for ACEMLA was filed for 1981. If it was then a legitimate "performing rights society," one would think such a claim would have been made.

or "not using the exact correct title," Tr. 201, notwithstanding the fact that they were made by the same shareholder, officer and principal, Mr. Bernard, or his counsel, both of whom presumably knew what the proper names of the entities were and would have proceeded with care in making filings with the Tribunal.

52. LAM previously claimed to the Tribunal and Second Circuit that Latin American Music and Latin American Music, Inc. were "performing rights societies." LAM now avers that they are "copyright owners." Letter of June 20, 1985. The Tribunal's records, and those of the Court, show that LAM never informed the Tribunal or Court of the incorrect claim -- so vital to the Tribunal's and Court's decisions -- before the Second Circuit's decision. The Tribunal is entitled to raise questions as to the good faith and credibility of LAM's claims in the face of such startlingly misleading representations.

53. The informational form allegedly used by ACEMLA, LAM Exh. 2 (first document), referred to in LAM's written case as an "agreement," Written Direct Case of ACEMLA, 2-3, is, according to Mr. Bernard, not an "agreement" at all, Tr. 260, and was not used in 1982 or 1983, Id. On its face, it is not an agreement transferring or authorizing the licensing of performing rights.

54. The Tribunal's procedural order required LAM to submit "a list of the entities to whom the claimant licenses the public performance of [its] works." 50 Fed. Reg. 31,645

(August 5, 1985) (emphasis added.) LAM did not (and could not) comply, and instead submitted "a list of those entities which ACEMLA seeks to license," Written Direct Case of ACEMLA, 2 (emphasis added), and "correspondence . . . regarding the potential licensing of copyrighted works," Id. (emphasis added). That correspondence related only to 1985 and not to 1982 or 1983. LAM Exh. 3.

55. LAM claimed to license "most" of the music from Spanish-speaking countries. LAM Exh. 3, p. 7. That claim is contradicted by other documents LAM itself relies upon, e.g. the WJIT and WADO "logs" submitted, LAM Exhs. 10 and 11, and by the ASCAP and BMI survey information, Comments of ASCAP, BMI and SESAC, September 3, 1985.

56. LAM submitted correspondence with PBS, presumably to prove both that LAM seeks to license PBS, and that PBS performs LAM works. LAM Exh. 3, pp. 17-22. When asked what made PBS think that "Frenesi," a work in the BMI repertoire, was licensed by LAM, LAM Exh. 3 pp. 21-22, Mr. Bernard made the wholly-unsupported allegation that ASCAP or BMI "put them up to it," in the hope thereby of "committing me to a mistake," Tr. 310. Yet LAM did not see fit to introduce a subsequent letter from PBS making clear that PBS learned that "Frenesi" was not a LAM work. A/B/S Exh. 13X, Tr. 311. If "Frenesi," the only work PBS performed which it thought might be a LAM work, was known to LAM not to be its work, why was LAM Exh. 3, pp. 21-22 introduced? If it was introduced, as

LAM indicates, as an example of "correspondence . . . regarding the potential licensing of [LAM] copyrighted works," it could only be misleading.

57. LAM Exh. 4, consisting of photocopies of 80 45-RPM records of songs claimed by LAM, contained massive duplications. A/B/S Exh. 15X. After elimination of duplicates, there were in fact only 43 records listed, rather than 80. Id.; Tr. 319.

58. LAM claimed that all of the 43 non-duplicated records in LAM Exh. 4 "appeared on the 1982-83 charts as major hits." LAM Exh. 4, introductory sheet. Mr. Bernard testified that the charts which that phrase referred to were the specific charts submitted as LAM Exhs. 5 and 6. Tr. 176-177.[17] Yet, of the 43 records listed on LAM Exh. 4, only 11 appeared on the charts in LAM Exh. 5 and 6. A/B/S Exh. 16X.

59. Mr. Bernard did not prepare the alleged WJIT "logs," did not know who did or how, and could not confirm that any of the songs listed were performed by that station. LAM Exh. 10; Tr. 338. Many of those "logs" were allegedly of broadcasts in 1981, not 1982 or 1983. LAM Exh. 10; Tr. 335-337.

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[17] "Q. What charts are you referring to?
"A. I am referring to charts from Billboard, Canales and several other local and international magazines.
"Q. Are these the charts that appear as Attachments 5 and 6?
"A. These are the charts that appear on Attachments 5 and 6." Tr. 177.

