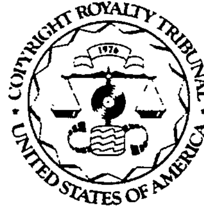

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In the Matter of	)	
	)	
1989-1991 Satellite Carrier	)	CRT Docket Nos. 91-1-89SCD
Royalty Distribution	)	91-5-90SCD
Proceedings	)	92-2-91SCD

DECISION AND ORDER

The Copyright Royalty Tribunal has determined that the Joint Network Parties (Networks) are not entitled to receive royalties paid by satellite carriers to retransmit superstations and public television stations. Although the Tribunal adheres to its previous rejection of an automatic pay-in\pay-out formula, it distinguishes the question of allocating royalties from within a single fund vis-a-vis the question of allocating royalties from separate funds.

Background

On October 15, 1992, the Program Suppliers, Broadcaster Claimants, American Society of Composers Authors and Publishers,

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Joint Sports Claimants, Broadcast Music, Inc., SESAC, Inc., and Devotional Claimants (hereinafter Certain Copyright Owners) filed joint comments reporting that they had been able to negotiate a settlement among themselves; but they had been unable to negotiate a settlement with the Networks and Public Broadcasting Service (PBS). Therefore, they requested that the Tribunal declare two Phase I controversies: (1) a controversy between works which are owned by the Networks and works which are owned by Certain Copyright Owners; and (2) a controversy between works which are owned by PBS and works which are owned by Certain Copyright Owners. On October 21, 1992, PBS filed a pleading addressing the scope of the Phase I issues and proposing a two-stage Phase I proceeding. PBS argued that Certain Copyright Owners' "proposal contemplates a 'fee generation' or 'pay-in/pay-out' approach, under which the royalty award to PBS or the commercial networks would be limited to what satellite operators have actually paid as compulsory license fees for the retransmission of public television or commercial network stations." PBS alleged that the Tribunal has consistently refused to accept the proposition that the allocation of copyright royalties should be determined on a "fee generation" basis. Finally, PBS requested a bifurcated Phase I proceeding with stage one being used to define the controversy or controversies which exist in Phase I.

On October 23, 1992, Certain Copyright Owners filed a "Motion For Partial Distribution," requesting prompt distribution to them of all royalties paid for carriage of superstations by satellite carriers for 1989, 1990, and 1991 (including interest earned). Certain Copyright Owners claimed that they own all the works contained in the retransmissions of superstations, and have agreed among themselves as to the division of royalties allocated to those retransmissions. They, therefore, conclude that, with regard to those royalties, there is no controversy.

At the October 26, 1992 prehearing conference, the Tribunal granted PBS' request for a bifurcated Phase I proceeding. The Tribunal directed Certain Copyright Owners, PBS, and the Networks to file briefs and reply briefs addressing stage one of the Phase I proceeding. The Tribunal also deferred making a decision on the request for partial distribution until after the conclusion of stage one.

After the prehearing conference, but prior to the filing of the briefs, Certain Copyright Owners and PBS reached a settlement. Consequently, only Certain Copyright Owners and the Networks filed briefs.

Certain Copyright Owners' Arguments

Certain Copyright Owners contend that "[t]he only issue currently before the Tribunal is whether the Networks (ABC, CBS, and NBC) may receive any of the royalties paid by satellite carriers to retransmit superstations -- even though none of the programs within the Networks' Phase I claim was broadcast on those superstations." Certain Copyright Owners believe that the Networks are not entitled to any portion of the superstation fund because none of the Networks' copyrighted works appeared on superstations.[1]

Certain Copyright Owners note that pursuant to the Satellite Home Viewer Act of 1988 (SHVA), satellite carriers pay different rates for carriage of network stations and superstations. Specifically, in 1989-1992, satellite carriers paid 3¢ for network stations and 12¢ for superstations.[2] This discrepancy in rates, they maintain, is due to the fact that the Networks made a conscious trade-off during the legislative process, opting to accept a lower rate in order to prevent the retransmission of any

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[1] In this Phase I proceeding, we are considering only the network-produced and copyrighted programming which appeared on network stations. Network-produced and copyrighted programming which appeared on independent stations will be considered as "syndicated programming" in the Phase II proceeding.

[2] 17 U.S.C. § 119(b)(1)(B)(1991).

network stations to areas served by the Networks' affiliates. Consequently, network stations may be retransmitted by satellite carriers only to those geographic areas that are not served by any other station affiliated with that network (white areas). Certain Copyright Owners accuse the Networks of being disingenuous because "[h]aving sought the legislative restrictions which effectively reduce the total Section 119 royalties paid for network stations and having agreed to the lower (3 cents) rate for those stations, the Networks now seek to inflate their share of Section 119 royalties at the expense of Copyright Owners."

