Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

JUN 24 1988

In the Matter of:	)	
	)	Docket No. 88-1-86JD
1986 JUKEBOX ROYALTY DISTRIBUTION PROCEEDING	)	

REPLY 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 24, 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 Reply 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.

2. ACEMLA's Proposed Findings of Fact and Conclusions of Law are riddled with misstatements of fact and law. In addition, ACEMLA has failed to establish any nexus between its evidence and the play of ACEMLA-claimed songs on jukeboxes -- a connection the Tribunal has advised ACEMLA that it must establish. ACEMLA's evidence does not constitute substantial evidence of entitlement, and ACEMLA has therefore failed to meet the burden imposed on it by the Copyright Law.

3. Our Proposed Findings anticipated and dealt with most of ACEMLA's arguments. These Reply Findings will therefore simply document a few of ACEMLA's more glaring misstatements, misrepresentations and misdirected arguments.

I. ACEMLA'S DEMOGRAPHIC ARGUMENT

4. ACEMLA has, once again, pressed the identical "demographic" argument which the Tribunal has repeatedly rejected in the past. ACEMLA Proposed Findings, p. 2, ¶1.

5. To the extent that ACEMLA relies on the demographic data to establish the share of all jukebox performances represented by Spanish-language music, its reliance is misplaced. The Tribunal has previously said that this unanalyzed demographic data cannot be so utilized: "criticism of ACEMLA's proofs . . . comes mainly in the lack of nexus between the assertions of ACEMLA and any desired conclusion that ACEMLA may want the Tribunal to reach" (emphasis added). 52 Fed. Reg. 46330 (1987) [1985 proceeding]; see, also, 47 Fed. Reg. 53937 (1982) [1981 proceeding]; 49 Fed. Reg. 34555 (1984) [1982 proceeding]; 50 Fed. Reg. 47581-47582 (1985) [1982-1983]; 51 Fed. Reg. 43459 (1986) [1984 proceeding]. And, the undisputed evidence of the Settling Parties' Latin music experts -- which the Tribunal found "credible" -- is that 45 r.p.m. records play little or no role in the Latin music industry generally. 85: Tr. 681-

683, 688, 692, 694-695 (Garcia); 85: Tr. 443, 445 (Ahrold); SP Proposed Findings, pp. 7-8, ¶18; 52 Fed. Reg. 46330.

6. To the extent that ACEMLA relies on the demographic data to establish its own entitlement, the Tribunal has rejected the claim by noting the lack of relation between that demographic data and ACEMLA's claim: "It is presumed that ACEMLA offered evidence of an increase in Spanish-language persons in the United States from 1980 to 1985 to demonstrate a greater audience for its works, but these demographic figures in no way lead the Tribunal to understand what percentage of Spanish-language music in the United States ACEMLA controls." 52 Fed. Reg. 46330 (1987) [1985 proceeding]. Not only has ACEMLA failed to present any new evidence to establish that relation, but ACEMLA's Proposed Findings regarding the demographic data have been lifted verbatim from the findings which ACEMLA proposed, and the Tribunal rejected, in the 1985 jukebox proceeding. Compare, ACEMLA Proposed Findings, p. 2, ¶1 and 85: ACEMLA/IBC Proposed Findings, p. 20, ¶35.

II. ACEMLA'S CABLE TELEVISION CARRIAGE ARGUMENT

7. This year, ACEMLA seeks somehow to relate data on cable carriage of distant signal "Spanish-language" television stations, incorporated from the 1985 Cable Royalty Distribution Proceeding, to its jukebox entitlement. ACEMLA Proposed Findings, pp. 2-3, ¶2.

8. But, again, ACEMLA fails to show any nexus between cable television distant signal carriage data and either the percentage of Spanish-language music performed on jukeboxes, or the percentage of such music which ACEMLA allegedly controls.[1] If anything, ACEMLA's reference to the 1985 cable proceeding highlights how weak ACEMLA's entitlement showing really is: in the 1985 cable proceeding, ACEMLA was able to establish a claim to only $1. 1985 Cable Royalty Distribution Proceeding, 53 Fed. Reg. 7132, 7139 (1988).

III. ACEMLA'S ESTIMATE OF THE AMOUNT IN CONTROVERSY

9. ACEMLA repeats and combines the five-times-rejected demographic data with the irrelevant cable television subscriber data, and concludes that "a meaningful estimate would be that 4% of jukebox play is attributable to Spanish-language music." ACEMLA Proposed Conclusions, pp. 4-5, ¶6.

