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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

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

REPLY COMMENTS ON ENTITLEMENT TO ROYALTIES

The undersigned parties ("Copyright Owners") submit their reply comments responding to the "Brief of the Joint Network Parties" (hereinafter "Network Brief") filed November 3, 1992 in the captioned dockets.[1]

INTRODUCTION

The Networks and Copyright Owners agree that the Tribunal should follow its prior rulings, but disagree as to what precedent applies to the question presented.

The Networks focus on the Tribunal's treatment of the time-plus-fee-generated methodology (or, specifically, the "pay-in/pay-out" aspect of that methodology). But the time-plus-fee-generated approach seeks to address the question of royalty distribution among program types -- i.e., the assessment of comparative value of those program types. Copyright Owner Comments at 10-13 (hereinafter "Comments"). The question presently before the Tribunal is different -- it concerns the Networks' eligibility to

[1] The Networks styled their submission as a "Brief In Support of the PBS Motion Opposing A Pay-In/Pay-Out Methodology." After filing its Motion, however, PBS agreed to settle with Copyright Owners. Copyright Owners believe it is inappropriate to comment on any aspect of that settlement; accordingly, they will not comment on any of the statements made in PBS's unsolicited November 2, 1992 filing with the Tribunal. Nevertheless, it should be emphasized that, by settling, neither Copyright Owners nor PBS have endorsed or agreed with the other's position. Likewise, PBS has not endorsed the Copyright Owners' position on these issues.

receive royalties paid specifically for carriage of stations on which Network-owned programming was not broadcast. That issue is not addressed by the time-plus-fee-generated approach; therefore, the Tribunal's prior rulings on that issue have no applicability here.[2]

The only relevant precedent is that concerning eligibility to receive royalties. The Tribunal and Court of Appeals ruled in the 1983 cable royalty distribution proceeding that PBS may not receive any 3.75 royalties because those royalties were not paid for the carriage of PBS stations. Comments at 104. Likewise certain claimants do not receive any syndex royalties because syndex royalties are not paid to carry programming owned by those claimants. Id. No satellite carrier pays the 12 cent superstation rate to retransmit Network-owned programs (just as no cable operator pays the 3.75 rate to retransmit PBS stations). Consequently, the Networks are not eligible to receive any satellite carrier royalties paid for the superstations and PBS stations which do not broadcast any of their programming.

ARGUMENT

I. The Networks Address The Wrong Question

At this initial stage, the Tribunal is faced with a question of eligibility to royalty distribution, not with the later issue of royalty allocation among eligible claimants. The Networks ignore

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[2] The Networks misstate the Tribunal's rulings on time-plus-fee-generated issues. The Tribunal rejected the use of time as a measure of value in the time-plus-fee-generated approach, not the use of the pay-in/pay-out aspect. And that rejection was not absolute: the Tribunal rejected the time-plus-fee-generated approach as the sole means of distributing royalties, but found it useful in situations where it was considered with other evidence.

the question of ownership eligibility, and, instead, argue that the issue -- which they characterize as a question of "pay-in/pay-out" -- should be determined by the criteria used for program valuation in royalty allocation among eligible claimants. E.g., Network Brief at 2 and 6 ("Carriage of network news or public television programming, for example, is extremely valuable to cable/satellite distributors, and the statutory 'pay-in' amounts simply provide no information about how much a particular broadcast signal is worth to those distributors.").

Copyright Owners agree that retransmission of all copyrighted works on all stations retransmitted by satellite carriers is extremely valuable to the carriers, and worth substantially more than the statutory payments. But resolving that inequity is a legislative matter, not an issue for the Tribunal to decide. Making claims about the value of programs, as the Networks have done, although proper as part of a distribution hearing, is not relevant to a preliminary motion on eligibility. The issue at hand is whether the Networks are eligible to share the royalties paid for superstations, when no program for which the Networks can make a Phase I claim is broadcast by superstations.

II. The Networks Erroneously Equate Pay-In/Pay-Out With The Time-Plus-Fee-Generated Methodology

The Networks look to the Tribunal's rulings on "time-plus-fee-generated" as the appropriate precedent for deciding this issue. They characterize the time-plus-fee-generated methodology as "a pay-in/pay-out approach for all programming." Network Brief at 2. The Networks argue that the Tribunal has consistently rejected a pay-in/pay-out approach. Network Brief, 2 et seq. The

Networks fail to recognize that the pay-in/pay-out calculation is not the equivalent of the entire time-plus-fee-generated approach, but merely the first step in that approach.