Certain Copyright Owners maintain that Congress directed the Tribunal to consider its cable royalty distribution precedent in allocating the satellite royalties. Examining the cable precedent, they maintain that the present case is analogous to the 3.75 and Syndex royalties rather than the Basic cable royalties. Specifically, they state that the satellite carrier royalty "plan is comparable to the cable 3.75 and Syndex plans because reporting and payment calculations under all three are based on individually identified stations." Since 1983, the Tribunal has divided the cable royalties into three funds: Basic, 3.75, and Syndex. Citing the Tribunal's 1983 cable royalty distribution decision which created the three funds, and the Court of Appeal's decision which

affirmed it, Certain Copyright Owners assert that the Tribunal has never permitted a claimant to receive any portion of a royalty fund comprised of fees paid for stations which did not carry any of its copyrighted works.[3]

Certain Copyright Owners differentiate the Basic cable royalty plan from the satellite carrier royalty plan on the grounds that Basic royalties are not divided by type of station for reporting, payment, or distribution purposes. They explain that Basic cable royalties are calculated using a "distant signal equivalent" (DSE) factor, so that each type of station is assigned a DSE value: 1.0 DSE for independents and 0.25 DSE for network affiliates and public television. Larger (Form 3) cable systems pay Basic royalties based on the total DSE value, using a sliding percentage scale which declines as the number of DSE's increase.[4] Moreover, they state, smaller (Form 1 and 2) cable systems pay either $28 per accounting period or a fee based on flat percentage rates, irrespective of the number of distant signals, if any, they carry.[5]

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[3] *1983 Cable Royalty Distribution Proceeding Final Determination*, 51 Fed. Reg. 12792 (1986); *NAB v. CRT*, 809 F.2d 172 (2d Cir. 1986).

[4] 37 C.F.R. § 308.2(a) (1991); 17 U.S.C. § 111(d)(1)(B)(i)-(iv)(1991).

[5] 17 U.S.C. § 111(d)(1)(C),(D)(1991).

They conclude that, the assignment of any specific amount of royalties to a particular station under the Basic cable payment plan is "problematic."

Certain Copyright Owners also distinguish the division of royalties into separate funds from the fee generation approach for distribution. Specifically, they rely on the Tribunal's 1983 cable decision, in which it rejected the argument that the division of royalties into separate funds was equivalent to a "fee generated" approach to distribution.[6] This decision, they point out, was wholly affirmed on appeal.[7] They maintain that establishing eligibility to receive royalties is only the starting point of any distribution process. Eligible parties are then required to prove their entitlement to a specific percentage share of each fund, through evidence of the value of their copyrighted works. Certain Copyright Owners declare that historically, "time-plus-fee generation" has been presented to the Tribunal as a method for allocating value among programming types, not to divide royalties among station types so as to determine claimant eligibility.

With respect to the statements made by the Tribunal and the

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[6] 51 Fed. Reg. at 12807.

[7] 809 F.2d at 178.

Arbitration Panel (Panel) regarding "pay-in/pay-out" during the recent satellite carrier rate adjustment proceeding,[8] Certain Copyright Owners argue that statements were directed only at the issue of rate-setting. They explain that in the rate adjustment proceeding, the "pay-in/pay-out" issue therein was triggered by the fact that, in the case of satellite royalties, unlike in the case of cable royalties, owners of network programming are entitled to claim royalties. Consequently, in satellite, unlike in cable, all of the programming on network stations is compensable, not just the non-network programming. Certain Copyright Owners maintain that, because "of this parity on the 'pay-out' side, it was argued, unsuccessfully, that the rates (or 'pay-in') for superstations and network stations should be equal." They conclude that the Tribunal and the Panel found that the SHVA requires the balancing of several competing factors, not just the fact that all programming on both types of stations was compensable, in setting a final rate for network stations. Certain Copyright Owners contend that such a ruling which concerns "the rate (or 'pay-in') for network stations" has no precedential value where the issue is one of a claimant's eligibility to receive a share of a fund consisting of royalties paid for stations which never carried its copyrighted works.

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[8] *1991 Satellite Carrier Rate Adjustment Proceeding*, 57 Fed. Reg. 19052 (1992).

In their reply brief, Certain Copyright Owners reiterate the position that the only issue before the Tribunal in stage one of the Phase I proceeding is whether the Networks are eligible to receive royalties paid specifically for carriage of stations on which no network-owned programming appeared. They conclude that the foregoing question must be answered in the negative, because the royalties paid for network stations are limited to the monies available for distribution to the owners of copyrighted works which appeared on those stations.

That issue, they assert, is not addressed by the time-plus-fee-generated approach, which has been proposed in the past as a method for determining the value of each of the claimant's copyrighted works. They further explain that the Networks are incorrect in equating pay-in/pay-out with the time-plus-fee-generated methodology. Pay-in/pay-out, they allege, is merely the first step in the time-plus-fee-generated approach. Therefore, they conclude, the precedent which exists regarding the time-plus-fee-generated methodology is not controlling in the instant case.

Certain Copyright Owners differentiate the treatment of PBS in cable royalty distributions from the proposed treatment of the Networks in satellite royalty distributions. They restate their

belief that it is not possible to precisely ascertain the amount that is paid into the cable Basic Fund for each station, including public television. They base their assertion on the methodology used to calculate cable royalty fees. Certain Copyright Owners point out that during the 1989 cable royalty distribution proceeding, testimony was presented to the effect that royalties in the cable Basic Fund can be assigned only by averaging the total royalties paid by a cable system, by the number of stations carried by that cable system. Moreover, they maintain that the testimony concerning the amount of carriage and royalty fees paid for public television and other stations, given during the 1989 proceeding, was presented solely to compare year-to-year trends or differences between claimants, not to ascertain exact amounts paid into the funds. Accordingly, since it is not possible to accurately calculate the amount that was paid in by cable systems for carriage of public television, it is impossible to prove or disprove the Networks' claim that PBS received more than the amounts paid by cable systems for carriage of public television stations.