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[1] Indeed, the available evidence shows that, at the very least, a substantial portion of cable television performances and jukebox performances cannot possibly be related. The uncontested evidence in both the 1984 and 1985 cable royalty distribution proceedings was that, depending on the standard of measurement used, performances of theme and background music accounted for between one-third and more than one-half of television performances. 1984 Cable Proceeding: Tr. 63-64 (Boyle); 1985 Cable Proceeding: MC Wr. Dir. Case, p. 7. As that music does not consist of songs, and therefore is never commercially recorded -- let alone on 45 r.p.m. singles -- it cannot possibly be performed on jukeboxes. And, the evidence is that ACEMLA controls no theme or background music. 84 Jukebox Proceeding: Tr. 96-98 (Bernard).

Far from being "meaningful", ACEMLA's "estimate" is a wild guess based entirely on irrelevant data.[2]

10. ACEMLA's demographic and cable data do not contradict the "credible" evidence of the Settling Parties' Latin music experts in the 1985 jukebox proceeding that the availability of 45 r.p.m. records of Spanish-language songs for jukeboxes is extremely limited. Indeed, ACEMLA's "evidence" does not even address the crucial issue of the availability of Spanish-language 45 r.p.m. records for use in jukeboxes.

IV. ACEMLA'S BILLBOARD TOP LATIN ALBUM CHART EVIDENCE

11. ACEMLA says that 60 of its claimed songs allegedly were contained on albums which appeared on Billboard Top Latin Album charts in 1986. ACEMLA Proposed Findings, p. 3, ¶3. However, ACEMLA fails to state that these charts do not reflect national popularity of the albums listed and that, more importantly, Mr. Bernard was unable to state how many -- if any -- of these 60 songs were ever pressed on 45 r.p.m.

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[2] For example, ACEMLA argues that "it is necessary to select a figure between" the demographic and cable data to establish "jukebox use by Spanish-speaking residents." ACEMLA Proposed Findings, p. 5, ¶6. Why these figures establish the parameters of such use is wholly a mystery. Neither has ever been related to jukebox play. It could well be reasonable to conclude that "jukebox use by Spanish-speaking residents" is, to a large degree, the play of popular English-language songs. See, 82-83: Tr. 39 (Messinger), showing that 41% of songs in jukeboxes in Hispanic neighborhoods are in English.

records. 85: Tr. 763 (Garcia); Tr. 7 (Bernard); See, SP Proposed Findings, pp. 14-15, ¶¶37-38.

V. ACEMLA'S ALLEGED MONITORING

12. ACEMLA says that its monitoring shows that ACEMLA-claimed works were performed on four radio stations in 1986. ACEMLA Proposed Findings, pp. 3-4, ¶4. However, ACEMLA overlooks the fact that, as it has admitted, its monitoring cannot be, and is not, representative in any way of the universe of radio performances.[3] 85: Tr. 343-344 (Bernard).

VI. ACEMLA'S PUERTO RICAN RECORD STORE CHARTS

13. ACEMLA says that 44 of its claimed "songs appeared on singles 'Hit Parade' charts prepared by Puerto Rican record stores in 1986." ACEMLA Proposed Findings, p. 4, ¶5. We have dealt with the infirmities of these charts at length in our Proposed Findings. SP Proposed Findings, pp. 10-11, ¶¶24-27. We note here only that these charts are contained in flyers prepared by a single Puerto Rican record store, not

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[3] ACEMLA asserts that "it would appear to be a relatively simple task [for BMI] to submit a reasonable sample" of logs from Spanish-language radio stations, annotated to show control of performing rights for the songs listed. ACEMLA Proposed Findings, p. 5, ¶7. This assertion is contradicted by the record, however: On cross-examination by ACEMLA's counsel, BMI's Vice President Robert L. Ahrold testified that there were significant costs and difficulties in conducting a statistically meaningful analysis of raw data contained on BMI's radio station logs. Tr. 96 (Ahrold); on the cost of conducting such analysis, see, 1982-1983 Jukebox Proceeding: Reply of ASCAP, BMI and SESAC dated June 24, 1985, Apps. A and B.

many "stores," as ACEMLA's Proposed Findings imply. See, ACEMLA Exh. 3.

VII. THE CONTESTED CLAIMS TO PARTICULAR SONGS

14. ACEMLA alludes to its production of "copyright registrations for a number of . . . songs claimed by Settling Parties." ACEMLA Proposed Findings, p. 4, n. 1. The fact that ACEMLA has registered claims to these songs with the Copyright Office does not prove that its claims of control over these songs are valid. And, in any event, as the Tribunal has recognized, the Tribunal does not have the authority to resolve conflicting claims of ownership. NBC v. CRT, Docket No. 87-1157 (D.C. Cir. June 7, 1988). Indeed, although the parties have stipulated that, when quantifying claims, they will provide the Tribunal with figures both including and excluding the contested works, ACEMLA has not done so.[4] Tr. 4-5.

15. ACEMLA has sought to reserve the opportunity to submit Reply Findings regarding its alleged relationship with SPACEM and its alleged ownership of the many ACEMLA-claimed songs which are in the Settling Parties' combined repertories. It says it will offer such Reply Findings "if the Settling Parties continue to claim ACEMLA works in their proposed findings." ACEMLA Proposed Findings, p. 4, n. 1.

