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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of:

CABLE ROYALTY)
DISTRIBUTION PROCEEDINGS)

Docket No. CRT 79-1

JOINT MEMORANDUM AND PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS AND SESAC, INC.

The American Society of Composers, Authors and Publishers (ASCAP) and SESAC, Inc. (SESAC) submit this joint memorandum and proposed findings of fact and conclusions of law, in accordance with the Copyright Royalty Tribunal's Order in these proceedings (Tr. of May 29, 1980, 123-124) and rules of procedure (37 CFR §310.54).

I. INTRODUCTION

As we read the record, no single theory, proposal or formula has been established which the Tribunal could adopt and mechanically apply to decide the complex issues before it in Phase I of these proceedings. Instead, the Tribunal must weigh the evidence and exercise its judgment. We endorse the approach suggested by Commissioner Brennan as being the only one available to the Tribunal on this record. He suggested that the decision might be based on judgment of a combination of factors, rather than on any mathematical formula or combination of formulas.

". . . Assume, when this body eventually gets to the point of voting on distribution of the cable royalties, that this Commissioner decides that he does not intend to vote to distribute the royalties on the basis of a single mathematical formula, or any combination of mathematical formulas. Further, assume that this Commissioner may vote on the basis of a combination of factors which he deems relevant to a proper allocation of royalties.

These factors could include such elements as the damage caused to the copyright owner by the cable transmission, the benefit to the cable system from the cable transmission, the marketplace value of the programs being transmitted, the total number of eligible program hours transmitted, the quality of the program content,

and possibly other factors which this Commissioner might deem to be relevant.

In this hypothetical, let us assume that the Commissioner would be disposed to judge these factors on the basis of the entire record made in this proceeding." (Tr. of May 5, 1980, 113-114)

In the absence of any established all-encompassing approach, the Tribunal must exercise its judgment, based on the entire record and on its view of the various theories advanced.

We shall first analyze the theories presented and then apply the theories to evaluate the claims of each group. Our conclusions as to the shares to which each group is entitled are set forth below.

II. ANALYSIS OF THE PROPOSED DISTRIBUTION THEORIES

There have been many different distribution theories proposed. Ours, based on the marketplace value of the copyrighted works performed by cable systems, is the theory with widest applicability to all claimant groups. It is also, we submit, the only useful theory in the record which values music's share of cable royalties.

The broadcasters' theory is based on program duration. The program producers and syndicators have taken the same approach, but refined it by adding a "fee-generated" factor -- weighting the time of each program by the compulsory license fees generated by each station carried by cable.

We believe any time-based approach is worthless. The

testimony repeatedly established that copyrighted works are not valued by sellers in any market on the basis of their duration.

The sports interests offer several theories. One is based on the size of distant cable audiences attracted by different types of programming. This is a valid theoretical measure of the value of programs -- it is the standard used in the broadcasting industry -- but it does not purport to value music.

We, and others, have stressed that the Tribunal must exercise judgment in apportioning cable performance royalties. The sports interests suggest reasons cable operators import distant signals and the valuation by cable operators of programming in distant markets. We believe these suggestions are useful when placed in proper context -- they are helpful, but not dispositive.

We turn to our analysis of each theory.

A. Our Marketplace Value Theory

A distribution based on the marketplace value of the rights to perform the copyrighted works being retransmitted by cable systems is, we submit, the best approach to value supported both by theoretical analysis and by this record. In our economic system, marketplace forces are the best determinants of the economic value of goods and services. We believe the Tribunal's decision should be based on the judgment as to what cable operators would pay in the market, if there were no compulsory license. (See, testimony of Dr. Paul Fagan, Tr. of March 31, 1980, 50-51)

We suggest that the Tribunal value claims based on the amounts paid by television and radio broadcasters for the very same copyrighted works retransmitted by cable systems. Our proposal, we believe, has more virtues than any other:

First, it is the product of free market economic forces, not hypothetical constructs or questionable mathematical formulas. (Id., 51) Most of the other theories presented are artificially derived. Nowhere in the real world are copyrighted works valued on the basis of program duration ("fee-generated" or otherwise) or hypothetical reasons for subscribing to cable television. (In Manhattan, the principal "reason" for subscribing for many apartment-dwellers is that, without cable, reception is very poor.) The only other proposal which even purports to use realistic economic indicators is sports' audience measure. That approach, however, does not aim at valuing music.

The program producers and syndicators' witnesses agree that the value of a copyrighted work is measured by the economic realities of the marketplace, by bargaining between licensor and licensee. See, test. of Jack Valenti, Tr. of April 8, 1980, 60-61; test. of Allen Cooper, Tr. of April 9, 1980, 142.

The sports claimants would have the Tribunal use the marketplace created when rights in copyrighted works are licensed to cable systems for program originations, rather than the marketplace for the television and radio broadcasts which are carried in secondary transmissions. (See, Joint Sports Claimants' letter of May 19, 1980.) Their suggestion is inappropriate because the compulsory license covers secondary transmissions, not program

originations. The market analogy we suggest uses amounts paid for performance rights in precisely those copyrighted works which are used by cable in secondary transmissions. Moreover, the market for performance rights for cable originations is in its infancy, unlike the mature broadcast market we suggest, which has been in existence for many decades.

