BEFORE THE COPYRIGHT ROYALTY TRIBUNAL

WASHINGTON, D.C.

ORIGINAL

In the Matter of	)	
	)	
1982 and 1983 Juke-Box	)	Docket No. 83-2
Royalty Distribution	)	Docket No. 84-283JD
Proceedings	)	

ASOCIACION de COMPOSITORES y EDITORES de MUSICA LATINOAMERICANA'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Asociacion de Compositores y Editores de Musica Latinoamericana ("ACEMLA"), by its attorneys, hereby submits its proposed Findings of Fact and Conclusions of Law with respect to the above-captioned proceeding.

BACKGROUND

By Order Consolidating Proceedings and Setting Future Procedural Dates, 50 Fed. Reg. 31645, published August 5, 1985, the Copyright Royalty Tribunal ("Tribunal"), consolidated the distribution of the 1982 and 1983 Jukebox Royalty Funds. Previously on November 5, 1984, the Tribunal declared that a controversy existed in the distribution of the 1983 Jukebox Royalty Fund, 49 Fed. Reg. 46458, published November 26, 1984. The Tribunal determined that the controversy existed only as to 5% of the 1983 Fund which represents Spanish language musical works performed on jukeboxes and ordered the distribution of 95% of the 1983 fund. 49 Fed. Reg. 48956, published December 17, 1984. On May 30, 1985, the United States Court of Appeals for

the Second Circuit vacated the 1982 Jukebox Royalty Distribution determination for the disputed 10% of the fund and remanded for further proceedings.[1/] The part of the fund which was in dispute was Spanish language musical work performed on jukeboxes. Consequently, the Tribunal found that the parties and issues of the remanded 1982 proceeding and 1983 proceeding were substantially the same and therefore consolidated the two proceedings. The Tribunal Order specified the following issues:

(1) The status of ACEMLA, Latin American Music, Latin American Music, Inc. and Italian Book Company ("IBC").

(2) Entitlement - 1982 - The parties must prove entitlement to the 5% of the 1982 fund that remains in controversy.[2/]

(3) Entitlement - 1983 - The Tribunal mandated that ASCAP, BMI and SECAC (ABS) must prove entitlement to 100% of the 1983 fund while ACEMLA must prove entitlement to 5% of the fund. The Order noted that IBC must submit its 1983 claim and must prove entitlement.[3/]

On January 7, 1985, the Tribunal heard oral argument regarding how the parties might prove entitlement to the portion of the fund which represents Spanish language music performed on jukeboxes. As a result, the Tribunal recommended the following submissions: (a) a survey of jukeboxes; (b) a sworn statement

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1/ A.C.E.M.L.A. v. Copyright Royalty Tribunal, 226 U.S.P.Q. 509 at 514 (2d Cir. 1985).

2/ 10% of the fund had been retained to assure sufficient funds to resolve any controversy, but after two individual claimants had not appealed and because the extent of ACEMLA's claim was 5%, the Tribunal distributed 95% of the fund.

3/ The parties have tentatively agreed to a stipulation whereby IBS would dismiss its claim.

from jukebox operators; (c) a survey of radio and other media performances; and (d) hit song charts.

On June 20, 1985, previous counsel for ACEMLA, in response to the Tribunal's letter of May 16, 1985, noted that ACEMLA owned no copyrighted works and that only Latin American Music and Latin American Music, Inc. owned copyrights. Those three entities were parties to an agreement whereby ACEMLA was authorized to license the public performance of all nondramatic musical works on behalf of Latin American Music and Latin American Music, Inc. Consequently, the original claim filed jointly by those three entities was amended to reflect ACEMLA as the sole claimant.

ISSUE I - STATUS OF ACEMLA

1. ACEMLA is the assumed name of a New York State business corporation named Latin American Music Company, Inc. which holds certain mechanical rights (Statement of Raul Bernard, p. 1, Tr. 180-181). The certificate of assumed Name was filed with the New York State Department of State Corporations and State Records Division on April 16, 1984 (ACEMLA Direct Case Ex. 1). However, the name ACEMLA was used prior to 1984 (Tr. 207-208). ACEMLA is a division or a subsidiary of Latin American Music Company, Inc. ("LAM") which represents and administers the performing rights held by LAM (Tr. 180-181).

2. LAM and ACEMLA have a business address at 214 West 96th Street, New York City, New York (Tr. 211). They receive correspondence from composers and publishers at this address (Tr. 373). This is also the business address for OTOAO Records

International. LAM, ACEMLA and the record company share five employees (Tr. 203, 213-214). LAM, the parent of ACEMLA, also has a business address in Puerto Rico where it employs an individual on a part-time basis. It sometimes employs persons in Philadelphia as well (Tr. 213).

