

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL

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

Pre-Hearing Memorandum of the
National Association of Broadcasters

The National Association of Broadcasters ("NAB")
for and on behalf of various broadcasting stations claiming
compulsory cable royalty fees, hereby responds to the
December 19, 1979 order of this Tribunal, 44 Fed. Reg.
75201, directing interested parties to submit a pre-
hearing memorandum on the following subjects:

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.
5. Identification of any subjects that require determination by the Tribunal prior to the commencement of the evidentiary hearing.

The December 19th order further directed that all pre-hearing memoranda be submitted in accordance with the Tribunal's findings set forth elsewhere in that order. Specifically, the Tribunal ruled that the Copyright Act "does not provide for" payment of cable royalty fees to Broadcaster Claimants for secondary transmission of their broadcast day compilations, sports programming and exclusively held syndicated programming. These rulings by the Tribunal led the NAB to file a Petition for Review of the December 19, 1979 order with the United States Court of Appeals for the District of Columbia on January 17, 1980, and to petition this Tribunal for a stay of that order pending judicial review and to request a three week continuance of these proceedings on January 18, 1980.

On January 29, 1980, the Tribunal denied the NAB's petition for a continuance and a stay. In its opinion accompanying that decision, the Tribunal found, inter alia, that "all claims are still pending" -- notwithstanding the Tribunal's December 19th decision which construed the Copyright Act so as to eliminate the broadcasters' claims based on their

copyright ownership of their broadcast day compilations, sports programming and the syndicated programming exclusively licensed to the stations.

As we demonstrate below, the seeming inconsistency between the Tribunal's December 19th and January 29th decisions should be resolved by a declaratory ruling. Since clarification of the December 19th and January 29th orders obviously cannot be rendered prior to the submission of this pre-hearing memorandum, we assume throughout that discovery and presentation of evidence in support of all claims will be permitted, including the broadcasters' claims specifically covered by the December 19th order.

The Form and Timing of Written Statements
by Claimants of Their Direct Cases

The interests of all parties will be served by the simplest and most precise presentation of evidence. We submit that where, as here, econometric studies and expert statistical analysis rather than sensorily-perceived phenomena provide the bulk of the evidence, the parties' direct cases are best presented by way of verified written evidence (i.e., deposition of direct witnesses and documentary evidence and all supporting raw data) exchanged among the parties and submitted to the agency in advance of the

hearings, in lieu of direct oral testimony by witnesses at the hearing stage. The parties would, of course, have the right to conduct further discovery of opposing parties' direct evidence after its submission, but before the hearing, prior to the submission of a written statement of their rebuttal cases. In this way, claimants are afforded full discovery and maximum opportunity for precise development of their direct cases. At the same time, this permits parties cross-examination of any particular witness as well as the chance to present rebuttal witnesses and rehabilitative evidence at the evidentiary hearing.

This approach comports with Section 7(c) of the Administrative Procedure Act*, which recognizes the propriety of written presentations of direct evidence, so long as cross-examination of deponent witnesses and proffer of rebuttal and rehabilitative evidence by the parties is permitted at the hearing stage for "a full and true disclosure of the facts". See 5 U.S.C. §556(d).

As explained by the Second Interim Administrative

*Section 803(a) of the Copyright Act of 1976 requires that the procedures of the Tribunal be in accordance with the provisions of the Administrative Procedure Act.

Conference of the United States (1961062), S. Doc. No. 24, 88th Cong., 1st Sess. 92, 93 (1963), presentation of direct cases by written evidence has many beneficial results:

"(1) [t]he exchange of written evidence facilitates settlement techniques in situations in which there is staff participation; (2) the hearing examiner, after studying the direct evidence of the parties prior to hearing, can participate in the case in an intelligent fashion, leading to more elective use of conference techniques and more informed rulings at the hearing; (3) in a substantial number of cases, particularly those of less moment, the parties may be satisfied with their written presentations, and an oral hearing becomes unnecessary; and (4) the efforts of the parties at the oral hearing, if one is necessary, are confined to clarifying the major issues through informed cross-examination. Properly handled, written procedures should result in a more adequate record being produced in a shorter space of time."

These same considerations apply here. A shortened procedure, similar to that used by the Interstate Commerce Commission (see, e.g., 2 Davis on Administrative Law §14.16 (1958 and 1970 supp.)), could be easily modified to fit the time schedule imposed on this Tribunal by Section 804 of the Copyright Act. We suggest that all claimants should submit to the Tribunal and exchange among themselves all direct written evidence of their cases (i.e., depositions of all direct witnesses including depositions of their expert witnesses, documentary evidence, exhibits and all raw data

underlying statistical studies, etc.), together with a memorandum setting forth an overview of their direct cases, no later than April 15, 1980. By May 15, 1980, any further discovery necessary for rebuttal of claimants' direct evidence should be completed, with parties submitting and exchanging on that date a written statement of their rebuttal cases and a list of their rebuttal witnesses. We suggest that claimants then be given two more weeks before the commencement of the evidentiary hearing in order to marshal any rehabilitative evidence they may need and to agree among themselves the matters still in dispute and respecting which oral evidence is to be introduced.