Finally, Certain Copyright Owners rebut the Networks' allegation that the legislative history of the SHVA reflects the special value placed on network programming by satellite dish viewers. Certain Copyright Owners maintain that the statement of

Chairman Kastenmeier, that "the bill takes affirmative steps to treat similarly" network and non-network programming relates solely to the fact that the SHVA directed the Federal Communications Commission (FCC) to determine the feasibility of imposing syndicated exclusivity rules, similar to those imposed on the cable industry, on the satellite dish industry.[9]

The Networks' Arguments

The Networks, on the other hand, oppose what they perceive as Certain Copyright Owners' attempt to apply pay-in/pay-out to the distribution of the satellite carrier royalties. The Networks allege that the Tribunal has consistently rejected a "pay-in/pay-out" approach for all programming. They cite as an example of the Tribunal's rejection of "pay-in/pay-out," its distribution of cable Basic Fund royalties to owners of programs shown on public television stations.

They explain that under the cable royalty distribution plan "users pay only 1/4 as much in royalties for public TV stations and network stations as independent stations." According to the

[9] 134 Cong. Rec H9664 (daily ed. October 5, 1988) (statement of Chairman Kastenmeier).

Networks, "the Copyright Office data make it possible to determine precisely how much money is paid into the cable Basic Fund for public television programs." To support this proposition they cite specific testimony, introduced in the 1989 cable royalty distribution proceeding. The Networks rely on the fact that although in 1989 the royalties paid for carriage of public television stations amounted to 2% of the Basic Fund, the Tribunal awarded 4% of the Basic Fund to programs carried on those stations.

The cable Basic Fund distribution, they assert, "is the clear analogue to the distribution of the satellite royalty fund," because "[i]n each case, every distributor must pay the royalty for carriage of a particular station, and in each case, network and public station royalties are one fourth those of independent stations." The Networks distinguish the two cable specialty funds, the 3.75 and the Syndex funds, on the ground that they were created in accordance with specific provisions of the Copyright Act, which apply only to cable proceedings[10].

The Networks also refer to the Tribunal's two determinations addressing the SHVA: *1991 Notice of Declaratory Ruling*[11], and the

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[10] 17 U.S.C. § 801(b)(2)(B),(C)(1991).

[11] 56 Fed. Reg. 20414 (1991).

1991 Satellite Carrier Rate Adjustment Proceeding[12]. They construe statements made by the Tribunal in both decisions, that the "pay-in" may not necessarily correlate to the "pay-out" in cable and satellite, as supporting their proposition that the Networks should have access to royalties paid by satellite carriers for the carriage of superstations even though the Networks' copyrighted works were never carried by superstations[13]. Citing a string of cases, the Networks maintain that the Tribunal is bound by its precedent in the cable and satellite proceedings because "[a]s a general legal principal, an agency may not, absent a clearly articulated and logically defensible rationale, reach different results in cases with essentially the same facts."

The Networks allege that "[n]othing in the legislative history of the SHVA suggests that Congress intended that the distribution of the royalty fund to the various copyright owners be influenced by the statutory mechanism for payment of fees into the fund by satellite carriers." They assert that the legislative history indicates that separate legislative concerns motivated the pay-in and distribution provisions. The Networks claim that "Congress meant to transplant into the SHVA the pay-in scheme from the cable

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[12] 57 Fed. Reg. 19052 (1992).

[13] 56 Fed. Reg. at 20415; 57 Fed. Reg. at 19052.

compulsory license to...insure that the infant satellite home dish industry was not disadvantaged vis-a-vis the cable industry in its ability to obtain distant-signal broadcast station signals; to increase delivery system competition; to avoid cable dominance of the new home dish industry; and to avoid discriminatory home dish pricing."

With regard to the distribution of royalty funds, the Networks cite the SHVA Judiciary Report, in which the Judiciary Committee refused to impose "particular limiting standards for distribution" and recommended that the Tribunal "consider all pertinent data and considerations presented by the claimants, and...take into account its royalty distribution determinations under the section 111 [cable] compulsory license."[14] The Networks also rely on a statement made by Chairman Kastenmeier that, "the bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national television networks and non-network programming distributed by independent television stations," as support for the proposition that compensation to the copyright owners for the use of network programming should not be restricted to the royalty fees

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[14] H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 23 (1988).

collected for carriage of network stations[15].

In their reply brief, the Networks accuse Certain Copyright Owners of confusing the issue in stage one of the Phase I proceeding. They allege that Certain Copyright Owners are attempting in stage one to create "an unfair and artificial ceiling" on the Networks' share of the royalty fund. They maintain that Certain Copyright Owners are trying "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." The extent of subscription to network stations, they conclude, goes solely to the merits of the claim for network-owned programming in a Phase I distribution. They deny that it provides support for the "preclusive pay-in/pay-out cap sought by Certain Copyright Owners."

