MAY 2 5 1980

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

In the matter of	)
Cable Royalty Distribution Proceedings	)

MEMORANDUM OF
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
REGARDING CATEGORIES OF BROADCAST PROGRAM COPYRIGHT
OWNERS NOT FULLY REPRESENTED BY ELIGIBLE CLAIMANTS

The National Collegiate Athletic Association ("NCAA") submits this memorandum in response to the Copyright Royalty Tribunal's May 7, 1980 order, Item 2 of which directed interested parties to submit briefs: "on the legal issues applying to the situtation of those categories of claimants not fully represented by its total number of eligible claimants." As we understand the task thus set by the Tribunal, it is to identify the principles which govern the distribution of cable royalties where some otherwise qualifying programming or copyright owners in a particular class or category may not be covered by claims filed with the Tribunal.

For the reasons stated below, the principles which apply are two in number:

1. Consistent with the remedial and compensatory purposes of Congress in enacting section 111 of the Copyright Act, royalty fees should be distributed as widely as possible among owners of copyright in qualifying programming, and such owners should not be excluded from the distribution without clear and compelling reason.

2. In those instances, if any, where it appears that some portion of the copyright owners or of the qualifying programming in a particular distribution category is not represented among the interests to which distribution will be made, the fees attributable to such owners or programming should be reallocated among all of the owners, in all categories, to which distribution is being made.

We presume that the circumstances which give rise to the Tribunal's solicitation of views are those which we understand prevail in, for example, the category consisting of motion pictures and syndicated programming, where it appears that not all of the movies and series included in qualifying secondary transmissions are covered by claims filed for the year 1978. In addressing this issue, it is first necessary to examine the nature and intended function of the claims filing provision.

The relevant statutory provisions are as follows:

> (4) The royalty fees . . . shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:
>
> (A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and
>
> (B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and
>
> (C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.
>
> (5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

> (A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmission shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation . . .
> (B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall . . . distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall . . . conduct a proceeding to determine the distribution of royalty fees.

17 U.S.C. § 111(d)(4) and (5).

The provisions of clauses (A), (B) and (C) of section 111(d)(4) above establish clearly substantive criteria which must be met by a copyright owner in order to qualify for distribution from the pool of statutory fees. In contrast, although section 111(d)(5) provides for the filing of a claim each July by "every person claiming to be entitled to compulsory license fees for secondary transmissions", it does not provide expressly that such a filing is a condition to the receipt of distributable fees. Section 111(d)(5) is, in any event, a procedural provision, the purpose of which is to assist the Tribunal in making an early decision as to whether or not a controversy exists with respect to the distribution of the royalty fees for the period concerned.

There is nothing in the statute or its legislative history that suggests that that procedural provision was intended to be a barrier to the recovery of cable royalty fees by the copyright owners of otherwise qualified and compensable

programming. Indeed, to give it such effect would defeat the fundamental purpose of the statutory cable royalty scheme, which was to provide a means for assuring "that copyright royalties [are] paid by cable operators to the creators of [copyrighted program material carried in connection with their basic retransmission operations]. H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 89 (1976).

The Tribunal should construe the statute in a manner which will give effect to the intent of Congress, not defeat it, United States v. American Trucking Associations, Inc., 310 U.S. 534, 542 (1940); accord, City of New York v. Train, 161 U.S. App. D.C. 114, 123, 494 F.2d 1033, 1042 (1974), aff'd, 420 U.S. 35 (1975); United States v. Public Utilities Commission, 80 U.S. App. D.C. 227, 231, 151 F.2d 609, 613 (1945), and, accordingly, should exercise great care before determining that particular programming or an otherwise qualified copyright owner is excluded from the distribution by virtue of the procedural provisions of section 111(d)(5).

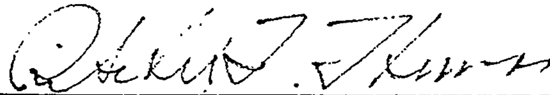
The record of these proceedings to date does not fully disclose to what extent, if any, the situation postulated in the Tribunal's directive in fact exists. As noted above, we understand that it may arise in the motion picture and syndicated programming category, and possibly in the local station programming category. In the sports programming area, which is of particular interest to the NCAA, it is unclear to what extent there is an issue in this regard, because it is unclear what categorization will be adopted by the Tribunal.

If intercollegiate sports programming is a separate distribution category, the issue posed by the Tribunal is not a concern within that category. The overwhelming preponderance of nonnetwork telecasts of intercollegiate sports events carried on a distant signal basis in 1978 are covered by the claims filed by the NCAA. If the category utilized by the Tribunal is one that covers sports programming of all kinds, amateur and professional, there may be in fact a number of events that are not covered. However, there is no evidence in the record that a significant amount of such programming is involved.

Assuming that, as to one or more categories of programming, it is found that copyright to significant amounts of programming taken into account by the Tribunal in computing the allocation to that category is held by parties to which no distribution can be made, then whatever royalties are attributable to that programming must be reallocated among all distributees in all categories. The statute is clear that all of the fees (after deduction of the Tribunal's reasonable administrative costs) are to be distributed to qualified copyright owners. 17 U.S.C. § 111(d)(4). For the purpose of that reallocation, each copyright owner (or group of owners) would be assigned a percentage of the excess equal to the ratio between the amount found to be distributable to that

owner or group and the aggregate fees initially found to be distributable to qualified copyright owners.

Respectfully submitted,



Ritchie T. Thomas
Judith Jurin Semo

Squire, Sanders & Dempsey
21 Dupont Circle, N.W.
Washington, D.C. 20036

Counsel to the National Collegiate Athletic Association

Dated: May 23, 1980

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of May, 1980, copies of the foregoing Memorandum were served upon parties to this proceeding by first class mail, postage prepaid, addressed to each of the following:

James F. Fitzpatrick, Esquire
David H. Lloyd
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Philip R. Hochberg, Esquire
Vorys, Sater, Seymour & Pease
1800 M Street, N.W.
Washington, D.C. 20036

Arthur Scheiner, Esquire
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036

Gordon T. King, Esquire
Coudert Brothers
200 Park Avenue
New York, New York 10017

Gene A. Bechtel, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006

Jacqueline Weiss, Esquire
Public Broadcasting Service
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024

Albert F. Ciancimino, Esquire
SESAC, Inc.
10 Columbus Circle
New York, New York 10019

Bernard Korman, Esquire
ASCAP
One Lincoln Plaza
New York, New York 10023

Charles T. Duncan, Esquire
Peabody, Rivlin, Lambert & Meyers
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Edward W. Chapin, Esquire
Broadcast Music, Inc.
320 West 57th Street
New York, New York 10019

Jeffrey D. Southmayd, Esquire
Fisher, Wayland, Southmayd & Cooper
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

James J. Popham, Esquire
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Janice F. Hill, Esquire
National Public Radio
2025 M Street, N.W.
Washington, D.C. 20036

Richard Dannay, Esquire
Schwab, Goldberg, Price & Dannay
1185 Avenue of the Americas
New York, New York 10036

Judith Jurin Semo