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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the matter of)
)
) Docket No. CRT 79-1
Distribution of)
Cable Royalty Fees)

RESPONSE OF THE JOINT SPORTS
CLAIMANTS TO THE CANADIAN BROADCASTING
CORPORATION'S OFFER OF PROOF

The Joint Sports Claimants submit the following re-
sponse to the Canadian Broadcasting Corporation's ("CBC")
August 25, 1980 "offer of proof." As discussed below, no
broadcaster has shown any entitlement to the 12% of the
cable royalty pool which the Tribunal allocated in Phase I
to the "Joint Sports Claimants and the N.C.A.A."

I. BACKGROUND

In October of 1979 the broadcasters urged the
Tribunal to decide whether they or the sports interests
were the proper claimants of the royalties attributable to
sports telecasts. The broadcasters claimed that such a
decision would substantially simplify the proceedings.
After receiving extensive briefs from the parties, in-
cluding the CBC, and listening to oral argument, the

Tribunal issued its December 19, 1979 order. In this order the Tribunal ruled that the parties should proceed on the basis that:

"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 shall be distributed to broadcaster claimants."

Despite their professed desire for simplicity, the broadcasters moved for a stay of the proceedings pending their appeal of the December 19 order. This required the Tribunal to evaluate the likelihood that the broadcasters would succeed in their arguments concerning entitlement to sports royalties. The Tribunal, in denying the broadcasters' motion, again rejected the broadcasters' arguments.

During Phase I the broadcasters had an opportunity to present evidence establishing the value of any programming, including sports programming, for which they were entitled to claim. CBC however did not even appear at any of the hearings. And the NAB, relying upon its time-based theory, did not present evidence as to the value of any sports programming.

The Tribunal then gave the broadcasters an opportunity to present any evidence as though the December 19, 1980 order had never been entered -- evidence which, in their opinion, established that they were the proper claimants of the sports royalties attributable to the telecasts for which the Joint Sports Claimants and NCAA had claimed. In its May 9, 1980 order the Tribunal advised: "On May 22 and 23 the Tribunal will receive testimony by claimants in justification of their claim on the basis of any theory or evidence excluded from presentation during Phase I by the terms of the Tribunal order of December 19, 1979." The Tribunal also emphasized that the broad question of entitlement to the royalties claimed by the Joint Sports Claimants and NCAA was a matter for resolution in Phase I. (See Tr. 5/22 at 4, 11.)

CBC again failed to introduce any evidence. The NAB, on the other hand, provided a single witness on May 22, 1980. Neither the NAB nor the CBC ever sought to present any evidence after the close of the Phase I hearings on May 23, 1980 and before the Tribunal's Phase I decision on July 30, 1980.^{*/} On the basis of the record that had been developed

^{*/} The Joint Sports Claimants in fact indicated that they had no objection to NAB's placing into the record the contracts of the 27 (out of 66) flagship stations represented
(Footnote continued on following page.)

the Tribunal correctly concluded in its July 30, 1980 order that there was no reason to change its December 19 ruling.

In the order the Tribunal announced an award of 12% of the royalty pool to the "Joint Sports Claimants and N.C.A.A."^{*/} Presumably, this award was intended to compensate the Joint Sports Claimants and NCAA only for that programming which they had validly claimed and presented proof. The Tribunal also reaffirmed its December 19 ruling on the entitlement of the sports claimants to the sports royalties "except when contractual arrangements specifically provide that such royalties shall be distributed to broadcaster claimants." The Tribunal noted:

"In its Phase I determination, the Tribunal has awarded the full share of these royalty fees to the sports claimants. The evidentiary consideration of this issue has not been concluded and the Tribunal in its final determination will make such adjustments as may be warranted on the basis of the Phase II proceedings."

(Footnote continued from preceding page.)

by the NAB -- provided the Joint Sports Claimants were permitted to present any additional relevant material. But NAB did not attempt to place these contracts in evidence while the Phase I record was still open. Clearly, the orderly conduct of these proceedings does not permit the NAB to introduce Phase I evidence after the close of Phase I.

*/ The Tribunal was also quite specific about which parties would receive the other shares of the pool. It allocated "3.25% to "U.S. and Canadian Television Broadcasters;" 75% to the "Motion Picture Association of America, Christian Broadcasting Network and other program syndicators;" 5% to the "Public Broadcasting Service (for all purposes);" 4.5% to the "Music Performing Rights Societies;" and .25% to "National Public Radio."

