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

In the Matter of)

DISTRIBUTION OF)
CABLE ROYALTY FEES)

DOCKET 79-1

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

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I. Statement of Ultimate Conclusions

1. The Tribunal is under a mandate to distribute the cable royalty fund in accordance with the provisions of the Copyright Act and the expressed intent of the Congress as reflected in its legislative history. Under the Act the Tribunal is required to issue a decision based upon a reasoned analysis and supported by substantial evidence of record.

2. The objective of the Act was to compensate copyright owners for the compulsory license granted to cable systems for the retransmission of their works. While Congress chose not to specify the "particular, limiting standards for distribution ..." of the royalty fees, its paramount and clearly stated objective was to compensate the copyright owners both for the harm they suffer from such distant retransmissions and for the benefit derived therefrom by the cable systems. As stated by the Congress:

... transmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it was licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976). Benefit to the cable system is properly measured by the amount of time which the different categories or types of programs are carried by cable systems, and by the value of such programs to the

cable systems, provided that the determination of value is based upon objective and probative evidence.

A. Syndicated Programs

3. Syndicated programs (movies and series programs) are entitled to the major portion of the royalty fund. The time plus fee generated methodology employed by Program Syndicators is fully consistent with the statutory formula: it provides for distribution to copyright owners on a "pay-out" formula based on the "pay-in" by cable systems for the retransmission of their programs, and it gives full effect to the underlying harm/benefit rationale and to the intent of Congress. Based upon all the competent and probative evidence, including showings by adverse parties, syndicated programs occupied 80 to 83% of the time devoted by cable systems to the carriage of distant signals, the value of these programs to cable systems was evidenced by a Nielsen share of total viewing of 82%. Accordingly, it is concluded that the category of syndicated programs should be allocated 82% of the fund.

B. Sports Programs

4. Sports programs occupy only a very small portion of the time devoted by cable systems to the carriage of distant non-network signals. Estimates of sports' time portion range from 2.1 to 5%. On the other hand, such programs enjoy a somewhat better share of total viewing, as evidenced by the Kalba Bowen

Associates Study which determined sports' Nielsen viewing ratings to be 11%. The reliability of this ratings index of sports popularity is questionable, however, because the sample of 24 stations relied upon included 16 sports flagship stations. As a consequence, the study has a built-in bias in favor of sports programs, and the claimed 11% rating appears to be overstated. On balance, it does appear that the sports program category merits a greater share of the fund than would be justified by time only, and therefore its proper share should be 7.5%.

5. NCAA has not presented a direct case; it is, in any event, properly classified as a sub-set of sports, and accordingly, its share of the sports allocation should be determined in Phase II.

C. Locally-Produced Programs of Broadcasters

6. Congress was unable to find any harm to local stations from the retransmission of their locally-produced programs by cable systems in distant markets, and NAB has offered no probative evidence of such harm to broadcasters, or of any benefit cable systems derive from the carriage of those programs.

7. The direct case on behalf of commercial broadcasters to establish their share of the royalty fund was explicitly limited to a time basis only, for the stated reason that an allocation which included a factor based on viewing would violate the First and Fifth Amendments. The claimed constitutional infirmity has no basis in law: the authorities relied upon by NAB in support of its position have no bearing or pertinence to the use of

objective audience measurement and evaluation studies, which is consistent with the Congressional purpose of basing royalty compensation on the value of programs. (Section IV.C. below, NAB's First Amendment Argument).

8. No reliance can be placed on the exhibits and testimony proffered in support of the claim of commercial broadcasters to a share of the royalty fund based on time. The predicate of their case was the analysis by bi Associates of a data base which was critically flawed in its design and execution.

9. The evidence submitted by other parties, however, does furnish a basis for the allocation of a fair share to commercial broadcasters for locally-produced, non-sports programs. Program Syndicators' Study A supports a finding of 14.5%, and Joint Sports Claimants' KBA Study, based on Nielsen data, supports a finding for local programs of 14% on a time basis and a 7% share of total viewing.^{2/} When these data are evaluated in the light of the harm/benefit standard, it is concluded that 6% of the royalty fund should be allocated for broadcasters' locally-produced non-sports programs.

10. Claims of broadcasters to a share of the fund based on "exclusivity" and "compilation" are legally unfounded and should be rejected. Even were such claims tenable, when afforded an

^{2/} Program Syndicators' Study B cannot be utilized for this purpose since the data source relied upon, FCC Form 303-A, does not furnish a break-out for locally-produced programs separate from sports.

opportunity to establish the factual bases for these claims and for claims to the retransmission of sports events, the broadcasters failed to offer any competent or material evidence; therefore, even if legally tenable, their claims based on exclusivity, compilation and sports would be denied in view of this failure of proof.

D. Public Broadcasting Service

11. The fee generated methodology of Program Syndicators would allocate to PBS a share of 4.5%, which is the amount paid in by cable systems for the retransmission of programs broadcast by non-commercial television stations. Under this approach, it is not necessary to consider in Phase I of this proceeding whether PBS is a network; that question would arise in Phase II, in the consideration of the shares of individual claimants, where it would be necessary to determine whether PBS distributed programs are network programs and not entitled to share in these royalties.

12. The evidence of record does establish that PBS is a network within the meaning of Section 111(f) of the Copyright Act. The only reliable data and analyses which proceeded on that basis would fix the PBS share at 3.8-3.9%. However, under the preferred analysis of Program Syndicators, which does not turn on the network status of PBS, it is concluded that the PBS share should be 4.5%.

E. National Public Radio

13. No allocation can be made to NPR in view of its failure

to provide any showing on which a finding could be made as to its share, if any. Further, independent evidence of record establishes that, at best, any share of NPR would be de minimis.

F. Music Interests

14. The allocation to music interests proposed by BMI should be rejected on the grounds that the data and methodology employed are patently erroneous and may not be relied upon.

15. The proper application of the ASCAP/SESAC analysis based on fees paid for a blanket music license requires a comparison of such fees to all broadcast television expenses. This comparison shows music's share to be 3.9%, which, together with a factor for radio, results in a share for music of 4.0%. That amount should be paid "off-the-top" by each programming element in proportion to its share of the royalty fund.

G. Character Claimants

16. The Copyright Act makes no provision for a separate entitlement for copyright owners of cartoon characters; these character claimants have not advanced any legal or factual support for their position.

H. Summary of Allocations

17. Following is a tabular presentation of the resulting allocations to claimant groups:

<u>Category</u>	<u>% Share</u>	<u>Allocation to Music</u>	<u>Ultimate Share</u>
Program Syndicators	82.0%	3.28%	78.72%
JSC	7.5%	.30%	7.20%
NAB	6.0%	.24%	5.76%
PBS	4.5%	.18%	4.32%
Music	--	--	4.00%
Total	100.0%	4.00%	100.00%