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Before the  
Copyright Royalty Tribunal  
Washington, D.C. 20036

In the Matter of )  
 )  
Distribution of 1978 Cable ) Docket No. 79-1  
Royalty Fees )

Broadcast Music, Inc.  
Proposed Findings of Fact  
And Conclusions of Law

Broadcast Music, Inc. ("BMI"), by its attorneys,  
submits the following proposed findings of fact and conclu-  
sions of law in Phase I of this proceeding in accordance  
with the directive of the Tribunal. 1/

I. Summary of Position

1. Each of the participants in this proceeding  
has emphasized different factors and has applied different  
approaches in justifying the specific distributions it  
seeks. Nevertheless, BMI believes that the various studies  
offered herein will assist the Tribunal in carrying out its  
complex task. While the record in this proceeding demon-  
strates that virtually every study is subject to interpreta-  
tion, and elements of some methodologies employed are subject  
to significant question, taken together, the various studies  
do suggest general trends which should guide the Tribunal in

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1/ Tr., May 29, 1980, p. 123.

establishing relative shares. Therefore, it may be practical for the Tribunal to start its analysis with the requested percentage distributions claimed by each participant group and to modify those figures to the extent they are not supported by the record.

2. As discussed in detail hereinafter, BMI submits that the record in this proceeding fully justifies and supports the allocation of 15% of the total cable royalty fund to the performing rights organizations, including BMI, as the proper claimants for the music interests herein. Notwithstanding the clear justification for BMI's original claim for 17%, in an effort to compromise the numerous competing claims filed with the Tribunal and to accommodate the legitimate interests of others, BMI herein proposes a reduction in the share allocated to music to 15% of the royalty fund.

3. While the Tribunal must exercise the ultimate judgment in allocating the total royalty fund, in an effort to assist the Tribunal's deliberations, BMI offers the following possible distribution among other competing claimants, other than music, as one to which BMI would not object:

Program syndicators	50 %
Sports (including NCAA, 5%)	20 %
Public Broadcasting Service	8 %
National Association of Broadcasters	3 %

Radio in general	1 %
National Public Radio	.5 %
Miscellaneous (including character claimants, Canadian Broadcasting System, Christian Broadcasting Network, Inc.)	2.5 %

This distribution is based on findings by the Tribunal that (1) "broadcast day compilation" is not a proper basis for a claim, and (2) "program exclusivity" is not a proper basis for a claim. In addition, it is BMI's position that to the extent that some claimants do not properly represent an entire industry, and copyright owners unrepresented have not filed claims at all, the share of the pool representing the industry portion which has not filed claims should be distributed pro rata among all the properly filed claimants. See, Memorandum of Broadcast Music, Inc., May 23, 1980.

## II. Introduction

### a. The Parties

4. In this proceeding the Tribunal, pursuant to Section 111(d)(5)(B) of the Copyright Act of 1976, 17 U.S.C. § 111(d)(5)(b), has undertaken the difficult task of distributing 1978 compulsory license payments to copyright owners. In this Phase I of the proceeding, the Tribunal is considering how to divide the royalty fund among major claimant groups. The participants in this phase of the proceeding are as follows: The National Association of Broadcasters, the Joint Sports Claimants (including Major League Baseball,

Inc., the National Basketball Association, the National Hockey League Services, Inc., and the North American Soccer League), the National Collegiate Athletic Association, the Public Broadcasting Service, Program Syndicators (including the Motion Picture Association of America, its members, and other producers), Character Claimants (the copyright owners of various cartoon and puppet characters appearing in non-exempt cable programming), the Canadian Broadcasting Company, the Christian Broadcasting Network, and Music Claimants (including separate presentations by BMI, on the one hand, and the American Society of Composers, Authors and Publishers and SESAC, Inc., on the other).

b. Procedural History

5. Pursuant to Section 302.2 of the Tribunal's rules, claims for a share of royalty funds were due to be filed on or before July 31, 1978 covering the period January 1 through June 30, 1978. Claims for the period July 1, 1978 through December 31, 1978 were due to be filed July 31, 1979.

6. Inasmuch as the parties were unable to reach a voluntary agreement, on September 12, 1979, pursuant to 17 U.S.C. 111(d)(5)(B), the Tribunal declared the existence of a controversy concerning the distribution of the cable royalty fees paid by cable operators during 1978. (44 F.R. 53099).

7. On October 17, 1979 the Tribunal published an order directing briefing on specified preliminary issues concerning: (1) the issue of the broadcast day as a copyright compilation; (2) the issue of programming of which a broadcaster is the exclusive licensee; (3) the objections raised as to the standing of certain sports claimants. (44 F.R. 59930). Briefs were filed by various parties, including BMI, on November 15, 1979.