In the time-plus-fee-generated methodology, pay-in/pay-out is followed by application of "the percentages [of time] of the categories of programming carried on those signals to the weighted royalties" to estimate a percentage share for each program type. 1978 Final Determination, 45 Fed. Reg. 63026, 63028 (1980). Contrary to the Networks' claim, the Tribunal did not reject the time-plus-fee-generated method because it used a pay-in/pay-out factor, but rather because it used time to measure program value:

> We find serious weakness in the MPAA formulation. Both studies [which were based on time factors] used factors for estimating the amount of non-network programming carried by network affiliate stations. The validity of these estimates was not sufficiently established in the opinion of the Tribunal. We thus rejected the MPAA formulation as a complete solution to the allocation problem.

Id. at 63037. That ruling is consistent with the secondary status given "time" as a distribution criterion. See, e.g., 1983 Final Determination, 51 Fed. Reg. 12792, 12808 (1986) ("We again reject any time-based formula, for, as we have said, they only serve to distort any marketplace analysis.")(emphasis added).

The Tribunal's rulings on time-plus-fee-generated approaches are thus irrelevant to the instant matter for two reasons. First, time-plus-fee-generated methods address distribution of royalties among competing program types, while the question here concerns eligibility to receive distribution. See Copyright Owners Comments at 9-13 (explanation of difference). Second, the time-plus-fee-generated approach was rejected because it used time (which

"distorts marketplace analysis") to measure program value,[3] not because time-plus-fee-generated used a pay-in/pay-out factor.

III. The Treatment of PBS In Cable Royalty Distributions Does Not Answer The Eligibility Question

The Networks next contend that the basic cable royalty distribution to public television (PTV) claimants shows unwillingness to base distribution on pay-in/pay-out. Networks Brief at 4 et seq. That argument depends entirely on the following premise: "the Copyright Office data make it possible to determine precisely how much money is paid into the cable Basic Fund for public television programs." Id. at 4. The premise is wrong.

The Networks cite the testimony of Dr. Lemieux from the 1989 Cable Royalty Proceeding as support for their premise that royalties paid for PTV stations can be precisely determined. Id. n. 7. The testimony does not support the Networks' claim. Indeed, the key question was asked by the Tribunal's General Counsel at page 2014-15 of the October 14, 1992 transcript, only the first page was part of the excerpt in Appendix B to the Networks Brief:

> Mr. Cassler: Dr. Lemieux, if you had three Independent stations coming in to a cable system, how did you assign which one would be the first DSE, the second DSE, and the third DSE or did you average them? ...
> The Witness: Okay. The total royalties -- obviously, there is a sliding scale in royalty payments, but that's not taking

[3] The Networks point to the 1988 Phase II ruling that time-plus-fee-generated is of "some relevance." Networks Brief 3 n. 6. In that case, the time-plus-fee-generated method was being used in Phase II, where royalties are allocated among individual claimants in the same category. That fact was crucial: "In Phase II, [time-plus-fee-generated] use has had more relevance because like programming is being compared and the potential for gross marketplace distortion is less, although [time-plus-fee-generated is] never accepted at full value." 55 Fed. Reg. 5649, 5651 (1990). Here, we are concerned with Phase I, not Phase II, issues.

into consideration when the royalties are allocated out the other end.

So the order in which these stations are counted since it's arbitrary, depending on how the cable operator chose to fill out the form, wasn't used.

So, basically, we simply took the total amount of royalties paid and then divided it up by distant signal equivalents. So in some sense, yes, we are averaging --

Thus, under the DSE formula, assigning royalties to any particular station was "arbitrary," and the amounts assigned to PTV (or any other) stations resulted from averaging a system's total royalties paid by the number of stations carried by that system.[4] See also Copyright Owners Comments at 6-7 (description of why DSE formula makes matching precise royalties to specific stations extremely difficult). As the General Counsel's questions showed, it is impossible to determine, in cases where a cable system carries more than one distant signal, what station accounts for the "first" DSE (and a higher rate) and what stations account for the "second" or "third" DSEs. October 4, 1991 tr. at 2014-15.[5]

The Phase I testimony cited by the Networks, concerning the amount of carriage and amounts paid for PTV and other stations,

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[4] "Averaging" has been consistently used by Cable Data Corporation in reporting cable royalty information for presentation to the Tribunal since the 1979 proceeding.

[5] The Networks contend the statement of account (SOA) form shows that royalties can be ascertained precisely. That is wrong -- the SOA form does not provide the information necessary to do so. Royalty payments are based on the total DSE value of the stations carried, and not on an individual station basis. See Block 8, page 17 of the SOA contained in Networks' Attachment A (royalty computation entirely by DSE value without reference to specific stations). The Networks also refer to cross examination of Ms. Lawson, a PBS witness, as showing that the precise amount of royalties paid for PTV stations was known. Networks Brief, Attachment B. The statements relied on are actually questions put by counsel to Ms. Lawson, whose responses indicated she could neither confirm nor deny the assumptions of the questions. Questions of counsel, of course, are not accepted as evidence.

sought to compare year-to-year trends or differences between parties, not to identify the exact amounts paid. Therefore, the parties used and the Tribunal accepted certain conventions for estimating the per station carriage and royalty payments solely for use in making such comparisons. One accepted convention is to approximate the royalties paid per station by a cable system by averaging basic royalty payments among the stations carried. So long as all parties use the same averaging methodology, it is possible to discern the trends (upward or downward) in carriage.