The second virtue of our proposal over all others is that it is based on hard economic data. Our figures are not the product of computer manipulation of questionable data. Rather, they are based on FCC data unchallenged here. (Tr. of March 31, 1980, 52-53.) The Tribunal should examine the comparative costs to broadcasters of performance rights in various kinds of copyrighted works.

A few words are needed here to deal with the NAB's effort to cloud the issue by talking about irrelevant program costs, costs other than those incurred for the purchase of performing rights in copyrighted works. (Id. 68ff.) The red herrings they offered included six cost items which, for FCC purposes, happened to appear in the same schedule as the relevant data we had extracted. These were: 1) payroll for employees considered talent; 2) payroll for all other employees; 3) records and transcriptions; 4) outside news services; 5) payments to talent; and 6) other program expenses. (Id., 70)

None of these costs is in the slightest degree relevant to the issue here, valuation of performance rights in copyrighted works. The NAB would include such expenses as petty cash and salaries of station program department personnel, clerks, secretaries, and managers. (Id., 124.) These items, clearly, have nothing to do with the relative values of music, movies, syndicated programs, sports or other programs, when they are purchased by a copyright user. Therefore, we excluded them from our computation.

The broadcasters also attacked by suggesting that significant costs for synchronization and dramatic performing rights, not covered by the cable compulsory license, are included in the FCC line item which includes cost of music performing rights. But, as the record shows, these sums are negligible at most and, in fact, when acquired are paid for by program producers, not by broadcasters. If they appear at all in the FCC line item we used, they do so only to a de minimis extent. (Id., 120-121.)

The third merit in our proposal is that it can evaluate and compare the claims of all claimant groups. (Id., 51.) True, broadcasters do not pay themselves for the programs they produce and own and, therefore, would receive nothing -- but an adjustment can be made to pay them a minimal share of cable royalties. Their programs, mostly local news and local public affairs, have very little, if any, value in distant markets. (Id., 52.)

All the other non-broadcast parties agree, as illustrated by the following statement by counsel for MPAA:

"We fully agree with the testimony of Dr. Fagan who appeared on behalf of ASCAP who said that just plain common sense establishes that a local program consisting of local news, local public affairs when transmitted to a distant market will get a lower rating, will have less value and will have less popularity than sports and most certainly of feature movies and syndicated series programs."
(Tr. of April 8, 1980, 5.)*

As we shall discuss later, an analysis of other theories confirms that broadcasters' works are of minimal value to cable systems.

Fourth, our proposal values music; no other party has even tried to do so. Music is not usually the sole program element in television, occupying program time to the exclusion of all other copyrighted program elements, and so cannot be valued on a time basis. (BMI's time-based theory, virtually identical to the NAB's, must therefore fail.) An audience measure, too, cannot separate music from all other program elements. Our proposal stands alone as the only evidence in the record on the value of music.

*For the Joint Sports Claimants' view, see their pre-hearing memorandum, especially appendix 1.

B. The Broadcasters' Time Theory

The broadcasters' organizations -- NAB, PBS and BMI -- argue that royalty distribution should be based solely on the time occupied by copyrighted materials. We disagree for several reasons:

First, a parade of witnesses testified that copyrighted works are never sold on the basis of their duration. Thus, the MPAA's President, Jack Valenti, confirmed that time was never a measure of value of copyrighted works:

"Q. Sir, are motion pictures or other syndicated programs sold by the pound in the marketplace? That is, a broadcaster for example comes to a syndicator and says I have two hours of time I have to fill. Give me anything for those two hours?

A. I am not aware of such events.

Q. Are all copyrighted motion pictures or other syndicated programs fungible?

A. Do you mean capable of being replaced?

Q. No. I mean exactly of the same value.

A. Of course not." (Tr. of April 8, 1980, 59-60.)

Another MPAA witness, Allen Cooper, agreed:

"Q. . . . You heard Mr. Valenti testify yesterday -- I will try to paraphrase -- that programs are not valued in the marketplace on a time basis, generally. Do you recall that?

A. Yes.

Q. Do you recall that you nodded your head?

A. I would agree to that." (Tr. of April 9, 1989, 137.)

Alexander Korn, another MPAA witness, also agreed. (See, Tr. of April 10, 1980, 129-130.) The rejection of time as a measure of value by these MPAA witnesses is particularly significant because the MPAA has advocated a time-based theory, which we discuss below.

The Joint Sports Claimants also agree that time is not a significant measure of value. They say so in their Pre-Hearing Memorandum (at 7-8).

Even the broadcasters' own witnesses agreed that time alone is not an adequate measure of value. Lawrence Grossman, President of PBS, said so and stressed judgmental factors, "quality and rareness":

"Q. . . . Do you think that a two-hour program of say, Pavarotti singing selections from opera has the same value as a two-hour program of Charlie's Angels, even though both run for two-hours?

A. It depends on how you define value. If value is defined as what it costs to produce that program when they have it, if one is measuring value by counsel's four-year old daughter, then I don't think there is any doubt when you compare Sesame Street to the Chicago Cubs, regardless of the cost of the programs or the number of people, how she would rate the values. I think in my terms, a half-hour Pavarotti program would have far more value than a three-hour Charlie's Angels.