The clear implication of the Tribunal's July 30 rulings was that the Tribunal had no intention of reopening again the broad question of entitlement to the royalties sought by the Joint Sports Claimants and NCAA. The broadcasters had more than an adequate opportunity to present any evidence or argument on this issue, and the Tribunal, having considered all that was in fact presented, had decided the issue adversely to the broadcasters. The only remaining "evidentiary consideration" for Phase II was whether any particular broadcaster had the type of contractual arrangement specified in the Tribunal's December 19 and July 30 orders -- i.e., those providing that the cable royalties sought by the Joint Sports Claimants and NCAA are to be awarded to broadcaster claimants.

This was again made clear in an August 6, 1980 letter from the Tribunal to the NAB. In response to the first of NAB's requests for a declaratory ruling, the Tribunal advised that it had "granted the opportunity to present all relevant evidence pertaining to the sports question in the May 9, 1980 Order." The Tribunal concluded that "evidence during Phase II must necessarily be limited to contractual arrangements which provide that royalties designated to the transmission by cable systems of sporting events shall be distributed to broadcaster claimants."

Notwithstanding the clear language of the Tribunal's orders, the NAB sought a second declaratory ruling. It requested the Tribunal to rule that the broadcasters should be allowed to present during Phase II the very same type of evidence which it offered through its single witness during the Phase I hearing on May 22, 1980 -- specifically, the stations' role in the production of sports telecasts; copyright notices; terms of individual contracts which suggested that broadcasters were copyright owners; and broadcasters' carriage of games performed by teams other than those represented by the Joint Sports Claimants and NCAA. The Joint Sports Claimants opposed NAB's motion explaining that it confused "what the Tribunal invited the NAB to do and what NAB tried to do in Phase I -- i.e., address the general issue -- with what an individual broadcaster might do now in Phase II -- show a specific contractual right to royalties." The Tribunal subsequently denied NAB's request for a secondary declaratory ruling.

II. ARGUMENT

In its August 25, 1980 "offer of proof" CBC states that it had intended to present evidence during the Phase II hearing on August 20, 1980 with respect to essentially two

subject matters: 1) its "production" and purported copy-right ownership of certain sports programming; and 2) cable carriage of this programming. As discussed in detail below, the "evidence" which is set forth in CBC's "offer of proof" and which was adduced at the August 20, 1980 hearing provides no basis for awarding CBC any portion of the 12% of the royalty pool allocated in Phase I to the "Joint Sports Claimants and the N.C.A.A."

A. CBC's Proffered Evidence Concerning Cable Carriage Was Both Untimely And Lacking In Any Probative Value.

Insofar as CBC sought to establish the amount of cable carriage of certain sports programs, its proffered evidence was simply untimely. During Phase I the Joint Sports Claimants submitted evidence concerning the cable carriage of the programming for which they had validly claimed. CBC also had an opportunity in Phase I to submit such evidence, but failed to do so. Indeed, as noted, CBC did not even appear at the Phase I hearings.

Furthermore, CBC's proffered evidence fails to provide a basis which would support an award of any amount of the royalty pool to the sports programming which CBC is claiming.

Relying solely upon time-based factors derived from the thoroughly discredited BI Associates study, CBC makes no attempt to deal with those considerations which the Tribunal in its July 30, 1980 order determined were of primary significance.

- B. The CBC "Offer of Proof" Does Not Contain
 A "Statement Of The Evidence Which It Is
 Contended Would Have Been Adduced" Concerning
 Its Alleged Copyright Ownership of Certain
 Sports Telecasts. Thus, The CBC "Offer"
 Is Insufficient Under Section 301.51(g) Of
 The Tribunal's Rules.

Section 301.51(g) of the Tribunal's rules provides that: "If the Chairman rejects or excludes proposed oral testimony and an offer of proof is made, the offer of proof shall consist of a statement of the substance of the evidence which it is contended would have been adduced."

(Emphasis added.) CBC's August 25 "offer of proof" does not provide such a statement and thus it is impossible to evaluate the probative value (if any) of the evidence which CBC says it wanted to introduce on the question of copyright ownership.

CBC's "offer of proof" states only that CBC's witnesses would have "demonstrated that during 1978 CBC was the

producer and copyright owner of a number of sports programs." There is nothing in the "offer" which so much as suggests what evidence would have been introduced to make such a demonstration. The "offer of proof" does no more than assert the ultimate conclusion which CBC would urge upon the Tribunal -- i.e., that it is the copyright owner of certain sports programming. The "offer" completely fails to describe, even in the most general terms, the evidence which (in CBC's opinion) might support this bald conclusion and which was rejected by the Tribunal.