8. On December 19, 1979 the Tribunal requested pre-trial briefs in accordance with the following: (1) the Copyright Act does not provide for payment of cable royalty fees to broadcaster claimants for the secondary transmission of the broadcast day as a compilation; (2) the Copyright Act does not provide for the payment of cable royalty fees to broadcast claimants who have acquired rights to syndicated programming in a market, which rights are exclusive against other broadcasters; (3) the Copyright Act provides for the distribution of cable royalty fees to performing rights organizations; and (4) the Copyright Act provides that cable royalty fees awarded for the secondary transmission of certain sporting events shall be distributed to the sports claimants, except when contractual arrangements specifically provide that such royalties be distributed to broadcaster claimants. (44 F.R. 75201).

9. Evidentiary hearings in Phase I were held on March 31, April 8, 9, 10, 24, 25, 28, 29 and 30, and May 1, 2, 5, 6, 22, 23, 27, 28, and 29, 1980.

10. At the hearing on May 29, 1980, pursuant to Section 301.54 of the Tribunal's rules, Chairman Burg called for proposed findings of fact and conclusions of law to be filed on or before July 7, 1980.

c. Standards Governing Distribution

11. The Copyright Act does not contain specific provisions governing the appropriate division among competing copyright owners of royalty fees collected from cable systems and placed into the royalty fund pursuant to Section 111. The legislative history indicates that the drafters believed "... it would not be appropriate to specify particular, limiting standards for distribution." H. Rep. No. 94-1476 (Judiciary Committee) September 3, 1976 (to accompany S. 22), p. 97. Instead, the Tribunal is "to consider all pertinent data presented by the claimants." Id.

12. In the presentation of their direct cases, some parties rely, at least in part, on statistical analyses intended to show the portion of distant signal carriage devoted to programming involving the copyright claim. In BMI's view, the relative amounts of retransmission of the various categories of copyrighted works provides the most definite basis for division of royalty payments. Therefore,

such quantitative factors should be given significant weight in making a determination. At the same time, however, the value of copyrighted material to cable systems and the detriment of its retransmission to copyright owners are considerations which underlie the creation of the compulsory license. Thus, the legislative history indicates that:

[The] retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been 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. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing.  
Id., p. 90.

13. It is apparent that considerations of "value" interplay with statistical measurements of the use of copyrighted material. Thus, the relatively greater amount of retransmission of one category of copyrighted material over another may be an indication of its commercial desirability. Therefore, both quantitative and qualitative factors should be considered in determining the appropriate division of royalties.

III. Findings and Conclusions Concerning  
Music Claimants

14. BMI has asserted that the performing rights organizations are entitled to 17% of the royalty fund. The claim is based on the application of a time value methodology. 2/ The methodology determines the relationship of music, as indicated by its use, to total programming of distant signals carried by cable systems in the United States. 3/ This approach clearly demonstrates both an objective measure of the relative use of music and its value to the cable system. For example, the study demonstrates that music is associated with virtually every television program carried on cable systems. 4/ In addition, it is the dominant factor underlying the secondary transmissions of radio signals. 5/

15. BMI's time value determination is based on a sample of 144 cable systems selected from the Television Factbook. An analysis of the cable systems shows 69% of signals carried are distant signals. 6/

16. To determine program music content, BMI uses a previously prepared detailed study of the 1975-76 television season involving 40 television stations and seven non-consecutive random weeks derived from an "exploded" Federal

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2/ Direct Testimony of Dr. Richard F. Link, p. 5.

3/ Tr., March 31, 1980, p. 12.

4/ Id., p. 36.

5/ Direct Testimony of Dr. Richard F. Link, p. 5.

6/ Id., p. 4.

Communications Commission's ("FCC") Composite Week. 7/ Dr. Richard F. Link, BMI's statistician, indicates that the early study is valid, despite the fact that the fund concerns programming in 1978, because the content of television programming in that period did not change significantly. 8/

17. Approximately 2400 local television program hours were analyzed. Music comprised 515 hours or 21.7% of the total time. This percentage was adjusted by the 69% figure mentioned above to obtain the weighted relationship of music to distant television programming, approximately 15%. 9/ In addition, BMI estimates 2% as the time value allocable to secondary transmissions of radio. The estimate is based on the general finding that music comprises 90-95% of total radio time. Dr. Link concluded on the basis of his professional experience, that no reasonable methodology could reduce the percentage of radio within cable retransmissions to less than 5%. Nevertheless, to be conservative, he adopted the 2% figure. 10/

18. ASCAP and SESAC, in a joint statement, attempt to determine the economic value of music to cable systems using a different approach. They do not consider the actual

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7/ Id., p. 3.

8/ Tr., March 31, 1978, p. 30.

9/ Direct Statement of Dr. Richard F. Link, p.4.

10/ Id., p. 5.

use of music by cable systems. Instead, they suggest that fees paid by cable systems for the use of music should be analogous to those paid by radio and television stations. 11/ In an attempt to develop an objective methodology to implement their approach 12/ ASCAP/SESAC use radio and television station financial data obtained from FCC reports. They purport to calculate the percentage of radio and television expenditures for copyrighted material applicable to music. ASCAP/SESAC propose a 13.5% share for music.

