Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of

Cable Royalty)
Distribution Proceedings)

REPLY MEMORANDUM OF THE
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers (ASCAP) submits this reply memorandum, in accordance with the Copyright Royalty Tribunal's notice of October 17, 1979 (44 FR 59930), concerning certain issues of copyright ownership which might affect claims for cable compulsory license fees under 17 U.S.C. §111.

We shall limit our reply to three points: 1) the significance of 17 U.S.C. §§501(c) and (d); 2) claims concerning cartoon characters; and 3) the broadcasters' allegation that music performing rights organizations have no basis for claims to cable royalties.

IF BROADCASTERS WERE COPYRIGHT OWNERS BY VIRTUE OF THEIR "COMPILATION" OR "SYNDICATED EXCLUSIVITY" CLAIMS, THERE WOULD BE NO NEED FOR SPECIAL PROVISIONS IN THE COPYRIGHT LAW CONFERRING STANDING TO SUE ON THEM

Certain broadcaster claimants allege that their "compilation" copyright claims are valid because the copyright law gives them standing to sue for copyright infringements resulting from unauthorized cable retransmissions. Mem. Br. of Golden West Broadcasters, at 12-13; Mem. Br. of All Pro Broadcasting, Inc., et al., at 9-10. But the fact that special provisions conferring standing on broadcasters were included in the Copyright Act -- specifically Sections 501(c) and (d) -- proves the opposite conclusion.

Section 501(c) deals with an infringing secondary transmission by a cable system which has not complied with the compulsory license requirements. It confers standing to sue upon a television broadcast station which holds a "copyright or other license to transmit or perform the same version of that work" which is transmitted within the station's local service area by the cable system.

Section 501(d) deals with a cable system which alters the primary transmission of the broadcast station it is retransmitting. It confers standing to sue on both the broadcast station whose broadcast is altered and any broadcast station within the local service area where the cable system's secondary transmission occurs.

The broadcasters' briefs say "[t]he reason for this special provision [§501(c)] is not clear since it would appear that a television station as the copyright owner of the broadcast day with the right to transmit the work would have standing to sue as the copyright owner and/or the 'owner of an exclusive right under a copyright.'" Id.

We submit the reason for both provisions is very clear. One of the basic tenets of the copyright law, after all, is that a copyright owner has the right to sue for infringement of his work. 17 U.S.C. §§501(a) and (b). If the broadcasters' claims of "compilation" copyright and "syndicated exclusivity" ownership were correct, there would have been no need for Sections 501(c) and (d) -- special provisions conferring standing to sue. We suggest the draftsmen of the law did not act carelessly in

including those provisions.

Indeed, the House Report (subsection (d) was added by the House) is clear that no standing to sue would exist without these provisions. It states, "Section 501 contains two provisions conferring standing to sue under the statute upon broadcast stations . . . " H.Rep.No. 94-1476, 94th Cong., 2d Sess. (1976), at 159 (emphasis added). And, regarding Section 501(d), "in such cases, standing to sue is also conferred on [the primary transmitter and other local broadcasters]." Id. (emphasis added).

Without these provisions, broadcasting stations would have no standing to sue because, with the exception of locally produced programs they create and own, they are not "copyright owners." They own no "compilation" copyright in the broadcast day, and their "exclusive" rights are only for broadcasts, not cable retransmissions.

OWNERS OF CARTOON CHARACTERS ARE NOT ENTITLED TO A SHARE OF CABLE ROYALTIES UNDER THE COPYRIGHT ACT AND INDUSTRY LICENSING PRACTICES

The owners of certain cartoon characters claim to be entitled to a share of cable royalties because, they say, their "works" are "included" in cable transmissions. We suggest this claim ignores the Congressional intent behind the law, and the realities of industry practices.

We will not restate in detail the legislative history of Section 111. As both our previous Memorandum and the MPAA's

noted, Congress had a very clear idea of those who should divide cable royalties. Owners of cartoon characters were not among that group.

