

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

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JUN 17 1988

In the Matter of:)
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1986 JUKEBOX ROYALTY)
DISTRIBUTION PROCEEDING)
)

Docket No. 88-1-86JD

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC,
INC. ON THE ISSUE OF ACEMLA'S ENTITLEMENT

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Dated: June 17, 1988

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1. The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. (collectively, the "Settling Parties") hereby submit their Proposed Findings of Fact and Conclusions of Law on the issue of ACEMLA's entitlement, in accordance with the Order of the Copyright Royalty Tribunal ("Tribunal"), dated March 14, 1988.¹

¹ References to the record are as follows: Documents are referred to by abbreviation of sponsoring party or witness, and title of document. References to the 1986 transcript are given as Tr. ____, followed by the last name of the witness testifying, if appropriate. References to pages of the transcript and to witnesses' written statements in prior jukebox proceedings which have been incorporated by reference are preceded by the year of the proceeding in which they were submitted. Abbreviations used are: SP (Settling Parties); ACEMLA (Asociacion de Compositores y Editores de Musica Latinoamericana); LAMCO (Latin American Music and Latin American Music Co., Inc.).

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I. INTRODUCTION

2. The Tribunal has determined that ACEMLA was not a "performing rights society" in 1986, as that term is defined in 17 U.S.C. §116(e)(3).

3. Because ACEMLA is simply an assumed name for LAMCO, the Tribunal has, in similar circumstances in the past, considered ACEMLA's claim to royalties to be a claim by LAMCO as a "copyright owner not affiliated with a performing rights society," pursuant to 17 U.S.C. §116(c)(4)(A). Final Determination of the Distribution of the 1985 Jukebox Royalty Fund, 52 Fed. Reg. 46324, 46326 (1987); Final Determination of the Distribution of the 1984 Jukebox Royalty Fund, 51 Fed. Reg. 43455, 43457 (1986). ACEMLA's claim to royalties in this proceeding therefore is similarly, in reality, a claim by LAMCO, as a "copyright owner not affiliated with a performing rights society."²

II. BACKGROUND AND CHRONOLOGY

A. The Copyright Law

4. The Copyright Law requires the Tribunal to distribute annually compulsory license fees paid by jukebox "operators"

² Henceforth, all our references to "ACEMLA's" entitlement should be read as referring to LAMCO's entitlement as a "copyright owner not affiliated with a performing rights society."

for the privilege of performing publicly copyrighted musical compositions on "coin-operated phonorecord players."³

5. 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

³ These terms are defined in 17 U.S.C. §116(e), as follows:

"(1) A 'coin-operated phonorecord player' is a machine or device that --

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An 'operator' is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player."

[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," "as they shall by agreement stipulate among themselves"; in the absence of such an agreement, they must prove their entitlement. 17 U.S.C. §116(c)(4)(B). ACEMLA v. CRT, 763 F.2d 101 (2d Cir. 1985) ["ACEMLA I"]; ACEMLA v. CRT, 809 F.2d 926 (D.C. Cir. 1987) ["ACEMLA II"]; ACEMLA v. CRT, 835 F.2d 446 (2d Cir. 1987) ["ACEMLA III"]. The law defines a "performing rights society." 17 U.S.C. 116(e)(3).⁴ 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); ACEMLA I, 763 F.2d at 108.

B. The 1986 Jukebox Royalty Distribution Proceeding

6. Five entities filed claims to 1986 jukebox royalties: ASCAP, BMI and SESAC (the three statutorily-identified performing rights societies) appearing jointly; Italian Book Corporation ("IBC"); and ACEMLA, whose entitlement is at issue here.

⁴ "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."

7. By letter dated November 13, 1987, counsel for IBC advised the Tribunal that IBC had reached a voluntary agreement with the Settling Parties and withdrew its claim.

8. By Order of December 14, 1987, modified by Orders dated January 15, and March 14, 1988, the Tribunal announced that it would conduct the hearing on the 1986 Jukebox Royalty Distribution in two phases: Phase I would determine the status of ACEMLA -- i.e., whether ACEMLA was a "performing rights society." The Tribunal would then issue an interlocutory decision on that question. Depending on that decision, Phase II would consider proofs of entitlement either for ACEMLA alone, if ACEMLA was not found to be a "performing rights society", or for ACEMLA and the Settling Parties, if ACEMLA was found to be a "performing rights society".