19. While BMI and ASCAP/SESAC apply different methodologies to support their respective claims, they are in agreement that the distribution finally set by the Tribunal should consider the figure indicated in the legislative history of the Copyright Act -- 15%. This figure was inserted in early drafts of the legislation and remained in the various bills until 1974. 13/ Both the BMI and the ASCAP/SESAC proposals fall within the range of the Congressional guideline. While the Tribunal must exercise its discretion in determining the proper distribution, the legislative history provides at least a starting point for its analysis.

20. In the course of the hearings there was brief discussion as to whether the non-exclusive nature of music

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11/ Joint Statement of ASCAP and SESAC, p. 1.

12/ Id., p. 3.

13/ See, S. 543, 91st Cong., 1st Sess., (1969) § 111(d)(3)(c) and S. 644, 92nd Cong., 1st Sess. (1971), S. 1361, 93rd Cong. 1st. Sess. (1973).

licensing somehow makes it less valuable than copyrighted material licensed on an exclusive basis, such as syndicated television programs. 14/ BMI fails to see the relevance of exclusivity to inherent value. The purpose of §111 of the Copyright Act is to establish compensation to copyright owners for the profitable use of their works. The compulsory license provisions act as a substitute for a bargaining process between the copyright owner and the user of copyrighted materials. As BMI's study has shown, music is a significant and essential part of cable television programming. A bargain established between music copyright owners and users of music would reflect those factors. Music's value is not diminished by virtue of its availability in other contexts.

21. One further matter concerning music claimants warrants specific comment. In a pleading submitted to the Tribunal May 23, 1980, the program syndicators assert the extraordinary claim that music claimants may not have standing before the Tribunal. While MPAA make no specific allegations relating to BMI, MPAA makes the specific, albeit absurd claim that ASCAP may not be permitted to represent its members in this proceeding. The assertion, raised out of order in a pleading which was supposed to respond to the

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14/ See, e.g., Tr., March 31, 1980, p. 14.

issue of claimants not fully represented, is based on blatant misrepresentation and misapplication of a consent decree governing certain ASCAP operations.

22. The language of the decree cited by the program producers is as follows:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis.

23. The language obviously limits ASCAP to the business of non-exclusive public performance rights of music. How this language proscribes ASCAP's participation in this proceeding is beyond comprehension. The Tribunal has already ruled that the performing rights organizations are proper claimants in this proceeding. (44 F.R. 75201) These diversions are merely argumentative, add no substance to the proceeding and waste the Tribunal's time.

24. The program producers also claim that all music claimants are not before the Tribunal because it is asserted that some composers, authors or publishers may not be found, "with the direct result that the remaining members' share will be increased proportionately." 15/ The program producers again miss the point. The performing rights

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15/ Brief of program producers, p. 4.

organizations, including BMI, have filed on behalf of all of their affiliates and members. The claimants in this proceeding, so far as music is concerned, are the performing rights organizations. The Copyright Act specifically recognizes BMI and the other performing rights organizations as proper claimants before the Tribunal. See, e.g., 17 U.S.C. § 116(e)(3). The distributions of funds within those organizations are matters of private contract. This is a wholly different situation from the program producers, who base their claim on all syndicated programming but do not represent the entire syndicated program industry.

25. Thus, in an effort to recognize the substantial use and value of music in cable programming and in order to accommodate other valid claims herein, distribution of royalty funds should be structured to permit a 15% payment to music claimants.

#### IV. Findings and Conclusions Concerning Other Claimants

26. In this section BMI will outline its suggestions regarding a possible allocation of royalty funds to claimants other than music to which BMI would not object.

a. National Association of Broadcasters

27. The National Association of Broadcasters ("NAB"), asserts that it should receive 21% of the royalty fund for the retransmission of locally produced television programming. 16/ In limiting its claim to locally produced programming, NAB apparently acquiesces in the Tribunal's December 19, 1979 holding that "compilation" and "program exclusivity" are not proper bases for claims. 17/

28. The claim concerning locally produced programming is based on the calculation of the time allocated to distant carriage of that programming and of the proportionate amount of total royalty fees paid by cable systems. 18/ NAB estimated the total hours of non-network, locally produced programming using Copyright Office Statements of Account and FCC Annual Programming Reports for each station carried by each cable system. 19/ These percentages were then applied against the total royalties paid by each cable system to yield the royalties alleged to be equivalent to the amount

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16/ Direct Statement of NAB, p. 5.

17/ NAB witness Herschel Shosteck states that statistical studies did not consider the matter of broadcast "compilation." Direct testimony of Herschel Shosteck (Television), p. 16.

18/ Id., p. 16.

19/ Id., p. 2.

of locally produced programming. The sum of the royalties associated with locally produced programming for each system yields the total claimed. 20/

29. Cross-examination of NAB witness Roger Wagner demonstrated a number of errors which cast doubt on the validity of the NAB claim. For example, Mr. Wagner referred to errors which may appear in the Statements of Account. 21/ He also referred to the possibility of errors in data entry. 22/ Mr. Wagner also conceded that in calculating the total amount of local programming there was an allocation of 100% of Canadian broadcast time to local programming. 23/

30. NAB witness Shosteck, employed by NAB specifically to evaluate the methodology underlying the 21% figure, testified as follows:

MR. LLOYD (Counsel for Joint Sports Claimants):  
Now, I think that the record is now abundantly clear, sir, that the 21 percent does not reflect the percentage of local broadcaster time carried on a distant signal basis by cable systems.

