

REPLY

Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D. C. 20036

In the Matter of)
)
Distribution of Cable)
 Royalty Fees)
)

REPLY MEMORANDUM OF BROADCAST MUSIC, INC.

Broadcast Music, Inc. (BMI), by its attorneys, submits this reply memorandum in the above-captioned proceeding. In the first round of comments, BMI addressed the four issues specifically set for comment by the Copyright Royalty Tribunal. 1/

In this memorandum, BMI confines its comments to a single matter -- the clear and specific requirement of the Copyright Act that authors and publishers of music receive due compensation for the public performance of their work. Two parties in this proceeding 2/, without support or explanation, challenge the claims made by the music licensing organizations on behalf of their affiliates and members. Ignoring fundamental principles underlying the Copyright Act in general, and Section 111 in particular, these parties claim that compensation by cable systems for performance of copyrighted musical works

1/ 44 F.R. 59930 (October 17, 1979).

2/ Radio Station WGNA, Submission, November 14, 1979, p. 3, and National Association of Broadcasters, Memorandum, November 15, 1979, p. 29.

somehow results in a "double award." The argument is unsupportable and specious. In the long history of the Copyright Act, there has never been any suggestion that rights applicable to all other copyright owners were to be denied to the authors of musical compositions. There is simply no support for this "double award" theory in the Act itself or the underlying legislative history. To the contrary, the argument undermines the very concept of copyright since it would deny authors and publishers of musical compositions an interest in the public performance of their works.

I. Background

The copyright laws protect the "writings" of "authors." Under the 1976 Act, copyright protection subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated." Sec. 102(a). Assuming the requisite originality and proper fixation, the owner of copyright obtains a bundle of exclusive rights "to do and to authorize," including "in the case of . . . musical . . . works" the right "to perform the copyrighted work publicly . . ." Sec. 106(4).

The Copyright Act specifically recognizes "musical works, including any accompanying words," as protected works of authorship. Sec. 102(a)(2). It is recognized that, insofar as music is concerned, the right of public performance is of primary

value. The greatest source of revenues in the music industry derives from public performance rights. Shemel and Krasilovsky, This Business of Music, Billboard Publications, 4th ed., 1979, p. 157. Those rights, specifically guaranteed to the music copyright holder in Section 106 of the Copyright Act, are the lifeblood of the music composer and publisher.

BMI and the other performing rights organizations are organized to license public performance rights and collect performance royalties on behalf of their affiliates and members. While the performance right is among the most important for holders of music copyrights, it is difficult to enforce. Musical works are performed so extensively that it is virtually impossible for composers and publishers effectively to enforce their performance rights on an individual basis. See Nimmer on Copyright, Sec. 8.19.

The performing rights organizations, including BMI, are organized to license public performance rights and collect performance royalties on behalf of their members. BMI, as the transferee of its affiliates, obtains the rights to publicly perform, and to license others to perform, its affiliates' works. In the broadcasting industry, for example, BMI licenses the major television networks to perform works in its repertoire. In addition, local broadcasting stations obtain licenses to cover the performance of the copyrighted musical works in their locally originated programming. For this non-exclusive right, the local broadcasters pay a fee based on a percentage of their net revenues.

II. Section 111 Establishes a Compulsory License For the Retransmission of All Copyrighted Materials Including Musical Works

It is clear that authors and publishers are "copyright owners" and it is obvious that their musical "works" are "included" in the secondary transmissions of cable systems. The 1976 Copyright Act enumerates a number of limitations on the copyright owner's exclusive right to perform, among them the Section 111 compulsory license for cable television systems. Under this Section, the copyright owner of any work included in a distant, non-network secondary transmission 3/ is entitled to share in cable television royalties. Nimmer on Copyright, Sec. 8.18[E]. There is no suggestion either in the Statute or the legislative history that the Section recognizes only particular copyright owners but is blind to all others. Section 111(d)(4) provides for distribution of royalty payments to "copyright owners" whose "works" were "included" in a secondary transmission.

To argue that the Section is inapplicable to the music copyright denies not only the clear meaning of the Section, but also its legislative purpose. Congress recognized that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program

3/ "Secondary transmission" is defined as "...the further transmitting of a primary transmission simultaneously with a primary transmission...". "Primary transmission" is defined as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service...". 17 U.S.C. Sec. 111(f).

material"; and that the retransmission of these copyrighted materials "is of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues."

