

RE 2-11-79

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

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

REPLY BRIEF AND MEMORANDUM
OF THE JOINT SPORTS CLAIMANTS

Major League Baseball, the National Basketball Association, the National Hockey League and the North American Soccer League ("Joint Sports Claimants"), by their attorneys, submit the following in response to the National Association of Broadcasters' ("NAB") Memorandum concerning the "standing" of the Joint Sports Claimants. This brief is submitted in accordance with the Tribunal's notice published at 44 Fed. Reg. 59930 (October 17, 1979).^{*/}

*/ The Tribunal's October 17 notice also requests comments on other issues, including the NAB's "compilation" theory. The Joint Sports Claimants strongly support that portion of the brief of the Motion Picture Association of America ("MPAA") which demonstrates beyond any doubt that broadcasters are not entitled to Section 111 royalties based upon this notion of compilation. In particular, as the Joint Sports Claimants noted in their "Memorandum in Response to the Tribunal's October 17, 1979 Notice," many of the broadcasters licensed to present sports telecasts are contractually forbidden from recording (and therefore "fixing") these telecasts. This underscores the MPAA's point that the broadcasters are unable to meet a fundamental prerequisite to compilation -- lawful fixation of the entire day's programming.

I.

In its October 17 notice the Tribunal requested a "legal brief or memorandum" on "the objections raised as to the standing of certain or all sports claimants." In response to this request the Joint Sports Claimants submitted an exhaustive brief which thoroughly examined several relevant factors, including the legislative history of the Copyright Revision Act; the forty-plus years of judicial decisions concerning the broadcast of sports events; the patterns of commercial dealings between sports clubs and broadcasters; and the language of the Act itself.

As explained in the Joint Sports Claimants' opening brief, these factors make it perfectly clear that the member clubs of the Joint Sports Claimants are the sole copyright owners of the telecasts of their games; that the clubs are the proper claimants of the Section 111 royalties attributable to these telecasts; and that the Joint Sports Claimants, on behalf of their member clubs, have the requisite "standing" in this Section 111 proceeding. Thus, the appropriate portion of the cable royalty fund attributable to sports programming should be distributed to the sports clubs, except where a broadcaster can establish that its contractual arrangement with a sports club provides that the royalties should be paid to the broadcaster.

In response to the Tribunal's October 17 request the NAB submitted a memorandum dealing with the legal issues it raised, including its "sports theory." Relying upon a two-sentence passage in one of the reports which accompanied the copyright legislation, the NAB argued that broadcasters are the authors of sports telecasts and, therefore, they are the copyright owners entitled to claim the CATV royalties attributable to these telecasts. According to the NAB, the sports clubs may claim royalties only where they have produced and recorded their telecasts, or where they have obtained "copyright in the broadcast by way of contract with the station producing and recording the telecast." NAB Memorandum at 11.

The deceptive simplicity of the NAB's argument is matched only by its absolute lack of substance and its complete disregard for the legislative history of the Act; well-established judicial authority; industry custom; and the language of the Act itself. Before discussing these matters, it is, however, important to emphasize that the Tribunal cannot, on the present state of the record, properly rule that any broadcaster is entitled to any portion of the royalties claimed by the Joint Sports Claimants.

II.

The NAB has succeeded in raising a theoretical (albeit completely invalid) issue concerning the ownership of sports telecasts. The NAB, however, is most certainly not the copyright owner of any of these telecasts. And while the NAB purports to represent certain broadcasters, the identity of these broadcasters remains a mystery to all except (presumably) the NAB. In particular, it is not now clear whether the NAB has been authorized to represent even one broadcaster who possesses, let alone has filed, a claim which conflicts with that of a member club of the Joint Sports Claimants.^{*/}

Furthermore, as noted in their earlier "Memorandum in Response to the Tribunal's October 17, 1979 Notice" at pp. 3-4, the Joint Sports Claimants are aware of only two broadcasters who even filed a claim in July 1979 specifically identifying any of the programming for which the Joint Sports Claimants have sought royalties -- and, neither of

^{*/} In contrast, each of the member clubs of the Joint Sports Claimants has authorized Major League Baseball, the National Basketball Association, the National Hockey League, or the North American Soccer League to represent it in these proceedings and to claim royalties on its behalf.

these broadcasters has a valid claim.^{*/} While there may be some question as to the body with the authority to resolve the sports ownership question, it would be patently improper even to suggest such a resolution except in the context of -- and with reference to -- bona fide conflicting claims. Until the Tribunal requires the claimants to identify specifically the programming for which a claim has been made, the existence of any conflicting claims cannot be properly ascertained.