WITNESS SHOSTECK: That is absolutely correct.

MR. LLOYD: Okay, and that the figure of local time carried on a distant signal basis by cable systems is something less than 21 percent?

DR. SHOSTECK: That is correct.

Tr., May 30, 1980, p. 75.

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20/ Id., pp. 19-20.

21/ Tr., April 30, 1980, p. 81.

22/ Tr., April 30, 1980, p. 141.

23/ Tr., April 29, 1980, p. 97.

31. Witness Shosteck's testimony also pointed out a number of subjective factors which influence the result of the NAB study. In particular, Dr. Shosteck refers to NAB's assumption that total local programming should be adjusted by 20% to reflect time devoted to advertisements. 24/ Moreover, NAB also makes certain subjective assumptions concerning the proportion of network programming. 25/ Thus, from a computational standpoint, the NAB claim is subject to doubt.

32. Even if NAB's statistical studies were properly supported, there would still be a significant question regarding the validity of its claim. The record indicates that locally produced programming carried on a distant signal basis commands virtually no economic value. Locally produced programming is comprised chiefly of news and public affairs relevant primarily to the station's broadcast area. This circumstance reflects the obligation of broadcasters, enforced by the FCC, to present public affairs programming relevant to the local area, as the record in this proceeding clearly demonstrates:

MR. FABER (counsel for BMI): Is it correct to state that you, as a licensee, as with other licensees, are obligated to serve primarily your city of license?

NAB WITNESS RICHARD HUGHES (WPIX employee): Yes, that's true.

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24/ Tr., May 2, 1980, p. 35.

25/ Id.

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MR. FABER: Is there an FCC requirement, to your knowledge, that imposes any obligation on you to program on matters of interest to any communities other than your city of licensing and services area?

MR. HUGHES: I don't believe there is.

Tr., May 29, 1980, p. 99-100.

33. Witness Hughes also stated that to the extent WPIX, a New York independent, has appeal outside of its local broadcast area, that may be a function of its "unique" New York location. 26/

34. Moreover, Witness Hughes admitted that, even if some public affairs programs appealed to distant markets, public affairs comprises a very small portion of WPIX programming:

CHAIRMAN BURG: . . . [A]s a practical matter, some of these areas certainly in the light green portion of this map [outside WPIX's local broadcast area] wouldn't have as much interest per se as the people indigenous to that certain belt to New York State or that area, would they, in your programming? I mean Youngstown, Ohio, or Trumbull County, Ohio, or Morgantown, West Virginia?

ANSWER: . . . I believe that those public affairs issues which are larger than New York, and we try to give them as broad a focus as we can, would be of interest to people in Youngstown, Ohio.

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But we're talking about a fairly narrow part of our schedule when we talk about public affairs. When we talk about entertainment programming, then I've no doubt that the material which we provide would be of great interest to them.

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CHAIRMAN BURG: Oh, sure, I can understand that. But by your own admission this is a narrower programming in terms of quantity.

THE WITNESS: The public affairs is narrow. 27/

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26/ Tr., May 29, 1980, p. 101.

27/ Tr., May 29, 1980, p. 69-70.

35. Entertainment programming does not relate to NAB's claim unless it is locally produced. Witness Hughes stated, however, that "[WPIX has] relatively few locally produced entertainment programs." 28/

36. The NAB utterly fails to establish any credible evidence supporting the proposition that locally-produced programming warrants a claim of 21% of the royalty fund. It is also clear that even WPIX's locally-produced programming is chiefly public affairs and, as in the case of all broadcast stations, is necessarily directed at the local market. Moreover, NAB's own witness states that public affairs programming comprises only a small portion of the broadcast day. If locally-produced programming derives any distant viewer interest, it is clear that that interest is very limited.

37. In view of the limited appeal of locally-produced public affairs programming outside of local markets and its small proportion of the broadcast day, together with the significant questions which have been raised concerning the validity of NAB's computations, the royalty payment to NAB should be substantially modified accordingly. BMI proposes a distribution share to NAB of 3% for local programming retransmission.

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28/ Tr., May 29, 1980, p. 65.

b. Public Broadcasting Service

38. The Public Broadcasting Service ("PBS"), representing 183 public television stations, a regional public television network and various other program producers, as well as PBS itself, claims approximately 12% of the royalty pool.