H. Rep. No. 94-1476, 90th Cong., 2d Sess., p. 90. In return for this beneficial use of copyrighted material, Congress established the royalty concept. Congress recognized that the retransmission of copyrighted musical works is an integral part of CATV operations and increases their revenues in precisely the same manner as the retransmission of other copyrighted works included in their programming. Early drafts of the general revisions in the bill went so far as to include a specific percentage of the royalty fees -- 15% -- for copyrighted musical works. See S.543, 91st Cong. 1st Sess. (1969), Sec. 111(d)(3)(c); S.644, 92nd Cong., 1st Sess. (1973), Sec. 111(d)(3)(c). While this provision was deleted ultimately to allow for a determination by the Tribunal of the appropriate share for music copyright owners, there is no suggestion in the legislative history that copyrighted musical works should be denied recognition. S.1361, 93rd Cong., 2nd Sess. (1973).

III. The Statute and Legislative History
Indicate that Retransmission of
Copyrighted Works by a Cable System
Is a Performance Separate and in Addition
to a Broadcasting Performance and
Separate Compensation Must be Paid

Cable television is one of a number of technologies not contemplated by the 1909 Copyright Act. As these systems grew, they became an accepted entertainment and information source for

a vast number of subscribers throughout the nation. Copyright owners, including music interests, became concerned that their exclusive performing rights were devalued because this new medium was using copyrighted works without licensing or payment of compensation. Cable television operators took the position that they did not need to obtain a license to cover the copyrighted material because they were merely retransmitting the material broadcast by others. The copyright owners argued that cable television systems were infringing their copyrights by "performing" without a license the material contained in the broadcasts.

The United States Supreme Court first faced the question in Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968), where it held that the functions of a cable television system did not constitute a "performance" within the meaning of Sections 1(C) and 1(D) of the 1909 Act then in force.

The Court faced the question again in Teleprompter Corp. v. CBS, 415 U.S. 394 (1974). This case presented a new element. The copyright holders argued that changes in the operations of cable systems, from the carriage of strictly local signals to the importation of distant signals, moved cable retransmission to performance status.

The Supreme Court held, notwithstanding, that "reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between

the broadcasting station and the ultimate viewer." Teleprompter Corp. v. CBS, Id. at 407.

These cases were heard and decided while legislative proposals addressing the cable--copyright controversy were pending. The problem had been before Congress since 1965. In its Supplementary Report on the earliest proposals, the Register of Copyrights recognized the issues raised by the performance controversy -- the same concerns Congress was to address finally over a decade later:

...we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill. 4/

The 1965 proposals died in committee. At the time the Court considered Fortnightly, a revision bill passed by the House and one introduced in the Senate were under consideration in the Senate Subcommittee on Patents, Trademarks and Copyrights. 5/ These proposals also failed adoption. When the Court considered Teleprompter, still later attempts at revision were pending. 6/

4/ Second Supplementary Report of the Register of Copyrights on The General Revision of the U. S. Copyright Law: 1975 Revision Bill, Chapter V, p. 4.

5/ H.R. 2512, 90th Cong., 1st Sess. (1967); S. 597, 90th Cong., 1st Sess. (1967).

6/ S. 1361, 93rd Cong., 1st sess. (1973); H.R. 8186, 93rd Cong., 1st Sess. (1973).

Recognizing the long history of controversy and the need for a careful balancing of interests, the Court in both Fortnightly and Teleprompter left resolution of the controversy to Congress.

Congress accepted the invitation to act two years after Teleprompter. In the 1976 general revision, Congress established clearly the principle that cable retransmissions are public performances for which compensation must be paid. It is obvious that the concept of "secondary transmission" describes the activities which the Court in Fortnightly and Teleprompter found did not constitute "performance." As the legislative history clearly indicates, it was the Congressional purpose to modify these cases and make cable retransmission subject to copyright liability. See H. Rep. No. 94-1476, 90th Cong., 2d Sess. pp. 88-89.

The revised Act clearly contemplated additional royalty payment for the additional performance. The report of the House Judiciary Committee, for example, stated:

...a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her 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 broadcast to its subscribers...

H. Rep. No. 94-1476, 90th Cong., 2d Sess., p. 63. 7/

7/ Cf. Remarks of Rep. Danielson, reporting out the bill which became the Copyright Act, referred to secondary transmissions as "something extra [which] could be considered as a 'performance,' or as an alternative to a performance." 122 Cong. Rec., H10,904 (daily ed. September 22, 1976) (remarks of Rep. Danielson).

Thus Congress rejected the position taken by the cable industry in Fortnightly and Teleprompter that retransmission is not a separate performance for which compensation is required. Instead, Congress established the principle that public performance rights may be licensed to broadcast stations and to cable systems for separate royalty payment.