9. On April 8, 1988, after development of a full record through written submissions and hearings, the Tribunal issued its interlocutory decision in Phase I on the question of ACEMLA's status. The Tribunal concluded that, for 1986, as in the past, ACEMLA was not a "performing rights society." It therefore became necessary for the Tribunal to assess proof only of ACEMLA's entitlement, as a "copyright owner not affiliated with a performing rights society." This was so because the Settling Parties were the only performing rights societies in these proceedings; had, as such, agreed among themselves on the division of the remainder of the fund; and

so were not required to present proof of their entitlement.
17 U.S.C. §116(c)(4)(B).

10. On May 4, 1988, ACEMLA filed the Phase II Direct Case of ACEMLA ("ACEMLA Wr. Case/Phase II").

11. On May 18, 1988, the Tribunal held an evidentiary hearing of ACEMLA's Phase II direct case, which was presented through the testimony of ACEMLA's "principal," L. Raul Bernard.

12. On May 25, 1988, the Settling Parties filed their Phase II Rebuttal Case ("SP Wr. Reb./Phase II").

13. The Tribunal conducted two days of evidentiary hearings on the Settling Parties' Phase II rebuttal case: On June 2, 1988, the Tribunal heard the testimony of BMI's Vice President of Corporate Relations, Robert L. Ahrold; and on June 3, 1988, the Tribunal heard the testimony of ASCAP's Director of Membership, Paul S. Adler.

14. At the conclusion of the hearing on June 3, 1988, the Tribunal closed the record. Tr. 144.

III. PROPOSED FINDINGS OF FACT REGARDING ACEMLA'S ENTITLEMENT

A. The Amount in Controversy

15. ACEMLA claimed all of "that portion of the copyright royalties [paid] by jukebox owners in 1986 attributable to the play of Spanish language music." ACEMLA Wr. Case/Phase II, p.1; Tr. 9-10. However, ACEMLA did not specify, in either

dollar or percentage terms, what that portion was.

16. In prior proceedings, ACEMLA's "evidence" on this question consisted of unanalyzed demographic data, which the Tribunal consistently rejected as unrelated to the question. 52 Fed. Reg. 46330; 51 Fed. Reg. 43459, n.1; 50 Fed. Reg. 47577, 47581-47582 (1985).

17. In this proceeding, ACEMLA presented no new evidence to assist the Tribunal on this issue. Instead, Mr. Bernard flatly refused to specify what portion of the total jukebox fund was represented by his claim to all of the "portion of the jukebox royalties attributable to the play of Spanish-language music during 1986." Tr. 9-10 (Bernard). Asked by Chairman Aguero for such a specification, Mr. Bernard replied: "That is for the Tribunal to decide."⁵ Tr. 9.

18. To assist the Tribunal in considering this question, the Settling Parties incorporated testimony presented in the 1985 jukebox proceeding by Latin music experts on the extent of the Spanish-language music market and on Spanish-language music use in jukeboxes. SP Wr. Reb./Phase II, Tab A, p. 3. That testimony established: (1) that Spanish-language 45 r.p.m. records are proportionately far rarer than English-language 45 r.p.m. records; (2) that the nature of the

⁵ When pressed by Chairman Aguero, ACEMLA's counsel stated that "[f]or a going-in claim, I guess [8% is as] good as any number." Tr. 10.

Spanish-language music market is such that 45 r.p.m. records are pressed, if at all, primarily as a promotional tool, for use by radio stations, and are not available for jukebox placement; and (3) that the Spanish-language music market is not national, but rather is local, and consists of many extremely diverse and fragmented markets. 85:Tr. 681-683, 688, 692, 694-695, 701-702, 761 (Garcia); 85:Tr. 443, 445 (Ahrold).