60. The "logs" LAM submitted to show what was played on WADO, LAM Exh. 11, were in fact WADO's clearance requests to ASCAP, and do not show what was played on WADO. Tr. 339-349; Affidavit of Dwight S. Young. Indeed, the opposite conclusion from that originally advocated by LAM is more reasonable -- that if WADO did not have a license from LAM, it would not illegally perform alleged LAM works once their ownership were known. Tr. 345-347. (Even Mr. Bernard's testimony suggested this explanation. Tr. 346-347.) And, those WADO clearance requests related to 1985, not 1982 or 1983. LAM Exh. 11; Tr. 342; Affidavit of Dwight S. Young.

61. The affidavits submitted which were allegedly executed by jukebox operators in Philadelphia, LAM Exh. 12, are of questionable veracity. The details of their procurement are not personally known by Mr. Bernard. Tr. 352-362. LAM did not produce Mr. Martinez, the LAM employee who obtained them, as a witness. And the instructions given by Mr. Bernard to Mr. Martinez serve only to confuse the record. Mr. Bernard testified that he told Mr. Martinez to visit establishments that would have jukeboxes containing Spanish music,

> "and find out if this particular music, any of our music had been played at some time during 1982 or '83 or presently, and if there was present music of ours, to list it on this other--if there is any at all, they are presently to list it, to request an affidavit from those people that would have first-hand knowledge of

> the business, itself, that these were performed there, that these records were found there." Tr. 358[18]

62. These instructions were not in keeping with the Tribunal's procedural order, 50 Fed. Reg. 31,645 (August 5, 1985), which allowed only the submission of "sworn statements from jukebox operators" (emphasis added). Mr. Bernard does not know if those executing the affidavits were jukebox operators or not. Tr. 354-357. Doubts as to the allegation that the persons executing the affidavits are, in fact, jukebox operators are raised on the affidavits' face. E.g., cf. LAM Exh. 12, affidavit of Flora Betancourt ("I am the owner of the above-described jukebox"), with the statement in the same affidavit ("The owner or operator of this jukebox is: Regal Vending"), with Mr. Bernard's testimony, Tr. 356 ("I could not tell as to that lady, whether she is the owner [of the jukebox].").

63. Those completing the affidavits were asked to recall whether specific songs, of the thousands that might have been on the jukeboxes, were listed some 2 and 3 years previously. Tr. 359-360. That, we suggest, would be a prodigious and incredible feat of memory.

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[18] Note that the instruction was not limited to songs on the jukeboxes in 1982 and 1983; songs "presently" on the boxes were to be listed as well.

64. Some of the affidavits which allege that the jukeboxes in question were licensed are contradicted by the records of the United States Copyright Office, which lists them as unlicensed. A/B/S Exh. 17X.

65. The overwhelming majority of a sample of the establishments on LAM's "Partial List of Some Establishments in the New York City Area Which Have a Juke-Box Performing Spanish Language Titles, Including Some from [LAM] Repertoire," LAM Exh. 12, do not in fact have any jukebox. A/B/S Exh. 18X (Revised); Tr. 406-439.

66. The way in which those establishments were identified as having jukeboxes was only vaguely described, to say the least. Mr. Bernard could not even say when the list was prepared, and so the dates during which the establishments allegedly had jukeboxes are unknown. Tr. 367-368. Other than the four of which Mr. Bernard said he knew personally (and which claim was questioned by the A/B/S Offer of Proof on A/B/S Exh. 18X (Revised)), the others were the result of alleged haphazard inquiry by Mr. Bernard's sales clerks of Hispanic customers in his record store. Tr. 368-371.

67. Mr. Bernard's oral testimony is vague on essential elements. For example, he stated "I cannot remember dates too well," Tr. 193, and alluded to his bad chronological memory, even though specific dates were important to this proceeding -- for example, whether events occurred before, during, or after 1982 and 1983. E.g., Tr. 258 and 268

(whether specific contracts were drafted or used in 1982 or 1983); Tr. 367 (when the "Partial List" of jukeboxes in the New York City area was prepared).