Q. What you are telling me, sir, is that the duration of programming standing alone is not the measure of value.

A. I think nothing standing alone is a measure of value. They all have to be factored in, including quality, including, as I say, suggestive values of quality and rareness, if you will." (Tr. of May 1, 1980, 81-82).

Richard Hughes, an NAB witness, listed the items which he thought were measures of program value, and time was not among them:

"Q. . . . Were you telling us, sir, that the value of your programming as you see it was measured by that list of things you recited, ratings, dollar volume, revenue potential, need in the community, your sense of pride and satisfaction in putting a program on?"

A. Yes." (Tr. of May 22, 1980, 67.)

Even if time were of some use in determining value here for some claimants, it cannot be used to determine music's value, as BMI urges. Music on television generally is performed with other copyrighted material simultaneously and cannot fairly claim credit for all the time it occupies. The record contains no suggestion of a method of apportioning value based on time between music and other simultaneous copyrighted program elements. And, of course, music performing rights are never valued on a time basis when they are licensed to users.

Application of any time-based formula would not comport with the law's mandate to the Tribunal. We agree with this statement of the Joint Sports Claimants:

"If Congress had intended the distribution process to be as simplistic and mechanical as that urged by the NAB, there would have been no need to entrust this responsibility to the Tribunal. But rather than prescribe a precise formula and require its rote application, Congress recognized that distribution should be left to an expert body which could study the 'pertinent data' and weigh the 'considerations presented by the claimants.' Further, it underscored the relationship between royalty payments and the marketplace concerns of value both to the buyer and seller. Congress has, in short, carved out a role for the Tribunal far more central and difficult than the NAB's theory would allow.

Operating within the guidelines set by Congress, the Tribunal must make a judgment as to how the marketplace, if functioning in the typical buyer-seller framework, would allocate the royalty pool." (Pre-Hearing Memorandum of Joint Sports Claimants of March 24, 1980, 8-9.)

In sum, the broadcasters' time-based approach is not helpful in solving the problem of distribution of cable royalties. It would produce an enormous and wholly unjustified windfall for broadcasters.

C. The MPAA's "Fee-Generated Time" Theory

Program producers and syndicators, led by the MPAA, also advocate distribution based on the time occupied by copyright programs, but with the added twist of a "fee-generated" factor. They suggest the relative time occupied by programs of claimant groups should be weighted by the compulsory license fees generated by each distant station carried on cable systems -- this, they say, will value each groups' copyrighted works with more precision.

This approach has the same infirmities as the broadcasters' time-based theory: copyrighted works simply cannot be, and are not, valued anywhere else based on their duration. The MPAA's witnesses admitted as much. See, testimony of Jack Valenti (Tr. of April 8, 1980, 59-60), Allen Cooper (Tr. of April 9, 1980, 137) and Alexander Korn (Tr. of April 10, 1980, 129-130).

And, of course, the MPAA's theory -- like any time-based theory -- is inapplicable to music. Mr. Cooper agreed that music could not be valued on the "fee-generated time" theory:

"Q. In your computation you did not allocate any portion for music?

A. That is correct." (Tr. of April 9, 1980, 137.)

There is a surface attraction to the "fee-generated" approach. The House Report, in speaking of the distant signal equivalent (DSE), which is the heart of the MPAA's fee-generated theory, defines it as "the value assigned to the secondary transmission of any non-network television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming." H. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), 100 (emphasis added).

But the DSE supplies a dollar valuation only for each distant station's entire signal; it is not helpful for the further, necessary differentiation of the value of different copyrighted works included in each station's signal. The "fee-generated" approach still values two hours of "Gone With The Wind" the same as two hours of "Beach Blanket Bingo" or a half-hour of "All in The Family" the same as a half-hour local public affairs program on the Chicago sewer system, when originated by the same distant station. The MPAA's witness, Allen Cooper, testified that, while programs of the same duration have different values, the "fee-generated" approach nevertheless assigns them the same value:

"Q. Would you also agree with Mr. Valenti's statement that assuming both movies ran the same length that 'Gone With The Wind' would not have the same value as 'Beach Blanket Bingo'?

A. It would have a greater value.

Q. You recall Mr. Valenti also said, and I ask you if you agree with his statement to the effect that if a syndicated program ran for half an hour, 'All in the Family', it would not have the same value to distant signal cable system as a half hour locally produced program discussing the Chicago sewer system.

A. Agree with not having the same value. I think I clearly indicated he thought the sewer program would have a lower value.

Q. Nevertheless, on page 22 I believe it is of your statement in the first full paragraph, you indicated that in your analysis you valued all quarter hour segments alike no matter what the program carried on them was, is that correct?

A. That is correct." (Tr. of April 9, 1980, 137-138.)

Thus, the MPAA's time-based measure values all works broadcast by the same distant station identically, based solely on the time they occupy, which is contrary to the testimony of their own witnesses as to the value of different works. That, we suggest, is a fatal flaw.

