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

In the Matter of)
)
DISTRIBUTION OF CABLE)
TELEVISION ROYALTY FEES)

BRIEF OF THE JOINT SPORTS CLAIMANTS
IN RESPONSE TO PARAGRAPH 2 OF
THE TRIBUNAL'S MAY 7, 1980 MEMORANDUM

The Joint Sports Claimants submit this brief in response to paragraph 2 of the Tribunal's May 7, 1980 notice requesting briefs on the "legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants." As explained below, we believe that the Copyright Revision Act requires the distribution of the royalty pool to be based upon the relative values of the specific identifiable programming for which valid claims have been filed; consequently, the Tribunal cannot divide the royalty pool among broad generic categories without taking account of the works in each category for which valid claims have and have not been filed.

Section 111(d)(4) of the Copyright Revision Act provides in relevant part that the cable television royalty fees "shall . . . be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period . . . ." (Emphasis added.) The House Committee Report, at page 91, amplifies this point by explaining that:

> "All the royalty payments required under the bill are paid on a semi-annual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly claim that their works were the subject of distant non-network retransmissions by cable systems." (Emphasis added.)

We believe that the language quoted above establishes three fundamental principles which must guide the Tribunal's distribution of cable royalty fees. First, all the fees (after deducting reasonable costs) must be distributed. Second, only those eligible copyright owners who filed valid claims are entitled to share in the royalty pool; the Tribunal must, in other words, distribute the royalty fees among the actual -- not potential -- valid claimants. Third, compensation can be paid only for specific, identifiable

copyrighted works carried by cable on a distant signal basis; no claimant is entitled to royalties simply on the basis of an assertion that it is associated in some way with some amphorous class of programming, such as "sports", "movies" or "local programming."

It is in recognition of these principles that the Joint Sports Claimants have urged the Tribunal to require each party to identify the particular programming for which it is claiming. Such an approach would allow the Tribunal to compare fairly all of the claimed (rather than potential) programming; to determine whether the claims are valid; and to make an award to each of the claimant groups (and in the absence of an agreement among members of the group, each claimant) without the need for any further proceedings. The Tribunal has elected, instead, to recognize initially broad generic groups of copyright owners to which it will, at the conclusion of Phase I, assign percentages of the royalty pool. These assignments will be made as if every copyright owner within each of the generic groups has filed a valid claim with the Tribunal.

In view of the statutory provisions and legislative history quoted above, the Copyright Revision Act does not

permit the Tribunal to distribute the funds on the basis of such assignments. Surely, for example, if only one program syndicator had filed a claim covering its inventory of distantly carried programs, there would be no basis for awarding that syndicator the share of the pool the Tribunal determined was attributable to the distant signal programming of the syndicated suppliers who elected not to assert claims. By the same token, it would be improper to award the Joint Sports Claimants royalties attributable to the distant carriage of a non-network water polo or motocross telecasts as to which no entity had filed a claim. To do either would not provide each claimant with a fair share of the pool -- vis-a-vis all other claimants -- for his specific, identifiable work. Rather such an approach would provide claimants of equivalently valued programming with vastly different rewards. Such an approach would also provide certain claimants with a bonanza simply by being associated with some generic group identified by the Tribunal. */

*/ In Phase I, for example, the Tribunal is being urged by the NAB to make an award to commercial broadcasters based on its computation of all of the local programming time of all television stations in the United States and Canada. If

(Footnote continued on following page.)

In short, the Tribunal cannot award a share of the royalty pool to a generic group without regard to who in that group has or has not filed valid claims and to what extent they have done so. The ultimate distribution must reflect a fair comparison of only the properly claimed programming.

We are not suggesting that the Tribunal reverse its determination, reflected in earlier rulings, to assign shares of the royalty pool as though each of the groups were fully represented.*/ But after doing so, we submit, the Tribunal must require each claimant or joint claimant in Phase II

(Footnote continued from preceding page.)
valid claims have, in fact, been filed by stations for only half of that programming and the distribution were made to commercial broadcasters based on the Phase I assignment, each actual broadcast claimant would receive twice as much in royalties as the value assigned a particular claiming station's local programming by the Tribunal. In contrast, if the music licensing organizations' claims are accepted that they represent all music in this proceeding, participants in the share awarded the music category would receive the value actually assigned them. We believe that the Tribunal must deal ultimately with the relative values of the claimed programs in the distribution of the pool.

*/ Likewise, we are not suggesting that the Tribunal's failure to consider only valid claims was not in error. We simply acknowledge that our position was not accepted when the Tribunal established the Phase I - Phase II dichotomy on February 14, 1980.

(1) to identify the specific programming for which it is claiming; (2) to establish the validity of its claim for that programming; and (3) to demonstrate how much of the share allocated to the generic group into which its claim falls should be awarded for that claimant's programming. The portions of the pool allocable to the value of all unclaimed programming must then be redistributed to all valid claimants.

To illustrate, the Joint Sports Claimants have urged that the Tribunal perform its distributional role as a surrogate for the marketplace, taking into account the value of each claimant's programming to cable operators and the damage which distant importation of that programming causes the claimants. Under these criteria, we have advocated that the distant telecasts of live professional sports events merit an award of from 25 to 30 percent of the royalty pool. If, for example, the Tribunal assigns 28% of such live professional sports programming, the Joint Sports Claimants would seek to establish in Phase II that valid claims have been filed for programming representing all or virtually all of the value of such programming, again taking into account

the criteria of value and harm. To the extent the record demonstrated that any portion of the pool for live professional sports events should be allocated to other minor sports programming, such as water polo or motocross, that portion would be redistributed to all of the claimants in accordance with the relative value of their programming. */

In sum, the final allocation of royalty dollars cannot be made without regard to actual valid claims; the Tribunal must make this allocation by comparing the relative values of the programming for which proper claims have been filed, and not all programming. We believe that the approach

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*/ The Sports Claimants have thus far geared their proof to the Tribunal's rulings and have provided some evidence framed in terms of "sports" programming. We have also presented our primary proof, however, as to the value of live professional sports events to cable and the harm to the professional sports leagues from distant cable transmission. In Phase II we expect to show, for example, that in terms of value the telecasts of professional baseball, basketball, hockey and soccer games far exceeds the value of telecasts of motocross, water skiing, water-polo or skeetshooting events. By the same token, we would acknowledge that a movie such as "Gone With the Wind" has an economic value greater than documentary presentations on agricultural practices in eastern Europe, even though both fall into the generic category of "movies and syndicated programming."

outlined above is consistent with these statutory objectives, and takes account of the Tribunal's election to deal with the subject matter in two separate phases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of May, 1980, copies of the foregoing Brief of the Joint Sports Claimants In Response To Paragraph 2 Of The Tribunal's May 7, 1980 Memorandum were served upon parties to this proceeding by first class mail, postage prepaid, addressed to each of the following:

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