68. Further, Mr. Bernard frequently declined to answer questions, including the most significant questions, conclusively. E.g., Tr. 224 (is Latin American Music Co., Inc. a "performing rights society"?); Tr. 225 (are any alleged authorizations to ACEMLA to license performing rights in writing?); Tr. 228 (are specific authorizations from other entities with ACEMLA? are they with Latin American Music Co., Inc.?); Tr. 305 (are more than 50% of songs from Spanish-speaking countries in LAM's repertoire?); Tr. 331 (did LAM only put in charts on which their songs appeared?).

B. ASCAP, BMI and SESAC Introduced the Only Quantifiable Proof of an Award to LAM If It Had Claimed as a Copyright Owner

69. None of the evidence LAM introduced dealt with any objective, quantifiable proof of any entitlement it might have.[19] LAM has instead referred to "some measure of inference to prove entitlement." Written Direct Case of ACEMLA, 5. However, nowhere in its case -- either written or oral -- has LAM in any way related its evidence or that alleged inference to a quantification of its claim. Indeed,

[19] As noted previously, and as discussed below, we believe that LAM is, if anything, a "copyright owner," not a "performing rights society," and so is not entitled to any award because it is claiming solely as a "performing rights society." In these proposed findings, we assess the award it would receive if it had filed as a copyright owner.

it has not even stated its claim, which presumably is the 5% referred to in its Justifications of Claim filed in the 1982 and 1983 proceedings on November 17, 1983 and October 30, 1984, respectively.

70. The only objective, quantifiable evidence going to LAM's possible entitlement as a copyright owner was introduced by ASCAP, BMI and SESAC. That evidence was in the form of: (1) the track record of performances of LAM works in the ASCAP survey in 1982 and 1983; (2) the track record of performances of LAM works in the BMI survey in 1982 and 1983; and (3) a limited, informal survey of 76 jukeboxes located in Hispanic neighborhoods in four cities, conducted in August 1985.

1. LAM's Track Record of Performances in the ASCAP Survey

71. The track record of performances of LAM works in the ASCAP survey in 1982 and 1983 was submitted to the Tribunal in the Comments of ASCAP, BMI and SESAC of September 3, 1985, and was the subject of part of Paul S. Adler's testimony. PSA 2; Tr. 111-113. The operation, reliability, credibility and accuracy of ASCAP's survey are described in detail in the Reply of ASCAP, BMI and SESAC, dated September 24, 1985.

72. LAM had submitted, pursuant to the Tribunal's order, 50 Fed. Reg. 31,645 (August 5, 1985), a list of 179 works it claimed to own, which it said were "most performed." LAM Exh. 13. ASCAP ran those works through its survey for calendar years 1982 and 1983 with the following results.

73. If performances in all media were considered, LAM would be entitled to an award of $157 for 1982 and $112 for 1983. If performances in radio only were considered, LAM would be entitled to an award of $326 for 1982 and $267 for 1983. Comments of ASCAP, BMI and SESAC, September 3, 1985, 2-5; PSA 2; Tr. 111-113.

2. LAM's Track Record of Performances in the BMI Survey

74. The track record of performances of LAM works in the BMI survey in 1982 and 1983 was submitted to the Tribunal in the Comments of ASCAP, BMI and SESAC of September 3, 1985, and was the subject of part of Alan H. Smith's testimony, AHS 4-6; Tr. 145-148. The operation, reliability, credibility and accuracy of BMI's survey were described in detail in the Reply of ASCAP, BMI and SESAC, dated June 24, 1985.

75. BMI ran the LAM list of 179 "most-performed" works it claimed to own through its survey for calendar years 1982 and 1983 with the following results.

76. LAM would be entitled to $36.60 for 1982 and $47.50 for 1983. Comments of ASCAP, BMI and SESAC, September 3, 1985, 6-7; AHS 4-6; Tr. 145-148.

3. The Limited, Informal Survey of Jukeboxes in Hispanic Neighborhoods

77. In its procedural order, 50 Fed. Reg. 31,645 (August 5, 1985), the Tribunal suggested that it would welcome a survey of jukebox performances. The record proves that a valid scientific survey of jukebox performances would be prohibitively expensive. GM 4-5; Tr. 30-31; AHS 6-7; Tr. 148-149.