The "double award" argument ignores completely the Congressional purpose and the statutory concept thus established.

BMI's licensing agreements with broadcast stations are consistent with the legislative scheme. 8/ The rights obtained by a broadcast station under these contracts are necessarily limited to the area where the station broadcasts. The compensation called for by the agreements covers only performances of copyrighted musical works within the limited geographical scope of the station's broadcast operations. Section 111 is directed to licensing of and compensation for the retransmission of distant, non-network signals, i.e., the retransmission of copyrighted musical works beyond the local broadcast area. The blanket licensing agreements do not include royalty payments for the distant retransmission.

8/ "Except as expressly herein otherwise provided, nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever." Broadcast Music, Inc. Local Station Television License Agreement, Paragraph 1C.

IV. The Double Award Argument Was Rejected by Congress At Least Insofar As Distant, Non-Network Signals Are Concerned

The "double award" argument is not new. Cable interests originally raised it in the debate preceding adoption of the revised Copyright Act. See "CATV and Copyright Liability," 80 Harv. L. Rev. 1514, 1522-1525 (1967). It was argued that cable television provided a broadcast station with a greater audience, thereby increasing advertising revenues. Although the parties who raised the "double award" argument in this proceeding do not explain their position, it is assumed that their argument is that since broadcast music license fees are based on a percentage of revenues, such revenues, together with a cable royalty payment, constitute a "double award."

While the revision proposals were being considered, however, there was evidence that double awards were not likely to result from cable retransmission of distant signals containing programs supported by local or regional sponsors. Copyright owners and broadcasters testified that the cost per thousand rate which advertisers pay on the basis of audience size applied only to the station's area of dominant influence and that a much lower return was expected from retransmission to distant audiences. 9/ In addition, a Federal Communications Commission

9/ See Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., pp. 711-712, 743-752. See generally, Meyer, "The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot", 22 N.Y.L. Sch. Rev., 545, 547 (1977).

study released January 20, 1976, concluded that any increase in advertising revenues by virtue of cable retransmissions would be insignificant. The study indicated that local and regional advertisers would not pay the broadcast station for audiences outside of their target area for distribution of their products. 10/ It is apparent that if the broadcasters' "double award" argument were valid, it would be equally applicable against them: broadcasters would receive double compensation for their own copyright claims if they are already compensated through additional revenues.

V. Compilation and Exclusive Licensing Arguments Do Not Affect the Retransmission Royalty Claims Filed by Performing Rights Organizations

Broadcasting interests challenging music interests make the additional argument that the broadcasters' compilation claim for the broadcast day overrides and invalidates all other copyright claims for retransmission royalties, including those of the performing rights organizations. This argument blatantly ignores the Statute. As we pointed out in our initial memorandum, even to the extent the Tribunal might recognize a compilation claim, Section 103(b) of the Act limits copyright protection in a compilation to the added material contributed by the author of the compilation as distinguished from the preexisting work. Moreover, the copyright in a compilation does not in any way affect copyright protection in the original work. A valid

10/ 57 FCC 2d 625, 640-641 (1976).

compilation claim in no way overrides claims for performance of underlying copyrighted works.

Broadcasters also argue that performing rights organizations and program syndicators have transferred their performance rights to the broadcasters and that, therefore, their cable retransmission claims are invalid. We pointed out in our initial comments that, under the Copyright Act, ownership may be transferred in whole or in part by exclusive license. See Sec. 201(d)(1), and Sec. 101, definition of "transfer of copyright ownership." Whatever the application of those sections to syndicated programs licensed on an exclusive basis -- and we believe any copyright interest obtained by broadcast stations from program syndicators is subject to geographical limitations contained in the exclusive licensing agreements -- BMI licenses performance of musical works on a strictly non-exclusive basis and no copyright interest is transferred.

VI. Conclusion

The "double award" argument completely ignores the Congressional purpose of the revised Act and its legislative scheme. Congress has determined that retransmission by cable television systems is a public performance separate from and in addition to the performance of the work by broadcast stations. It has found that cable systems enhance the value of their service through performance of copyrighted works and, thus, should be required to compensate the copyright owner for the

privilege of use. There is no question that musical "works" are among those "included" in secondary retransmissions within the terms of Section 111 of the Copyright Act; and that the royalty claims of BMI and the other performing rights organizations are properly before this Tribunal. The challenge to the claim is baseless and should be rejected.

Respectfully submitted,

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