

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C. 20036

**REPLY MEMORANDUM OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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POINT I.

BOTH THE LANGUAGE AND THE POLICY
OF THE 1976 COPYRIGHT ACT REQUIRE
THAT BROADCASTING STATIONS BE
COMPENSATED FOR DISTANT RETRANS-
MISSION OF THEIR "BROADCAST-DAY"
COMPILATIONS AND THEIR SYNDICATED
PROGRAMMING IN ADDITION TO ANY
OTHER PROGRAMMING PRODUCED AND
RECORDED BY THE STATIONS

PRELIMINARY STATEMENT

Apparently, opposing claimants totally mis-
conceive the nature of and reason for the various
rules governing statutory interpretation. Rules of
statutory interpretation are employed only when the
language of the statute itself is ambiguous.

Both the language and purpose of the statute
at issue here, however, are unequivocally clear: under
the new Copyright Act, any and all copyright owners
of works included in a distant, non-network secondary
transmission are entitled to a share of the compulsory
royalty fund to compensate them for cable use of their
works.

Notwithstanding the clear meaning of the 1976 Act, opposing claimants, led by the Motion Picture Association of America ("MPAA"), argue that the legislature intended that broadcasters receive compulsory royalties only for secondary transmission of the programs which they produce and record.

In effect, then, they ask this Tribunal to disregard the fundamental principle that a statute must be read as a whole and to ignore the crucial inter-relationship between Section 111 and those portions of the new Act which define copyrightable works and copyright ownership.

(a) The Broadcasters' Claims Are Entirely Consistent With The Various Rules Governing Statutory Construction.

For the most part, opposing claimants rely heavily upon the argument that the stations' compilation and syndicated programming claims are inconsistent with the "legislative history" of Section 111. It is therefore necessary to discuss the various interpretive guides

which are accepted by courts and administrative agencies in interpreting statutory meaning.

Throughout this discussion, it must be remembered that the concept of legislative intent is useful in statutory construction only if it is understood as the sum of the individual ideas, views, and attitudes of all the members of the legislature.¹ As Professor Radin has observed, taking the realities of legislative procedure into consideration, "the intention of the legislature is undiscoverable in any real sense.**a legislature... has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."²

In other words, "legislative intent" is merely the composite or net meaning that is communicated by

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Landis, A Note on "Statutory Interpretation", 43 Harv. L.Rev. 886 (1930).

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Radin, Statutory Interpretation, 43 Harv.L.Rev. 863, 869 (1930).

the legislature.³ As a result, statements and opinions expressed by individual members of Congress, as a rule, are not considered in ascertaining statutory meaning.⁴

Statements made by the committee member in charge of the bill upon presenting the bill to the floor, form the only exception to this rule. Such statements are generally accorded the same weight as formal committee reports.⁵

On the other hand, remarks by the legislator sponsoring the bill during the course of its consideration on the floor must be used cautiously, if not entirely disregarded, for two reasons:

"The first reason is that in actual practice the legislator who is identified as the sponsor of a bill by reason of having intro-

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See, e.g., Harrison v. Northern Trust Co., 317 U.S. 476 (1943); Day v. North American Royon Corp., 140 F.Supp. 490 (S.D.N.Y. 1956); see, generally, a Re-Evaluation of Use of Legislative History in the Federal Courts, 52 Col.L.Rev. 125 (1952); Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L.Rev. 370 (1947).

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See, e.g., 73 Am.Jur.2d. Statutes, §175 and cases cited therein.

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2A Sutherland, Statutory Construction §48.14, n.4 and cases cited therein.

duced it often-times assumes that role and performs that function at the instance of some private party who is interested in procuring passage of the bill, and the 'sponsor' in fact knows no more about the bill than anyone else ... secondly, where he does in fact have specific knowledge about the bill, his statements may be suspect because, being a protagonist in support of a partisan position in regard to the bill, he would have incentive to make statements calculated to improve chances of enactment even where that might entail some specific sacrifice of complete candor."⁶

The considerations obviously apply here. For the most part, opposing claimants rely on extemporaneous statements made by various interested parties during subcommittee hearings to support their argument that the stations' claims are inconsistent with the legislative intent behind Section 111. These statements offer no support for that argument, however, for several reasons.