78. However, mindful of the Tribunal's recommendation, a limited, informal survey of jukeboxes was performed in Hispanic neighborhoods in four cities with sizable Hispanic populations (New York, Los Angeles, San Antonio, and Miami). GM 4-9; Tr. 29-39.[20]

79. That limited, informal survey revealed that, of 11,592 listings on the 76 jukeboxes that were surveyed, only 45 were of works LAM could possibly claim to own. GM 8; Tr. 35-36, 39. None of the jukeboxes on which the LAM works appeared were licensed. Tr. 35.

80. Based on reasonable assumptions about the proportion of licensed jukeboxes which are located in Hispanic neighborhoods, and assuming that the works on licensed and unlicensed jukeboxes do not significantly differ, the limited, informal survey would support a LAM award of $564 for 1982 and

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[20] These cities ranked first, second, fourth and seventh, respectively, among United States cities with Hispanic populations. GM 5. By contrast, much of LAM's questionable evidence that any jukebox operators used LAM's songs was gathered in Philadelphia, which ranks nineteenth among cities in Hispanic population. Tr. 366-367.

$555 for 1983. GM 8-9; Tr. 40-41. If only the licensed jukeboxes in the survey were considered, LAM would get nothing. Tr. 35.

III. CONCLUSIONS OF LAW

A. Neither ACEMLA Nor Any of the LAM Claimants are "Performing Rights Societies" Under the Law.

81. The Copyright Law's definition of a "performing rights society" sets forth several standards to be met:

> "A 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc."

17 U.S.C. § 116(e)(3). On this record, ACEMLA does not meet those standards, as follows:

82. ACEMLA is neither an association nor a corporation. Its only office is in New York. There is no record evidence that it has any attributes of an "association," for example, that it has complied with the New York General Associations Law. It is, by its "principal's" own admission, not a corporation.

83. ACEMLA does not in fact license anything to anyone. It had no licensees in 1982 or 1983, and has none today.

84. There is no evidence in the record that ACEMLA licenses performing rights on behalf of copyright owners. The only remotely credible evidence is that ACEMLA might be able to license performing rights on behalf of Latin American Music and Latin American Music Co., Inc. But all three entities are merely the alter egos of one man, L. Raul Bernard. It is unreasonable to conclude that the law would grant "performing rights society" status to a fictional creation of one person, which creation's main purposes seem to be to obtain an award from the Tribunal in these proceedings, and, possibly, to use such a finding to thrust his creation on the public and the user community as a legitimate "performing rights society."

85. There is no evidence in the record that ACEMLA has acquired any rights of public performance of nondramatic musical works at all. ACEMLA claims that it has acquired exclusive rights. But it has not put in any evidence of written transfers of such rights, and the record indicates such written transfers may not exist. The Copyright Law requires transfers of copyright ownership -- including transfers of exclusive rights -- to be in writing and signed by the transferor to be valid. 17 U.S.C. § 204(a). Thus, on this record, ACEMLA is not the valid owner of any exclusive copyright rights, the only kind of rights it claims to own, and so the only basis for a claim to entitlement here.[21]

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[21] The Copyright Law also requires that the transfer of any exclusive right under a copyright must be recorded in the Copyright Office as a prerequisite to bringing an
(footnote continued)

86. Indeed, by Mr. Bernard's own definition, ACEMLA is not a "performing rights society." He said: "A performing rights society to me is such an entity that has control of those rights by contracts of either the publisher or with the composer." Tr. 247. But ACEMLA has no such contracts. We would also note that every music publisher would meet Mr. Bernard's definition, since every music publisher acquires such rights by contract with the writer. Mr. Bernard's definition must therefore be in error for it is inconceivable that the law intends to allow every music publisher to claim as a "performing rights society."

87. The only possible support for a claim to ownership of copyright rights by any entity in the LAM group contained in the record is the contract (including riders) submitted by Latin American Music Co., presumably another alter ego for Mr. Bernard. That contract is nothing more than an agreement between a writer and a music publisher. It might qualify as support for a claim that Latin American Music Co. is a "copyright owner," but it conveys no rights to ACEMLA or any "performing rights society." Further, there is no record evidence of any agreements between ACEMLA and copyright owners not under Mr. Bernard's control. And, given its allusions to such arrangements for foreign works in the record, it is reasonable to conclude that they are simply arrangements

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(footnote continued from previous page)
infringement action. 17 U.S.C. § 205(d). ACEMLA has put in no evidence of any such recordation.

between music publishers (sometimes referred to as subpublishing arrangements), and not grants to a "performing rights society."