The Amount of Time, Number of
Witnesses and General Identification
of Studies or Other Exhibits to be
Required in the Presentation of
Claimants' Cases

Inasmuch as there has been no discovery as yet, we respectfully submit that claimants are in no position to reliably predict the amount of time, number of witnesses, and exhibits which will be presented. Within the framework suggested in Point I above, this information will be available no later than April 15, 1980 when claimants submit and

exchange written evidence and a statement of their direct cases.

With respect to the general identification of studies or other exhibits, the broadcasters intend to rely upon statistical analysis of various types of computer-stored data cable systems to demonstrate the extent to which their non-network programming has been included in distant cable retransmissions.

Conduct of the Evidentiary Hearing.

At this point we see no benefit to having the hearing conducted in phases other than as set forth above.

We submit that the MPAA should be required to first present its case followed by the Sports Claimants, the Musical Claimants and then the broadcasters with additional claimants to follow. The MPAA is claiming the largest share of the royalty pool and should properly be expected to present its case first. Moreover, inasmuch as the NAB was required to lead off during the argument phase of each issue on December 5th and 6th, it is only appropriate that the order of presentation be reversed at the hearing.

Subjects Requiring Determination by
the Tribunal Prior to the Commencement
of the Evidentiary Hearing.

a) The December 19, 1979 Order.

The Tribunal's order of December 19, 1979 was considered in all respects final by NAB and, final except for appellate review purposes by the Joint Sports Claimants, by the MPAA and by ASCAP.

The Joint Sports Claimants at page 9, footnote 1, of its memorandum opposing the stay requested by NBA concluded, as did NAB, that the Tribunal's order rejected NAB's claim of copyright in and to sports programming.

Similarly, the MPAA argued at pages 8 and 14 of its memorandum opposing a stay that the December 19 order not only governed the forthcoming evidentiary hearing but that in any event, should that order be reversed, the broadcasters would have to adduce evidence at a further evidentiary hearing with respect to "exclusivity and/or compilation".

ASCAP's brief opposing the stay, at pages 2 and 3, states that the issues NAB hoped to win were finally and irrevocably decided against it by the Tribunal.

In short, all claimants who have submitted briefs on the stay requested by NAB have construed the Tribunal's

December 19 order as rejecting NAB's claims for cable royalties based upon sports programming, exclusivity and compilation and precluding the introduction of evidence on those issues. Yet the Tribunal's "Notice" of January 29, 1980 states at page 6:

"The Order of December 19 governs the terms and scope of "a pre-hearing memorandum", a pre-hearing conference and one phase of an evidentiary hearing. We have not voted to reject any claim -- all claims are still pending."

This language creates uncertainty, and should be resolved by a declaratory ruling pursuant to §301.45 of the Tribunal's rules and regulations. Specifically, NAB is uncertain as to the identity of the "one phase of an evidentiary hearing". Which phase is the Tribunal addressing in this context? In addition, we request a ruling declaring that at any evidentiary hearing, the broadcasters are entitled to submit evidence which will be fully considered in support of the claims of exclusivity, compilation and sports programming.

b) Access to Tribunal For Resolution of Disputes

We think it only realistic to assume that from time to time there will be good faith disputes over discovery requests, compliance with the Tribunal's procedures and rules, etc. In view of the limited time available for completion of pre-hearing proceedings it seems desirable to establish ways and means for the resolution of such disputes. NAB strongly urges

the establishment of as informal and expeditious a resolution procedure as possible.

c) Unclaimed Royalties

Although this subject may be one not requiring resolution in advance of the hearing it ultimately will have to be faced. It now appears that less than one hundred percent of the programming eligible for royalties has been claimed by certain claimant interests including the broadcasters and the MPAA. At some point a decision will have to be made as to the disposition of such royalties.

d) The Sports Claimants

One problem we had with the Tribunal's December 19th Order was that in a given situation, a broadcaster-sports team contract could recite that the broadcaster owned all rights of copyright yet make no provision for copyright royalties. The order would award royalties to the sports team which under the hypothetical is not a copyright owner.

Under the circumstances, we submit that that part of the Tribunal's December 19th order affecting the Sports Claimants should be clarified to remove the presumption of copyright ownership in the Sports Claimants and to require such Sports Claimants to come forth with specific factual evidence which demonstrates copyright ownership.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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