3. Mr. Raul Bernard is President and sole stockholder of LAM and principal of ACEMLA. He described ACEMLA as a performing rights society or organization (Tr. 125, 176). ACEMLA does not own any copyrighted material (ACEMLA Direct Case, Statement of Mr. Bernard, p. 1). It has no affiliation with any statutorily defined performing rights society (id.) ACEMLA's function is to license performing rights on behalf of composers and publishers to users (Tr. 175-176). It is assigned musical works by various entities that own these works, and thereby controls their performing rights (Tr. 177). Besides representing and administering the performing rights of LAM (Tr. 180-181), ACEMLA also holds agreements with other domestic and foreign publishing companies and foreign rights societies to represent them in the capacity of a performing rights society (Tr. 183).[4/] Examples of these foreign and domestic entities are Edimusica of Colombia; Sadram of Equador; West Side Music, Manhattan (New York City); Hony Incorporated in Mexico, and

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4/ See, also, those materials exchanged with the Tribunal and the parties on October 16, 1985 at the Tribunal's request.

others (Tr. 227). ACEMLA has written authorizations from these entities (Tr. 227).

4. Mr. Bernard stated that ACEMLA has between 50,000 and 100,000 song titles in its repertoire (Tr. 190). (Partial catalogue of copyrights of LAM, partial catalogue EDIM/LAM submitted as Exhibits A and B in the 1982 Juke-Box Royalty Distribution proceedings on October 11, 1983.)

5. Examples of ACEMLA's agreements with publishers and composers included a rider which states at Paragraph 4 that "all performance rights are also assigned to LAMCO under this agreement, pursuant to first and second clauses hereof. That LAMCO shall represent the composer before any and all performance royalty, collection societies in the United States and throughout the world; and that it may negotiate these rights in accordance with and under the terms of the said exclusive agreement" (ACEMLA Direct Case, Ex. 2, p. 5, ABS Ex. 10, p. 5). These riders were in use in 1982 and 1983 (Tr. 267).

6. A similar rider at Paragraph 5 contains the following language:

> The composer declares that he is not a member of any composers organizations or society controlling his performing arts, that all such performing rights are exclusively controlled as part of this contract, that the composer is aware that his performing rights, in their totality, will be administered and under the name of the editor, Latin American Music Company, Inc., LAM and/or Asociacion de Compositores y Editores de Musica Latinoamericana. (ACEMLA Ex. 2, p. 5; ABS Ex. 10, p. 6, Tr. 273.)

7. Mr. Bernard testified that Paragraphs 4 and 5, respectively, provide the signatory with membership in ACEMLA (Tr. 270-276). ACEMLA's distribution system is premised upon contractual agreements with composers, editors and other entities with which it reaches agreement. Most of these agreements require a 50% division of all royalties collected by ACEMLA in the future (ACEMLA Direct Case Statement of Mr. Raul Bernard, Tr. 279-282). The 50% allocated to ACEMLA as licensor will be allocated to each title and reported as such using actual airplay from radio station and television station logs obtained from licensed stations. If no such logs are produced, airplay time is documented through monitoring (Tr. 233-234). ACEMLA's proposed contract with broadcast stations requires the station to submit to ACEMLA the actual program logs (Tr. 234). To date, ACEMLA has not entered into agreements with broadcast stations (Tr. 235). However, ACEMLA is currently monitoring Spanish language broadcast stations as well as taping and maintaining some of the programs (Tr. 235, 237). ACEMLA organizes the data recorded into groups with dates, times, and titles. The information is maintained in case ACEMLA has to proceed legally against any entity (Tr. 237). ACEMLA performed similar monitoring and taping activities in 1982 and 1983. The data compiled from monitoring and taping activities will be used to make distributions as soon as ACEMLA begins collecting royalties (Tr. 258).

8. For distribution purposes, consideration is also given to data obtained through the composer or editor. The additional information includes actual reported mechanical sales and performance information. Furthermore, both local and national charts may be used to reflect a higher or lower percentage levels of distribution payments depending on the overall performance rate (ACEMLA Direct Case Statement of Mr. Raul Bernard, p. 3). On occasion, ACEMLA has advanced money to composers and publishers against future royalties (Tr. 244-255; ABS Ex. 10X, para. 5, p. 5).

9. Since 1982, ACEMLA has been involved in the enforcement of its members' rights and the collection of royalties on their behalf. ACEMLA has notified many broadcast stations of its representation (ACEMLA Direct Case Ex. 3, pp. 1-12, 14-16, 18-20). Moreover, broadcast stations have recognized ACEMLA"s claim. Station WJIT at New York City requested interim permission to continue to play compositions from ACEMLA's catalogues. This temporary authorization was granted. Further, WJIT investigated and found that ABS did not have the right to license the selections that WJIT was playing (ACEMLA Ex. 3, pp. 8-9).

10. ACEMLA is presently negotiating with Radio Station WNWK at Newark, New Jersey in order to obtain a license from that organization and negotiations between the two parties are continuing (Tr. 183-184). In fact, ACEMLA has written to over 300 radio and television stations in its attempt to license its repertoire throughout the United States (Tr. 184).