39. The PBS claim is challenged by the program syndicators which assert that PBS bases the bulk of its claim on programming which should properly be characterized as network rather than local programming. The Copyright Act authorizes royalty distributions only to copyright owners of distant, non-network programs. 29/ However, review of PBS operations demonstrates that it is not a network in the traditional sense. PBS does share certain similarities with the commercial television networks. For example, it electronically distributes programming to the various non-commercial educational stations around the nation. There are, however, crucial differences. Lawrence K. Grossman, President of PBS, testified that unlike the commercial networks PBS is itself owned by member stations. 30/ Moreover, he testified that the majority of PBS programs are produced by specific stations or independent producers and selected by member stations through a syndication mechanism known as the stations program cooperative. Unlike the commercial networks, in many instances these programs are

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29/ See, H. Rep. No. 94-1476 (Judiciary Committee), September 3, 1976 [to accompany S. 22], p. 97.

30/ Tr., May 1, 1980, p. 11.

not broadcast by member stations simultaneously nationwide. Thus, the distant retransmission of a PBS program in a particular area may reduce the demand for that program by the PBS station which serves the cable area. This is precisely the economic injustice the copyright royalty mechanism is intended to correct. On the other hand, in virtually all cases, commercial network programs are distributed nationwide. 31/

40. Finally, the language in §111 of the Act suggests that there is a Congressional intention to distinguish between non-commercial educational and network programming. Section 111(e) of the Act sets out separate definitions for each and establishes separate distant signal equivalent values for each type.

41. Therefore, the basis of the PBS claim is valid and the program syndicators' challenge must be rejected.

42. The PBS claim utilizes a computational approach similar to the methodology used by NAB. However, BMI does not understand the PBS claim to be based in any way on retransmission of local programming. Rather, the PBS claim is based on its role in a syndication process. Therefore, there is no need to apply the adjustment for local programs made with respect to the NAB claim.

43. While the accuracy of the PBS methodology is subject to question, BMI believes that an allocation of 8% of the royalty fund to PBS would not be unreasonable.

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31/ Tr., May 1, 1980, pp. 20-21.

c. Sports Claimants

44. Separate claims were filed by the so-called joint sports claimants, described above, and by the NCAA. The joint sports claimants ask that a total of 25% of the pool be allocated to all sports claimants including NCAA. 32/ Their claims are based upon their own estimation of the relative market values of sports, movies, syndicated television and local news and public affairs programming. Additionally, they assert that they are entitled to that percentage figure despite the fact that other sports programs such as tennis, bowling and golf, which are not part of either group and would not otherwise be represented in the pool, have contributed substantially to enlarging the viewing audience for distant signal programming. 33/

45. In support of the relative market values which they assert, the joint sports claimants submit a survey by Batten, Barton, Durstine & Osborn, Inc. of cable operators' attitudes concerning the value of sports to the financial success of their systems. The survey included only twenty cable executives, and of those only eleven answered critical questions regarding the value of sports relative to other types of programming. The small number of

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32/ Prehearing memorandum of the joint sports claimants, p.1.

33/ Tr. April 24, 1980, p. 60.

respondents makes drawing general conclusions somewhat speculative. 34/

46. The joint sports claimants also submit a viewership study by A.C. Nielsen Company which finds that more cable households view distant signal sports programming in an average quarter hour than view movies, syndications, or locally produced distant signal programming. While the statistics may be technically correct, they do not take into account the fact that, although sports may claim large audiences, there are far fewer hours of it than of other types of programming. When sports is unavailable, subscribers turn to other types of entertainment, and the viewership for those hours has not been reflected in the study. 35/ Thus, as a measurement of the viewership of sports relative to other programming, the Nielsen survey has some limitations.

47. The sports claimants rely on attitude surveys which show that cable viewers are motivated more by the availability of sports programming than by other factors to subscribe to cable systems. The attitude studies provide some indication that sports programming has some value which exceeds that indicated by the number of hours it is carried. But both the method of selection and the total size of the sample leave the reliability of the conclusions in the

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34/ Tr., April 24, 1980, p. 130.

35/ Tr., April 28, 1980, p. 97.

survey in some doubt. 36/ There is evidence in the record that had the survey been more representative it would have shown large city subscribers to have far less interest in distant signal sports programming than is otherwise implied. This is a critical observation, particularly since the large cable systems contribute disproportionately to the cable royalty pool. 37/

48. Finally, the joint sports claimants submit a report by Kalba Bowen Associates, Inc., which summarizes and evaluates the studies mentioned above and then concludes that 25% to 30% of the royalty pool is a reasonable share for the sports claimants. 38/ The study itself provides no justification for that percentage range, but is apparently the result of subjective weighing of both the quantifiable and nonquantifiable research assembled therein.

49. In its separate presentation, NCAA states that, in its view, a twenty percent allocation from the pool to sports is justified. Its submission includes: cable program guides and advertisements in which sports figures prominently; letters from cable operators which attest to the economic value of such programming; and a market study conducted by a single cable system in the San Jose, California

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36/ Tr., April 28, 1980, p. 134, 138.

37/ Tr., April 28, 1980, p. 133, 136.

38/ The Comparative Value of Non-network Distant Signal Sports Programming on Cable Television, p. 47.

area which purports to show that cable subscribers want more college sports programming. NCAA also submits a study which surveys cable subscriber attitudes in large markets. It provides further evidence that the relative value of various kinds of programming cannot be measured exclusively by viewer ratings. 39/ These submissions complement and support any conclusions which can be drawn from the joint sports studies. Nevertheless, the twenty percent figure claimed by NCAA and the twenty-five percent figure claimed by the joint sports organizations are no more clearly justified as a result of the large market attitude study than they would be without it.