The MPAA clearly was concerned with this inconsistency. It tried to find a better method of valuation. Thus, Allen Cooper's prepared statement said:

"During the course of our studies, we felt that it would be desirable, if possible, to introduce objective 'quality' factors, so that we could weight programs and the resulting royalty entitlements on the basis of their relative value to cable systems." Test. of Allen R. Cooper dated March 26, 1980, 4.

We suggest our marketplace value theory accomplishes that task -- and, as noted previously, the MPAA agrees that ours is a reasonable method of valuation. The MPAA's "fee-generated" time approach, unfortunately, is not.

D. Sports' Audience Theory

The Joint Sports Claimants suggest valuation based on the size of the distant cable viewing audience attracted by different types of programs. This theory is appealing, but has the considerable infirmity that it does not value music. Music is heard on almost all programs. See, testimony of Dr. Paul Fagan, Tr. of March 31, 1980, 131. Its value cannot be separated from the value of other program elements and assessed by measurement of audience size. For audience rating purposes, all the elements are fused, and any measurement which values the program as a whole cannot be used to value any one element in it.

Leaving this infirmity aside, we think audience is a valid measure of the value of different types of programming. There can be no argument on this point, for the entire broadcasting industry -- including public broadcasting -- relies on audience ratings as a measure of program value.

This measure is no doubt used by cable systems in deciding which distant signals to carry. Audience size indicates viewer preference. The greater the viewer preference, the more subscribers and subscriber revenues the cable system should have. Subscriber revenues, of course, are the ultimate test of program value to cable systems.

E. Other Theories

Other theories offered are of some use. The Joint Sports Claimants polled cable operators and asked them what types of programs they would like to import, and the relative price they would pay for each. There were serious methodological problems with this poll and, beyond those, it is useless in evaluating music's share. But, we think, the results are helpful in that they confirm the conclusion suggested by good judgment, of the very low value in distant markets of broadcaster-owned programming -- primarily local news and public affairs. See, Pre-Hearing Memorandum of Joint Sports Claimants dated March 24, 1980, 8 and 11-12. As repeatedly suggested during the proceedings, the value of a local public affairs program on the Chicago sewer system is nil to a distant cable system.

F. Methodological Questions

During the hearings claimants attacked one another's methodologies. We need not review those attacks here and suggest that there is no need for the Tribunal to get bogged down in the details of methodological analysis and criticism.

Rather, on the basis of the record, we think an objective assessment of the relative merits of each theory leads inexorably to the conclusion that the most methodologically troublesome theories -- the broadcasters' and the MPAA's -- are not helpful in resolving competing claims. If the Tribunal shares our judgment, there would be no need to examine the methodological details. This was made clear on cross-examination of the NAB's witness, Roger Wagner:

"Q. There has been much discussion of inaccuracies, errors, problems, with computer-generated data.

Sir, if the basic premise of the NAB's position is incorrect, then no one really need be concerned with any questions of inaccuracies or errors, is that true?

A. That would be true, yes, sir." (Tr. of May 1, 1980, 89-90.)

Having considered the relative merits of each theory, we now apply them to the claims submitted.

III. APPLICATION OF THE THEORIES TO THE CLAIMANT GROUPS

Two preliminary matters must be discussed before we address allocation of royalties to individual claimant groups.

First, the royalty pool must be divided between retransmissions of television and radio broadcasters. Separate allocations must be made for each. 17 U.S.C. §111 (d)(4)(c).

During Phase I most claimants dealt with television only, and ignored radio.*

Second, claimants in certain groups who might have filed claims failed to claim. We speak of these groups as not being fully represented.

We (and others) believe that claimant groups which are not fully represented should not receive the full shares they would be entitled to if they were fully represented. Rather, we suggest, equity requires distribution of amounts attributable to claimants not represented to those individual claimants who have filed claims in all groups, on a pro rata basis.

Accordingly, in our proposal for allocation of royalties to different claimant groups, we first set forth the share that

*E.g., Allen Cooper of the MPAA testified that the MPAA ignored radio completely in its analysis:

"Q. You did not allocate anything for radio in your analysis, did you?

A. There is no specific payment made for radio by cable systems.

Q. Therefore you did not determine any share to be allocated for copyright owners whose works were performed by distant radio signals, is that correct?

A. The answer is no." (Tr. of April 9, 1980, 137.)

would be attributed to claimant groups as if all were fully represented. We then make an appropriate adjustment to account for the failure of potential claimants to file claims.

A. Division of Royalties Between Television and Radio Retransmissions

We estimate 5% as the share of cable royalties which may reasonably be attributed to radio retransmissions. See, our Pre-Hearing Memorandum of March 24, 1980, 6-8; testimony of Dr. Paul Fagan, Tr. of March 31, 1980, 58.

There is no hard data on cable retransmissions of distant radio signals. And, if there were, there would still be no way to quantify the amount of cable royalties attributable to radio as opposed to television retransmission because no separate payment is made for the right to retransmit distant radio stations. 17 U.S.C. §111 (d) (2).

Our allocations of royalties are made on the basis of a 95% - 5% split between television and radio.

We turn first to consider television's 95% share.