ISSUE II - ENTITLEMENT

A. ABS

11. Gloria Messinger is the Managing Director of ASCAP. She has been employed by ASCAP for the past 30 years and has worked exclusively for that organization (ABS Exhibit Direct Testimony of Gloria Messinger).

12. Ms. Messinger offered the conclusion that "virtually all" copyrighted music performed in the U.S. is licensed to ABS (Tr. 27). She testified that "It would be most extraordinary not to belong to one of those organizations because . . . you can't effectively license performances in a territory as big as the United States and around the world without being associated with one of these organizations" (Tr. 28). Ms. Messinger opined that failure to join ABS would be illogical (Statement p. 3).

13. Ms. Messinger testified that ASCAP performed a limited survey of songs on 76 jukeboxes in New York, Miami, San Antonio and Los Angeles (Tr. 31-33). The survey was performed during August 1985 (Tr. 64, Statement p. 7). It was accomplished by ASCAP personnel at locations selected by these personnel and the results were tabulated and analyzed by ASCAP employees as well (Tr. 65, 68-69, 71).

14. According to Ms. Messinger, the survey showed that 11,600 songs were listed in the 76 jukeboxes (Tr. 73). Of these listings, 45 were allegedly from ACEMLA's catalogue, and Ms. Messinger believed that 23 individual songs were duplicated (Tr. 36, 73).

15. Ms. Messinger noted some reservations about the survey's validity (Tr. 34). She conceded that the survey did not represent a random sample (Tr. 34). It only ascertained what works were listed on a given jukebox and did not attempt to address which works were actually played on the jukebox (Tr. 35). One of the limitations that Ms. Messinger acknowledges was that the survey did not include any songs that she knew for certain appeared on the jukeboxes in 1982 and 1983 (Tr. 72).

16. Appendix A consists of the most performed Spanish language songs in ABS catalogues for 1982 and Appendix B consists of the most performed Spanish language songs in ABS catalogues for 1983 (Tr. 44). The songs listed in Appendices A and B are not the songs most played in jukeboxes in 1982 and 1983. They are the most performed Spanish works based on an analysis of the ASCAP survey which tallies the world performances and includes radio as well as all other media (Tr. 44, 47).

17. The same 74 song titles appear in Appendix A for 1982 and in Appendix B for 1983. Ms. Messinger's only explanation for this duplication was her testimony that " . . . it is a fact of a scientific random sample where works that are most performed are most performed" (Tr. 54). However, the song "Amigo Mio" is not listed as a most performed Spanish song in the ABS catalogues for either 1982 or 1983 (Exhibits A and B). See paragraphs 23, 41 and 44, <u>infra</u>.

18. Ms. Messinger did not know whether any of the songs listed on Appendices A and B were manufactured as 45 rpm

recordings (Tr. 53). Nor did she have any direct knowledge that any of the songs listed on Appendices A and/or B actually appeared on jukeboxes in 45 rpm format during 1982 and 1983 (Tr. 54).

19. Paul Adler is ASCAP's Director of Membership. Mr. Adler has been employed by ASCAP in various positions since 1967 (Tr. 100-101). Mr. Adler's duties include the maintenance of information about what works are in the society's repertoire, and the distribution of royalties to the society's members and the members of foreign societies who license through ASCAP. He also deals with surveys of peformances and the distribution of money based on the surveys (Tr. 102).

20. The ASCAP general survey is a random stratified, disproportionate survey (Tr. 108). The survey sample consists of 60,000 hours of local radio performances, 30,000 hours of local television performances, a complete count of performances on the television networks, and surveys of background music services such as Muzak Seaberg, Magnatronics, Custom Music, airlines and live performances at colleges, universities and concert halls (Tr. 109, 123).

21. The survey of local radio is accomplished by means of tape recordings taken 365 days a year randomly, around the clock, without the knowledge of the station. The tapes are sent to New York where ASCAP's staff listen to the tapes and write down the titles they can identify (Tr. 110).

22. ASCAP, by its Managing Director's testimony, believes that the Juke-Box Royalty Funds should be distributed on the basis of ABS' general surveys (Tr. 44-45).

23. ASCAP took ACEMLA's list of the 179 most performed works in its catalogue (ACEMLA Ex. 13) and ran it through the ASCAP survey for 1982 and 1983 to determine the hypothetical share of credits these works would have earned (Tr. 112-113).

24. ASCAP claims to own the rights to three titles on the ACEMLA list of 179 titles; "Amigo Mio", "La Verdad" and "Se me Fue." BMI claims to own two works claimed by ACEMLA; "Cerveza, Humo Y Licor" and "Negando Su Idioma." Therefore, ASCAP did not compute credits for these five titles (Comments of ABS, filed September 8, 1985).

25. After deducting a hypothetical 50% share for ASCAP of the royalty funds, ASCAP determined that ACEMLA's titles, if licensed to ASCAP for 1982, would have been entitled to an award of $157.01 if based on the survey of performances of all media, and $362.23 if based on a survey of radio performances only. For 1983, the two awards would be $112.07 and $256.66, respectively (Tr. 144-148).

