Original

MAY 23 1980

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

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

BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ITS MEMBER COMPANIES, AND OTHER PROGRAM PRODUCERS AND DISTRIBUTORS ON THE ISSUE OF CATEGORIES OF CLAIMANTS NOT FULLY REPRESENTED

In response to the "Cable Distribution Schedule of Proceedings" issued May 7, 1980, by the Copyright Royalty Tribunal (Tribunal), the Motion Picture Association of America, Inc., its member companies, and other companies engaged in the production and/or distribution of programming exhibited by television broadcast stations,[1/] submit their brief "on the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants" (hereinafter "unclaimed fund").

At the very outset it is important to recognize that consideration of alternative bases of allocation of the unclaimed fund arises only after a decision as to the allocable shares of groups of claimants in Phase I of this proceeding. Having made that determination the Tribunal would then be in a position to determine in Phase II the bases for allocation and distribution

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1/ The member companies and other program producer/distributor companies are listed in Attachment A.

of the cable royalty fund, including the unclaimed fund, to individual claimants.

The questions presented by the unclaimed fund permeate the showing of each category of claimants in this proceeding. Two possible bases exist for distribution of that fund: (1) distribution of the unclaimed fund in a particular category of claimants to the eligible claimants within the same category; or (2) apportionment and distribution of the total unclaimed fund in all categories among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the cable royalty fund.

1. Are Any Categories Fully Represented?

Before addressing these alternative bases for distribution of the unclaimed fund it is important to address first the continuing refrain of Joint Sports and Music claimants in this proceeding that they represent 100% of all eligible claimants in their respective categories, while others represent less than 100%. This claim is not supported by the record and the facts show that neither category represents 100% of the eligible claimants. Indeed Music interests face the threshhold question as to whether any eligible claimants are before the Tribunal.

ASCAP's "Filing of Claims to Cable Royalty Fees" (dated July 24, 1978) states: "The claim is filed on behalf of all ASCAP members, pursuant to their membership agreements with ASCAP." (Emphasis added.) This indicates clearly that the basis for the claim is the membership agreement, but no showing has been proferred that the membership agreement authorizes ASCAP to represent its

members in filing claims before the Copyright Royalty Tribunal.[2/]

Assuming arguendo that ASCAP, SESAC, and BMI can be considered as the proper parties to file claims for cable license fees under the Act, the record shows that 100% of the individual claimants will not receive distribution even though music is basing its present claim on 100% of music used in distant signal carriage. This results from a continuing situation in which members whose works are used, thereby entitling them to distribution, cannot be found. ASCAP's counsel testified as to the situation:

> MR. KORMAN: I might comment ASCAP, the performing rights, are the only people in this room who deal regularly with this problem. ASCAP runs into a situation frequently where there is no member share.
>
> We have older works. You would have a composer or estate of a composer as a member, but the author has disappeared. He is nowhere to be found. His descendants are not known, and the work is performed. The composer does not get the lyric writer's share earned by those performances nor [does] the publisher.
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> That goes into a pot and is shared by all members. (3/31/80 Transcript, pp. 60-61).

The fact that these members cannot be found, regardless of the reasons, means that a certain portion of otherwise eligible music

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2/ The "Amended Consent Judgment," Civil Action No. 13-95, entered March 14, 1950, in United States of America v. American Society of Composers, Authors and Publishers, et al., provides in part as follows:

> IV. Defendant ASCAP is hereby enjoined and restrained from:
>
> (A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis.

claimants will not share in the distribution of the cable royalty fund, with the direct result that the remaining members' share will be increased proportionately. This has the same effect as allocating to any group or category of claimants a share of the cable royalty fund on the basis of 100% representation when in fact less than 100% of the eligible claimants will share in the proceeds. The Tribunal, if it determines ASCAP, SESAC, and BMI have technically met the filing requirements, must look to the practical aspects of how music's share will be distributed.

The disparity between 100% of the music claimed and distribution among less than 100% of eligible claimants results in a claim by Music of a larger share of the cable royalty fund than could be justified by individual claims. In view of this effect, the Tribunal should find that the music category does not fully represent its total number of eligible claimants.

The Joint Sports Claimants argued in their Pretrial Memorandum (dated January 31, 1980), that "No claimant is entitled to royalties simply on the basis of an assertion that it is associated in some way with some amorphous class of programming ..." (p. 8). Rather, they argued individual claims must be substantiated before a claim would be allowed. Because Joint Sports Claimants assertedly could justify 100% of their claims for baseball, basketball, hockey, and soccer, they apparently felt that they represent fully -- or, at least, share in the proceeds resulting from -- the entire spectrum of sports programming shown

by distant signal carriage.