B. Cable Television Royalties

1. Music

Based on this record, music's share of cable television compulsory license fees can only be determined by comparing the amount television broadcasters pay for music performing rights to the amounts paid for performing rights in other copyrighted materials. None of the other theories presented -- whether based on time, "fee-generated" time, audience, or some other facts -- even purports to value music. And, as we have shown, none of the attacks made on our theory stands up on analysis.

We have shown the amounts paid by television broadcasters for copyrighted materials in 1978 in our Pre-Hearing Memorandum of March 24, 1980, 3-5 and at the hearings. (Tr. of March 31, 1980, 53-57.) Music's share of the television portion of cable royalties is 7.4%. Since the television portion is 95% of the total royalties paid, music's share of the total attributable to performances on cable television is 7.0%.

2. Broadcasters

There are three claimant groups for cable television royalties whom we classify as broadcasters. They are the National Association of Broadcasters (NAB), the Canadian Broadcasting Corporation (CBC) and the Public Broadcasting Service (PBS)* We shall examine each after discussing the broadcasters' claims generally.

Broadcasters have claimed that their shares should be determined based upon the duration of their programs relative to total duration of all television distant signal programs. The theory is unsound, as we have shown, because copyrighted works cannot be valued, and are not valued, in any market, on the basis of their duration.**

An assessment of the broadcasters' claims must start

*PBS is also a television program syndicator. We discuss here only its "broadcaster" share. We shall discuss its "syndicator" share in our discussion of the syndicator group generally, below.

**We believe the record shows the broadcasters' "syndicated exclusivity" and "compilation" claims are wholly unjustified. Indeed, there is no evidence to support them. Tr. of May 22, 1980, 135-139; Tr. of May 23, 1980, 29-31.

with consideration of the value of the programs they own to cable systems. These programs, primarily local news and local public affairs programs, are of virtually no interest to viewers in distant cities and, therefore, are of minimal value under the compulsory license.

Our proposal gives broadcasters no share of cable royalties because no broadcaster purchases another's local news and public affairs programs, which are of no interest outside the originating station's market.*

We recognize that broadcasters are entitled to some payment for distant retransmissions of their programs and believe that other measures of value proposed in these proceedings are helpful in determining that share.

One such measure is the size of the distant cable audience viewing broadcasters' programs. As the Joint Sports Claimants demonstrated, broadcasters' programs attract approximately 7% of the total audience. (Joint Sports Claimants' Pre-Hearing Memorandum of March 24, 1980, Appendix 2, 38.) That 7%, of course, would be the broadcasters' share in a three-way division among broadcasters, program producers and sports interests after music's share had been deducted.

Another indicator of the value of broadcaster-owned programs

*Of course, some broadcasters -- such as Westinghouse and Metromedia -- are also program producers and syndicators. They are included in the syndicator group for their syndicated programs.

is the value cable operators ascribe to them, as shown by the Joint Sports Claimants' study of operators' attitudes. That study showed that broadcaster-owned programs would receive about 2% of cable royalties.

Still another measure is the good judgment or "common sense" approach we and others suggest. A cable system would not import a distant signal in order to retransmit distant local news and public affairs which have little or no audience appeal to its subscribers.

Taking all these factors into account, we believe broadcasters should receive at most 5% of cable television royalties. Since television accounts for 95% of all cable royalties, broadcasters should therefore receive 4.8% of the total for their television programs.

The next question is how to allocate that 4.8% among the NAB, CBC, and PBS.

First, CBC has not, on our reading of the record, made a case for any significant cable royalties. CBC's voluminous written submission includes no precise statement of the amount to which it claims entitlement, only a time-based formula which it says can be applied to its claim. (See, CBC Pre-Hearing Memorandum, 14.) Representatives of CBC, though present during the Phase I proceedings, took no part in the hearings. And, from the program listings presented in the CBC's Pre-Hearing Memorandum, it is clear that many CBC shows are either owned by other claimants or originated as

United States network programs. (See, CBC Pre-Hearing Memorandum, Doc. No. 1.) We believe any CBC share should be judged in the light of the shares awarded NAB and PBS.

We believe the NAB and PBS are entitled to share royalties in a ratio of three to one, respectively. We base this ratio on a number of factors. One is the very small relative audience share public broadcasting programming attracts. (See, e.g., testimony of Lawrence Grossman, Tr. of May 1, 1980, 75-76; testimony of Dale Rhodes, Tr. of May 6, 1980, 21) Another is the relative number of commercial and noncommercial television stations -- approximately 750 and 250 respectively, based on FCC figures.

Further, as the hearings disclosed, public broadcasting stations duplicate programming to a great extent. (See, testimony of Lawrence Grossman, Tr. of May 1, 1980, 76-80; testimony of Dale Rhodes, Tr. of May 6, 1980, 21-28.) All other factors being equal, this makes public broadcasting programming worth less than commercial broadcasting programming to distant cable systems: A cable system importing a commercial station will obtain movies and programs not available within its market during that broadcast week. But if it imports a distant noncommercial station it will obtain a good deal of duplicate programming during that week. Thus, the cable viewer, for example, will be able to see the same episode of "Masterpiece Theater" four times instead of twice.*

*Cable systems do not, as a general matter, import noncommercial stations because of their unavailability within the cable systems' owner markets. PBS states that 85% of all television households can receive public television stations over the air. Test. of Lawrence Grossman (PTV Exh. 1), 8.

