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Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

ORIGINAL

1989-1991 Satellite Carrier	)	CRT Docket Nos. 91-1-89SCD
Royalty Distribution	)	91-5-90SCD
Proceedings	)	92-2-91SCD

REPLY BRIEF OF THE JOINT NETWORK PARTIES IN SUPPORT OF THE PBS MOTION OPPOSING A PAY-IN/PAY-OUT METHODOLOGY

Pursuant to the Tribunal's directive, the Joint Network Parties ("Networks") hereby submit their reply to the Comments on Entitlement to Royalties submitted by Certain Copyright Owners on November 3, 1992 ("Comments"). The Networks urge the Tribunal to continue its longstanding precedent and reject any notion that the amounts paid-in by satellite carriers per station should dictate the Satellite Home Viewer Act ("SHVA") distribution process. Nothing in the Comments provide any basis for the CRT to overrule its clear and consistent refusal to adopt a pay-in/pay-out cap on distribution of royalties by any means, including use of separate funds.

In their Comments, Certain Copyright Owners urge the Tribunal to divide the SHVA royalty fund into three separate funds, the effect of which would be to severely restrict -- at the outset, without regard to any of the factors that control distribution in the cable context -- the compensation for copyright owners of programming appearing on network or public television stations. Their proposal is based on three fundamentally flawed premises. First, Certain Copyright Owners confuse issues relevant to the merits of Phase I distribution with the preliminary issue of their proposed

arbitrary pay-in/pay-out cap. Second, Certain Copyright Owners unsuccessfully try to cloud the fundamental similarities between the Basic Cable Fund and the SHVA Fund. And third, they attempt to pose the 3.75 and Syndex Funds -- specialty funds created in response to Federal Communications Commission ("FCC") rule changes -- as the model for SHVA distribution. Here, too, their argument fails because those specialty funds were authorized by statutory language not applicable to the SHVA or the facts currently before the Tribunal.

I. There Should Be No Confusion Between the Pay-in/Pay-out Cap and the Ultimate Question of Phase I Distribution

The Networks do not seek to have their share in the Phase I royalty distribution prejudged. Once all the facts are in, the Tribunal may decide to award owners of network station programming either more or less than was paid in to carry network stations -- precisely as the Tribunal has freely done with respect to programs on Public Television Stations in distributing cable royalties since 1978. The Networks merely seek to prevent the creation of an unfair and artificial ceiling on their potential share.

Certain Copyright Owners have attempted to confuse the pay-in/pay-out issue by suggesting that the statutory limitation of network station delivery only to "white areas" is evidence that network compensation should be limited by the establishment of a separate network fund (Comments at 2). In fact, the extent of subscribership to network stations goes solely to the merits of the claim for network-owned programming in a Phase I distribution, and has no relevance to the preclusive pay-in/pay-out cap

sought by Certain Copyright Owners.[1]

Certain Copyright Owners cite nothing in the statute or its legislative history to suggest that concerns addressed by the white area language are relevant to the distribution of SHVA royalties, and we are aware of no such indication. Congress, in response to concerns raised by local broadcasters and networks, found a way to ensure delivery of network signals to unserved households without jeopardizing the exclusive over-the-air distribution delivery system established by the Networks and their local affiliates.[2] This compromise was established for the purpose of maintaining "localism" -- the ability of a local network affiliate to serve its area with local news and information -- by insuring that the local affiliate could support its local programming with the advertising revenue from exclusive local distribution of popular network programming. The Judiciary Committee noted:

> Moreover, the bill respects the network/affiliate relationship and promotes localism. *Further, the bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national*

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[1] Roughly 1/4 of the monthly satellite home dish subscriptions are for network stations. 1991 Satellite Carrier Royalty Adjustment Proceeding, Direct Case of the Copyright Owners, Exhibit 8 (February 6, 1992).

[2] *Satellite Home Viewer Act: Hearings on H.R. 2428 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary,* 100th Cong., 1st & 2d Sess. 215-230 (1987-1988) (Judiciary Hearings) (Statements of Mr. Al Seether, V.P. and Gen. Manager of KUTV, an NBC affiliate station in Salt Lake City, Utah, and Member of the NBC Affiliate Board; and Dr. Charles Sherman, Pres. and Gen. Manager of WHOI in Peoria, Ilinois, and Chairman of the Government Relations Comm. of the ABC Television Affiliates Association).