19. The Tribunal found this testimony of the Settling Parties' Latin music experts to be credible. 52 Fed. Reg. 46330.

B. ACEMLA Is Entitled to, at Most, 0.02122% of the 1986 Jukebox Royalty Fund

1. ACEMLA Introduced No Reliable Evidence of Entitlement for 1986

20. In discussing the testimony of the Settling Parties' Latin music experts, the Tribunal, in its 1985 jukebox royalty distribution decision, expressed concern that if 45 r.p.m. records had little or no significance in the Latin music industry, then evidence relating to Spanish-language album charts and the play of Spanish-language music on radio (the types of evidence which ACEMLA relied on in that and prior proceedings) "would have little connection to jukebox play." 52 Fed. Reg. 46330. The Tribunal noted, however, that the testimony of the Settling Parties' Latin music experts related to the practices of the Latin music industry generally, and

whereas the flyers, with certain exceptions, go through the bi-weekly period beginning November 22. Several titles appearing on the charts were omitted from the summary sheet and Mr. Bernard did not "have the slightest idea why." Tr. 22. The bi-weekly flyers for the periods beginning September 27, October 11, December 6 and December 20 were omitted. Mr. Bernard was unable to explain these omissions. Tr. 23.⁷

34. Each flyer submitted by ACEMLA contains two separate charts: a "Hit Parade," ostensibly purporting to list current titles ("Hit Parade of Today"); and a "Hit Parade Del Ayer," ostensibly purporting to list older titles ("Hit Parade of Yesterday"). Tr. 16, 24-25 (Bernard). Mr. Bernard acknowledged that most of the ACEMLA-claimed works appearing on these charts were listed on the "Hit Parade of Yesterday," though he was unable to specify how many of his titles appeared on which type of chart. Tr. 16, 25 (Bernard). In fact, 42 ACEMLA-claimed titles appeared on the "Hit Parade of Yesterday," whereas only 2 appeared on the "Hit Parade of Today." SP Phase II Exhs. 1X, 2X, 3X; ACEMLA Phase II Exh. 3; Response of ACEMLA, p.3.

⁷ After the hearing, at the Tribunal's direction, ACEMLA furnished an analysis of the September 27 and October 11 charts, but did not furnish the December 6 and 20 charts. Tr. 29-30. ACEMLA Response to Tribunal's Request for Additional Documentation, dated May 20, 1988, p. 3 ("Response of ACEMLA").

not specifically to ACEMLA's practices, which were not described in prior records. Id.

21. Therefore, in its 1985 decision, the Tribunal advised ACEMLA that, in future proceedings, ACEMLA would be required to "explain to the Tribunal more of its operations -- which songs have been recorded on 45 r.p.m. records, how many were released, how have they been distributed, and where." 52 Fed. Reg. 46330-46331.

22. Despite that advice, ACEMLA offered none of the evidence that the Tribunal said it would require for this proceeding. When Commissioner Argetsinger asked Mr. Bernard if he cared to comment on the absence of any such evidence from ACEMLA's Phase II Direct Case, Mr. Bernard responded that "it is not our operation to distribute or really to find out where these 45s are distributed. We know they are, as a matter of fact, within the business, within the trade, and all we can give you is what we have given you so far." Tr. 15.

23. Rather than comply with the Tribunal's advice and offer evidence which might materially assist the Tribunal in evaluating ACEMLA's unspecified claim, ACEMLA chose instead to offer precisely and only those same types of evidence on which it has relied in the past: (1) allegations that certain radio stations broadcast some ACEMLA works in 1986 (ACEMLA Phase II Exh. 2); and (2) introduction of certain 1986 charts allegedly listing ACEMLA songs, or albums containing ACEMLA songs

(ACEMLA Phase II Exhs. 1 and 3). Tr. 40 (Bernard). We deal with each type of evidence in turn:

24. ACEMLA's monitoring of four radio stations in 1986 was conducted in the same manner as ACEMLA's monitoring of three radio stations in 1985. Tr. 20-21 (Bernard); Tr. 21 (stipulation of ACEMLA's counsel); ACEMLA Wr. Case/Status, p. 3, ¶4.

25. Therefore, based on Mr. Bernard's testimony in the 1985 proceeding, we know that ACEMLA's 1985 and 1986 monitoring does not constitute a statistically valid, representative sample of performances on all Spanish-language radio stations 85:Tr. 344 (Bernard). The stations are not monitored continuously, and so there is no evidence of the frequency of performance of ACEMLA-claimed songs in relation to other songs for any period of time, let alone for the year 1986. 85:Tr. 343 (Bernard). Mr. Bernard was unable to offer any better evidence in this proceeding than he was in last year's proceeding; indeed, in response to a question from Chairman Aguero, Mr. Bernard could not even approximate the total number of different songs played on the four stations which ACEMLA monitored in 1986. Tr. 7-8.