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[4] ACEMLA quantifies its claim as 2% of the 1986 jukebox royalty fund. ACEMLA Proposed Findings, p. 6, ¶8. Contrary to our Stipulation, however, ACEMLA does not indicate whether that figure includes or excludes the disputed works, or what the alternative figure would be.

This is an attempt at sandbagging -- an attempt to avoid dealing with record evidence until the reply findings, so as to preclude the possibility of any reply. ACEMLA's justification for doing so -- the notion that we might abandon our claims to these songs -- is ludicrous, given the record. ACEMLA had a duty and an obligation to deal with these matters in its Proposed Findings. The Tribunal should reject any attempt by ACEMLA unilaterally to circumvent Tribunal procedures by withholding comment on this matter until its reply.

VIII. ACEMLA'S REFUSAL TO COMPLY WITH TRIBUNAL REQUESTS

16. ACEMLA misstates this record and the records of prior proceedings when it says that it "has repeatedly demonstrated that its music is popular by showing that it is broadcast on radio stations and listed in Hit Parade charts." ACEMLA Proposed Conclusions, p. 6, ¶7. Simply repeating this argument does not make it so. ACEMLA again ignores the Tribunal's concern, expressed in the 1985 jukebox royalty distribution decision, that an evident lack of nexus exists between ACEMLA's evidence and the play of ACEMLA-claimed songs on jukeboxes. 52 Fed. Reg. 46330.

17. ACEMLA also ignores the Tribunal's admonition that it "would require in future proceedings that ACEMLA explain to the Tribunal more of its operations -- which songs have been recorded on 45 r.p.m. records, how many were re-

leased, how have they been distributed, and where." 52 Fed. Reg. 46330-46331. ACEMLA offered none of the evidence the Tribunal said it would require for this proceeding.

18. We respectfully submit that, given ACEMLA's failure to heed the Tribunal's requests, the Tribunal should now do that which it was not inclined to do in the 1985 proceeding: discredit ACEMLA's record chart and monitoring evidence because of ACEMLA's failure to establish a connection between these items and the play of ACEMLA-claimed songs on jukeboxes in 1986.

IX. ACEMLA HAS NOT MET THE BURDEN OF PROOF, WHICH IS ITS ALONE

19. ACEMLA's last resort is an effort to distract the Tribunal's attention from ACEMLA's failure of proof by stating that we somehow failed to establish our entitlement in these proceedings. ACEMLA Proposed Conclusions, pp. 5, 6, ¶¶7,8. But, as ACEMLA should well know by now, because it is a "copyright owner not affiliated with a performing rights society", it 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). As the Tribunal has confirmed in prior determinations, "the burden is on ACEMLA alone to affirmatively show its entitlement." 51 Fed. Reg. 43455 [1984 proceeding]; see, also, 52 Fed. Reg. 46324 [1985 proceeding]; SP Proposed Findings, pp. 18-19, ¶45. The burden of proof of entitlement is, by statute, ACEMLA's and not ours. ACEMLA's

repetition of its claim that we have such a burden does not change the statute, and does not make its claim so.

20. If there could be any doubt that the burden is ACEMLA's alone, it is removed by the Second Circuit's decision denying ACEMLA's petition for review in the 1985 jukebox proceeding, handed down only yesterday. ACEMLA v. CRT ["ACEMLA IV"], Docket No. 88-4005 (June 23, 1988). The Court said: "Petitioners [ACEMLA and IBC] bore the burden of proving entitlement . . . ." (slip op. at 10).

X. THE LACK OF SUBSTANTIAL EVIDENCE OF ACEMLA'S ENTITLEMENT

21. ACEMLA claims that there is an "absence of evidence created by the Settling Parties' reluctance to prove their rights." ACEMLA Proposed Conclusions, p. 6, ¶8. But, to the contrary, the void here was created entirely by ACEMLA's failure to present substantial evidence establishing, directly or indirectly, that the songs it claims it owns were played on jukeboxes in 1986. ACEMLA has not put in any type of evidence beyond those types, introduced in prior proceedings, which the Tribunal has repeatedly criticized as insufficient and insubstantial. Indeed, in the appeal of the 1985 jukebox proceeding, the Second Circuit characterized ACEMLA's proof of entitlement as "scanty at best." ACEMLA IV, slip op. at 11. ACEMLA's evidence does not constitute substantial evidence of its entitlement.

22. Therefore, the only credible and substantial evidence of ACEMLA's entitlement is that presented by the Settling Parties which indicates that, at most, ACEMLA is entitled to 0.02122% of the 1986 jukebox royalty fund.

CONCLUSION

23. ACEMLA is entitled to, at most, a minimal award.

Respectfully submitted,

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Dated: June 24, 1988

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply 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 24th day of June, 1988, on the following:

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