50. BMI agrees that sports has a value to both cable system subscribers and operators which exceeds the number of hours of distant signal sports programming transmitted by cable. The lower of the two figures submitted by the claimants appears the most reasonable. We therefore suggest that the sports claimants could receive approximately 20% of the pool.

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39/ See, e.g., Tr., April 25, 1980, p. 84.

d. Program Syndicators

51. The program syndicators claim a minimum of 75% of the fund. 40/ They base this conclusion on statistical studies employing what they term a "time, weighted by fee-generated" 41/ approach. The principle underlying this methodology is that copyright owners' share of the fund should be determined on the basis of the contribution its program makes to the cable royalty fund. 42/

52. The measurement of time allocated by cable systems to carriage of syndicated programming is similar in many respects to time measurements employed by other claimants such as NAB. It is the weighting which sets the program syndicator's approach completely apart, however. The weighting methodology is complex. But simple analysis demonstrates that it is inappropriate for consideration by this Tribunal.

53. The weighting is constructed to develop a "stratified sample" of television stations from which time, associated with the various program categories, would be measured. The sample is weighted heavily toward independent stations. 43/

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40/ Testimony of Jack Valenti, p. 13.

41/ Direct Testimony of Allen R. Cooper, p. 13.

42/ Direct Testimony of Robert D. Hadl, p. 13.

43/ Direct Testimony of Allen R. Cooper, p. 16.

It is a well-known industry fact that independent stations carry much more syndicated programming than other stations since they are unaffiliated with networks. 44/ By favoring independent stations in the weighting process, the program syndicators favor themselves.

54. In the complex process of "fee generation" weighting employed by the program syndicators, distant signal equivalents are used to assign a portion of a cable system's royalty payment to particular stations. 45/ Congress established distant signal equivalents as a way to determine the amount which cable systems should pay into the fund. 46/

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44/ Statement of Jack Valenti, April 8, 1980, Tr. 45.

45/ Direct Testimony of Allen R. Cooper, p. 3-4.

46/ The royalty fee paid into the fund by cable systems is a function of revenues. The Act divides systems into three categories based on revenues. Each category system pays a percentage of at least a portion of these revenues. Special provisions apply in the case of the largest cable systems -- those with revenues in excess of \$160,000. The percentage applied to the revenues differ depending on the total distant signal equivalent of the system. Congress has assigned certain values to the various types of stations:

Independent	--	1.0
Network Affiliate	--	.25
Non-Commercial		
Educational	--	.25

For the sole purpose of determining how much non-exempt programming a cable system carries, the value assignment reflects the Congressional considerations that independent stations rely almost exclusively on non-exempt material, while network affiliates broadcast only 25% non-network material. R. Rep. No. 94-1476 (Judiciary Committee), September 3, 1976 [to accompany S. 22], p. 90. The total value associated with carriage of stations by a cable system determines the percentage of revenues paid into the fund. See §§ 111(d) and 111(f).

55. However, the program syndicators adopt improperly the value scheme to weight the distribution of payments out of the fund. Thus, if a cable system has total distant signal equivalent of 2.0 and carried WXXX, an independent station, WXXX would account for 1.0 or 50% of the cable system's distant signal equivalents. The program syndicators then applied this factor against the total royalty payment made by the system. If, for example, the system paid \$100,000 into the fund, the program syndicators claim that WXXX "generated" 50% or \$50,000 of those funds. The sum of all fees generated by WXXX overall from all cable systems yields that station's total "fee generation" according to the program syndicators.

56. Using this methodology, "fee generation" was calculated for every television station carried on a distant signal basis by a cable system. The results of this study showed what might be expected -- because the distant signal equivalent schedule values independent stations as four times greater than it does network affiliates or educational stations, independents "generated" a vast majority of the fees paid into the fund by cable systems. Thus, the "stratified sample" of 29 stations reflected the relative fee generations of the station types.

57. For these 29 stations, the program syndicators measured the time of the various program categories relative

to total time the stations were carried by cable systems. 47/ Using, for example, TV Guide to determine program categories, it is not surprising that the program syndicators found that syndicated programming comprised over 80% of total programming. 48/ The results obviously reflect weighting of the sample to favor the independent stations.

58. The problem is elucidated by Commissioner Coulter, and admitted by the program syndicators' witness, in the following exchange:

COMMISSIONER COULTER: . . . independent stations relative to network affiliate stations carry a greater proportion of syndicated programs, is that correct?

THE WITNESS: Independ [sic] stations relative to network, a greater in total number and proportion, yes.

COMMISSIONER COULTER: What I am trying to suggest is that the higher value given to independent stations by your formula and the fact that there are more syndicated program on those stations the effect of that is to give a greater value to syndicated programming?

THE WITNESS: This is the value given by Congress not by us.