26. In its 1985 decision, the Tribunal noted that, although it "had credited the works monitored by ACEMLA" in 1985, ACEMLA "ha[d] not given [the Tribunal] a statistically usable measure to relate the evidence to ACEMLA's percentage entitlement." 52 Fed. Reg. 46330. ACEMLA offered no evidence

this year to give the Tribunal such a statistically usable measure.

27. Further, a quantitative comparison of ACEMLA's monitoring results for 1985 and 1986 shows no significant change in either the total number of ACEMLA titles performed or in the total number of times such titles were performed, despite the fact that ACEMLA monitored four stations in 1986 as compared to three stations in 1985. ACEMLA's 1985 monitoring disclosed 227 performances of 139 separate ACEMLA-claimed titles, whereas ACEMLA's 1986 monitoring disclosed 274 performances of 127 ACEMLA-claimed titles. Compare, 85:ACEMLA Exh. 6 and ACEMLA Phase II Exh. 2 (Revised).

28. Turning to ACEMLA's record chart evidence, ACEMLA introduced no analysis of the 1986 record charts different from its analyses in prior proceedings.⁶

29. The Puerto Rican record store charts ACEMLA introduced in this proceeding are of the same type, from the same source, as the charts ACEMLA introduced in the 1985 proceeding. Compare, 85:ACEMLA Exh. 9 and ACEMLA Phase II Exh. 3; Tr. 40 (Bernard).

⁶ In the 1985 proceeding, ACEMLA introduced charts from: 1) Billboard; 2) Noticias El Mundo and Vocero, daily newspapers published in New York City, and 3) Guia Radial Del Show, a bi-weekly flyer which included two charts prepared by a single Puerto Rican record store located in Carolina, P.R. 85:ACEMLA Exhs. 7, 8, 9. For 1986, it introduced only charts from Billboard and the Puerto Rican record store and omitted entirely the charts from the New York City newspapers.

30. In the 1985 proceeding, one of the Settling Parties' Latin music experts testified that record store charts do not necessarily show what is being sold -- rather, they may show stock on hand which the store would like to sell. 85:Tr. 700 (Garcia). This is especially true in the Spanish-language music market, for there is a no return policy on Spanish-language 45s. 85:Tr. 682 (Garcia). Moreover, these particular record store song charts were suspect because works repeatedly appeared which were recorded by the individuals who ran the outfit which published the flyer containing the charts. 85:Garcia Wr.Reb. Test. pp. 9-10; 85:Tr. 705 (Garcia).

31. ACEMLA has offered no evidence that these same Puerto Rican record store charts were any more reliable or more probative of its claim in 1986 than they were in 1985.

32. In its written submission, ACEMLA claimed that its Phase II Exh. 3 was a "listing of ACEMLA's works appearing in 45 r.p.m. singles record hit parade charts during 1986." ACEMLA Phase II Exh. 3, p. 1. On direct examination, however, Mr. Bernard contradicted his own exhibit, stating that only "many" or "most" of the titles listed were ever available on 45 r.p.m. records. Tr. 15-16 (Bernard).

33. The summary sheet at page 1 of ACEMLA Phase II Exh. 3 purports to list all the titles highlighted by ACEMLA on the flyers containing the Puerto Rican record store charts which followed. However, the summary sheet only goes through June,

35. Moreover, Mr. Bernard was unable to state how the "Hit Parade of Yesterday" was compiled. Tr. 24 (Bernard). He did not know, for example, if that chart referred to songs popular on a specific date in the past. Tr. 24-25.

36. Mr. Bernard testified that ACEMLA-claimed songs are consistently popular throughout the year. Tr. 18. An analysis of the record store song charts submitted by ACEMLA disclosed that 34 ACEMLA-claimed titles were listed during the first six months of 1986, whereas only 10 such titles were listed during the last six months of the year. SP Phase II Exhs. 1X, 2X, 3X; ACEMLA Phase II Exh. 3; Response of ACEMLA, p. 3. Mr. Bernard had no explanation for the decline in listings of ACEMLA-claimed titles over the course of 1986. Tr. 31 (Bernard).