> *television networks and non-network programming distributed by independent television stations.* In short, the bill meets the public interest test for intellectual property legislation. H. Rep. 887 (part 1), 100th Cong., 2d Sess. 14-15 (1988) (Judiciary Report).

In any event, network affiliates and networks were not the only ones concerned about duplication of programming to which a local television station had exclusive delivery rights. Independent stations proposed that syndicated exclusivity rules be added to the SHVA to protect exclusive delivery contracts for syndicated programming.[3] To address this concern the Congress required the FCC to initiate a study and rulemaking on the feasibility of imposing syndicated exclusivity rules for private home viewing. 17 U.S.C. 119(3). The Judiciary Report states:

> While the Committee concluded that the provisions dealing with network affiliated stations (the "white area" provisions) could not appropriately be applied to independent television stations, a further conclusion was made that independent station owners of syndicated programming could potentially be afforded similar protection, if feasible. Judiciary Report at 27-28.

The Congressional Committees, in addressing the white area and syndicated exclusivity problems, were trying to protect localism and the existing exclusive contract arrangements of *both* network affiliate stations and independent stations. *Absolutely nothing* in the legislative history remotely suggests that Congress intended that their solutions to these concerns had anything to do with royalty distribution.

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[3] *Hearing Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce,* 100th Cong., 2d Sess. 51, 53-56 (1988) (statement of Preston R. Padden, Pres., Ass'n. of Independent Television Stations, Inc. (INTV)). Most, if not all, of the superstation members of the Broadcast Claimant Group are members of INTV.

Certain Copyright Owners also attempt to confuse the pay-in/pay-out cap with Phase I distribution issues by incorrectly accusing the Networks of claiming some specific sum that Certain Copyright Owners believe to be too large:

> The programs for which the Networks may properly claim constituted only a portion of the copyrighted works broadcast on Network stations; the works of the Copyright Owners also form an important part of the network stations' broadcasts. Nevertheless, the position of the Networks is that they are eligible to receive not only 100% of the royalties paid for the retransmission of network stations -- thus, including payment for works carried on network stations, which the Networks do not own -- but also some as yet unspecified portion of the royalties paid for superstations. Comments at 2-3.

But this rhetoric is simply wrong. In fact, all the Networks have sought is an even-handed opportunity for Network-owned local and Network-owned network programming to be weighed under the Tribunal's well-established factors on the same basis as all other programming. The issues of whether certain claimants receive relatively more or less than others belong in the Phase I distribution proceeding and are irrelevant to the threshold pay-in/pay-out issue.

II. The Basic Cable Fund is the Appropriate Precedent for the SHVA Royalty Fund

A. The CRT Can Determine and Has Determined the Amounts Paid-in for Stations Under both the Basic Cable Fund and the SHVA

The Basic Cable Fund is the appropriate analogy to the SHVA distribution. Certain Copyright Owners attempt to distinguish the Basic Cable Fund from the SHVA Fund by claiming that "[i]t is extremely difficult to attribute a particular royalty payment to a specific station" with regard to the Basic Cable Fund. Comments at 6. They contend that this is reason enough to distinguish the Basic Cable Fund from the SHVA Fund. This argument is disingenuous. Certain Copyright Owners themselves have routinely and without controversy computed the amounts paid in for certain stations in the cable context. The rejection of pay-in/pay-out in the cable context has had nothing to do with any difficulty of computation.

Indeed, it was the Program Suppliers who suggested pay-in/pay-out per-station caps in the first cable proceeding, so they must have known attributing cable operator payments to specific stations was feasible. 45 Fed. Reg. 63028 (1980). The Joint Sports Claimants have repeatedly provided such figures to the CRT through the testimony of Dr. Peter Lemieux.[4]

Both sports and other members of The Joint Sports Claimants have provided

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[4] E.g. 1989 Cable Royalty Distribution Proceeding (Testimony of Dr. Peter H. Lemieux, witness for Joint Sports Claimants, October 4, 1991, Tr. at 2014) (Written direct testimony of Dr. Peter H. Lemieux at 8 (Figure 4) (included in Networks' Brief, Attachment B).

