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

ORIGINAL

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

PRE-HEARING MEMORANDUM OF
BROADCAST MUSIC, INC.

Broadcast Music, Inc. (BMI), by its attorneys, submits the following comments in this proceeding in response to the Tribunal's notice, 44 F.R. 75201 (December 19, 1979).

Having received written comments and oral argument on the threshold issues in this proceeding, the Tribunal now requests interested parties to file a pre-hearing memorandum addressing the following:

1. Recommendations concerning the form and timing of submissions by claimants of the written statement of their direct cases;
2. The amount of time, number of witnesses and general identification of studies or other exhibits to be required in the presentation of claimants' cases;
3. Identification of matters requiring the production of additional information or claim justification from other claimants;
4. Recommendations concerning the conduct of the evidentiary hearing, including possible division of the hearing into specific phases; and
5. Identification of any subjects that require determination by the Tribunal prior to the commencement of the evidentiary hearing.

These matters will be addressed seriatum.

1. Form and Timing of the Direct Case

BMI favors procedural guidelines for the effective resolution of the issues in this case which entail a minimum of time and expense. While the Tribunal's Notice seeks comment concerning an "evidentiary hearing," we believe this term should be interpreted in its broadest sense. A full-fledged, trial-type evidentiary hearing is not required to effectively resolve the issues. The Tribunal can, in its discretion, adopt less formal procedures which would achieve the same results. As we indicated in our initial procedural comments in this proceeding, we believe that the Tribunal should designate a "paper proceeding" for this phase similar to the method utilized to resolve preliminary issues.

BMI recognizes that this phase of the proceeding will involve factual showings and, as a consequence, will require documentation, including the possible testimony of expert witnesses. However, procedures can be designed to accommodate these requirements without the necessity of a full, trial-type hearing. The parties should be required to submit their direct cases in written form as already contemplated by the Tribunal in its Notice. The written direct case should be fully supported and substantiated by written sworn testimony or affidavits in lieu of oral presentation and cross-examination of witnesses. Reply written comments,

also supported by affidavits, would respond to the arguments and factual contentions raised in the initial pleadings. Rebuttal cases could be authorized at the Tribunal's discretion. Finally, parties would submit to the Tribunal proposed findings of fact and conclusions of law based upon the record established. Oral argument could follow. The following schedule of procedural dates is proposed:

Written Direct Case	As the Tribunal Directs
Written Reply Comments (including written testimony or affidavits)	30 Days Later
Written Rebuttal Case (optional)	30 Days Later
Written Rebuttal Reply Comments (optional)	21 Days Later
Proposed Findings of Fact and Conclusions of Law	21 Days Later
Oral Argument (optional)	14 Days Later

Section 803(a) of the Copyright Act provides the Tribunal with flexibility to adopt procedural regulations consistent with the Administrative Procedure Act. The "paper hearing" concept has been applied in other agencies and is consistent with the requirements of the Administrative Procedure Act for rules not required by statute to be made "on the record" after hearing. See Administrative Procedure Act §§ 553(c) and 554(a).

2. Witnesses and Studies to be Presented

As indicated above, all testimony or affidavits including relevant statistical studies and work papers supporting a direct or reply case would be in written form. Under this arrangement there would be no necessity for cross-examination of witnesses since reply briefs would provide ample opportunity to challenge earlier factual assertions.

3. Matters Requiring the Production of Additional Information

At this time, BMI is aware of no specific matters requiring the production of additional information. Where need is demonstrated, provision can be made for informal discovery procedures.

4. Conduct of the Evidentiary Hearing

BMI has outlined above its recommended procedures for the conduct of a hearing. Two general issues applicable to this phase of the proceeding can be identified. The first issue is the amount of royalties which should be distributed to each claimant group (i.e., sports, program producers, broadcasters, or music claimants). The second general issue is the manner in which the royalties should be divided among the individual members of these groups.

Each of these issues involves wholly separate considerations and will require the production of different

economic and statistical evidence. BMI believes that the Tribunal can avoid confusion and delay if it segments the proceeding to permit separate and sequential resolution of the two issues. Therefore, after the Tribunal has resolved the question of royalty distributions to claimant groups, it should institute a separate "paper proceeding" to establish the distribution among individual claimants.

In order to permit orderly prosecution of this case, the individual participants or groups of participants must be identified at the outset. Thus, for example, the music performing rights organizations have been represented as individual parties to this proceeding and will continue to be so represented. On the other hand, we are uncertain as to whether claimant groups can and will represent collectively in this proceeding all individual claimants in their respective fields.

At this stage of the proceedings, the organizations or participants who have not already done so should state with specificity the claimants or groups of claimants whom they represent. In addition, it would be helpful if the Tribunal thereafter would identify all of the claimants who are parties to this proceeding and are entitled to share in the royalty distribution. In the Tribunal's order dated January 29, 1980, denying the petition of the National Association of Broadcasters for a stay, it was indicated that there are four

hundred and fifty claimants in this proceeding. The status of each of them should be defined, particularly with reference to their standing as individual claimants or as part of a subgroup which is also represented by an organization.

5. Identification of Additional Subjects

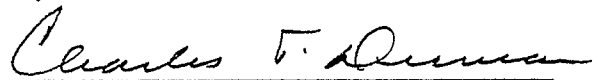
Except as set forth above, BMI does not suggest any additional subjects that require determination prior to the commencement of the evidentiary hearing.

Respectfully submitted,

PEABODY, RIVLIN, LAMBERT & MEYERS

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By CTD

Dated: January 31, 1980
Washington, D.C.