37. The Billboard Top Latin Album charts which ACEMLA introduced were the same type of evidence as the Billboard Top Latin Album charts which ACEMLA introduced in the 1985 proceedings: They were album, rather than singles charts. See, 85:ACEMLA Exh. 7 and ACEMLA Phase II, Exh. 1; Tr. 40 (Bernard). From testimony in the 1985 proceeding, we know that the Billboard Top Latin Album charts did not reflect any national popularity of the albums listed. 85:Tr. 763 (Garcia). The same is true for 1986.⁸

⁸ The geographic distribution of the Billboard charts on which ACEMLA-claimed works appeared in 1985 and 1986 is as follows:

(footnote continued)

38. In this proceeding, ACEMLA claimed that 60 different ACEMLA-controlled songs appeared on 28 different albums listed on the Billboard Top Latin Album charts. ACEMLA Wr. Case/Phase II, p. 3, ¶4. In response to a question from Chairman Aguero, Mr. Bernard was unable to state how many -- if any -- of these 60 songs were ever pressed as 45 r.p.m. records. Tr. 7.

(footnote continued from previous page)

For the first half of 1985, the Billboard charts which ACEMLA introduced indicated the following geographic distribution of album listings which contained songs ACEMLA claimed to control: New York - 36; Puerto Rico - 23; Florida - 11; California - 4; Texas - 0. 85:ACEMLA Exh. 7, pp. 1-7. For the second half of 1985, the Billboard charts disclosed that album listings identified by ACEMLA as containing ACEMLA-claimed works were grouped in three generic categories as follows: Tropical Salsa - 123; Pop - 9; and Mexican Regional - 4; 85:ACEMLA Exh. 7, pp. 8-18.

For 1986 Billboard Top Latin Album charts identified albums by generic category only (i.e., in the same way as had been done for the last half of 1985); they disclosed that album listings identified by ACEMLA as containing ACEMLA-claimed works were grouped as follows: Tropical Salsa - 198; Pop - 21; and Mexican Regional - 8. ACEMLA Phase II Exh. 1.

Note that the numbers given above refer to listings of albums, rather than to specific albums, and so contain duplications. Thus, hypothetically, a particular album which appeared on the Tropical Salsa chart for five weeks in a row is counted five times, not merely once.

It is interesting to note that, in response to Chairman Aguero's questioning, Mr. Bernard revealed that the radio stations ACEMLA monitored play the type of music which, according to the Billboard charts, ACEMLA does not control. Compare, the above analysis of ACEMLA's Billboard chart exhibits with Tr. 18-19 (WSKQ plays "mostly ballads, Mexican-type ballads"; WKDM plays "also some Mexican"; WJIT plays "also Mexican").

2. ACEMLA Claimed Songs Which Are
In the Settling Parties' Repertories

39. The Settling Parties analyzed the songs highlighted by ACEMLA in the 1982-1983, 1984 and 1985 proceedings, plus the songs highlighted by ACEMLA in this proceeding. Ahrold Wr. Reb./Phase II, pp. 3-5. In the 1986 proceeding, ACEMLA specifically mentioned 197 titles, of which 73 were in the Settling Parties' combined repertories. SP Phase II Exh. 3R; Tr. 117 (Adler). When the records of all prior proceedings from 1982 are added to these figures, we find that, for the proceedings covering the period 1982 through 1986, ACEMLA highlighted a total of 580 separate titles, of which 120 were in the Settling Parties' combined repertories. 84:SP Exh. 18R; 85:SP Exh. 34R; SP Phase II Exh. 3R.

40. In its decision in the 1985 jukebox proceeding, the Tribunal noted that it was "disturbed by the number of contested works" and "urge[d] the parties to settle or stipulate these matters." 52 Fed. Reg. 46331. In this proceeding, the parties have stipulated that, for purposes of any mathematical calculation of ACEMLA's award by any party, the evidence and analysis presented would both include and exclude those works claimed by both ACEMLA and the Settling Parties. Tr. 4-5.