Such duplication, we suggest, is of limited value.

In addition, there was much discussion at the hearings of PBS' role as a network. This is significant because the Copyright Law allows payment only to copyright owners whose works are included in "a non-network television program." 17 U.S.C., 111 (d) (4) (A). But the law does not define what a "non-network television program" is; it only defines a "network station":

"A 'network station' is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day."
17 U.S.C. §111 (f) (emphasis added)

PBS claims it is not a "network" because it does not have the same sort of affiliation agreements with local stations as the commercial networks have. We think the term "affiliated with" in the law's definition of "network station" clearly includes the arrangements between PBS and its stations. The plain meaning of the word "~~affiliate~~" as Webster defines it, supports our view:

"to attach as a member of branch: to bring or receive into close connection . . . to join as a member" (Webster's Third International Dictionary, 35.)

PBS describes its stations as "members" who join its "service". Test. of Lawrence Grossman (PTV Exh. 1), 5. They have thus affiliated with PBS for the purpose of carrying PBS programs, just as commercial network affiliates join to carry their networks' programs. The evidence shows that a substantial

part of each PBS' station's typical broadcast day -- 66% -- consists of PBS programs. Id., 3.

Since the copyright law provides for no payment for distant carriage of network programming, two-thirds of the programs on public television stations are ineligible for cable royalty payments.

Taking all these factors into account, we suggest the 4.8% of cable royalties allocated to broadcasters be divided by granting 3.5% to the NAB, 1.2% to PBS and 0.1% to CBC.

3. Sports

Both our market value approach and the Joint Sports Claimants' audience size approach yield comparable results in valuing the sports claim.

Sports received 11-12% of the total amount paid in 1978 by television broadcasters for the right to broadcast sports events. (See our Pre-Hearing Memorandum of March 24, 1980, 4-5) Based on the Joint Sports Claimants' audience data, sports attracted 11% of the total distant cable audience. See, Joint Sports Claimants' Pre-Hearing Memorandum of March 24, 1980, Appendix 2, 36 (Table 4.1).

Accordingly, we believe it is reasonable to allocate 11% of cable television royalties to sports claimants. Since television accounts for 95% of the total cable royalties, sports is entitled to 10.5% of the total.

The Tribunal has directed that we further apportion this amount between the Joint Sports Claimants and the NCAA.*

*The Joint Sports Claimants represent four professional sports -- the only four to have filed claims. Of course, as the record shows, many other professional sports are carried as distant nonnetwork programs by cable. See, our brief of May 23, 1980.

We respectfully suggest that allocation is a Phase II matter. We have no basis for making such an allocation, other than a guess: neither the NCAA nor the Joint Sports Claimants have as yet introduced any evidence in these proceedings on the subject.

Since the Tribunal has directed all parties to make an allocation, we do so, albeit on sheer speculation. Based on our purely subjective observations of television broadcasting, we estimate the ratio of carriage of professional sports to college sports to be 3:1. On that basis, the Joint Sports Claimants would receive 7.9% of the total cable royalties, and NCAA, 2.6%.

4. Program Producers and Syndicators

The final group, and without question the largest single claimant group, is the program producer syndicator group, chiefly represented by the Motion Picture Association of America (MPAA). The group includes claimants not represented by the MPAA, such as the Christian Broadcasting Network (CBN).

By adding the shares for music, broadcasters and sports claimants which we suggest, and deducting the total from the 95% of all cable royalties allocable to cable television retransmissions, we find the program producers and syndicators are entitled to 72.7% of all cable royalties.

This figure is in the same range as other measures of this programing. Under our market value approach, producers and syndicators would receive 79.1% of the amounts paid for copyrighted works by television broadcasters. When that figure is applied to the 95% share of total cable royalties applicable to cable television, producers and syndicators would receive approximately 75% of the total cable royalties.

The Tribunal has directed us to allocate specific percentages to three claimant groups within the producer and syndicator group: the cartoon character claimants, PBS for its syndicated programs, and all other program producers and syndicators, including those represented by the MPAA.

We have previously stated, and shall not repeat here in detail, that the cartoon character claimants are not entitled to any royalties from cable retransmissions. Simply put, they have conveyed any rights to such royalties they might have had to program producers and syndicators.

We believe PBS is entitled to about 2% of cable royalties for the programs it syndicates. We base this conclusion on the factors previously discussed: PBS is a network and many of its programs are not entitled to any cable royalties; the value to distant cable operators of importation of public television stations is less than the value of importation of commercial stations, because of the immediate duplication of programming that results; and PBS' audience share is minuscule compared to commercial television's audience.*

After PBS' 2% is deducted, 70.7% remains for the MPAA and any other producer and syndicator claimants such as CBN.

*Public television's claim that it is entitled to collect royalties for everything it carries no matter who the owner is, as ludicrous and the Tribunal should give it no weight.