In short, the Joint Sports Claimants can fully understand the NAB's creation of its "sports" theory as part of its attempt to inflate the overall broadcast share of the royalty pool. However, any question of the ultimate distribution of the Section 111 royalties, for which the clubs

^{*/} As explained in the Memorandum at p. 3, one of these broadcasters does not itself produce the sports telecasts for which it has claimed, but simply rebroadcasts the telecasts produced by another station and club. Thus, under the NAB's own theory, this broadcaster is ineligible to claim the CATV royalties attributable to these telecasts. See NAB Suggested Broadcaster's Justification 18 (July 1979). The other broadcaster has specifically agreed with the club concerned that the club is the copyright owner and proper Section 111 claimant for royalties attributable to the club's 1979-82 telecasts.

are the proper claimants under the law, is a matter between the parties directly involved -- the sports clubs and their flagship stations -- and not between the clubs and an aggressive trade association representing unidentified parties. The importance of this point is underscored by the fact that several of the clubs and their flagship stations have already negotiated arrangements whereby the station has agreed not to raise any objection to the clubs' claiming the entire Section 111 royalties. In no case of which the Joint Sports Claimants are aware has a club specifically agreed to permit the broadcaster to claim the royalties, although certain clubs have agreed to share any royalties they receive with their broadcasters. Where such arrangements have not been satisfactorily negotiated and the broadcaster has filed a specific conflicting claim, the Joint Sports Claimants are prepared to demonstrate that the broadcaster does not have a valid claim to any portion of the royalties attributable to the sports telecasts, based on the points set forth in their opening brief.

III.

The sole argument advanced in support of the NAB's sports theory is that there is a passage in one of the

reports accompanying the copyright legislation which states that cameramen and directors perform an "authorship" function in connection with sports telecasts^{*/} -- ipso facto, the NAB concludes, broadcasters are the copyright owners of, and are entitled under Section 111 to all of the royalties attributable to, these sports telecasts. For a number of reasons, the NAB's conclusion is plainly wrong.

First, as discussed on pages 41-42 of the Joint Sports Claimants opening brief, the passage relied upon by the NAB deals only with the copyrightability, and not with the copyright ownership, of sports telecasts. It was included in the report to confirm that, for constitutional

*/ This passage states:

"The bill seeks to resolve, through the definition of 'fixation' in section 101, the status of live broadcasts, sports, news coverage, live performances of music, etc. that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976).

purposes, there was "authorship" in sports telecasts just as there is in movies. This passage is simply silent as to who owns the copyright in sports telecasts and who is the proper claimant of the CATV royalties attributable to these telecasts.

Second, as discussed on pages 37-38 of the Joint Sports Claimants opening brief, a copyrightable sports telecast is the joint creation of the broadcaster and sports club alike.^{*/} Indeed, a telecast of an empty stadium would not be a copyrightable work. While cameramen and directors play an important role in capturing the game, the critical

^{*/} Compare H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976):

"The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable."

element of the work is, as the court noted in National Exhibition Co. v. Fass, 143 N.Y.S. 2d 767, 770 (S. Ct. 1954), the "original and unique performances of highly skilled performers" and "as the game unfolds, a drama consisting of the sequence of plays." Thus, the broadcasters the players and the club blend their activities to create a copyrightable work. And, contrary to the claim of the NAB, a sports telecast is not the product of the creative talents of the broadcasters alone.

Third, as noted on page 36 of the Joint Sports Claimants opening brief, Section 111(d)(4) of the Act authorizes the Tribunal to distribute CATV royalties only to "copyright owners;" this section says nothing about distribution to "authors." The distinction between "authors" and "copyright owners" entitled to receive CATV royalties is, of course, a distinction which the NAB has made in advancing its "exclusivity" theory -- but which it has conveniently and understandably ignored in advancing its "sports" theory.

As explained throughout the opening brief, it is perfectly clear from an examination of the legislative

history of the Act, the common law and industry custom that the clubs are the "copyright owners." The broadcaster has absolutely no right to make any telecast of a sports club's games except, and only, to the extent that the club has given it this right. Thus, the broadcaster's authorship function takes place within a contractual arrangement whereby the club, in exchange for the promotional value of the telecast and certain additional revenues, authorizes the broadcaster to help create a telecast of the club's games. The broadcaster, who also receives a significant promotional value from being permitted to broadcast the game as well as significant advertising dollars, possesses only the limited right to present the broadcast over conventional television in a defined geographic area. All other rights possessed by a copyright owner belong to the clubs. The broadcaster's authorship function is undertaken in a "work made for hire" situation where all copyright ownership rights are transferred to and vested in the club.