The Networks reiterate their belief that the cable Basic Fund, rather than the 3.75 or Syndex fund, is the appropriate analogy to the satellite fund. They disagree with Certain Copyright Owners' assertion that it is difficult to discern the precise royalty

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[15] 134 Cong. Rec. H9664 (daily ed. October 5, 1988) (statement of Chairman Kastenmeier).

payment made for a specific station. To support their position, they again cite the testimony presented during the 1989 cable royalty distribution proceeding regarding the decline of royalty fees paid for public television during the previous ten year period. They also reargue the proposition that the 3.75 and Syndex funds are distinguishable from the satellite fund in that the cable specialty funds were created in response to specific statutory authority, which only applies to cable proceedings[16].

Discussion

The issue is one of eligibility -- are the Networks eligible to receive royalties paid by satellite carriers to retransmit programs which are not owned by the Networks? Based on precedent, logic, and fundamental fairness, the Tribunal is unable to permit the Networks to share these royalties.[17]

Precedent

As stated above, both Certain Copyright Owners and the Networks assert that the Tribunal should adhere to past precedent.

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[16] 17 U.S.C. § 801(b)(2)(B),(C)(1991).

[17] As noted above, PBS entered into a settlement agreement with Certain Copyright Owners. Accordingly, there is no issue involving PBS before the Tribunal.

However, the parties would interpret and apply past precedent in a manner which would achieve diametrically opposite results.

In enacting Section 119, Congress directed the Tribunal to consider its precedent in allocating cable distribution royalties under Section 111. The 1983 Cable Royalty Distribution Proceeding[18] is most instructive in interpreting this precedent. As in the instant proceeding, the Tribunal faced a novel issue regarding the allocation of royalties in the context of a new royalty structure.

In 1983, the cable royalty fund differed significantly from the previous cable royalty funds considered by the Tribunal. From 1978 to 1982, cable royalties were paid into a single Basic Fund derived entirely from payments made by cable systems according to the rates set by Congress in Section 111 of the Copyright Act of 1976.[19] In 1983, for the first time, additional royalties were collected based upon: (i) the 3.75% rate for newly-permitted distant signals; and (ii) the Syndex surcharge, following the repeal by the FCC of the Syndex "blackout" rules. In the Phase I proceeding of the distribution proceeding, the Tribunal concluded

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[18] 51 Fed. Reg. 12792 (1986).

[19] *Id.*

that:

> [T]here are different factors underlying the royalties which derive from the statutory rates, the 3.75% rate, and the syndicated exclusivity surcharge, and that this justifies dividing the 1983 cable royalty fund and making *three separate allocations*" from: (i) the "Basic fund", (ii) the "3.75% fund", (iii) and the "Syndex fund" (emphasis added).

Because non-commercial educational stations were carried on an unlimited basis prior to FCC deregulation and no cable operator paid the 3.75% rate to carry any non-commercial stations, the Tribunal concluded that PBS was not entitled to any portion of the 3.75% fund. Because only the program suppliers and music claimants owned any copyrighted programming for which Syndex royalties were paid, all other claimants were excluded from sharing in the new Syndex fund.

Accordingly, the precedent set forth in the Tribunal's 1983 Cable Royalty Distribution Proceeding is abundantly clear -- the Tribunal may make separate allocations from separate funds where the claimants are not eligible to share in the allocation of royalties from all the funds. And claimants whose copyrighted

works were not carried by a particular type of station will be excluded from the distribution of the royalty fund comprised of fees paid for carriage of such stations.

Notably, the United States Court of Appeals for the Second Circuit gave its imprimatur to the Tribunal's decision to divide royalties into three separate funds in making its Phase I allocations:

> Moreover, the establishment of the 3.75% and Syndex royalty rates made new distribution criteria *imperative*. Certain claimants are, in fact, ineligible to receive royalties at the new rates, and distribution of royalties from a single fund would require complex adjustments of awards. The Tribunal thus reasonably concluded that its task of distributing royalties would be facilitated by making separate allocations of the royalties collected at the three separate rates.[20] (emphasis added)

In alleging that a mechanical pay-in/pay-out approach has been repudiated, the Networks make much of the assertion that the

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[20] *NAB v. CRT*, 809 F. 2d 172, 178 (2d Cir. 1986)(footnote omitted).

Tribunal, in the past, has awarded a higher percent of the Basic Fund to public television stations than is warranted based on the royalties paid for the carriage of these stations. We agree with the Networks that the Tribunal has rejected the automatic application of a pay-in/pay-out formula and acknowledge our recent statement that "the pay-in may not necessarily correlate to the pay-out".[21] However, the question of allocating royalties from within a single fund is clearly distinguishable from the question of allocating royalties from separate funds. In the former, the possibility of error is remote. In the latter, the certainty of error is inevitable, in that it envisions, and possibly encourages, payment of an amount to a claimant from a fund comprised of royalty fees paid for the carriage of stations which did not carry any of the claimant's programming.

Furthermore, without passing on the appropriateness of allocating a greater payment *from* the Basic Fund than the amount allegedly paid *into* the Basic Fund, and without prejudging the issues which we must consider in Phase II of this or any other proceeding, we note that it is difficult and, perhaps, impossible to ascribe a value to the carriage of any station in the Basic Fund

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[21] *1991 Satellite Carrier Rate Adjustment Proceeding*, 57 Fed. Reg. at 19052.

with sufficient specificity to guarantee that we will not exceed the appropriate payment. Under Section 111, Basic cable royalties paid by the larger (Form 3) cable systems (which contribute the overwhelming majority of the royalty payments) are determined by using the "distant signal equivalent" (DSE) formula. But there are no statutory or technical mandates, nor even an industry-wide practice, for determining which stations will be accorded the higher rate for the "first" DSE vis-a-vis the lower rates for the second through fourth DSE's or the yet-lower rates for the fifth and additional DSE's.