It is readily apparent from the full text of the subcommittee hearings that the lobbyists quoted in opposing briefs were in no position to predict the inter-

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2A Sutherland on Statutory Construction, §48.16, (1973), p. 222.

relationship between the various drafts of Section 111 and the rest of the proposed bill. Indeed, the argument that the broadcasters' testimony before the subcommittee now defeats their claims for royalties based on their syndicated programming and compilations is patently absurd, since neither claim was in issue during any of the subcommittee hearings on the bill. Because neither claim was considered, the Tribunal must ascertain the legislative purpose behind compulsory royalty compensation and, after doing so, defer to the legislature's manifested determinations of principle and policy.⁷ The determinations of principle and policy relevant here are thoroughly consistent with the broadcasters' position.

But more importantly, the so-called "legislative history" relied upon by opposing claimants must be disregarded because statements of individual lobbyists, as well as those of individual subcommittee members and legislators simply do not, and cannot override the clear

⁷ Keeton, *Venturing to do Justice* (Cambridge, Mass.: Harvard University Press, 1969) pp. 94-95, cited in 2A Sutherland, *Statutory Construction* §.45-09 (1973) p. 29-30.

meaning and overall legislative purpose of the bill. In short, the cardinal purpose, clear meaning, and import of the statute are the sole determinants of "legislative intent" here, and supercede the concocted type of "legislative history" set forth by opposing claimants.

(b) The Stations' "Broadcast-Day" Compilations Are Copyrighted Works Compensable By Compulsory Royalties.

The program syndicators argue that Section 111(d) (4)(A) of the Copyright Act must be interpreted as precluding the payment of royalties except for the secondary transmission of copyrighted "programs".⁸ This, the syndicators claim, is the plain unambiguous meaning of the statute and the obvious intent of the Congress.

Assuming, arguendo, that the syndicators' position is correct, what becomes of the music societies' claim to royalties based upon secondary transmission of television programs? Obviously, these claimants can and do not claim copyright ownership of "programs"

⁸ 17 U.S.C. 111(d)(4)(A) reads in relevant part as follows: "Royalty fees...shall...be distributed to... (A) any such [copyright] owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter..."

as the word is defined by the syndicators.

The brief submitted by the owners of copyrights in certain characters urges adoption of the opposite extreme. By focusing attention upon the words "...work... included in a secondary transmission...of a program", copyright owners of characters would have this Tribunal adopt a construction of Section 111(d)(4)(A) in which "program" is not the dominant word, and the phrase "...work...included" is all-important. According to this interpretation of the statute, only those copyright owners whose work is included in whole or in part in a secondary transmission of television programs are entitled to royalties. While this certainly favors the character claimants as well as the music societies, it necessarily means that the program syndicators are totally without standing to claim royalties - the syndicators claim ownership of programs, not works "included" in the programs.

In our view, these strained statutory constructions

can only pervert the congressional intent behind the new Act and Section 111. As we noted at the outset of this reply, all statutes must be interpreted as a whole and in the light of their overall legislative purpose. The legislative purpose behind 17 U.S.C. §111 (d)(4) seems clear enough:

"Each year...[royalties will be] distributed by the copyright royalty commission to those copyright owners who may validly claim that their works were the subject of distant non-network transmission by cable systems."
(Emphasis added.)⁹

In dealing with royalty distribution as well as other aspects of secondary transmission, the House Report uses three terms virtually interchangeably with "program": "work", "programming material" and "programming". In the language just quoted, the word "work" was thought sufficient. For example, within the body of Section 111(d)(4) itself, "program" is equated with "programming". A comparison between Section 111(d)(4)(B) with Section 111(d)(4)(C)¹⁰ shows that same use of the word "programming" for "program".

⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 91 (1976) [hereinafter "House Report"].