Fourth, the Tribunal should be aware, not only of the error of the NAB's legal arguments, but also of the immense

practical problems associated with adopting the NAB's sports theory. According to the NAB, "most, if not all, sports coverage is carried out by station personnel (e.g., play-by-play announcers, commentators, producers, directors, cameramen, switchers, statisticians, technicians, etc.) using station equipment and facilities (e.g., cameras, microphones, monitors, on-site control rooms, etc.)." NAB Memorandum at 13. The NAB would thus have the Tribunal believe that every sports telecast is typically made by a broadcaster using his own personnel who are all clearly acting as the broadcaster's employees. This, however, is simply not true.

Indeed, the personnel involved in the production of a sports telecast are frequently employed by other stations or by independent production groups who have entered into some arrangement with the broadcaster^{*/} -- an arrangement which in all likelihood will not say or imply anything about

^{*/} This is typically the case where a broadcaster televises a club's "away" games - i.e., games played in the opposing team's home stadium. (Last season over 70% of the nearly 1400 baseball telecasts involved away games.) Because of the costs and practical difficulties involved in transporting entire production crews and equipment to distant cities, the broadcasters necessarily rely upon other parties.

the copyright ownership of the resulting telecast. Similarly, the play-by-play announcers or color commentators are often employed by the clubs. And, as the NAB itself has noted, the sports club itself may have produced the telecast. See Joint Sports Claimants Opening Brief at 27 n. 17. Thus, the NAB's sports theory requires an examination of all of the circumstances surrounding each telecast for which royalties are claimed in order to determine who produced the telecast and what relationship these individuals had to the broadcaster-claimant. This, the Joint Sports Claimants submit, will be a most difficult, but necessary, task. Consistent with the position advanced above, this is a task which most certainly should not be undertaken in the absence of specific conflicting claims.^{*/}

Finally, the NAB has emphasized that broadcasters must actually "fix in a tangible medium of expression" i.e., videotape or otherwise record) the sports telecast before

^{*/} It should also be noted that, under the NAB's sports theory, it would be necessary for the Tribunal to calculate the royalties attributable to each station's telecast of sporting events rather than the royalties attributable to all sports telecasts -- since the broadcasters, unlike the sports clubs, have not filed a joint claim.

claiming the royalties attributable to this telecast. What the NAB has ignored is that, under their contracts, the sports clubs are the ones who can lawfully record and do record the telecasts of their games.^{*/} Moreover, as noted above, and in the Joint Sports Claimants opening brief at 30-32, the broadcasters are generally prohibited by contract from making such recordings.

CONCLUSION

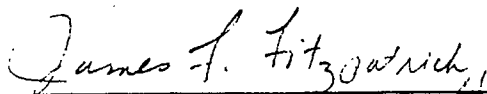
For the reasons stated above and in their opening brief, the Joint Sports Claimants request that the Tribunal take the following action with respect to the "objections raised as to the standing of certain or all sports claimants:"

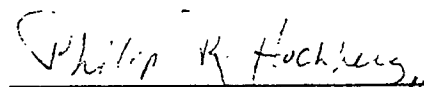
1. Declare that, under the Copyright Revision Act, the sports clubs, by reason of their indispensable contribution to the creation of the sports telecasts and in view of legislative intent, common law principles and industry custom, are the copyright owners of these telecasts.
2. Declare that the sports clubs have claimed and are entitled to claim the Section 111 royalties attributable to the telecasts of all of their games.

^{*/} See, e.g., Comments of Major League Baseball (filed June 15, 1978) where Major League Baseball described the fixation procedures of its clubs. These procedures were approved by the Tribunal in its notice published at 43 Fed. Reg. 40225 (Sept. 11, 1978). As part of the proof of their claim, the Joint Sports Claimants are, of course, prepared to list the specific telecasts, with proof of fixation.

3. Declare that the Section 111 royalties attributable to the sports telecasts will be awarded to the sports clubs except in those individual cases where a particular broadcaster a) claims those royalties attributable to specifically identified telecasts; and b) demonstrates that under the contractual arrangements with the club, the broadcaster has been granted a specific right to claim and to receive these royalties.

Respectfully submitted,


James F. Fitzpatrick
Robert Alan Garrett
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036


Philip R. Hochberg
VORYS, SATER, SEYMOUR & PEASE
1800 M Street, N.W.
Suite 800 South
Washington, D.C. 20036

Of Counsel:

Alexander H. Hadden
Office of the Commissioner
of Baseball
15 West 51st Street
New York, New York 10019

Attorneys for the Joint
Sports Claimants

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