There are additional considerations which preclude accurate calculation of the value of each station. For example, smaller systems pay a flat rate without regard to the number of distant signals. And the larger systems pay a minimum fee of .893% whether they carry one or no DSE's. Thus, royalties may be paid into the fund (or the denominator to be used in calculating the station's share of the royalty fund) even if there are no DSE's (and, therefore, no station can add this payment to its numerator). Consequently, any attempt to calculate the specific value of the royalty fees paid by cable systems for the carriage of a particular station is fated to be imprecise.

Unlike Section 111, Section 119 permits clear and unequivocal evaluation of the royalty fee paid for different categories of stations carried by the cable system. During the relevant time period, cable operators paid fees of 12¢ per subscriber per month for superstations and 3¢ per subscriber per month for network affiliates and public television stations. These two categories (of 12¢/sub/month and 3¢/sub/month) permit accurate evaluation of the royalty fees paid by satellite carriers for carriage of the stations within each category. These categories are analogous to the Basic, 3.75%, and Syndex categories. We have consistently found the three categories to be sufficiently distinct and identifiable to warrant denying a copyright owner, whose works have appeared on stations for which only one category type of royalties were paid, a share of a fund from another category.

Moreover, we note that the Networks do not allege that the Tribunal has ever allocated royalties to a copyright owner from within a fund comprised of royalties paid for stations which never carried any of the copyright owner's works. Instead, the Networks contend that the "Basic cable fund is the clear analogue to the SHVA royalty fund" and that the 3.75% and Syndex funds "are not relevant".

However, the Basic Fund is comprised entirely of stations for which the cable operator pays the same rate, unlike the SHVA royalty fund which, during the period in issue, consisted of two rates. Clearly, the Basic Fund under Section 111 is analogous to only one of the funds under Section 119; and the three Section 111 funds (Basic, 3.75%, and Syndex) are analogous to the two Section 119 SHVA funds (12¢ and 3¢).

Consequently, we are not persuaded that the payment of royalties to a copyright owner which allegedly exceed the amount that is paid in by copyright users for the use of the copyrighted work, and *which are from within a single fund* is sufficient precedent to support the Network's claim, or is sufficient to rebut clear precedent for the validity of separate allocations from separate funds.

Logic and Fundamental Fairness

The Networks seek to blur the 12¢ superstation and 3¢ network/public television station categories and commingle the royalty payments for an obvious reason - it is the only way they can tap into the larger stream of revenues from superstations and

avoid the reality that the Networks seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming. Payment to the Networks from a fund which categorically, demonstrably, and unambiguously excludes any network-owned programming is neither logical nor fair. Not only would the Networks receive royalties for which they were not eligible and to which they were not entitled, but, because it is a zero-sum game within each category, the other program owners would be deprived of royalties to which they were entitled.

Moreover, having gained eligibility for royalty payment, the Networks are now trying to get through *indirection* from the Tribunal what they could not get - or did not seek - through *direction* from Congress - parity with the copyright owners which furnish programming to superstations. But their effort to seek a subsidy from the owners of programming furnished to superstations is misguided. The Networks' opportunity for increased revenues lies not in this Phase I proceeding, but in a legislative or rate-setting proceeding.

In fact, a one-category-royalty fund for the distribution of royalties paid by satellite carriers would not only enable the

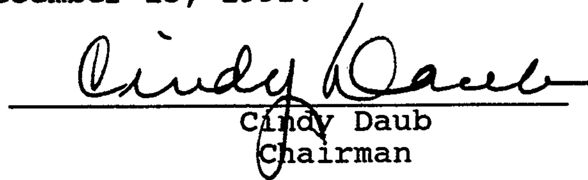
Networks to achieve virtual parity, it would give them a practical competitive advantage over other program owners. Initially, in negotiating with a satellite carrier, the Networks could emphasize the low (3¢/sub) cost of carrying a network station vis-a-vis the higher (12¢/sub) cost of carrying a superstation. Subsequently, having gained entry and widespread carriage due to a cost advantage of almost 400%, the Networks could ask the Tribunal for a substantial allocation of royalties from the pool which includes the more expensive superstation programming. This is analogous to buying a general admission ticket to the bleachers, then demanding to be seated in the reserved admission section behind home plate.

In order to minimize the possibility of over- or underpayment to the owner of copyrighted programming appearing on stations distributed by the satellite carriers, we have divided satellite carrier royalties into separate funds. Accordingly, copyright owners may only receive royalties paid into a fund for the retransmission of stations which, in fact, carried their programming.

WHEREFORE, in view of the foregoing, and the fact that all of the copyright owners, except the Networks, have negotiated a settlement, the Tribunal finds that one Phase I controversy exists

between Certain Copyright Owners and the Networks.

With regard to Certain Copyright Owners' request for partial distribution, the Tribunal invites the parties to file comments on the motion no later than December 15, 1992.



