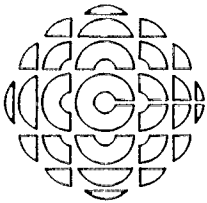


JUL 7 1980 2500

ORIGINAL

2 July 1980



Honorable Mary Lou Burg  
Chairman  
Copyright Royalty Tribunal  
1111 20th Street NW  
Washington, DC 20036  
USA

Dear Madam Chairman:

In responding to your direction of 30 May, 1980, which was given under §301.54 of the Copyright Royalty Tribunal Rules of Procedure, the Canadian Broadcasting Corporation submits the following comments.

During the past several weeks of Phase One hearings groups of claimants, and some individual claimants, have advanced proposals on appropriate ways of dividing the compulsory licensing fees paid by cable system owners during 1978 pursuant to 17 USC 111 (d). Except for the claim of the music rights societies and the cartoon characters, there appears to be general agreement on the use of time aggregation. As used in this letter, "time aggregation" means the total duration of all secondarily transmitted non-network programming owned by copyright owners who have claimed a share of the cable royalty fees under 17 USC 111 (d) (4) and (5). The major differences that remain are centered on the question of whether to weight the aggregations in order to reflect certain perceived values, or whether they should remain unweighted. Surveys and statistical samples were offered to explain how some proposals were developed, and various experts testified, each as to the validity of the claimant's own particular scheme.

. . . /2

Weighting Factors -

- (a) Box office, "quality", or market value: none of the claimants has demonstrated any way in which one or more of these factors can be quantified and applied to individual secondarily transmitted programs. The testimony of an MPAA representative explains why that association concluded that "it was not possible to introduce weighting factors based on perceived 'quality' ".<sup>1</sup>
- (b) Distant Signal Equivalents - The notion of weighting by Distant Signal Equivalents is an attractive one to CBC because all CBC signals secondarily transmitted in the United States are both Independent and Distant. However, after careful study of 17 USC CBC has concluded<sup>2</sup> that §111 cannot be construed or interpreted to mean that DSEs can or should be applied as a weighting factor in distributing cable royalty fees.

Statistical Sampling -

Statisticians agree that frequently the examination of a sample of items is preferable to a census procedure which requires the examination of every item in the universe. Often, sampling will provide reliable data at much lower cost than complete enumeration and, usually, its findings are more timely. Also, it can happen that a sampling study will yield more accurate information than a census because of the application of more rigorous quality control procedures since data collection and processing operations are carried out on a much smaller scale.

---

<sup>1</sup> Testimony of Allan R. Cooper, March 26, 1980 (pg. 4).

<sup>2</sup> CBC's letter to Chairman, CRT, dated 14 March 1980 (pp 11 - 13 incl.).

In CBC's view, the sampling studies placed before the Tribunal are of limited usefulness. In fact, given the nature of the data on which the Tribunal will make its determination, the advantages of sampling, briefly outlined above, are irrelevant. Statistical sampling would, if used, be inappropriate for the following reasons:

- (a) A distribution based on full enumeration would only be marginally more costly than sampling because the full data base on secondary transmissions has already been provided by the cable systems in statements of account filed with the Copyright Office.
- (b) Time is not a factor. There is a five month period between the deadline for submission of statements of account by the cable systems and the filing of claims by copyright owners. During this period, all the data can be verified. A computer using every item in the universe can then calculate the entitlement of all claimants in a short period of time.
- (c) Because the same cable system data base would be used for either sample or census, sampling could never be as reliable as complete enumeration.

Findings of Fact -

1. Except for the three music societies and cartoon characters, claimants agree in general on a time aggregation method for calculating shares to cable royalties.
2. Differences among the claimants still exist with respect to the use of weighting factors in calculating shares of cable royalties on a time aggregation basis.

Legal Conclusions -

1. CBC has set these down in detail earlier<sup>3</sup>, with appropriate comment and rationale. There are six requirements that must be met by a claimant before becoming entitled to a share of the cable royalty fees. These are: ownership, fixation, primary transmission, secondary transmission, non-network status and distant signal status.
2. Specifically on the issue of copyright ownership, a number of claimants (eg., CBC, NAB, Joint Sports Claimants, CBS Inc.) have asserted that the licensing of an exclusive right (such as the right to broadcast) transfers ownership in that right to the licensee and therefore, that only the licensee can assert a claim for a share of cable royalty by virtue of distant cable carriage of the program material which was exclusively licensed. This principle is firmly embedded in 17 USC, as CBC has demonstrated.<sup>4</sup>

Allocation of Total Royalty Fees for 1978 -

Proof of fixation and of copyright ownership by claimants has not yet been required by the Tribunal, and with only a few exceptions claimants have not been specific about the amount of programming in which they claim copyright ownership or about secondary transmission of that programming. With these qualifications the following percentage allocation is offered as a conscientious best effort based on evidence already in the record.

---

<sup>3</sup> CBC's letter to Chairman, CRT, dated 14 March 1980  
(pp 1 - 10 incl.)

<sup>4</sup> Op. cit. (pp 3 - 5 incl.).

Percentage Allocation of Royalty Fees  
for 1978

---

(a) MPA (and program syndicators)	50
(b) broadcasters	15
(c) Canadian Broadcasting Corporation	6.5
(d) sports	12
(e) NCAA	2
(f) music	3
(g) PBS	7
(h) NPR	3
(i) cartoon characters	0
(j) radio in general	1
(k) TV Ontario and Canadian claimants other than CBC	<u>0.5</u>
	100 %

Rationale and Support -

The above percentage allocations would be subject to adjustment once the Tribunal has made its determination on the issue of copyright ownership and has satisfied itself that claimants have also met the other five criteria. The letters in the paragraphs below correspond to the letters in the percentage allocation listing.