D. CABLE RADIO ROYALTIES

1. Music

Music is entitled to 79% of cable radio royalties, based on the amounts paid by radio broadcasters for copyright rights compared with amounts paid for other performance rights. See our Pre-Hearing Memorandum of March 24, 1980, 5-6. Since we have allocated 5% of the total cable royalties to radio, music is entitled to 3.8% of the total. The remaining 1.2% should be divided between commercial radio broadcasters and National Public Radio (NPR).

2. Radio Broadcasters

NPR has not specified the amount it claims. Although it said it would do so after the hearings (See, Tr. of May 6, 1980, 63), it offered only data concerning the hours of NPR programming by NPR stations making claims. In the absence of any justification by NPR of a specific share, we believe cable radio royalties should be allocated to commercial broadcasters and NPR in a ratio of ten to one respectively, based simply on the number of stations operated by commercial and noncommercial broadcasters, (about 7500 and 750, respectively, according to the FCC).

Accordingly, the NAB and any other commercial radio broadcaster claimants should receive 1.1% of the total cable royalties, and NPR, 0.1%.

IV. SUMMARY OF ALLOCATIONS

We have summarized our proposal for Phase I for cable royalty distribution in Figure I, which immediately follows this page. However, this chart does not represent the final royalty

FIGURE 1

Proposed Allocation Assuming All
Potential Claimants Have Filed Claims

TELEVISION:

Music:	7.0%
Broadcasters:	4.8%
NAB:	3.5%
PBS:	1.2%
CBC:	0.1%
Sports:	10.5%
Joint Sports Claimants:	7.9%
NCAA:	2.6%
Producers and Syndicators:	72.7%
Cartoon Claimants:	0.0%
PBS:	2.0%
MPAA & all others:	70.7%

RADIO:

Music:	3.8%
Broadcasters:	1.2%
NAB:	1.1%
NPR:	0.1%

100.0%

allocation. It is premised on the assumption that all potential claimants filed claims. We know that is not the case. Accordingly, the Tribunal must redistribute royalties for which no claim has been filed.

V. DISTRIBUTION OF UNCLAIMED ROYALTIES

As we have previously shown, proportionate redistribution of unclaimed royalties results in an increase in music's total share of 2.7%. See our brief of May 23, 1980. Since no other group is fully represented, we suggest each other group's share be reduced proportionately, so all reductions total 2.7%. Id.

The MPAA claims that all of the individual claimants who have jointly claimed through ASCAP, BMI or SESAC will not receive distribution of cable royalties, and therefore all music claimants are not represented. See MPAA Brief of May 23, 1980. The claim is specious. It is based on ASCAP's counsel's statement that, occasionally, ASCAP cannot find certain non-member writers of works when they have been performed, and so cannot elect them to membership or make royalty distributions to them. These so-called "non-member shares" are not paid to the other members in interest. If a lyric writer is a non-member, the composer and the publisher do not share the sum he would have received -- such sums are shared by all members. It should be noted that in these cases the copyright owner, the publisher, is the person entitled to claim, and is represented by ASCAP.

ASCAP, by virtue of its membership agreements, is entitled to claim cable royalties on behalf of all its members. All ASCAP

members agree to be bound by ASCAP's distribution rules -- including the rules providing for distribution of funds, half to publisher members as a group and half to writer members as a group, regardless of whether legal title to the copyright is in the publisher or the writer(s). Thus, ASCAP has made a proper claim for cable royalties on behalf of all its members. Among them, ASCAP, BMI and SESAC have claimed for all copyrighted music of any commercial value with only de minimis exceptions.

Accordingly, music's share should be increased by 2.7% and other groups' shares decreased by a total of 2.7%. We have worked out the mathematics of this adjustment, as set forth in Figure 2.

The Tribunal has directed the parties to set forth the total amounts each claimant group is entitled to receive, and we do so in Figure 3 in the order the claimant groups were listed by Chairman Burg at the hearing of May 29, 1980. (Tr., 123-124.)

FIGURE 2Proposed Allocation Based on
Actual Claims FiledTELEVISION:

Music:		9.6%
Broadcasters:		4.6%
	NAB:	3.3%
	PBS:	1.2%
	CBC:	0.1%
Sports:		10.2%
Joint Sports		
Claimants:	7.7%	
NCAA:	2.5%	
Producers and Syndicators:		70.6%
Cartoon		
Claimants:	0.0%	
PBS:	2.0%	
MPAA and		
all others:	68.6%	

RADIO:

Music:		3.9%
Broadcasters:		1.1%
	NAB:	1.0%
	NPR:	0.1%

 100.0%

FIGURE 3Proposed Allocation By Claimant Group

1. MPAA and other producers and syndicators:	68.6%
2. Broadcasters:	4.4%
(NAB: 4.3%)	
(CBC: 0.1%)	
3. Sports:	10.2%
(Joint Sports Claimants: 7.7%)	
(NCAA: 2.5%)	
4. Music:	13.5%
5. PBS:	3.2%
6. NPR:	0.1%
7. Cartoon Character Claimants:	0.0%
8. Radio in general:	*
	<hr/> 100.%

* Radio in general is entitled to 5% of the total; this sum is allocated to Music (3.9%), NAB (1.0%) and NPR (0.1%) and these allocations are included in the figures for each.