Cindy Daub
Chairman

Dated: 12/4/92

Commissioner Edward J. Damich, dissenting:

I respectfully dissent from the order of the Copyright Royalty Tribunal ("the Tribunal") in the 1989-91 Satellite Carrier Distribution Proceeding mandating separate funds[1] for royalty distribution purposes and ordering that "copyright owners may only receive royalties paid into a fund for the retransmission of stations which in fact carried their programming."[2]

Section 119 of the Copyright Act requires satellite carriers to pay by station type: 12 cents for each secondary transmission of a superstation and 3 cents for each secondary transmission of a network station.[3] At this stage in the 1989-91 distribution, the Tribunal effectively establishes two funds, one consisting exclusively of the fees paid in for superstation carriage (Superstation Fund) and another consisting of the fees paid in exclusively for network station carriage (Network Fund).[4] Program owners are only entitled to receive royalties out of a fund if

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[1]Copyright Royalty Tribunal Decision and Order at 25 (12/4/92).

[2]Id.

[3]17 U.S.C. § 119(b)(1)(B)(i) & (ii) (1991).

[4]At this stage in the proceeding, programs owned by public television are not included because of prior settlement. For 1993 and 1994, the Tribunal has established three separate rates: (1) for independent stations (17.5 cents), (2) for independent stations that are syndex-proof (14 cents), and (3) for network stations and noncommercial education stations (6 cents). 37 C.F.R. §310.3 (1992). (In the 1993-94 rate adjustment order, the Tribunal did not explain why it used "independent station" when section 119 and the arbitration panel use only "superstation." It appears that the Tribunal was using "independent" station and "superstation" interchangeably.) The rates effective for the period of this distribution (1989-91) were divided by Congress into "superstations" and "network" stations; therefore, both the Tribunal and I have adopted this usage in this decision and order. 17 U.S.C. §119(b)(1)(B) (1991).

their programs were carried by the type of station for which royalties were paid into the fund. Thus, if a program was carried only on network stations, then it would only receive royalties from the Network Fund. In adopting this scheme, the Tribunal limits the amount to be paid out in royalty distribution by the fees paid in. This pay-in/pay-out approach is illogical, contrary to fundamental fairness, and contrary to Tribunal precedent.

I. LOGIC

It simply does not follow logically that because Congress set different pay-in rates depending on station type that it intended distribution to follow the same pattern. Neither with satellite nor with cable did Congress establish detailed criteria to guide the Tribunal in distributing royalties;[5] the Committee Report for the Satellite Home Viewer Act (SHVA) however, states that the Tribunal "should...take into account its royalty distribution determinations under the section 111 cable compulsory license."[6] Regarding the cable compulsory license, the Committee Report for the Copyright Act of 1976 states:

> [I]t would not be appropriate to specify particular, limiting standards for distribution. Rather the Copyright Royalty [Tribunal] should consider all pertinent data and considerations presented by the claimants.[7]

By contrast, Congress was quite particular in establishing the

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[5]*See* 17 U.S.C. § 801(b)(3) (1991).

[6]H.R. Rep. No. 887, 100 Cong. 2d Sess., part 1, at 23 (1988).

[7]H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 97 (1976).

rates for both cable and satellite.[8] Thus, it is clear that Congress did not expressly direct coordination between the pay-in scheme and the distribution scheme, and the contrast between the great attention that Congress paid to the pay-in scheme and the great latitude that it gave to the Tribunal on the distribution side implies, instead, that coordination was not a goal.

Furthermore, when one compares the criteria for rate-setting in satellite with the distribution factors identified by the Tribunal in cable (to which Congress has directed the Tribunal's attention as a model for satellite distribution), it is immediately apparent that rate-setting involves many concerns that are irrelevant to the principal goal of distribution, viz. program valuation.[9] Thus, assuming that Congress followed its own criteria

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[8]*See* 17 U.S.C. §§ 111(d); 801(b)(2) (1991); 119(c)(3)(D).

[9]The factors for determining royalty fees for satellite are as follows:

> (1) the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station; (2) the fee established under any voluntary agreement; (3) the last fee proposed by the parties prior to arbitration; (4) maximizing the availability of creative works to the public; (5) affording the copyright owner a fair return and the copyright user a fair income under existing economic conditions; (6) the relative roles of the copyright owner and user with respect to creative contribution, technological contribution, capital investment, cost, risk, and opening of new markets for creative expression and media for their communication; and (7) minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

See 17 U.S.C. § 119(c)(3)(D) (1991). The primary factors for determining distribution for cable are as follows:

in setting the rates for satellite, the disparity between the pay-in amounts, which were determined by significantly different criteria from those of distribution, will govern the total amounts available for distribution in the Superstation Fund and the Network Fund.

Finally, even if the differences in criteria are ignored, it is only common sense that determinations made ex ante can never be as precise as those made ex post. It would be odd indeed if Congress intended to predetermine program worth to a significant degree at a time when it could only "guesstimate," instead of allowing the Tribunal the advantage of making more precise determinations based on hard data. Indeed, in its first cable royalty distribution proceedings, the Tribunal flatly stated:

> Because we find that the rate the cable systems pay under compulsory license is not a clear or true reflection of the direct marketplace value of the work, additional considerations, adjusted as appropriate, were used by the Tribunal to determine the marketplace value of the copyright owner's work.[10]

II. FUNDAMENTAL FAIRNESS

> (1) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems; (2) the benefit derived by cable systems from the secondary transmission of certain copyrighted works, and (3) the marketplace value of the works transmitted.