3. The Songs ACEMLA Claims to
Control Were Not Performed
Significantly on Radio

41. As in past years, the Settling Parties analyzed the track record of performances of the works ACEMLA claimed and

highlighted as significant. This year, we included all 580 works specifically highlighted by ACEMLA in its 1982, 1983, 1984, 1985, and 1986 cases. Adler Wr. Reb./Phase II, p. 3; Ahrold Wr. Reb./Phase II, pp. 3-5; Tr. 119 (Adler); Tr. 57-59 (Ahrold). We did so because the Tribunal had requested such an analysis in prior proceedings, and had used the results as the starting point for its final determination of ACEMLA's award in each of those proceedings. Adler Wr. Reb./Phase II, p. 2; Ahrold Wr. Reb./Phase II, p. 2; 50 Fed. Reg. 47577, 47582 (1985) [1982-1983 proceedings]; 51 Fed. Reg. 43455, 43459 (1986) [1984 proceeding]; 52 Fed. Reg. 46324, 46330 (1987) [1985 proceeding].

42. As discussed above, pursuant to the stipulation of the parties, the Settling Parties analyzed the track record of radio performances of ACEMLA-claimed works on bases which both included and excluded the 120 songs ACEMLA claimed which are actually in the Settling Parties' repertories.⁹

⁹ When Messrs. Adler and Ahrold stated that there were 73 titles claimed by ACEMLA which are actually in the Settling Parties' combined repertories, they were referring to titles specifically highlighted by ACEMLA in its 1986 Phase II Written Case. Overall, however, for the period 1982 through 1986, ACEMLA has highlighted 120 separate titles which are actually in the Settling Parties' combined repertories. 84:SP 18R; 85:SP 24R; SP Phase II Exh. 3R. Thus, though Messrs. Adler and Ahrold stated that ASCAP and BMI calculated ACEMLA's share of the jukebox fund on bases which both included and excluded 73 disputed titles, those calculations were in fact undertaken on bases which both included and excluded all 120 disputed titles. The percentages set forth in the Settling Parties' evidence are accurate for calculations involving all 120 disputed titles. See e.g., Tr. 101-102 (Ahrold).

43. Based on ASCAP's 1986 radio survey, and using all the works highlighted by ACEMLA for 1982 through 1986, including the 120 songs which were in the Settling Parties' combined repertoires, ACEMLA would have earned only 0.02122% of the 1986 jukebox royalty fund. Adler Wr. Reb./Phase II, p. 5; Tr. 120 (Adler). If all 120 titles claimed by ACEMLA which are actually in the Settling Parties' repertoires were excluded from the calculation, the total ACEMLA would have earned for 1986 in the ASCAP radio survey would decrease to only 0.01217% of the fund. Id.

44. Based on BMI's 1986 radio performance analysis, ACEMLA would have earned 0.005209% of the 1986 jukebox royalty fund if the 120 songs in the Settling Parties' repertoires were included in the calculation, and 0.00211% of the fund if those 120 songs were excluded from the calculation. Ahrold Wr. Reb./Phase II, p. 5; Tr. 59-60 (Ahrold).

IV. PROPOSED CONCLUSIONS OF LAW RELATING TO ACEMLA'S ENTITLEMENT

A. ACEMLA Is Entitled to, at Most, 0.02122% of the 1986 Jukebox Royalty Fund

45. At the outset, we note that the burden of proof in this proceeding is entirely ACEMLA's. The Tribunal has determined that ACEMLA is not a "performing rights society." ACEMLA therefore has the sole responsibility for proving its entitlement -- a responsibility created and imposed by the Copyright Act itself, and not by the Tribunal. As the statute

says, ACEMLA merits only "the pro rata share of the fees to be distributed to which [it] proves entitlement." 17 U.S.C. §116(c)(4)(A). The Tribunal has confirmed in prior determinations that the burden is ACEMLA's alone:

If ACEMLA is a copyright owner, the Tribunal must consider it first, and the burden is on ACEMLA alone to affirmatively show its entitlement.

51 Fed. Reg. 43,455 [1984 proceeding]; see, also, 52 Fed. Reg. 46,324 [1985 proceeding].

46. In its 1985 decision, the Tribunal criticized ACEMLA for its failure to meet that burden of proof -- for the "lack of nexus between the assertions of ACEMLA and any desired conclusion ACEMLA may want the Tribunal to reach." 52 Fed. Reg. 46330. The same conclusion, we suggest, holds true in this proceeding.