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COMMISSIONER COULTER: . . . The fact that you have attributed a higher value to independent stations plus the fact that there is more syndicated program relatively on independent stations, the arithmetical effect of that is to give a greater weight to syndicated programming?

THE WITNESS: I answer yes.

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47/ Direct Testimony of Allen R. Cooper, pp. 13-19.

48/ Id., p. 22.

COMMISSIONER COULTER: Syndicated programs get a higher relative weight and other program minus the examples you cite by definition a relatively lower value?

THE WITNESS: That is correct.

\* \* \*

COMMISSIONER COULTER: . . . [y]ou have applied it and the effect of that application has been to give independent [sic] stations on which a syndicated programming is more frequent than network affiliates a greater value. 49/

59. While the methodology clearly assigns syndicated programming a higher value, there is no rationale for this manipulation. There is no reason to believe that a particular program originating at an independent station is worth four times as much as the same program originating at a network affiliate. The value to the cable system viewer is still the same. Congress applied the formula to recognize the difference in program make-up between independents and network affiliates to insure that cable systems would pay royalties into the funds in accordance with the benefit received. 50/ There is no suggestion, either in the Act or the legislative history, that the distant equivalent signal schedule is intended to value particular programs.

60. In a second study, the program syndicators varied the approach by calculating the time percentage of program categories but continued to rely on the "fee generation" weighting. In this case time was calculated using program

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49/ Tr., April 9, 1980, pp. 168-171.

50/ H. Rep. No. 94-1476 (Judiciary Committee), September 3, 1976 [to accompany S. 22], p. 90.

category figures reported to the FCC. This study purports to demonstrate that approximately 83 percent of fees paid into the fund were generated by syndicated programming. 51/

61. The use of "fee generation weighting," as applied in both studies, as a basis for the distribution of royalty fees, is arbitrary, biased and has the effect of grossly inflating figures applicable to syndicated programming. Nevertheless, the studies do demonstrate the salient fact that cable systems heavily program independent stations which are, in turn, programmed with relatively large amounts of syndicated programming. On this basis, program syndicators should receive a significant share of the royalty fund.

62. BMI would not oppose an award by the Tribunal to the program syndicators of 50% -- an amount more than double the suggested award for the next highest category.

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51/ The second study contains another example of the use of assumptions to bias the results. To calculate the non-exempt portion of programming of network affiliated stations, it is necessary to factor out all network programming. To accomplish this, the program producers make the assumption that 33.5% of network affiliated programming does not originate at the network. Use of a lower figure such as 25% would ultimately have the mathematical result of lowering the percentage of fees generated by syndicated programs. While the program syndicators adopt the more favorable figure of 25% for non-network programming to calculate the relative percentages of program categories, they rely on the Congressional finding that non-network programming comprises 25% of a network affiliate's broadcasts in their weighting methodology.

e. Radio In General

63. NAB seeks a distribution of 7.9% of royalties paid to television claimants for distant radio signal retransmissions. 52/ This figure is based on a ratio of average radio expenses to average television expenses, gleaned from FCC data. 53/ NAB derives the conclusion that for every \$1000 of expense experienced by the average television station, radio stations experience an average of \$79 in expenses. 54/ NAB Witness Shosteck states that no study outlining cable carriage of radio is currently available. 55/

64. As indicated earlier, Dr. Richard F. Link, a BMI witness, stated, based on his professional experience, that no reasonable study would show the percentage of radio on cable to be less than 5%. If the NAB approach is accepted, the distribution for radio claimants would amount to less than 1%. This result occurs because the television distribution itself must be limited, as indicated earlier. In view of Dr. Link's statement, we believe that the resulting distribution would be unreasonably low. Instead, BMI would not object to a distribution for radio claimants equal to 1% of the royalty fund.

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52/ Direct Testimony of Herschel Shosteck (Radio), p. 3.

53/ Id., p. 2.

54/ Id., p. 3.

55/ Tr., May 2, 1980, p. 129.

f. National Public Radio

65. National Public Radio ("NPR") claims royalties from the copyright pool for audio programs distributed nationwide via cable systems. These include programming produced both by member public radio stations and by NPR's Program Service. NPR does not propose that it is entitled to any specific percentage of the pool, but in effect asks the Tribunal to determine the amount which would be adequate compensation for the use of original works by cable systems. 56/

66. NPR relies upon a 1976 NAB study and also upon FCC statistics to support its claim that "many" public radio stations are imported by cable systems as distant signals. 57/ Although the FCC characterized the survey as among the only hard data available, 58/ it has been criticized by some of the participants 59/ because it was limited to six markets and because the response rate was less than half of the total sample.

67. BMI would not object to a level of compensation to the public radio claimants equal to 0.5% of the royalty pool. This figure is a substantial proportion of the total percentage recommended for the radio in general category as discussed, supra.

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56/ Statement and Testimony of National Public Radio before the Copyright Royalty Tribunal, p. 5.

57/ The study was incorporated into Report and Order in Docket 19418, FCC 78-57, 67 FCC 2d 491 (Feb. 7, 1978), 43 F.R. 5012.