88. The use of the phrase "such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC Inc." in the law's definition is not merely for the purpose of statutorily identifying ASCAP, BMI and SESAC as "performing rights societies." Rather, it is reasonable to conclude that the phrase is included to set forth a standard, by way of illustration, to be met by any entity claiming to be a "performing rights society." Some of the attributes ASCAP, BMI and SESAC possess, which ACEMLA does not possess, are: (1) the licensing of hundreds of thousands of music users of all types; (2) the administrative ability to license such music users; (3) the ability to survey such users for distribution purposes; (4) the ability to police and enforce the rights of members of affiliates through infringement suits; (5) the ability to distribute royalties in an appropriate fashion; (6) the representation of a repertoire with wide breadth from many copyright owners; (7) the use of standard forms of membership or affiliation agreements; (8) the use of standard rules for the distribution of royalties; (9) the ability to represent foreign performing rights societies in the United States. See, generally, the description of "performing rights societies" in Nimmer on Copyright, § 8.19.

89. Although the Tribunal offered ACEMLA every opportunity to make a record on its status as a "performing rights society," it has spurned the invitation. On this record, it is clear that ACEMLA is not a "performing rights society," and that Latin American Music and Latin American Music Co., Inc. (for which all claims have been withdrawn) are music publishers and therefore, at most, "copyright owners" under the law.

B. LAM Is Not Entitled To An Award

90. LAM has stated that its sole claim is through ACEMLA. It has also stated that ACEMLA's sole claim is as a "performing rights society," and not as a "copyright owner."

91. In view of the conclusion that ACEMLA is not a "performing rights society," neither it nor any LAM entity has any status to receive an award in these proceedings.

C. If LAM Were Entitled To An Award As A "Copyright Owner," The Award Would Be Minuscule

92. The only record evidence which permits any quantification of LAM's claim, if the Tribunal were to treat it as a "copyright owner," is the evidence of its track record of performances in the ASCAP and BMI surveys, and the results of the limited, informal survey of 76 jukeboxes located in Hispanic neighborhoods.

93. Taking the high and low potential awards derived from this evidence suggests that the "zone of reasonableness" for an award to LAM, if it had filed as a "copyright owner," would be between $36.60 and $564 for 1982 and between $47.50 and $555 for 1983.

D. ASCAP, BMI and SESAC Have Justified Their Entitlement To The Entire Funds, Less The Stipulated Awards To Italian Book Co.

94. The record evidence shows that ASCAP, BMI and SESAC are entitled to the entire funds, less the stipulated awards to Italian Book Co.

95. Witnesses with great expertise in the field of musical performing rights have testified as to the dominant position of ASCAP, BMI and SESAC, and their testimony is credible. The Tribunal should also take administrative notice of the dominant position of these organizations, as suggested by the Second Circuit.

96. The conclusion that ASCAP, BMI and SESAC are entitled to the entire funds is corroborated by their chart evidence. Indeed, it is instructive to contrast the use of charts as evidence by ASCAP, BMI and SESAC with LAM's use of charts. ASCAP, BMI and SESAC submitted analyses of available 1982 and 1983 charts. The charts used were for single records only. They came from the most generally recognized charts, published by Billboard, and from charts published by a jukebox trade magazine, RePlay. LAM, on the other hand, selectively

put in only those charts on which they alleged their own works appeared, and did not relate them to the entire year's results. LAM used LP charts as well as singles charts, although jukeboxes do not play albums. And the record is barren of any evidence on the reliability of the singles charts LAM selected.

97. ASCAP, BMI and SESAC also introduced persuasive evidence of the strength of their repertoires in Spanish-language music. Indeed, the record shows that the popularity of Latin music in the United States is due to works licensed by ASCAP, BMI and SESAC.

CONCLUSION

98. LAM is not entitled to any award. ASCAP, BMI and SESAC are jointly entitled to the entire 1982 and 1983 jukebox funds, less the awards to Italian Book Co. which no party has contested for 1982, and to which all parties have stipulated for 1983.

Respectfully submitted,

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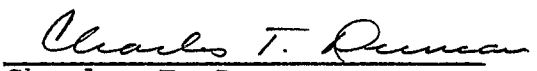

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of October, 1985 caused a copy of the foregoing "Proposed Findings of Fact and Conclusions of Law of ASCAP, BMI and SESAC" to be served via first-class mail, postage prepaid, on the following:

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