47. In the 1985 determination, the Tribunal noted that, although ACEMLA's 1985 monitoring efforts indicated that ACEMLA-claimed works were performed on radio, ACEMLA had not given the Tribunal "a statistically usable measure to relate that evidence to ACEMLA's percentage entitlement." Id. The Tribunal also noted its particular concern that credible evidence given by the Settling Parties' Latin music experts established that 45 r.p.m. records play little or no role in the Latin music industry generally. "If that were true," wrote the Tribunal, "then the album charts and radio play would have little connection to jukebox play." Id.

48. In the 1985 proceeding, the Tribunal did not "discredit" ACEMLA's evidence on the basis of the testimony of the Settling Parties' Latin music experts, because, "they were speaking only for the general industry practice, and not to ACEMLA's practices in particular." Id. However, because of the Tribunal's concern regarding the nexus between album charts, radio play and jukebox play, the Tribunal expressly advised ACEMLA that, in future proceedings, ACEMLA would be required to explain "more of its operations -- which songs have been recorded on 45 r.p.m. records, how many were released, how have they been distributed, and where." 52 Fed. Reg. 46330-46331.

49. In this proceeding, ACEMLA made no effort to comply with the Tribunal's direction. ACEMLA presented no new evidence showing which of its claimed songs were recorded on 45 r.p.m. records, how many -- if any -- were released in 45 r.p.m. format, or how or where any such 45's were distributed. When asked by Commissioner Argetsinger about the absence of the requested information, Mr. Bernard responded that "it is not our operation to distribute or really to find out where these 45's are distributed. We know they are, as a matter of fact, within the business, within the trade, and all we can give you is what we have given you so far." Tr. 15.

50. Thus, ACEMLA has failed to present any evidence indicating that the "credible" testimony of the Settling Parties' Latin music experts regarding the insignificant role

played by 45 r.p.m. records in the Latin music industry generally does not apply to ACEMLA's practices specifically. Rather, ACEMLA has relied on exactly the same types of evidence, without further analysis, which it presented in prior proceedings -- that is, alleged radio monitoring and record charts. ACEMLA has therefore failed once again to establish a nexus between its evidence and the play of its music on jukeboxes. ACEMLA is not entitled to even that marginal benefit of the doubt which the Tribunal gave it for 1985, when the Tribunal said it was not inclined to discredit ACEMLA's evidence on the basis of the experts' testimony. To the contrary, the evidence shows that, if anything, ACEMLA is entitled to less for 1986 than it received in prior years:

51. ACEMLA introduced two types of evidence of entitlement for 1986. The first was its alleged 1986 monitoring of four New York City area Spanish-language radio stations. That monitoring was conducted in the same manner as ACEMLA's 1985 monitoring, a manner so haphazard and incomplete as to allow no conclusions about the strength of ACEMLA's repertory in terms of radio or jukebox performances. Because no such conclusions may be drawn from this evidence, ACEMLA has failed to meet its burden of proof entitlement through the use of this evidence.

52. Indeed, the defects in this evidence were exactly the same for 1986 as for 1985: As ACEMLA admitted, the monitoring did not constitute a statistically valid

representative sample of radio performances. The recordings were not made continuously, so there was no way of comparing performances of ACEMLA-claimed works with performances of other works on those stations, let alone on all Spanish-language radio stations or all radio stations generally. Indeed, the lack of nexus is shown by the fact that Mr. Bernard could not even approximate how many songs were played on those four stations.

53. ACEMLA's second type of evidence was the use of record charts. That evidence was not significantly different from ACEMLA's chart evidence in prior years.

54. As in the past, ACEMLA submitted two types of chart evidence: The first type consisted of a flyer, distributed in some unknown manner in Puerto Rico, which contained a "Hit Parade of Today" and a "Hit Parade of Yesterday" chart compiled by a single Puerto Rican record store located in Carolina, P.R. The second consisted of Billboard's Top Latin Album charts.

55. The Puerto Rican record store charts were of no value for several reasons:

56. These charts were suspect on their face, given the repeated listing of songs recorded by those individuals running the outfit which published the flyer.