26. BMI performed a similar survey, utilizing its survey of works performed in all media. It concluded that if ACEMLA"s titles were in BMI's catalogues, the songs would be entitled to $36.60 of the 1982 Jukebox Royalty Distribution and $47.50 of the 1983 distribution. Id.

27. Mr. Adler testified that there is virtually nothing that is performed of any consequence that is not in the repertiore of ABS or the foreign societies they represent (Tr. 114). He also testified that with the exception of ACEMLA, he knows of no other performing rights societies in the U.S. (Tr. 120).

28. Spanish language radio stations were represented in the ASCAP survey in the same way that any other radio station offering any kind of format would have been represented (Tr. 136). Spanish language radio and television stations were not specifically addressed in the BMI survey which utilizes a universal random sample of all broadcast stations. BMI's survey did not take into consideration performances derived from jukebox play (Tr. 155).

B. ACEMLA

29. According to the 1980 U.S. Census, the number of individuals 5 years or older who speak Spanish at home is 12,117,606 out of a total population 5 years or older of 210,204,743 or approximately 5 percent (ACEMLA Ex. 8, p. 2).

30. According to the U.S. Census, in March 1983, Hispanics constituted 6.4% of the U.S. population. Further, 63% of Hispanics were 29 years of age or younger in 1980 as compared to 49% for non-Hispanics (ACEMLA Ex. 8, p. 1).

31. According to the results of a study undertaken by Discos CBS International cited in Music Video Retailer, New York, New York, January 1983 p. 22, the Hispanic record buyer

bought more records than the Anglo record buyer. Of the 20 records and tapes a Hispanic buys per year according to the study, 16 are of Spanish music (ACEMLA's Supplemental Statement in Justification of Claim, Ex. E, submitted in Docket no. 83-2).

32. In an article entitled "Spanish Speaking Market - On the Move: Largest Ethnic Group in the U.S.", Music Video Retailer, New York, New York January 1983, it was noted that the median age of Hispanics is 22 and the Spanish audience "exhibits a fierce allegiance to its homeland. . . . To the Spanish-speaking person, music is a significant part of his life." The article also indicates that 84% of U.S. Hispanics live in only 9 states. Id. at Ex. F.

33. According to Broadcasting Yearbook 1985, there are between 200 and 250 Spanish language radio stations (ACEMLA Ex. 9X, Tr. 335). Mr. Bernard stated that some of these stations are performing works licensed to ACEMLA (Tr. 334).

34. ACEMLA Exhibit 4 consists of photocopies of 45 rpm records containing titles that are part of ACEMLA's catalogue (Tr. 315). The exhibit consists of 43 photocopies of separate records (Tr. 319, ABS Ex. 10X). These titles include "Ultimatum" (ACEMLA Ex. 4, ABS Ex. 16X).

35. ACEMLA Exhibit 5 consists of Latin or Hispanic hit song charts for various dates in 1982 from various publications such as GUIA Radial; Canales Magazine; El Diario La Presensa;

Billboard[5/]; and charts from radio stations in Puerto Rico and New York. The charts are marked to reflect those albums which includes titles that are in the ACEMLA catalogue (ACEMLA Ex. 5, Tr. 186).

36. Examination of the titles in the charts for 1982 and 1983 will reflect that most of the titles which appear in 1982 do not appear in 1983 and vice versa (ACEMLA Exs. 5 and 6).

37. ACEMLA Exhibit 6 consists of Latin, Hispanic or Spanish language hit record charts from various dates in 1983 from various publications including Billboard; Canales Magazine; Radio Hit; GUIA Radial; and El Diario de New York. The charts are marked to reflect these records which contain titles that are in ACEMLA's catalogue (Tr. 186).

38. At least 11 of the 45 rpm records which contain titles in ACEMLA's catalogue and which are in ACEMLA's Exhibit 4 appeared on the 1982 and 1983 Latin/Spanish/Hispanic hit record charts that are included in ACEMLA Ex. 5 and 6 (ABS Ex. 16-X). Some titles such as "Ultimatum", "Amor Comprado" and "El Sueno" appear on several different hit record charts published by various publications and stations in different locations throughout the years 1982 and 1983 (ACEMLA Ex. 5 and 6).

39. Examination of ACEMLA Exhibits 5 and 6 reveals that numerous titles in ACEMLA's catalogue other than the titles

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5/ Testimony showed that the records listed in the Billboard charts submitted by ACEMLA were longplaying albums, but that hit songs on the LPs were manufactured in 45 rpm format (Tr. 186-187).

depicted on the 45 rpm records appearing in ACEMLA Exhibit 4 also appeared in the Latin/Spanish/Hispanic hit record charts.

40. Exhibit 10 is comprised of documents prepared by personnel at Radio Station WJIT and given to Mr. Bernard upon his request (Tr. 335, 338). The documents consist of records played on WJIT broadcasts during various dates in 1981 and 1982 (Tr. 337). The titles of these songs are numbered. Some of these numbers and titles are circled. One of the titles listed and circled on pages 1, 5 and 7 is "Ultimatum" (ACEMLA Ex. 10).