See 45 Fed. Reg. 63026, 63035 (1980).

[10]45 Fed. Reg., at 63028. Although this statement implies that there is some role for pay-in rates, there is no discussion of what role they play, and in any event they surely did not play the dramatic role assigned to them by the Tribunal in today's Decision and Order.

The adoption of the pay-in/pay-out rule is unfair because it places an artificial cap on the valuation of programming carried on network stations, since the Network Fund will normally be smaller than the Superstation Fund. If there is no division into funds, the Tribunal would receive evidence of the value of programming and divide up the money available for distribution (Basic Satellite Fund) according to its determination of the relative worth of all programming subject to the compulsory license. The only constraint on the Tribunal would be the amount of the Basic Satellite Fund, i.e. the total monies available for distribution under this compulsory license. Thus, the Tribunal would be free to follow the evidence of the value of programming carried solely on network stations wherever it leads, even if it leads to an award that is greater than the monies paid in for carriage of network stations (Network Fund).

However, if a program were carried only on network stations, the distribution scheme mandated by the Tribunal, would require it to disregard the evidence of the value of programming when that evidence pointed to an award that would exceed the total of the Network Fund, when the total of the Network Fund, as I have shown above, was determined by criteria different from that of program valuation. The Joint Network Parties ("the Networks") make this point in another way in their brief: "[A] first run episode of ROSEANNE on ABC would, before any [Tribunal] factors could be applied, be worth only a fourth as much as a 4-year-old ROSEANNE

rerun on a superstation."[11] Clearly, the establishment of one Basic Satellite Fund comports more closely with the Tribunal's stated goal of "simulat[ing] market valuation"[12] in distribution proceedings.

III. PRECEDENT

The rejection of pay-in/pay-out is firmly rooted in Tribunal precedent. As has been noted above, the legislative history of the SHVA directs the Tribunal to take into account its royalty distribution determinations under the cable compulsory license.[13] In its first cable distribution proceeding, the Tribunal made distributions from one fund, consisting of all the monies paid in for cable retransmission despite the fact that the pay-in rates varied according to whether the cable system was retransmitting an independent station on the one hand or a noncommercial educational or network station on the other.

In that same proceeding, the Motion Picture Association of America (MPAA) argued that programming should be evaluated by a time-plus-fee-generated method, i.e. that programming should be evaluated on the basis of the amount of time programs were carried plus their value to cable systems. The MPAA determined the value of the programs to the cable systems according to the value that

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[11]Brief of the Joint Network Parties at 5-6. (Programs carried on network stations are worth only one fourth of programs carried on superstations because the rate in effect for the period relevant for this proceeding was a 12 cent pay in for superstations and a 3 cent pay in for network stations.)

[12]45 Fed. Reg., at 63036.

[13]*Supra* n.6.

Congress assigned to the types of signals carried by cable systems for calculating the rates to be paid in for retransmission--in other words, according to the fees generated. The Tribunal noted that the MPAA's formula "would base the 'pay out' of royalties on the 'pay in'"[14] and rejected it in favor of a combination of factors.

The Tribunal has also rejected pay-in/pay-out in the satellite context. In its 1991 declaratory ruling the Tribunal rejected the argument that network programmers could not share in the satellite royalty distribution because of the structure of the pay-in scheme adopted by Congress. In accepting arguendo that its decision would result in illogical distributions, the Tribunal declared this to be irrelevant and pointed to its experience with cable distributions: "In the cable license there exists other disparities, because the pay-in does not correlate by statute to the pay-out."[15] In the 1991 Satellite Carrier Rate Adjustment Proceeding, the Tribunal stated: "[I]n cable and in satellite, the pay-in may not necessarily correlate to the pay-out."[16]

The Tribunal and the Certain Copyright Owners (CCO) make much of the Tribunal's decision to establish three funds for the distribution of cable royalties for 1983, but this was done in response to special circumstances that have no parallel in satellite distribution. Prior to the 1983 distribution, the

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[14]45 Fed. Reg. at 63028.

[15]56 Fed. Reg. 20414, 20415 (1991).

[16]57 Fed. Reg. 19052 (1992).

Tribunal had created two new rates in response to the Federal Communications Commission's (FCC) elimination of its distant signal rules and its syndicated program exclusivity rules. The Copyright Act permitted the Tribunal to establish these new rates, but, significantly, the Act required that the new rates must apply only to the signals affected by the FCC's change.[17] Thus, the Tribunal established the 3.75 rate and the Syndex rate as add-ons to the basic cable rate.

In its 1983 cable distribution, the Tribunal divided the cable royalties into three separate funds: the Basic Cable Fund, the 3.75 Fund, and the Syndex Fund. In approving the division into three funds, the U.S. Court of Appeals for the Second Circuit stated:

> [T]he establishment of the 3.75% and syndex royalty rates made new distribution criteria imperative. Certain claimants are, in fact, ineligible to receive royalties at the new rates, and distribution of royalties from a single fund would require complex adjustments.[18]

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[17]The 3.75 rate was established to account for the carriage of additional distant signals pursuant to a change in FCC rules. In authorizing rate changes pursuant to such a change, the Copyright Act provides that the new rate cannot apply to distant signals already carried:

> [N]o adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by...carriage of any signal permitted under the rules and regulations of the [FCC] in effect on April 15, 1976 [the enactment date of the Copyright Act].