58/ Tr., May 6, 1980, p. 109.

59/ Tr., May 6, 1980, p. 122.

g. Other Claimants

68. The Copyright owners of various cartoon and puppet characters (collectively known as the character claimants) have requested a share of the royalty pool. The program syndicators have suggested that the cartoon character claimants are not entitled to cable royalties because they do not qualify as "copyright owners" whose "works" are "the subject of secondary transmissions by cable systems" as defined by the Act. 60/ Their argument is that the characters are not separate works but are merged or incorporated into the programs in which they appear. 61/ They also maintain that the license agreements for the use of characters in programs assign to the producer all of the rights in the characters as used in the programs in which they appear, and that for that reason no further compensation is due. 62/

69. The character group's claim is based upon a complicated mathematical formula involving a spurious analogy to music, 63/ which does not appear to bear any resemblance to the actual use of the copyrighted material by cable systems. In particular, there is no logical support for the assumption that animated characters should be treated similar to music for purposes of distributing copyright royalties.

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60/ Section 111(d)(4), Copyright Act.

61/ Reply brief of the program syndicators, November 28, 1979, p. 24.

62/ Id.

63/ Summary Statement of the Direct Case of the Character Claimants, pp. 10-11.

70. In the event that the Tribunal decides that the character claimants are entitled to some portion of the copyright royalties, BMI is of the opinion that they are not entitled to as large a proportion of the royalty pool as they have requested. One-half of one percent of the pool would not be an unreasonable amount given the relative infrequency of the programming and the existence of alternative ways of receiving compensation.

71. The Tribunal has requested that all parties to this proceeding make recommendations with respect to two additional broadcast claimants which submitted direct cases, the Canadian Broadcasting Corporation ("CBC") and Christian Broadcasting Network, Inc. ("CBN").

72. CBC's claim does not contain a specific dollar amount. CBC does, however, provide a formula for the computation of such a claim, generally based on the proportion of CBC program hours of total distant signal hours. CBC itself recognizes that retransmission of its programs is generally limited to the northern U.S. border. 64/ In view of the relatively limited carriage of CBC programming, BMI would not find a distribution of .25% of the royalty fund to be unreasonable.

73. CBN claims to be the copyright owner of 15 different television programs broadcast on 137 separate

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64/ Direct Statement of CBC, p. 13.

television stations. 65/ It claims 4.69% of the royalty fund. This figure is based on computations purporting to show that CBN programming comprises 4.69% of all non-network programming. However, CBN did not measure the actual carriage on cable systems of the 137 stations. The analysis appears to assume that all independent stations are carried by an indeterminate number of cable systems thus significantly inflating the claim. In view of the limited nature of the total program hours, BMI would not find a distribution of 0.5% to be unreasonable.

74. BMI suggests the creation of a 2.5% miscellaneous category for two reasons. First, the character claimants, CBC and CBN claims would be paid out of the funds assigned to this category. The remaining funds could be used to resolve other small claims, if required. Any remainder could ultimately be distributed among all the claimants on a proportionate basis.

#### IV. Conclusions

75. The record in this proceeding fully supports the allocation of 15% of the total cable royalty fund to the music claimants including BMI.

76. In addition, in compliance with the Tribunal's directive that the parties set out specific distributions for

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65/ Direct case of CBN, p. 8.

each of the claimants in this phase, 66/ BMI suggests that a possible distribution of 1978 royalty funds, as follows, would not be unreasonable:

Music	15 %
Program syndicators	50 %
Sports (including NCAA, 5%)	20 %
Public Broadcasting System	8 %
National Association of Broadcasters	3 %
Radio in general	1 %
National Public Radio	.5 %
Miscellaneous (including character claimants, Canadian Broadcasting System & Christian Broadcasting Network, Inc.	2.5 %

Respectfully submitted,  
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Counsel

Dated: July 7, 1980  
Washington, D.C.

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66/ Tr., May 29, 1980, p. 123.

CERTIFICATE OF SERVICE

I, Donna R. Whitehead, of Peabody, Rivlin, Lambert and Meyers, do hereby certify that I have, this 7th day of July 1980, sent copies of the foregoing "Proposed Findings of Fact and Conclusions of Law" by First Class United States Mail, postage prepaid, to the individuals on the attached list.

  
\_\_\_\_\_  
Donna R. Whitehead

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By Hand

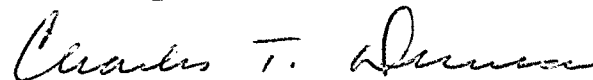
Mary Lou Burg, Chairman  
Copyright Royalty Tribunal  
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Dear Chairman Burg:

Transmitted herewith are the Proposed Findings of Fact And Conclusions of Law, filed on behalf of Broadcast Music, Inc. in the matter of Distribution of 1978 Cable Royalty Fees (Docket No. 79-1).

If there are any questions with respect to this filing, please do not hesitate to contact undersigned counsel.

Sincerely,



Charles T. Duncan

MWF:ua