41. Pages 1-4 of ACEMLA Exhibit 12 consists of the affidavit of Mr. Enrique Reyes. Mr. Reyes states that he is employed by A-1 Record Sales which distributes 45 rpm records to the jukebox trade. Mr. Reyes states that in Attachment 3 to his affidavit (p. 4), he has marked what he believes to be the "best sellers" or "hit" 45 rpm record titles during 1981-82 and 1983. Comparison of the titles marked with the most popular titles in ACEMLA"s catalogue, Exhibit 13, will show that most, if not all of the titles marked, such as "La Cucharita", "Ay Doctor", "Ultimatum" and others are in ACEMLA's catalogue.

42. Pages 5, 6, 7, and 8 of ACEMLA Exhibit 12 are also the affidavits of individuals involved in the distribution of records for the Spanish trade. The first affiant, Mr. Cruz, states that during 1982 and 1983, his firm sold 4000 45 rpm records to jukebox operations, while the second affiant, Mr. Amadeo, states that his firm sold 3000 45 rpm records to jukebox

operators. The affidavit states that the titles on the list were included. Attached to both affidavits are lists of song titles, some of which have been marked. Comparison of the titles marked on the attachment with the titles listed in Exhibit 13 will show that many, if not all, of the titles are identical (ACEMLA Exs. 12 and 13).

43. The title "Amigo Mio" has been marked on page 8 by Mr. Amadeo to indicate that the title was a popular seller to public and jukebox operators in 1982 and 1983 (ACEMLA Ex. 12, p. 8).

44. ACEMLA Exhibit 12, pages 9-30 consists of twelve (12) affidavits of owners and/or operators of jukeboxes in Philadelphia, Pennsylvania. The affidavits state that the titles marked on the page attached to the affidavit were performed in the specific jukebox during the years 1982 and 1983.

45. Many if not all of the titles marked on the affidavits are identical to the titles in ACEMLA Exhibit 13.

46. On each of the twelve affidavits, the title "Amigo Mio" is marked as being played in the jukebox during 1982 and 1983 (ACEMLA Ex. 12).

CONCLUSIONS OF LAW

ISSUE I - STATUS OF ACEMLA

1. 17 U.S.C. Section 116(c)(3) provides that if the Tribunal determines that a controversy exists with respect to the distribution of royalty fees deposited under subclause (A) of

Subsection (b)(1), the Tribunal shall, pursuant to Chapter 8 of Title 17, conduct a proceeding to determine the distribution of royalty fees.

2. 17 U.S.C. Section 116(c)(4) provides that the fees to be distributed shall be divided as follows:

> (A) to every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.
>
> (B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.
>
> (C) during the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

3. 17 U.S.C. Section 116(e)(3) defines "performing rights society" as "an association or corporation that licenses the public performance on non-dramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc."

4. ACEMLA is a subsidiary of Latin American Music Company, Inc. and ACEMLA represents, administers and licenses the performing rights of musical works on behalf of the composers and publishers to users of those musical works whether the use be in jukeboxes, radio or television or other media. ACEMLA not

only licenses the performing rights of works which have been published by LAM and assigned to ACEMLA by LAM, but also holds agreements with other domestic and foreign publishing companies and foreign rights societies to represent them in the capacity of a performing rights society.

5. Further, ACEMLA has been authorized, pursuant to written and signed contracts with domestic and foreign composers, publishers and performing rights societies to administer and license the performing rights of between 50,000 and 100,000 predominantly Spanish or Latin song titles.

6. The record evidence clearly shows that ACEMLA performs the activities and duties of a performing rights society. It monitors and tapes broadcast stations to determine whether its members' works are performed. It keeps these tapes and other records, including mechanical sales and performance information as well as local and national sales charts for two primary purposes: (1) the enforcement of its members' rights and (2) the distribution of royalties when received.

7. ACEMLA has attempted to the best of its ability to enforce the rights of its members, and has notified over 300 broadcast stations of its catalogue. It has also attempted to negotiate licensing agreements with a few of those stations.

8. Moreover, ACEMLA's "status" as a "performing rights society" has been recognized by at least two radio stations. WJIT, New York City has, for better or worse, recognized

ACEMLA's authority to license its member's work by ceasing to broadcast the works of ACEMLA's members after discovering that ABS did not have the authority to license these works. More positive recognition of ACEMLA's legitimacy is reflected in the ongoing negotiations with WNWK, Newark, New Jersey.

9. Finally, ACEMLA has a "distribution system" to distribute all royalties collected by ACEMLA which is grounded upon the organization's agreements with its members and other entities. Moreover, ACEMLA has, on occasion, advanced money to composers and publishers against future royalties.

10. Pursuant to 17 U.S.C. Section 116(e)(3)'s definition of a performing rights society, ACEMLA is an association that "licenses the public performance of non-dramatic musical works on behalf of copyrighted owners. . . ."