such data not only for PBS stations but for a variety of different groupings of commercial stations including superstations.[5] For example, the Joint Sports Claimants' counsel noted in the 1989 cable distribution proceeding: "[b]ut we see that for 1979 those cable systems, Form 3 cable systems, paid 3.7 percent of their basic royalties to carry distant public television signals; in 1983 that number dropped to 2.4 percent; and in 1989 the number is down to 2.0 percent."[6] Similarly, counsel for the Broadcaster Claimants noted: "[a]nd we know *exactly how much* money was actually paid by the cable operators making those purchase decisions in the cable marketplace in 1989, don't we?...And that was 2.0 percent in 1989... Two percent of all the basic fees, basic royalty fees, in 1989 were attributable to the separate purchase by cable operators of PBS affiliates; correct?"[7] *See* Networks' Brief, Attachment B.[8]

In light of this evidence, the Tribunal has had no trouble in determining pay-in amounts for the Basic Cable Fund. For 1989, for example, the Tribunal determined that the pay-in for Public Television Stations to the Basic Cable Fund was 2.0 percent. 57 Fed. Reg. 15286, 15303 (1992). The Tribunal also found the amounts paid in for PBS stations equalled 2.4 percent of the royalty fund in 1983. *Id.* The rates paid by

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[5] *Id.*

[6] 1989 Cable Royalty Distribution Proceeding, Question asked by Bob Garrett, November 4, 1991, Tr. at 3808.

[7] 1989 Cable Royalty Distribution Proceeding, Question asked by John Stewart, November 5, 1991, Tr. at 3958 (emphasis added).

[8] Note: the Statement of Account was included in Attachment A to the Networks' Brief. The relevant pages should read 3, 10 & 11.

satellite carriers under the SHVA are simply irrelevant to the SHVA distribution proceeding for the many reasons cited in the Networks' brief. The simplicity of the SHVA's flat rate ratio in no way distinguishes the fundamental Tribunal precedent that the amounts paid in for stations is not relevant to the amounts distributed for programming.

B. The 3.75 Fund and the Syndex Fund Are Not Relevant to the Distribution of SHVA Royalties

Contrary to Certain Copyright Owners' contention, the 3.75 and Syndex Funds are not precedent for SHVA distributions for several compelling reasons. First, the Tribunal has itself distinguished these funds from the Basic Cable Fund, which is made up of the amounts paid under statutorily-set fees by cable systems for every instance of carriage. These statutory fees paid into the Basic Cable Fund are exactly analogous to the statutory fees paid by satellite distributors; neither is analogous to the 3.75 or Syndex Funds. Second, both the 3.75 and Syndex Funds were created by the Tribunal in response to specific statutory language that does not apply to the SHVA. Third, the Tribunal created the 3.75 and Syndex Funds in response to changes in FCC rules which do not apply in the SHVA context. Finally, the Public Television Programmers were excluded from the 3.75 and Syndex Funds because the underlying FCC regulations did not apply to Public Television Stations. The Basic Cable fund offers the only proper precedent for the distribution of SHVA royalties funds.

In creating the 3.75 and Syndex Funds, the Tribunal conclusively distinguished

them from the Basic Cable Fund, stating the Basic Cable Fund "[is] derived entirely from the payments made by cable systems based on the rates set by Congress..."[9] And so they are in the SHVA. Like the Basic Cable Fund, the SHVA Royalty Fund is made up of the amounts paid under statutorily-set fees paid by satellite distributors for every instance of carriage, without regard to the complex regulatory consideration that determine whether a 3.75 or Syndex payment is due.

The Tribunal established the 3.75 and Syndex Funds only in response to the specific statutory authority granted in 17 U.S.C. 801(b)(2)(B)&(C).[10] 51 Fed. Reg.

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[9] 51 Fed. Reg. 12792 (April 15, 1986)

[10] 801(b)(2) states in part:

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be --

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 16, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area...of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to insure that the rates for the additional signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations...*Provided,* That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976...