VI. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior Proceedings

1. The Copyright Law, 17 U.S.C. §111(d)(4), provides that the Copyright Royalty Tribunal ("Tribunal") shall distribute compulsory license fees paid by cable systems, pursuant to 17 U.S.C. §111(d)(2), to certain copyright owners. 17 U.S.C. §111(d)(4). The procedure for that distribution is set forth in 17 U.S.C. §111(d)(5).

2. On September 12, 1979, the Tribunal, pursuant to 17 U.S.C. §111(d)(5)(B), declared the existence of a controversy concerning the distribution among copyright owners of cable royalty fees paid by cable operators during 1978. 44 FR 53099.

3. On December 19, 1979, the Tribunal, pursuant to 17 U.S.C. §801(b)(3), directed parties to submit briefs on various matters, including division of the evidentiary hearing in the cable royalty distribution proceeding into specific phases, and scheduled a conference on the issue, among others, for February 14, 1980. 44 FR 75201.

4. On February 14, 1980, after hearing arguments of the parties, the Tribunal ruled that the proceeding would be conducted in two phases. Phase I would allocate cable royalties to distinct groups of claimants. Phase II would allocate cable royalties to individual claimants within

each group. The Tribunal then conducted 17 days of Phase I evidentiary hearings. At the final hearing of May 29, 1980, the Tribunal directed parties to submit proposed findings of fact and conclusions of law, with supporting memoranda, regarding Phase I issues, by July 7, 1980. Tr. of May 29, 1980, 123.

5. In Phase I of this proceeding, the parties have advanced and the Tribunal has examined a number of theories or formulas for distribution of cable royalties. These include a market value approach based on the amounts paid for copyrighted works by broadcasters, suggested by the American Society of Composers, Authors and Publishers (ASCAP) and SESAC, Inc. (SESAC) on behalf of music; a time-based theory predicating royalty distribution solely on the duration of programs, advanced by the National Association of Broadcasters (NAB), Public Broadcasting Service (PBS) and Broadcast Music, Inc. (BMI); a "fee-generated" time-based theory proposing royalty distribution on the basis of the royalty fees allocable to each distant station carried pursuant to the compulsory license, and the duration of different programs on each such station, suggested by the Motion Picture Association of America (MPAA) and other program producers and syndicators; a theory based on size of viewing audience of

of distant cable television retransmissions, advanced by the Joint Sports Claimants (Sports); and several other theories including ones based on cable operators' statements concerning the attractiveness of certain distant programming, the harm to copyright owners of distant signal importation and subjective evaluation of program quality.

Findings of Fact

6. The Tribunal finds that no one theory or formula, or combination of theories or formulas, would provide an ideal, universal or satisfactory means distribution of the statutory compulsory cable license fees.

7. Certain theories advanced by the parties are more relevant and useful in Phase I of this proceeding than others.

8. The market value theory of ASCAP and SESAC is the most useful because:

- a) it is applicable to all claimants;
- b) it is based on uncontroverted data compiled by the Federal Communications Commission;
- c) it values exactly the same rights in exactly the same programs as those covered by the cable compulsory license;
- d) it is the only theory advanced which can properly value music's share of the compulsory license fees.

9. The time-based theories of NAB, PBS and BMI and the "fee-generated" time-based theory of MPAA are the least useful

because:

- a) no copyright rights are valued solely or even primarily on the basis of the duration of the copyrighted work;
- b) it is impossible to value music on the basis of duration;
- c) serious methodological infirmities with the time-based theories were demonstrated.

10. The audience theory of sports is useful to a degree because ratings are a widely-used measure of value in the broadcasting industry. The theory's usefulness is limited because it cannot be used to value music.

11. Other suggested theories are also useful, to limited degrees. While they cannot precisely quantify shares of royalties for claimant groups, they do indicate the greater or lesser values of different claims.

Conclusions of Law

12. The Tribunal, after study of 17 U.S.C. §111 and its legislative history, concludes that it has wide discretion in determining the distribution of cable royalties to eligible claimants.

13. Because all potential claimants have not filed claims, the Tribunal concludes that the amounts attributed to potential claims which were not filed should be proportionately distributed to all claimants who did file claims properly.

14. Based on the entire record in Phase I of these proceedings, the Tribunal concludes that royalties should be distributed to the claimant groups as follows:

a) MPAA and other producers and syndicators:	68.6%
b) Broadcasters:	4.4%
(NAB: 4.3%)	
(CBC: 0.1%)	
c) Sports:	10.2%
(Joint Sports Claimants: 7.7%)	
(NCAA: 2.5%)	
d) Music:	13.5%
e) PBS:	3.2%
f) NPR:	0.1%
g) Cartoon Character Claimants:	0.0%
h) Radio in general:	*
	<hr/>
	100.0%

15. Final distribution of cable royalties to claimants will be made at the conclusion of Phase II of this proceeding. Accordingly, this decision does not constitute a "final determination" of the Tribunal under

* Radio in general is entitled to 5% of the total; this sum is allocated to Music (3.9%), NAB (1.0%) and NPR (0.1%) and these allocations are included in the figures for each.

17 U.S.C. §803(b) or a "final decision" of the Tribunal
under 17 U.S.C. §§804(e) and 810.

* * *

Respectfully submitted,

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