¹⁰ This section must be read with 111(d)(2) which is couched in terms of "programming".

In summary, the interpretations urged by the program syndicators and the character claimants should be rejected. It must, if common sense is to prevail, be held that a compilation of programs is compensable for it is obvious that absent the clearest legislative expression to the contrary, no "work" should be singled out for unfair discriminatory treatment.

The program syndicators also claim that the broadcast day should be disallowed because its assembly is unauthorized. But this clearly is not the case: the syndicated programs were used by the stations in a manner precisely contemplated and agreed to by the syndicators. A given syndicator knows with absolute certainty that its programming will be combined with those owned by other syndicators in a manner totally within the discretion of the broadcaster, and, knows as well that any station's success or lack of success will depend upon that station's judgment in program selection and its skill in the arrangement of the programming selected. It is therefore abundantly clear that the

stations' use of syndicated programming in the assembly of the broadcast day is with the specific knowledge, authority and cooperation of the program syndicators.

In reality, the gist of the syndicators' claim is that the stations' "broadcast-day" compilations are not copyrightable works because the stations are without authority to "fix" (or copy) any of the underlying syndicated programs absent specific license from the syndicators.

The program syndicators proceed upon a misapprehension of their own making: contrary to the allegation at page 21, footnote 21 of their brief, the NAB justification never represented that the broadcasters "fixed" their entire broadcast day by recording it simultaneously with their transmission. What we did say, both in the NAB Justification and in our brief, is that certain stations who record their broadcast day employ an audio-video logger.¹²

The audio-video logger serves two purposes: First, it

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The logger is a device which permits pictures to be taken of a transmission at intervals of about 2.2 frames per second as opposed to 30 frames per second for an ordinary motion picture.

constitutes a log of the stations' programming for FCC purposes. Second, it adequately "fixes" the "live" programming produced by the stations for copyright purposes.

Neither the audio-video logger, nor any other method of "fixation", however, need be employed by the stations to include syndicated programming as part of their "fixed" broadcast-day compilations since syndicated programming is always adequately fixed for those purposes when it is delivered to the stations. Moreover, even if stations relied upon the audio-video logger to "re-fix" syndicated programming as part of their compilations, it is inconceivable that the resulting copy at approximately 2.2 frames per second would be an ephemeral recording within the meaning of 17 U.S.C. 112.

Certainly, stations which do not employ the logger fall outside the scope of the syndicators' argument since they simultaneously videotape the programming they produce as it is aired to the public "live". These tapes arranged with the tapes of syndicated programming licensed and delivered to the stations, together with tapes of daily commercial and public interest announcements, comprise a fully fixed

broadcast-day compilation.

In any event, the broadcasters submit that the authority to "fix" the broadcast day, regardless of the form of fixation is a right necessary to the full enjoyment of the broadcast rights granted to the syndicators.¹³ Were the right of fixation not necessarily implied, broadcasters would, among other things, be powerless to prosecute infringement actions based upon the pirating of the broadcast day.

For all of the foregoing reasons, it must be held that the broadcasters are entitled to a certain share of copyright royalties based upon the secondary transmission of the broadcast day.

- (c) The Statutory Language And Legislative History Of Section 201(d)(2) Of The New Act Mandates Distribution Of Compulsory Royalties To Broadcasting Stations For Secondary Transmission Of Programs Exclusively Licensed To Them By The Syndicators.

In essence, program suppliers claim that local

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See, 3 Nimmer on Copyright, §10.10[c] (1979) and cases cited therein.

stations holding exclusive exhibition licenses are not copyright owners within the meaning of the new Copyright Act because the compulsory license provision of the Act precludes them from asserting their exclusive exhibition rights against cable systems.

This argument is totally nonsensical and leads to an absurd interpretation of the 1976 Act's compulsory royalty provisions. If the approach suggested by the syndicators were followed to its logical conclusion, no copyright owner would ever qualify for compulsory royalties since no copyright owner can prevent distant transmission of its work by cable under the new Act.