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried

12804, 12805 (April 15, 1986). This narrowly crafted statutory language applies only to "the adjustment of the copyright royalty rates in section 111, solely in accordance with the following provisions". 17 U.S.C. 801(b)(2). It does not provide authority, let alone precedent, for the establishment of separate SHVA distribution funds. Neither do the FCC regulations, which preceded the establishment of the special funds and are utterly irrelevant to the SHVA royalty distribution scheme. Congress, in amending 17 U.S.C. 801, specifically added reference to Section 119 in 801(b)(3) regarding royalty distributions, but did not reference Section 119 in 801(b)(2) which authorized the specialty 3.75 and Syndex Funds. The SHVA does not contemplate or prescribe Tribunal action in response to similar -- or any other -- changes in FCC regulation, and the Basic Cable Fund remains the only appropriate model for SHVA royalty distribution.

The suggestion that the 3.75 and Syndex Funds establish some pay-in/pay-out eligibility principle applicable here is not supported by the history of these funds. First, the relevant statute itself clarifies that only those programmers affected by the change in the FCC's syndicated exclusivity rules are subject to the change in rates (801(b)(2)(C)), and therefore, the exclusion of Public Television Programmers from the Syndex Fund has not been due to a pay-in/pay-out analysis, since, as the Tribunal noted, the original and revised rules only applied to commercial stations, 51 Fed. Reg. 12806. Indeed, the Tribunal recently rejected Public Television's bid to share in the

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on those systems affected by the change.

Syndex Fund even though cable systems did pay in to the Syndex Fund to carry Public Television Stations under some circumstances. 57 Fed. Reg. at 15,304 (1992).

Similarly, Public Television Programmers do not participate in the 3.75 Fund, but only because the statute specifically states that "no adjustment in royalty rates shall be made...with respect to...carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976...". 17 U.S.C. 801(b)(2)(B). Carriage of an unlimited number of Public Television Stations was permitted by the FCC regulations before the modification, so Public Television Programmers were outside the scope of this specific legislative language. The exclusion of Public Television Programmers from both these special anomalous funds was for regulatory and statutory reasons having no relation to pay-in/pay-out. *NAB v. CRT,* 809 F.2d 178 n.7 (2d Cir. 1986).

Finally, Certain Copyright Owners acknowledge:

> Division of Section 119 royalties into three separate funds only tells the Tribunal the total amount paid for each type of *station.* Royalty distribution is based, however, on the value of the different kinds of *works* on available on stations. Comments Brief at 11.

This is exactly the Networks' point. The appropriate comparison, consistent with all CRT precedent, is the relative value of the programming; what station the programming is on is irrelevant.[11] Certain Copyright Owners seek to inhibit the

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[11] In fact, if taken seriously, the Certain Copyright Owners' arguments would militate creation not of three funds, but 18 separate funds, just because there are 18 stations delivered to home dish owners, each of which could have its pay-in separately calculated.

Tribunal's application of its traditional factors by corralling valuable network station programming into a minuscule pay-in fund having no relevance to the marketplace value of that programming. Certainly, if this theory is adopted, we can expect certain owners to promptly use it to try to restrict Public Television Programmers to the pay-in for *cable* carriage of Public Television Stations.

C. The Amounts Paid in per Station are not Relevant to the Amounts Paid out for Programming; The CRT's Distribution Criteria Balance the Relative Market Value of Programming Regardless of What is Paid in per Station

The SHVA directs the Tribunal to consider its own cable royalty distribution determinations and the pertinent data and considerations presented by the claimants. Judiciary Report at 23. The review of the CRT's cable royalty distributions clarifies that the Tribunal's established factors are designed to reflect the marketplace to the greatest extent possible by weighing the relative marketplace values of the programs affected by the compulsory license.

> The Tribunal decided that it was not the legislative intent of the Act to alter market valuation and return. Under our economic system of supply and demand, Congress regulated only the latter by providing a compulsory license for cable systems' use of copyrighted programming. The record clearly reflects that this programming has value. Thus by assigning the relative weight we have to marketplace value, we have determined not to impair the free play of market forces subject to the limitation necessarily imposed by Section 111. 45 Fed. Reg. 60636 (1980).