57. As the testimony of one of the Settling Parties' Latin music experts last year proved, record store charts are unreliable measures of sales, let alone of performances. Frequently, they list only the records the store in question would like to sell.

58. The Puerto Rican record store charts reflect sales, if at all, only in the local market in Carolina, Puerto Rico, where the record store is located.

59. The charts show a marked and, to Mr. Bernard, inexplicable, decline in listings of ACEMLA-claimed titles over the course of 1986.

60. Over 95% (42 of 44) of the ACEMLA-claimed songs listed on the Puerto Rican record store charts were on the "Hit Parade of Yesterday." There was no evidence as to how this chart was compiled. It is possible, for example, that this chart listed songs popular at some unspecified time in the past, or even at the whim of the chart author's memory. ACEMLA did not, and admitted that it could not, establish any nexus between this chart and 1986 performances on jukeboxes, or, indeed, in any medium. Thus, the "Hit Parade of Yesterday" charts cannot stand as credible evidence of any claim in this proceeding.

61. The Billboard Top Latin Album charts which ACEMLA submitted do not establish ACEMLA's entitlement, because Mr. Bernard was unable to identify any songs on the albums listed which were pressed or released as 45 r.p.m. singles.

62. Nor do the Billboard Top Latin Album charts represent sales in the national market. To the contrary, they are differentiated by type of Latin music, and those generic types are not popular in all markets. Further, ACEMLA's claimed songs appear almost exclusively on one chart -- the Tropical Salsa chart.

63. In sum, the Billboard Top Latin Album charts do not establish the necessary nexus to ACEMLA's claim of entitlement for jukebox performances.

64. Once again, ACEMLA claimed to represent many songs which were actually in the Settling Parties' combined repertoires. Conflicting claims exist for 37% (73 of 197) of the titles specifically highlighted by ACEMLA in its 1986 Phase II Direct Case; overall, conflicting claims exist for 21% (120 of 580) of the titles specifically highlighted by ACEMLA in its cases for the period 1982 through 1986.

65. As the Tribunal has recognized, and as the United States Court of Appeals for the District of Columbia Circuit has now confirmed, it is not within the Tribunal's authority to resolve conflicting claims of right between the Settling Parties and ACEMLA. 52 Fed. Reg. 46331 [1985 proceeding]; NBC v. CRT, Docket No. 87-1157 (D.C. Cir. June 7, 1988). But, the Tribunal may note that conflicting claims of a substantial nature do exist with respect to a large percentage of the titles claimed by ACEMLA to be most significant.

66. The ASCAP 1986 radio survey and BMI 1986 radio performance analysis continue to provide the best -- indeed, the only -- record evidence of the amount of any entitlement ACEMLA may have. The Tribunal has requested such data from us in prior proceedings, and has used it as the starting point for its determination of ACEMLA's award in each of those proceedings.¹⁰ 50 Fed. Reg. 47577, 47582 (1985) [1982-1983 proceedings]; 51 Fed. Reg. 43455, 43459 (1986) [1984 proceeding]; 52 Fed. Reg. 46324, 46330 (1987) [1985 proceeding].

67. Thus, once again for 1986, the Settling Parties calculated the track record of radio performances of ACEMLA-claimed works, both including and excluding the songs claimed by ACEMLA which are in the Settling Parties' repertoires.

68. The results of the Settling Parties' analysis show that ACEMLA is entitled to between 0.00211% and 0.02122% of the 1986 jukebox royalty fund, depending on whether the songs claimed by ACEMLA which are in the Settling Parties' repertoires are included or excluded from the calculation.

V. CONCLUSION

69. ACEMLA is entitled to, at most, 0.02122% of the 1986 jukebox royalty fund.

¹⁰ It is ironic that evidence we have introduced, at the request of the Tribunal, must serve as the starting point for, and the only credible evidence of, the amount of ACEMLA's entitlement -- an amount which ACEMLA, and not we, bear the burden of proving.

Respectfully submitted,

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Dated: June 17, 1988

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
"Proposed Findings of Fact and Conclusions of Law of American
Society of Composers, Authors and Publishers, Broadcast Music,
Inc. and SESAC, Inc. on the Issue of ACEMLA's Entitlement" was
served by hand this 17th day of June, 1988, on the following:

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