11. ACEMLA has previously submitted signed contracts with its members authorizing it to license their works. ABS has itself corroborated ACEMLA's authority, as opposed to theirs, to license various works. As noted, ACEMLA has attempted to enforce the rights of its members and maintains data and records in order to distribute royalties. ACEMLA describes itself as a performing rights society and its members - copyright owners - having signed agreements with ACEMLA rather than with ABS, demonstrate that they consider ACEMLA to be a performing rights society. ACEMLA, through its past and present dealings, acts like a performing rights society.

12. The statutory definition of a performing rights society sets forth the attributes of such a society, and provides certain examples, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

13. ACEMLA is in many ways similar to the "Big Three" in that it monitors and otherwise keeps itself apprised of the performance of its members' works and attempts to license the performance of those works. While ACEMLA is a substantially smaller entity than ABS, this fact is irrelevant to its status and is actually a function of its membership and their present needs. ACEMLA's membership overwhelmingly consists of Hispanic or Spanish-speaking composers and publishers. While Latin music is a steadily increasing share of the entire music market, it is not yet so great that an organization the size of ASCAP is necessary.

14. Moreover, size is relative. ASCAP is a larger organization than BMI. Both ASCAP and BMI are larger than SESAC. Further, IBC was a party to the voluntary agreements for distributing the jukebox royalties in 1981 along with ABS. 47 Fed. Reg. 53937 (1982). Pursuant to 17 U.S.C. Section 116(c)(4)(B) the royalties can only be distributed pursuant to a voluntary agreement <u>among performing rights societies</u>. IBC was, therefore, by statutory construction, a "performing rights society."[6/]

6/ That IBC has proposed a settlement conditional on a present admission that it is not a performing rights society is irrelevant. Its position derives from a wish to settle and does not affect its status before the Tribunal in previous years.

15. ACEMLA submits that IBC was not as large an entity as ASCAP, BMI or even SESAC, but that its size did not prevent it from assuming "performing rights society" status, nor has it barred the recognition of IBC as a performing rights society in the past. ACEMLA's size is equally irrelevant in a determination of its status under the Act. "Bigness" is nowhere inferred in the statutory language of Section 116(e)(3).

16. Finally, if ACEMLA is not a "performing rights society", what is it? It is not a copyright owner because it owns no copyrights. Yet is is authorized by copyright owners, i.e. composers and publishers, to license their work. Further, ACEMLA actively seeks to do just that. The only difference between ACEMLA and ASCAP, BMI and SESAC so far is size and success. For all other practical purposes and by any other measure or definition, ACEMLA is as much a performing rights society as ABS.

ISSUE II - ENTITLEMENT

A. ABS

17. Pursuant to the Tribunal's Order Consolidating Proceedings, supra, ABS must prove entitlement to the remaining 5% of the 1982 fund and 100% of the 1983 fund. However, the record reflects no evidence that ABS is entitled to even one thin dime of the jukebox royalty fund.

18. ABS' entire case rests on its repeated assertion that "virtually all" copyrighted music performed in the United States

is licensed to them, and that, therefore, the total jukebox funds should be distributed by them in the wake of their general survey.

19. However, ABS has not shown any relationship between its annual general survey which takes into account all performances except jukebox, or any direct evidence that any of its repertoire was even played on jukeboxes in 1982 and 1983. Further, pursuant to the results of ABS' own meager jukebox survey and the evidence submitted by ACEMLA regarding its entitlement (and ABS' failure to refute it), it is clear that, while ABS may license much of the performances in the United States, it does not license all of it, especially with respect to current popular Spanish language music played on jukeboxes.

20. Both ASCAP's and BMI's (and presumably SESAC's) surveys are for all purposes, if not identical, then extremely similar. They take into account performances of a work in radio, local and network television, record sales, surveys of background music services such as Muzak, and live performances in concert halls and colleges. They then apply "credits" to the work apparently based on the frequency of its performance. While the general surveys do not take into account jukebox performances of a work, it is ABS' belief that, absent a survey of jukeboxes, the jukebox performance "world" is a rough microcosm of the general survey world which may differ, but not significantly. Therefore, ABS argues that the jukebox fund should be

distributed to ABS, to be in turn distributed to its members on the basis of the member's showing in the general survey.

21. There are a number of fatal flaws to this conclusory logic. First, if there is to be any correlation between the performance of a work counted in the ABS general surveys and in a jukebox, the work must have been manufactured on a 45 rpm record, i.e. a maximum length of approxiamtely five minutes. This technical, mechanical limitation excludes opera, much classical music, and much jazz since the advent of the 33 1/3 rpm record (approximately 1950), and any other performance that exceeds the technical limitation.

22. Second, as a practical matter (and the Tribunal may take judicial notice of real world experience), certain categories of music are not frequently played on jukeboxes.[7/] While jukeboxes primarily devoted to short classical music pieces do exist, one may conclude that they are a "rara aves". The same may logically be said of other musical genres.