The general rule and precedent is a distribution scheme that, through the use of well-established factors, weighs the relative marketplace value of programming. The amounts paid in for stations has not been relevant in the cable distribution proceedings,

which is why Public Television Programmers have consistently received a greater percentage of the Basic Cable Fund than what was paid in for Public Television Stations. In its 1989 Cable Royalty Distribution Proceeding, the Tribunal provided insight into its decision to award Public Television Programmers twice as much as was paid-in for that programming:

> PBS offered that it has more content per program hour than commercial television; it is videotaped more; it is not geared for high ratings so the cume rating is more relevant; and PBS stations are careful to avoid head-to-head duplicative schedules.
>
> These factors all relate to the special appeal of PBS, *that it offers the cable system diversity, and that it has an intense viewership.* 57 Fed. Reg. 15303 (April 27, 1992) (emphasis added).

These considerations may result in any of the claimants' receiving more or less than was paid in because the Tribunal is weighing the relative market value among the programming, not against what was contributed to the fund on behalf of particular stations. Everything the Tribunal has said and done to date establishes this general principle: what goes in has not influenced, does not influence, and should not influence or direct what goes out.

Conclusion

Certain Copyright Owners have simply failed to establish an alternative to what is the plain Tribunal precedent for the creation of one distribution fund for SHVA royalties:

> (1) They have confused the pay-in/pay-out issue with the merits of Phase I royalty distribution issues;
>
> (2) They attempted but failed to distinguish the Basic Cable fund from a SHVA fund by claiming incorrectly that pay-in per station of cable funds cannot be easily determined when they themselves have regularly determined, and the CRT has accepted, "pay-in" amounts by station in the cable context; and
>
> (3) They have attempted to cite the cable 3.75 and Syndex Funds as precedent, but the statute permitting creation of those funds does not apply to the SHVA and the regulatory changes to which those specialty funds respond are not relevant to the SHVA.

Put simply, nothing in the Tribunal's past decisions, the plain reading of the SHVA, or its legislative history suggest that the Tribunal should interrupt its consistent rejection of a pay-in/pay-out cap. For these reasons, the Networks request that the Tribunal continue its twelve years of unbroken precedent and establish one SHVA royalty fund for the equitable, market-value distribution of SHVA royalty fees.

Respectfully submitted,

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November 10, 1992

CERTIFICATE OF SERVICE

I, Tamara Scully, hereby certify that true and correct copies of the foregoing STATEMENT OF THE JOINT NETWORK PARTIES were served by First Class United States Mail, postage prepaid, this 10th Day of November, 1992, on the following:

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ABC's 1st p.11. as was amended

Syndex Fund even though cable systems did pay in to the Syndex Fund to carry Public Television Stations under some circumstances. 57 Fed. Reg. at 15,304 (1992).

Similarly, Public Television Programmers do not participate in the 3.75 Fund, but only because the statute specifically states that "no adjustment in royalty rates shall be made...with respect to...carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976...". 17 U.S.C. 801(b)(2)(B). Carriage of an unlimited number of Public Television Stations was permitted by the FCC regulations before the modification, so Public Television Programmers were outside the scope of this specific legislative language. The exclusion of Public Television Programmers from both these special anomalous funds was for regulatory and statutory reasons having no relation to pay-in/pay-out.

Finally, Certain Copyright Owners acknowledge:

> Division of Section 119 royalties into three separate funds only tells the Tribunal the total amount paid for each type of *station.* Royalty distribution is based, however, on the value of the different kinds of *works* on available on stations. Comments Brief at 11.

This is exactly the Networks' point. The appropriate comparison, consistent with all CRT precedent, is the relative value of the programming; what station the programming is on is irrelevant.[11] Certain Copyright Owners seek to inhibit the

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Government Affairs

Charlene Vanlier
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November 12, 1992

The Honorable Cindy S. Daub
Chairman
Copyright Royalty Tribunal
1825 Connecticut Ave, N.W., Suite 918
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Dear Madam Chairman:

Please accept these copies of a corrected version of page 11 of the Reply Brief of the Joint Network Parties in Support of the PBS Motion Opposing a Pay-in/Pay-out Methodology filed on November 10, 1992. A citation was inadvertently deleted from this page during the editing process.

I regret any inconvenience and would be pleased to provide copies of the complete reply comments with the corrected page included if you should so desire.

Sincerely,

Charlene Vanlier

Charlene Vanlier

Enclosure

cc: Counsel of Record

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