What is really an issue here is the stations' rights vis-a-vis program suppliers. We submit that program suppliers which have sold their exclusive exhibition rights to local stations have surrendered all of their rights to compulsory royalties to these stations and that the syndicated exclusivity rules promulgated by the Federal Communications Commission in no way alter this.

The initial brief submitted by the NAB amply demonstrates that any station which purchases an exclusive license to transmit a copyrighted program within a particular geographic area automatically succeeds to the author's copyright ownership in that program with respect to those rights. By virtue of that ownership, such a station is entitled to compulsory royalties for a secondary transmission of that program within the area covered by its exclusive license.

Despite the obvious fact that program suppliers have surrendered their right to exhibit the programs licensed to the stations within the areas covered by the stations' licenses, program suppliers claim the same royalties. They attempt to justify this form of double recovery by arguing that the stations are not entitled to compulsory royalties because the exclusive exhibition rights owned by the stations are not cognizable under the 1976 Copyright Act.

But, as our main brief shows in depth, the language and legislative history of the 1976 Act make it abun-

dantly clear that local broadcasting stations holding exclusive licenses are copyright owners of the rights which they have been licensed and, as such, are entitled to all of the remedies and protection afforded copyright owners by the new Act, including the right to receive compulsory royalties.

Moreover, contrary to the MPAA's bald assertions, the legislative history of the new Copyright Act confirms that FCC Regulations in no way impinge upon the rights and protection accorded to exclusive licensee stations under the Copyright Act. During the subcommittee's presentation of the 1976 Act on the floor of the House, Rep. Edward Hutchinson spoke for the subcommittee and stated the following:

"I would like to make it clear for the record, since the language in the report is reflecting my amendment, that the Federal Communications Commission and the Copyright Royalty Commission are two entirely separate commissions with entirely separate jurisdiction, proceedings and functions." ¹⁴

During the House debate of the bill, another sub-

¹⁴122 Cong.Rec. 31984 (cum.ed., September 22, 1976).

committee member, Rep. Robert W. Kastenmeier again confirmed that:

***copyright liability is quite independent of actions pending before the FCC. The copyright liability this [cable] system is entitled to is compulsory, in any event, it cannot be denied to the system [by the FCC], and so the system should not be free from compliance."¹⁵

By the same token, the FCC cannot deny or alter the stations' right to collect compulsory royalties. Simply stated, stations which own exclusive transmission rights to syndicated programming have the option of protecting those rights under the Copyright Act (by claiming compulsory royalties for cable transmission of that programming) or the FCC's syndicated exclusivity rules (by forcing cable to delete that syndicated programming from its distant signal).

The syndicators' argument based on Section 501(c) of the new Act is also inopposite. According to the syndicators, if stations were actually "legal or beneficial owners" of the syndicated programming covered by their exclusive license, there would be

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122 Cong. Rec. 32013 (cum.ed., September 22, 1976).

no need for Section 501(c), since stations could sue for infringement along with other copyright owners under Section 501(b). This argument erroneously presumes that any other interpretation of Section 501(b) would make Section 501(c) totally redundant.

According to Professor Nimmer, however, Section 501(c) is redundant of Section 501(b), to the extent that it grants exclusive licensee stations the right to sue for copyright infringement since these stations are copyrights owners under Section 201(d)(2) of the Act and could therefore sue for infringement under Section 501(b).¹⁶ Obviously, Section 501(c) merely emphasizes the fact that non-exclusive licensees along with exclusive licensees of copyright works transmitted by cable are entitled to sue for infringement under Section 111(c).

Finally, the argument that broadcasters' claims for royalties based on their exclusive licenses are "impossible to effectuate" is totally specious.

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See, generally, 4 Nimmer on Copyright, §12.02 (1979).

Indeed, the broadcasters are in the process of compiling data which would adequately permit the Tribunal to resolve all of their claims.

Point II

COPYRIGHT OWNERSHIP OF SPORTS PROGRAMMING CAN ONLY BE RESOLVED BY ANALYSIS OF THE VARIOUS CONTRACTS ENTERED BETWEEN THE SPORTS CLAIMANTS AND THE BROADCASTERS.