23. Third, a survey of all inclusive musical performances would be different than a survey of jukebox performances because of the very nature of jukeboxes. Jukeboxes, to be profitable, must reflect songs people want to pay hard cash to hear and are, therefore, more geared to current popularity and the transitory nature of public taste. A survey of world performances would, in contrast, tend to reflect less change year after year because

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7/ Federal Rules of Evidence, Article II, Rule 201(b).

of the proportionately higher repeat performances of standards and "golden oldies".

24. For example, consider ABS' survey of its most popular Spanish titles for 1982 and 1983. They are the same for both years according to Ms. Messinger because "what is most performed is most performed." In contrast, review the record charts submitted by ACEMLA for 1982 and 1983. The titles are not the same. Therefore, the popularity of at least Spanish songs change from year to year. Because jukeboxes must reflect what the public wants to hear to be financially viable, one can reasonably conclude that jukebox titles are, to some extent, also transitory. Therefore, in addition to the fact that ABS has offered no material evidence to establish that ABS' general surveys relate to jukebox performances, there are many theoretical and conceptual arguments which would contradict ABS' argument. The jukebox royalty fund is a finite, discrete amount of money which, by law, must be distributed to the individuals and entities whose copyrighted work is actually played on jukeboxes. Use of the ABS general survey will not accomplish this end even in rough approximation.

25. For example, the song "Alice's Restaurant" by Arlo Guthrie is a frequently performed song and, therefore, may earn many credits in the general survey. However, the song is too long to appear in 45 rpm format and thereby make its way into jukeboxes. Yet the composer/publisher will receive a portion of the jukebox royalty fund notwithstanding that the work has never been performed on a jukebox!

26. Alternatively, consider the song "Amigo Mio" to which both ASCAP and ACEMLA claim to hold the rights.[8/] As noted previously, "Amigo Mio" does not appear as one of ASCAP's most performed titles in 1982 and 1983. Further, considering the totality of the world's performances of all music of all categories and types, it is safe to assume that "Amigo Mio" will not garner many credits in the 1982 and 1983 ASCAP surveys. To the extent that it was frequently listed by jukebox operators/owners and suppliers as a popular song in those years, "Amigo Mio" appears to have been frequently performed on jukeboxes in 1982 and 1983 and, therefore its copyright holder(s) may be entitled to some portion of the fund. However, if the fund is redistributed via ASCAP's general survey, "Amigo Mio"'s copyright holder(s) will receive little, if any, of the fund.

27. ABS has failed to show any concrete evidence that 100% of the titles on jukeboxes are in their repertoire. They cannot even show it theoretically. If reference is made to a more general radio survey, the very same defects are present. Many performances played on classical, jazz, beautiful music and other formatted types of radio stations may not appear on 45 rpm records or on jukeboxes.

28. No correlation plausibly exists between ABS' general surveys of the world's performances and the actual performances on jukeboxes. Nevertheless, ACEMLA recognizes that approxi-

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8/ ACEMLA is currently researching and documenting its claim with a view towards litigation against the publishers.

mately 100% of the jukebox royalty fund has been distributed on that basis in 1978, 1979, 1980 and 1981, and 95% of the fund for 1982. One may reasonably conclude in those years that many copyright holders received jukebox royalties they did not earn and that just as many copyright holders whose works were actually performed on jukeboxes received not a penny of the royalties to which they were legally entitled. This is the fallacy of the ABS surveys which, at their worst, deprive copyright holders of royalties to which they are entitled.

29. Yet ABS argues that the general surveys are the best measure of performances and that the Tribunal should apportion the vast majority of 1982 and 1983 funds on that basis to ABS. However, the Court of Appeals has noted that "[n]ot precise adjudication but fairness and rough justice seem to have been the congressional objectives established by the 1976 amendment" to the Copyright Act.

30. ACEMLA submits that distribution of the remaining 5% of the 1982 fund and 100% of the 1983 fund to ABS on the basis of their general surveys is neither "fair" nor "just", even "roughly", to the actual copyright holders of works performed in jukeboxes. Such a distribution could only be justified on the basis of administrative convenience and would exhibit a clear disregard of Congress' intent when it enacted the 1976 amendment to the Act.

31. In the instant case, contrary to ABS' assertions and based upon (1) ASCAP's own limited and self-serving survey of jukeboxes in 1985, (2) the affidavits of jukebox suppliers and owners/operators supplied by ACEMLA, and (3) the fact that titles in ACEMLA's catalogues were hit records in 1982 and 1983, one may reasonably conclude that no where near 100% of the titles in jukeboxes in 1982 and 1983 were licensed to ABS.

32. ABS has already received 95% of the 1982 fund, but it has not proven entitlement to the remaining 5% of the 1982 fund and has not shown that it is entitled to 100% of the 1983 fund.