17 U.S.C. § 801(b)((2)((B) (1991). Regarding the Syndex rate change, the Copyright Act provides that "any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change." *Id.* § 801 (b)(2)(C). *See also* "distant signal equivalent," *Id.* § 111(f) (1991).

[18]*NAB v. CRT*, 809 F.2d 172, 178 (2d Cir. 1986).

The decision of the Tribunal and the statement of the court must be understood in the context of the Copyright Act's requirement that the 3.75 and syndex rates would apply only to affected signals. Since Congress was so concerned that the new rate apply only to affected signals, it is reasonable to assume, as did the Tribunal and the court, that Congress also required that the proceeds derived from these rates be kept separate.

It is clear from the structure of the Copyright Act that the 3.75 and syndex rates (and therefore their corresponding distribution funds) are exceptions to the general distribution scheme reflected in the Basic Cable Fund, which is not subdivided into separate funds corresponding to different pay-in-rates according to station type. Nothing in the Copyright Act pertaining to the satellite compulsory license in any way resembles the special treatment afforded the 3.75 and Syndex Funds. Thus, the proper analogy for satellite distribution is the Basic Cable Fund, not the eccentric 3.75 and Syndex Funds.

IV. ELIGIBILITY

In an attempt to account for the Tribunal's consistent rejection of pay-in/pay-out, the Tribunal and the CCO seek to distinguish "eligibility" from program valuation. A programmer is "eligible" to share in royalties for a fund only if his or her program was carried on a station for which royalties were paid into the fund. Once beyond this threshold, pay-in/pay-out is not determinative.

There is a surface appeal to the argument that it is "unfair"

for a programmer to have a share of monies that derive from fees for the retransmission of stations that did not carry his or her programs, but it is only "unfair" if the rate that satellite carriers pay is calibrated to represent the value of the programs that they retransmit. In fact, in setting the pay-in rates, Congress did not set out to approximate what programs are worth, but instead, set rates by station type according to a host of factors that are unrelated to the actual value of the programs carried. It cannot be said that satellite carriers are paying the Congressionally-determined price of the programs carried on superstations such that if a network programmer whose programs are not carried on superstations is compensated from the Superstation Fund that he or she is being paid for something he or she did not provide. In paying the statutory rates for the carriage of superstations, satellite carriers are simply not "buying" the programs carried on those stations in the ordinary sense of that word; they are creating a Basic Satellite Fund from which programmers are to be paid according to the fair market value of their programs as determined by the Tribunal.[19]

"Eligibility" is a clever device to rationalize what is

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[19]The Tribunal implies that it has never "allocated royalties to a copyright owner from within a fund comprised of royalties paid for stations which never carried any of the copyright owner's works." Decision and Order, at 22. First, the fact that it has never done so does not mean that it has adopted a rule to that effect. Second, the Tribunal admits that it is difficult and perhaps impossible to trace the pay-in to the pay-out in the Basic Cable Fund. *Id.*, at 20-21. Third, the Tribunal followed this practice in the 3.75 and Syndex Funds because Congress required that the rates be separate from the basic cable rates. *Supra*, n.17.

nothing more than prejudging program value according to inappropriate criteria. As has been pointed out, if division into funds depending on station type is adopted, there is a profound affect on the value of programming that is carried on network stations since the pay-in for the Network Fund is so much smaller than that for the Superstation Fund. Programs confined to the Network Fund are handicapped: 25% of $5 million will always be more than 100% of $1 million. That is why "eligibility" should be rejected--it skews the process of program valuation that is committed to the Tribunal. The real issue is program valuation, not "eligibility."

The Tribunal also fails to address the full implications on cable distribution of adopting pay-in/pay-out as a general rule for satellite distribution. Pay-in/pay-out was formerly applicable only to the exceptional 3.75 and Syndex Funds in cable distribution, but if it is the general rule for satellite distribution, why not for the Basic Cable Fund as well? The Tribunal's new rule of thumb is that it will create separate funds according to the type of station retransmitted and only program owners whose programs where carried on that type of station will be eligible to share in the royalties paid in for that type of station. Thus, in cable distribution, if it is possible to identify the amounts paid in for retransmission of noncommercial educational stations, it is consistent with the general rule that the Tribunal has adopted today to argue that programmers whose programs are carried only on noncommercial educational stations are

confined to a "Noncommercial Educational Fund."[20]

In conclusion, the Tribunal's adoption of a pay-in/pay-out rule to govern satellite royalty distribution is unjustified because:

1. It illogically allows rate categories based on one set of criteria to constrain royalty distribution based on different criteria.
2. It unfairly prevents the determination of real program value by artificially limiting program valuation to percentages of discreet funds.
3. It disregards its many precedents rejecting pay-in/pay-out in both the cable and satellite contexts and makes a general rule out of a practice hitherto confined to exceptional circumstances (3.75 and Syndex Funds).

[20]The Networks and the CCO differ on whether it is possible to determine the pay-in by station type in cable. In the 1989 Cable Distribution Final Determination, however, the Tribunal stated that, regarding noncommercial television, "[f]ees generated declined from 2.4% to 2%." 57 Fed. Reg. 15286, 15303 (1992).