The accepted conventions are sufficient for trend purposes, but not as evidence of precise amounts paid. _See_ _1989 Cable Royalty Final Determination_, 57 Fed. Reg. 15286, 15297 (1992) (discussion of downward trend in distant PTV carriage). Dividing total basic cable royalties paid per system by the number of DSEs carried by the system gives a reasonable approximation of the per station royalties. It, nevertheless, remains only a rough approximation, unlike the direct and precise quantification of per station satellite carrier royalties.

Because the exact amount of basic cable royalties paid for PTV stations cannot be determined, it is impossible to prove or to disprove the Networks' claim that PBS received more than the amounts paid for carriage of PTV stations by cable systems. Contrary to the Networks' assertions, the size of PBS's share is not determinative of the issue here. The more pertinent fact is that PBS was eligible to share in basic cable royalties because its programming was carried on stations for which basic cable royalties were paid. That is unlike the present case in which the Networks

are seeking to recover royalties paid for superstation carriage, even though no Network programming is carried on superstations.

IV. Any Anomalies In Distribution Result From The Statutory Plan, Not From Division Of Royalties Into Separate Funds

The Networks argue that "adoption of a pay-in/pay-out cap would result in obvious anomalies" in the royalty distributions. Network Brief at 5. Among the claimed possible anomalies is the payment of less for a program carried on a network station than the same program would receive if carried on a superstation. Copyright Owners agree that result would occur, not because the satellite carrier royalties are divided into separate funds, but because the Copyright Act itself requires it.

The statutory plan assigns a lower cents per subscriber rate for network stations as compared to superstations and limits their carriage to "white areas," while superstation carriage is not so restricted. Lower fees for network stations combined with their restricted carriage areas mean total royalties paid for them will be considerably less than total royalties paid for superstations. Neither the Tribunal nor the parties can change that result.

That statutory plan was adopted, in part, due to the Networks' insistence on protecting the exclusivity granted to their affiliates. H.R. Rep. No. 887 (Part II), 100th Cong. 2d Sess. 19-21 (1986). One price of limiting network station carriage to white areas is lower total royalty payments. The lower per subscriber rate (3 cents) for network stations also serves to reduce total royalties paid for network retransmission. Thus, the statutory

plan -- not dividing royalties into separate funds -- operates to reduce payments made for network carriage.

The Tribunal recognized that any anomalies in royalty shares result from the statutory plan, not from division of royalties into separate funds based on eligibility:

> Whether this [the statutory plan] would lead to illogical distributions is possible, but not relevant, because that's a decision Congress made.

56 Fed. Reg. at 20415 (1991).

Division of royalties into separate funds based on ownership eligibility has no effect on the total royalties paid for network stations nor on the royalties available to owners of network programs. Under any conditions, the Tribunal will have to consider the fact that no programs for which the Networks are making a Phase I claim are broadcast by a superstation or a public television station. Royalties paid for network stations are all the monies available for distribution to the owners of copyrighted works on those stations. That is not anomalous, but is required by and follows from the statutory plan. [6]

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[6] The Networks contend that "the legislative history reflects the special value placed on network programming for satellite dish viewers." Networks Brief at 12. The Networks rely on a statement by Chairman Kastenmeier that "the bill takes affirmative steps to treat similarly" network and non-network programming. Id., quoting 134 Cong. Rec. H9664 (daily ed. October 5, 1988). Chairman Kastenmeier defined those affirmative steps as "asking the FCC, within 120 days of the effective date of [Section 119], to determine the feasibility of imposing syndicated exclusivity rules for the dish industry similar to those recently ordered for cable television." 134 Cong. Rec. H9664 (daily ed. October 5, 1988). Clearly, the "affirmative steps" referred to the similar syndicated exclusivity protection, and not to the similar royalty distribution.

CONCLUSION

For the reasons stated in this Reply and in our Comments, the Tribunal should rule that the Networks are not eligible to receive any of the Section 119 royalties paid for the retransmission of superstations or public television stations. Copyright Owners urge the Tribunal to divide the satellite carrier royalties into the network station fund on one hand, and the combined superstation and public television funds on the other, to make immediate partial distribution of the combined superstations and public television funds to Copyright Owners and PBS jointly, and to designate as the sole remaining issue for hearing the allocation of the network station fund as between the Joint Network Parties and the undersigned Copyright Owners.

Respectfully submitted,

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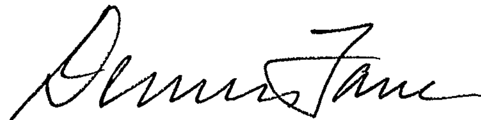

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