The transparency of this claim is evident. Distant signal carriage of sports is not limited to men's professional baseball, basketball, hockey, and soccer, as is implicitly suggested by Joint Sports Claimants, but includes carriage of other sports, e.g., tennis, wrestling, water skiing, motorcross, collegiate sports, golf, boxing, gymnastics, women's professional basketball, high school basketball, and harness racing. (Joint Sports Claimants, Direct Testimony of Bowen and Lemieux, Exhibit D.) All these were apparently used as part of the "amorphous" grouping called sports for purposes of Joint Sports Claimants' distribution proposal even though not all owners of these programs had filed to obtain compulsory license fees.[3/] Again, the practical effect will be to base the share on 100% participation when this is not justified by aggregation of actual individual claims nor by the final distribution of sports' share.

Program Syndicators do not dispute that less than all program owners who would fall in their category have filed claims. It is apparent that the category of broadcasting does not fully represent all eligibile claimants.

Thus it must be concluded that no category fully represents its total number of eligible claimants. Because this situation

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3/ While it appears collegiate sports will attempt to obtain some portion of the sports share, this will still not result in the sports share being distributed to 100% of eligible sports claimants.

occurs within each category before the Tribunal, whatever treatment is required should be applied uniformly. Should the Tribunal believe special treatment be afforded the unclaimed fund, Program Syndicators submit that the best treatment would be to establish each category's share to the cable royalty fund on the basis that they all represent 100% of eligible claimants. This would enable the major question in this proceeding to be decided on a consistent basis vis-a-vis each category. The unclaimed fund should then be segregated by determining what portion of total programming on distant signal carriage was not claimed by an eligible claimant; this would then be distributed in an entirely separate process.

This methodology is reasonable and appropriate because it permits the allocation among categories to be made in a relatively straightforward manner which lends itself to continuing application. Each category can be assumed to represent fully all eligible claimants for purpose of determining the allocable shares for all groups of claimants. This approach also avoids the difficult adjustments that would be required to account for unclaimed amounts prior to an allocation formula being determined. Furthermore, if the allocation is based on full representation, it will provide a better guide for future determinations on distribution shares.

2. How Should The Unclaimed Fund Be Distributed?

Assuming that an unclaimed fund should and can be determined, two possible methods of distribution are open to the Tribunal.

First, and the preferred method in our opinion, those portions of the unclaimed fund relating to a particular category should be distributed to the eligible claimants within the same category. This method recognizes that those most closely identified with the type of programming generating compulsory license fees should receive the benefits so as to stimulate and to promote production and development of programming in proportion to its use by cable systems and benefit to the viewing public. A second method of distribution would be to allocate the unclaimed fund on the basis of each individual claimant's pro rata share of the cable royalty fund.

We believe that the first method is preferred for the following reasons. Perhaps the closest analogy to the legal issues raised by the distribution of the unclaimed portion of the cable royalty fund is the distribution of damages in a class action suit. Under Rule 23 of the Federal Rules of Civil Procedure, once the appropriate class has been determined, the court may require that class members "opt in" to any claim for damages by submitting individual notice of his or her damages. E.g., Sledge v. J. P. Stevens Co., Inc., 585 F.2d 625, 652 (4th Cir. 1978).

The "opting in" procedure under Rule 23 encompasses many of the procedures contained in the Copyright Act of 1976 and the regulations thereunder for filing to receive a portion of the compulsory license fees. Each requires the possible claimants to file a claim by a date certain and thereby cut-off further

claims to possible awards. See Robinson v. Union Carbide Corp., 544 F.2d 1258, 1264 (5th Cir. 1977) (Judge Wisdom, concurring opinion.)

In two class action settlements where a settlement fund was established prior to final resolution of the size of the classes or their respective claims, the courts upheld redistribution of the fund within the same classes when the actual liability was substantially lower than originally anticipated. In Beecher v. Able, 575 F.2d 1010 (2nd Cir. 1978), the court redistributed an established settlement fund which was approximately quadruple the size of the actual claims within the framework of the classes originally set on the basis of the type of securities owned. The Second Circuit upheld this redistribution on the basis that the court acted within its "duty to insure equitable allocation of the proceeds of the settlement." 575 F.2d at 1016; see also Zients v. LaMorte, 459 F.2d 678 (2nd Cir. 1972).

In the Antibiotics Antitrust Litigation the claims of individual consumers were considered to be a sub-class within the larger class of governmental entities. When it was determined that the actual claims of individual consumers were considerably less than the amount apportioned to them as a sub-class, the unclaimed amount was allowed to revert to the class of governmental entities of which they were a part, instead of being made available for distribution among all classes. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D. N.Y. 1970); aff'd, 440 F.2d 1079 (2nd Cir. 1971). The Second Circuit assumed

the propriety of keeping the fund within the same class and indicated that this was the best way to maximize the benefits to the overall class, including the subclass, as opposed to transferring all or a portion of this amount to a different class, as was argued should be done. 440 F.2d at 1091.