PRELIMINARY STATEMENT

The joint sports claimants rely upon legislative history, common law principles, the "work for hire" doctrine and the contracts entered by them with the broadcasters. Only the latter form a basis for their claims and it now appears that ultimate resolution of the issue will depend upon an analysis of each contract.

(a) Legislative History.

The legislative history cited at length by the joint sports claimants certainly demonstrates their desire to prevent cable systems from benefiting unfairly but has little, if any, bearing upon the issue of copyright ownership. More specifically, these interests make an ample showing of their awareness of: (1) the

fact that cable systems could have an adverse impact upon gate receipts and the sale of television rights; and (2) that as a consequence, cable systems should not get "a free ride". But this very legitimate concern has been resolved through compulsory licensing and in no way bears on the standing of the sports claimants.

As we pointed out in our initial brief (at page 15), copyright ownership by the sports claimants can only be established where: (a) they produced and recorded broadcast coverage of the games themselves; or (b) they secured copyright ownership by way of contract with the station which produced and recorded that coverage. Nothing cited by the claimants weakens the force of this argument.¹⁶

They do, however, claim that the broadcasters have acknowledged their copyright ownership during subcommittee hearings on Section 111 when (1) Mr. Summers "guessed" that the club or league owned the copyright; (2) when Mr. Jenner indicated he assumed that they did pursuant to contract, and (3) when Mr. Wasilewski,

¹⁶ Indeed, the sports claimants recognize as much as they ultimately rely upon their contracts with the broadcasters.

uttered the remarks quoted at page 18 of the sports claimants' brief in the context of a discussion on the intricacies of the record industry.

The foregoing, on its face, acknowledges nothing. Copyright ownership is a legal question involving a number of factors and it is simply impossible to determine which, if any, entered Mr. Summer's "guess" or Mr. Wasilewski's answer to a question concerning the record industry.

As demonstrated at the inception of our Reply this sort of thing is not legislative history.

b) Common Law Principles

Here, the sports claimants place principal reliance upon National Exhibition Co. v. Fass, 143 N.Y.S 2d, 667 (Sup. Ct. 1955). In this case, the court's decision turned upon specific factual findings that the plaintiff sports team owner had by contract retained broadcast rights and, that the defendants activity interfered with such rights to the detriment of the club.

As we have often said: if a ball club either produces and records the broadcast, or by contract has

secured copyright ownership, it is entitled to copyright royalties.

c) Works Made For Hire

In our memorandum we demonstrated that authorship and fixation were entirely the results of the efforts of the broadcaster. In arguing that copyright in the audiovisual works in issue belong to them, the sports claimants invoke the "work for hire" doctrine.¹⁷

The doctrine is inapplicable for a number of reasons. Firstly, the broadcaster is not an employee. Secondly, should the sports claimants assert that the audiovisual work produced by the broadcaster is specially commissioned they would have to demonstrate the existence of a written instrument wherein the parties expressly agree that the work is considered one for hire. No such contract is claimed.¹⁸

¹⁷ As a preliminary matter these claimants first suggest that a sports event itself is copyrightable. Apart from the question of "fixation" the suggestion was long ago rejected. See Seltzer v. Sunbrock, 22 F.Supp. 621, 631 (S.D.Cal. 1938). The claimants reference (fn. 26 at page 38) to authorship in sound recordings is irrelevant inasmuch as sound recordings are "works" within the meaning of 17 U.S.C. 102(a)(7). Football games are not.

¹⁸ 17 U.S.C. 101

CONCLUSION

We respectfully urge the Tribunal to:

1) rule that the broadcasters claims based upon the broadcast day and syndicated programming are ripe for the submission of such supporting evidence as they may choose to adduce;

2) rule that the competing claims as to ownership of sports programming are to be resolved in accordance with the contracts involved; and,

3) schedule a conferance to set ground rules for the foregoing, together with such other matters as the Tribunal may deem appropriate.

Respectfully submitted,

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