The cartoon interests make much of Section 111(d)(4), which describes potential claimants as those whose works are "included" in secondary transmissions. This provision, they say, is very different from that which would have resulted if Congress had used the words "incorporated" or "embodied."

The semantic distinction escapes us. The effect of their claim, however, would drastically restructure the copyright law. If owners of cartoon characters can make legitimate claims because their works are "included" in cable retransmissions, so can scriptwriters, novelists, and all those whose works are assimilated into the final product. That result is not what Congress intended.

The cartoon interests analogize their position to that of copyright owners of music. They state that a cartoon character, like a musical composition, "retains its separate identity" when used in a program. But they ignore one vital difference between the use of music and the use of cartoon characters:

Performing rights in music are separately licensed by the copyright owner or his representative. Generally, they are not requested by the program producer. Indeed, since performing rights in music are not generally requested by the program producer, license or other agreements between the music copyright owner and the producer usually expressly exclude performing rights. This is not the case with cartoon characters: like the screen-

play used in the program, the right to use cartoon characters is conveyed to the program producer for all uses of the program, including cable retransmissions.

The cartoon interests, recognizing that they cannot overcome this hurdle, try to ignore it. They say they are entitled to cable royalties "irrespective of any licensing arrangements which may have been made by [cartoon] claimants with program producers or others." Br. of Archie Comic Publications, Inc., et al., at 9, n.

But licensing arrangements cannot be ignored, and, we suggest, they are dispositive here. Both Congressional and contractual intent are clear: music is entitled to cable royalties, cartoon characters are not.

THE BROADCASTERS' CLAIM THAT MUSIC PERFORMING RIGHTS ORGANIZATIONS ARE NOT ENTITLED TO SHARE IN CABLE ROYALTIES IS WHOLLY SPECIOUS

In what appears to be an afterthought to its memorandum, the NAB says it is "at an absolute loss as to the basis of the Musical Societies' claim to an interest in the royalties." Mem. of NAB, at 29. If so, they show either a basic ignorance of the law or a disregard for it.

The Congressional Reports leave no room for doubt concerning the validity of our claim for cable royalties. Every non-exempt public performance of a copyrighted musical composition requires the copyright owner's license, whether by broadcast, or by cable retransmission of the same broadcast rendition:

> " . . . the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he sings a song; a broadcasting network is performing when it transmits his performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcasts to its subscribers . . ." S.Rep. No. 94-473, 94th Cong., 1st Sess. (1975). at 59 (emphasis added); H.Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 63

If the cable system performed copyrighted music in its retransmissions, and no compulsory license existed, it would need a license from those who created and owned that music or their representative. The compulsory license replaces the voluntary license that would otherwise be necessary. Creators and owners of musical compositions are therefore entitled to share in compulsory license fees.

The NAB alleges that payment to music performing rights organizations will result in a "double award" because we are already "compensated" through the blanket licenses we issue to local radio and television broadcasters. But that argument is specious and fundamentally in error.

ASCAP's licenses to radio and television broadcasters are only for their broadcast performances. See ASCAP's Mem. of November 15, 1979 at 10-11. The licenses do not include performing rights for cable retransmissions of those broadcasts. (Indeed, we can imagine the broadcasters' response if, during negotiations for licenses for their broadcast performances, we had asked for additional sums as payment for the cable performances.)

There is no "double award" because neither the broadcasters nor anyone else have paid for cable performances.

Finally, we note that radio station WGNA alleges that music performing rights organizations are not entitled to cable royalties because of the "principle of divisibility", i.e., that a broadcasting station holding an exclusive right is the "copyright owner" for that particular right. WGNA's error is that it has not read its ASCAP license agreement: it has been granted no exclusive right by ASCAP of any sort, let alone any right to claim cable royalties for performances of our members' music.

CONCLUSION

The Tribunal should reject the broadcasters' specious "compilation" "exclusivity" and "double award" claims, and the cartoon interests' claims.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By Bernard Korman /jm
Bernard Korman
General Counsel

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Of Counsel:

I. Fred Koenigsberg
Benjamin L. Zelenko