The lesson of these cases is that the Tribunal should focus on the proper distribution between categories as if they represented fully all eligible claimants. The first concern of the courts in the above-cited cases was that the settlement amount represented a reasonable resolution for the entire matter. That individual shares turned out to be different within this broader resolution was less important because the courts were not looking for individual resolution. The value of grouping individual parties is that each claim does not have to be resolved separately, but that they can be resolved as a group.

That individuals within the category may get larger shares than they would if others had filed should be of minimal concern where, as here, it will not result in dramatic increases in shares. The essential character of this proceeding, division among categories, will be maintained; future hearings on the same matter can look for some guidance to the allocation among categories used here, rather than starting afresh with different mixtures of individual claimants each year. For these reasons, Program Syndicators believe that the allocation of the entire cable royalty fund should be made among categories of eligible claimants with a specific category dividing among themselves.

As set forth above the alternative method would be to view the unclaimed fund as a separate pot which should be shared on the basis of each claimant's proportionate share of the claimed cable royalty fund. Individual shares in the unclaimed fund would be determined by comparing the amount received by an eligible claimant to the total claimed fund. This factor would then be multiplied by the unclaimed fund to determine the amount going to that individual claimant. This would divide the unclaimed fund equitably among all eligible climants in the same proportion as each received from the claimed cable royalty fund. Under this alternative a proportionate sharing of the unclaimed fund is essential to an equitable distribution. Weighting the share to the unclaimed fund on the same basis as the Tribunal uses for the primary distribution would provide a consistent basis for determining overall distribution.[4/]

For the reasons stated, Program Syndicators urge the Tribunal to determine in Phase I of this proceeding the share allocable to each group of claimants. Two alternatives are available for allocation and distribution of the unclaimed fund. The preferred method would be to permit the amount of the unclaimed fund relating to a specific category to remain within that category for distribution to eligible claimants therein. An alternative method would

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4/ The ASCAP/SESAC boost of 25% for claimants who did not file has no relationship to reality. Its obvious flaw is that while in the small (albeit, inflated) share ASCAP/SESAC claims, the 25% boost does not appear significant, if applied to all categories it will mean a percentage share for all categories totalling well over 100%.

be to segregate the entire unclaimed fund for distribution among all eligible claimants on the basis of their individual shares to the claimed cable royalty fund.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.
ITS MEMBER COMPANIES
OTHER PROGRAM PRODUCERS AND
DISTRIBUTORS

By _____
Arthur Scheiner

_____
Dennis Lane
Its Attorneys

Wilner & Scheiner
2021 L Street, N. W.
Washington, D. C. 20036

May 23, 1980

ATTACHMENT A

Member Companies of Motion Picture Association of America, Inc.

Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Walt Disney Productions
Filmways Pictures, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corporation
United Artists Corporation
Universal Pictures, a Division of Universal City Studios, Inc.
Warner Bros. Inc.

Other Program Producer/Distributor Companies

Celebrity Productions, Inc.
Goodson-Todman Enterprises, Ltd.
G-T Programs, Inc.
Hanna-Barbera Productions
ITC Entertainment, Inc.
Lakeside Television Company
Lassie Television, Inc.
Lone Ranger Television, Inc.
Marvel Comics Group, a Division of Cadence Industries Corporation
MTM Enterprises, Inc.
Panel Productions, Inc.
Price Productions, Inc.
Q-M Productions
T.A.T. Communications Company
Tandem Productions, Inc.
Viacom International

CERTIFICATE OF SERVICE

I, Shirley Roach, a secretary in the law firm of Wilner & Scheiner, hereby certify that copies of the foregoing Brief of the Motion Picture Association of America, Inc., Its Member Companies, and Other Program Producers and Distributors on the Issue of Categories of Claimants Not Fully Represented have been sent by first-class United States mail, postage pre-paid, to the attached list on this 23rd day of May, 1980.

Shirley Roach

Shirley Roach

James F. Fitzpatrick, Esquire
David H. Lloyd, Esquire
Robert Alan Garrett, Esquire
Vicki J. Divoli
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Counsel for Sports Interests

Judith Jurin Semo, Esquire
Squire, Sanders & Dempsey
21 DuPont Circle, N. W.
Washington, D. C. 20036
Counsel for NCAA

Gordon T. King, Esquire
Coudert Brothers
200 Park Avenue
New York, New York 10017
Counsel for National Association of Broadcasters

James J. Popham, Esquire
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Richard Dannay, Esquire
Schwab, Goldberg, Price & Dannay
1185 Avenue of the Americas
New York, New York 10036
Counsel for Cartoon Claimants

Gene A. Bechtel, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D.C. 20006
Counsel for Public Broadcasting Service

Jacqueline Weiss, Esquire
Public Broadcasting Service
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024

Bernard Korman, Esquire
American Society of Composers, Authors and Publishers
One Lincoln Plaza
New York, New York 10023

Edward W. Chapin, Esquire
Broadcast Music, Inc.
320 West 57th Street
New York, New York 10019

Albert E. Ciancimino, Esquire
SESAC, Inc.
10 Columbus Circle
New York, New York 10019