B. ACEMLA

33. Pursuant to the record evidence, various titles in ACEMLA's catalogue were manufactured on 45 rpm records. Furthermore, examination of the record shows that these same titles were hit records and were therefore popular on Latin/Spanish record charts in 1982 and 1983. Additonally, these same titles are frequently cited in the affidavits of jukebox suppliers and owner/operators as being popular sellers in the jukebox trade in 1982 and 1983. It is clear that titles in ACEMLA's catalogue were in jukeboxes in 1982 and 1983 and were frequently played titles in jukeboxes in 1982 and 1983. These songs are the only songs which the record evidence shows did appear and were frequently played on jukeboxes in 1982 and 1983.

34. As noted in the U.S. Census statistics in 1983, Hispanics accounted for roughly 6.4% of the U.S. population and, in

total, are a younger group than non-Hispanics. Moreover, Hispanics buy more records than non-Hispanics, and, overall, music, especially Latin music, plays a "significant part" in their lives.[9/]

35. ACEMLA has stated in previous jukebox royalty proceedings, that jukeboxes tend to be located in "less fancy restaurants and bars." The Tribunal may take official notice of the validity of this submission. ACEMLA v. CRT, supra.

36. ACEMLA has also previously submitted that the establishments in which jukeboxes are located ". . . tend to exist in far greater numbers in poorer communities where, unfortunately, a large segment of the Hispanic population resides." Id. ABS has not made any showing to contradict this assertion.

37. Since Hispanics buy records in a greater proportion than the general population, it is reasonable to conclude that Hispanics bought more than 6.4% of the records sold in 1983. Furthermore, the overwhelming majority of records bought by Hispanics were of Spanish language music.

38. Considering that a significant proportion of jukeboxes are found in establishments located in Hispanic neighborhoods, that these establishments are frequented by the Hispanic population, and in light of the importance of Spanish music to the average

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9/ The Tribunal may take official notice of the Arbitron study "Radio Today: The Hispanic Listener" which was reported in Broadcasting, August 12, 1985, and which corroborates the above information.

Hispanic, it may be concluded that the more popular Spanish titles on these particular jukeboxes were frequently performed.

39. These factors as they relate to jukeboxes alone result in a conclusion that the percentage of performances of popular Spanish songs on jukeboxes exceeds the percentage of the Hispanic population in the United States, i.e. more than 6.4%.

40. ACEMLA has shown through documentary evidence that (1) titles in its catalogues were among the most popular Latin/Hispanic songs in 1982 and 1983; (2) that these titles were manufactured on 45 rpm records; (3) that these titles were present on jukeboxes in 1982 and 1983; and (4) that these same titles were the major sellers to jukebox owners/operators in 1982 and 1983. It would be unreasonable to conclude that these same titles were not frequently performed in jukeboxes in 1982 and 1983.

41. Therefore, ACEMLA submits that with respect to total jukebox performances, and in light of the percentage of Hispanics in the general population, their higher proportionate purchase of records (especially of Latin music records), the high proportion of jukeboxes in establishments frequented by Hispanics, and the clear popularity of song titles which are in ACEMLA's catalogue on those jukeboxes in 1982 and 1983, ACEMLA is entitled to at least 5% of the 1982 and 5% of the 1983 Juke-Box Royalty Funds.

ULTIMATE CONCLUSIONS

42. ACEMLA is a "performing rights society" as defined by 17 U.S.C. Section 116(e)(3) because it is an association that licenses the public performance of non-dramatic musical works on behalf of copyright members.

43. ABS has not shown that it is entitled to any portion of the remaining 5% of the 1982 Jukebox Royalty Fund, nor has it shown that it is entitled to any of the 1983 Jukebox Royalty Fund.

44. ACEMLA, on the contrary, has shown that its members are entitled to the remaining 5% of the 1982 Jukebox Royalty Fund and that its is entitled to at least 5% of the 1983 Jukebox Royalty Fund.

Respectfully submitted,

ASOCIACION de COMPOSITORES y EDITORES de MUSICA LATINO-AMERICANA

By _____
Bruce A. Eisen

By _____
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October 17, 1985

CERTIFICATE OF SERVICE

I, Joanne K. Lee, a secretary in the law firm of Shrinsky, Weitzman & Eisen, P.C., do hereby certify that on this 17th day of October, 1985, I sent a copy of ACEMLA's "Proposed Findings of Fact and Conclusions of Law", via United States first class mail, postage prepaid, to each of the following:

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Acting Chairman
Copyright Royalty Tribunal
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Joanne K. Lee

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October 17, 1985

HAND DELIVERED

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Acting Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036

Re: 1982/1983 Jukebox Royalty Distribution Proceedings
Docket Nos. 83-2, 84-2, 83-JD

Dear Chairman Ray:

On behalf of Asociacion de Compositores y Editores de Musica Latinoamericana, we are filing herewith an original and four copies of its "Proposed Findings of Fact and Conclusions of Law" with respect to the above-captioned proceeding.

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

SHRINSKY, WEITZMAN & EISEN, P.C.

By Allan Mosk
Allan G. Moskowitz

Enclosures