



MAY 23 1980

American Society of Composers, Authors and Publishers
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May 23, 1980

Bernard Korman
General Counsel

Hon. Mary Lou Burg, Chairman
Copyright Royalty Tribunal
1111 20th Street, N. W.
Washington, D. C. 20036

Re: Cable Royalty Distribution
Proceedings

Dear Chairman Burg:

Attached are seven copies of ASCAP's brief on the question of how the Tribunal should deal with the fact that not all claimants filed claims.

Copies are being mailed today to counsel on the attached list.

I have asked Mr. Koenigsberg to telephone you and counsel for the other parties to advise that ASCAP will not produce any rebuttal witness.

Sincerely,

A handwritten signature in cursive script that reads 'Bernard Korman'.

Bernard Korman

BK:H

Encls.

cc: All Counsel

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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D. C.

In the Matter of:)
)
CABLE ROYALTY)
Distribution Proceedings)

BRIEF OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS

May 23, 1980

The American Society of Composers, Authors and Publishers (ASCAP) submits this brief on the legal issues raised because not all categories of claimants fully represent eligible copyright owners who might have claimed but failed to do so. Our brief is submitted in accordance with the Copyright Royalty Tribunal's Schedule of Proceedings issued at the close of direct testimony.

MUSIC'S SHARE SHOULD BE
INCREASED BECAUSE IT ALONE
OF THE CLAIMANT GROUPS
REPRESENTS 100% OF POTENTIAL
CLAIMANTS

The Copyright Law requires the Tribunal to distribute all cable royalty fees deposited to those copyright owners who have filed claims. There is no provision for distribution to nonclaimants:

"The royalty fees thus deposited shall . . . be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmission by cable systems" 17 U.S.C. § 111(d)(4).

The first stage of these proceedings involves allocation of royalties to groups of claimants. The direct cases have proposed allocations of royalties to each group as if, contrary to the fact, all the potential claimants in each group had made claims. Thus, the motion pictures and program syndicator groups have advocated their "fee-generated" .

proposal using factors which include all syndicated programming, not merely the syndicated programming for which claims have been filed. The Joint Sports Claimants, too, have made a claim based on the value of all sports programming and not on the value of the sports programming for which claims have been filed. And the NAB asks for a share for broadcasters based on the time occupied by all broadcaster-owned programming, not the programming for which claims have been filed.

The record shows that all who could have claimed royalties for 1978 failed to do so. This failure of potential claimants to claim royalties would be immaterial if the proportion of nonclaimants in each group were about the same. In that case, each group's proportionate share would remain the same.

However, the proportion of nonclaimants in each group is not the same. The music claimants, ASCAP, BMI and SESAC, account for virtually 100% of the potential music claimants--those copyright owners whose music is included in distant cable television and radio programming. The Supreme Court addressed the ASCAP and BMI shares in the CBS case last year:

"Almost every domestic copyrighted composition is in the repertory either of ASCAP . . . or of BMI" BMI v. CBS, 441 U.S. 1, 5 (1979).

The same state of affairs does not exist for any other claimant group:

- Only 50 of 500 eligible motion picture and program producers and syndicators filed claims for royalties deposited for the last half of 1978. See, Memorandum of Joint Sports Claimants of October 2, 1979, pp. 3, 8.

- Only 40% of eligible television broadcasters filed for that period. Id.

- The five sports interests claiming--professional baseball, basketball, hockey and soccer (the Joint Sports Claimants) and certain college sports (the NCAA)--represent only a portion of the total number of potential sports claimants, which would include tennis, football, boxing, wrestling, golf, and so on. See, Transcript of April 24, 1980, at 55-57, 128-129; Transcript of April 25, 1980, at 96-96.

Because each claimant group represents a different percentage of potential claimants within the group, it would be unfair, inequitable, and contrary to the Copyright Act to allocate shares to each group as if each group were fully represented.

It would be unfair and inequitable because the claimants who did file in a group where others failed to file would receive a windfall--their rightful shares would

be inflated by the fortuitous circumstance that others in their group failed to file. That kind of windfall would injure all other claimants who filed. Such a result, we suggest, is contrary to the intent of the Copyright Law, which envisions payment to claimants based on the valuation of their claims and not based on the valuation of claims that might have been, but were not, filed. It would hardly be fair for claimants to get their share and the share that would have gone to potential claimants in their group if those potential claimants had filed claims.

We suggest that the fair and equitable approach is to allocate shares only to those who did claim; put another way, we suggest a proportionate distribution, to all who filed claims, of the shares which would have been allocated to potential claimants who did not file claims.

Accordingly, we think there should be a reduction of the overall shares of those groups which include nonclaimants, and a corresponding increase in music's share because music is the only group which has fully claimed its royalties.

This adjustment, of course, is applicable only for 1978 royalties, since music is the only group which has claimed 100% of its potential share of 1978 royalties.

For subsequent years, the result will be different, if more potential claimants file claims. An appropriate adjustment can be made for later years by voluntary agreement or by the Tribunal.

In our statement of March 24, 1980, we estimated the nonclaimants' share at one-fifth of the total. That amount should be allocated proportionately among those who have claimed. To raise the amount of money claimed from 80% to 100% is to increase the 80% by 25%. The 25% increase in music's share as a group goes from 10.8% to 13.5%. (See ASCAP's Statement of March 24, 1980, pp. 8-9.) The remaining groups' shares would, therefore, be proportionately decreased by a total for all those groups of only 2.7%.

We recognize, of course, that our estimate is not based on facts in the record. An estimate is necessary because although the record is clear that not all potential claimants filed claims, there are no facts in the record as to the value of shares represented by potential claimants who failed to file. We believe our estimate is reasonable and suggest that the Tribunal consider it along with any other reasonable estimates that other parties may propose.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By Bernard Korman
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General Counsel

Of Counsel:

I. Fred Koenigsberg
Benjamin L. Zelenko

Dated: May 23, 1980.