- (a) Program "syndicators" usually license broadcast rights on an exclusive basis, and in so doing transfer copyright ownership of those rights to the licensees. Accordingly, copyright in the secondarily transmitted rights is not owned by these claimants, and such rights are not available to the syndicators as the basis of a claim under the requirements of 17 USC 111 (d) (4) and (5). Although

MPAA has provided very little information about copyright ownership during the proceeding, it appears that a substantial part of the MPAA claim is for programs licensed on an exclusive basis. In some instances broadcast rights are not exclusive, and this has been estimated at 50 %, subject to review by CRT of whether the criteria have been met.

- (b) To the extent that broadcasters have transmitted exclusively licensed programs the broadcasters are owners (as licensees) and are the proper claimants with respect to the licensed exclusive rights as well as to programs they have produced and fixed.
- (c) The expression "locally originated programming" (and variations of it) has been used pejoratively on a number of occasions by some claimants. It cannot be found either in 17 USC 111 or in House of Representatives Report No. 94-1476. All CBC programming is "locally originated", or to give it the correct statutory designation, "non-network".<sup>5</sup>

CBC operates one of the world's major broadcasting services, particularly in terms of volume and quality of production. During 1979, for example, CBC won 27 awards at festivals of international rank. Most of the programs thus honored were produced in 1978. In television, these included the Golden Rose of Montreux and the International Emmy, while in radio CBC programs

---

<sup>5</sup> CBC's letter to Chairman, CRT, dated 14 March 1980 (pp 7 - 8).

were honored by two Ohio Awards and both first and second prizes in the Major Armstrong FM awards.

In justification of its 6.5 percent share of the cable royalty fees, CBC is prepared to present full documentation on ownership of radio and television programs, primary and secondary transmissions of those programs, fixation of the programs, and their distant signal status.

- (d) and (e) The validity of the sports claim (including NCAA) is difficult to assess because of the dispute with NAB over ownership of the broadcasts of games, the lack of a precise quantification of sports programs, and the possibility that the sports claimants have included some CBC owned programs in their claims.

However, on the basis of the record it appears that a combined share of 14% is reasonable, subject to adjustment as proofs of ownership, fixation and transmission are required by the Tribunal.

- (f) There is no doubt that the music rights societies represent many copyright holders whose works are licensed on a non-exclusive basis. In comparison with the copyrighted works of other claimants, with the exception of cartoon characters, music presents special problems of measurement. Item counts are meaningless because the duration of individual selections can run from a few seconds to three or four hours. Music is often featured, but it can be used

as a theme, as a bridge, or as background. The attempts of the societies themselves to estimate percentages have been unsuccessful, for reasons that are implicit in the above remarks.

Distant secondary transmission of music is not detrimental to its value. Indeed, a strong argument can be developed to show that the value of music is enhanced by broader distribution. The measure of success of a popular song lies in the frequency with which it is heard and the number of people who hear it. Disc jockeys do not refuse to play a disc because the music on it has appeared on the local cable system. Further, because broadcasters pay a fee that is not dependent on frequency of use or choice of title, it is hard to see how secondary transmissions have any effect that is different than the effect of the primary broadcast on which the music appears.

For these reasons, CBC suggests that the music rights societies be compensated for distant secondary transmissions on the same basis as they are for the primary use. Combining the 1978 rates for radio and television, averaging them and rounding off, gives 3%. It must be emphasized, however, that some of the broadcast claimants such as CBC and TV Ontario have no general licensing agreements with any of the three claimant societies.

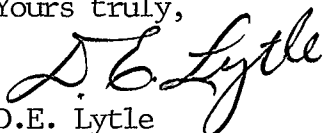
(g) and (h) Based on information in the record on PBS and NPR, with respect to production, broadcast hours, and distribution, the percentage allocation to these two non-commercial organizations seem reasonable. However, it is again emphasized that a requirement by the Tribunal of proof of ownership and of secondary transmissions may result in significant changes.

- (i) The copyright ownership of cartoon characters and cartoons depends upon such matters as conditions of employment and of the contracts under which the characters were created and exploited. Some testimony was directed towards attempting to establish a high "market value" for cartoon characters. This is simply another unquantifiable weighting factor. The success of cartoon characters in selling toys or T-shirts is irrelevant. What is relevant is whether non-network programs in which they appeared were the subject of distant secondary transmissions during 1978.

In CBC's opinion, cartoon character claimants have not established that they are entitled to special status. They should be regarded as syndicators, and part of the joint claim of that group.

- (j) Since CBC and NPR have already been considered individually, as the major radio claimants, the remaining 1978 radio claim is relatively small. The allocated percentage is appropriate for the time being until the usual qualifying proofs have been submitted. In addition, a small but finite share for radio ensures that a place is held for it during the Phase Two portion of the proceeding.
- (k) Other than CBC, TV Ontario is the major Canadian claimant for 1978. There are five or so other Canadian television claimants as well, to share the suggested allocation of 0.5%.

Yours truly,

  
D.E. Lytle  
Director  
Corporate Program Services

P.O. Box 8478  
Ottawa, Ontario K1G 3J5  
CANADA