As noted above, the Tribunal made it clear that the only relevant Phase II evidence concerning entitlement to the royalties claimed by the Joint Sports Claimants and NCAA would consist of those contractual arrangements providing that such cable royalties are to be awarded to broadcaster claimants. Insofar as broadcasters possessed any other evidence which they believed relevant to this issue, they were afforded an opportunity to present this evidence during the Phase I May 22 and 23 hearings -- an opportunity of which CBC never availed itself.

Since the CBC says nothing in its "offer of proof" about the nature of its evidence, it cannot be determined

from that document whether the CBC has any evidentiary material which satisfies the Phase II standard set forth in the Tribunal's July 30 order -- that is, whether it has relevant Phase II evidence. To the contrary, the August 25 "offer of proof" suggests that CBC would have the Tribunal open up once again the Phase I controversy concerning entitlement to sports royalties.

C. During The August 20, 1980 Hearing The CBC Also Failed To Demonstrate That It Has Any Relevant Phase II Evidence.

During the August 20 hearing the CBC had marked for identification, and sought to place in the record, seven separate contracts concerning the broadcasting of sports events over CBC stations. It was our understanding that CBC's offer of proof would include some discussion of what CBC considered to be the Phase II relevancy of these contracts. The August 25 "offer of proof", however, does not even mention these contracts, let alone establish such relevancy.

Nevertheless, the CBC has offered these contracts into evidence. It is thus pertinent to emphasize, as we did at the hearing, that these contracts do not establish CBC's entitlement to any portion of the 12% of the royalty pool allocated to the "Joint Sports Claimants and the N.C.A.A."

and, therefore, that they should not be received in evidence.^{*/}
None of the contracts satisfies the Phase II standard established by the Tribunal.^{**/} And to the extent that the CBC seeks to argue based upon the provisions of the contracts that it, rather than any sports club, is the copyright owner of the sports telecast and entitled to cable royalties, CBC's argument is simply untimely -- CBC was given an opportunity to present any evidence it desired on this issue during Phase I but failed to do so.

The seven contracts suffer from other infirmities as well. First, CBC Exhibits Nos. 1, 2 and 3 are the only ones which concern the telecasts of professional sports clubs represented by the Joint Sports Claimants. But none of these contracts is between such a club and CBC. Rather, CBC Exhibit No. 1, which authorizes CBC to broadcast certain National Hockey League games over television in Canada only,

^{*/} For the same reasons discussed here, the evidence which NAB sought to introduce during Phase II was also improper.

^{**/} To the extent that any of the contracts specifically discussed copyright ownership, CBC is granted copyright ownership of the recordings of the telecasts -- and not the live telecasts themselves. Each contract is silent on the ownership of the copyright in the live telecasts and each contract is silent on entitlement to royalties.

is between CBC, Molson Breweries of Canada Ltd., MacLaren Advertising and the Canadian Sports Network Limited ("CSN"); neither the NHL nor any NHL club is a party. CBC Exhibit No. 2, which is a contract between CBC and CSN, authorizes CSN to produce a "post-game wrap-up program" for telecasting immediately after certain telecasts of NHL games; again neither the NHL or any NHL club is a party. And CBC Exhibit No. 3, which authorizes CBC to broadcast certain Toronto Blue Jays Baseball games in Canada only, ^{*/} is between CBC and Labatt Breweries of Canada Ltd.; the Blue Jays are not a party.

It is axiomatic that those parties which have contracted with CBC have no greater rights than those which the sports clubs have licensed to them in the first instance. CBC Exhibit 3, in fact, provides in paragraph 16(b) that it is "subordinate and subject to all contracts entered into: (i) between Labatt's and the Toronto Blue Jays Baseball Club; and (ii) between Labatt's and that other party or parties from whom Labatt's has or shall have secured the requisite rights to any Major League Baseball games" See also paragraph 15 of CBC Exhibit No. 12 ("CSN's performance

^{*/} Significantly, paragraph 20 states that "rights for cable" are "not included" in the agreement.

under this contract is subject to its agreements with the National Hockey League and its member clubs.") Absent the actual contracts with the clubs, which CBC has not sought to introduce, it is impossible to determine whether the clubs have in fact transferred any rights, as alleged by CBC.

Second, CBC Exhibit No. 2 involves the broadcast of "post-game wrap-up" programs, and not the live telecast of any professional sporting events. To the extent that CBC owns the copyright in this "post-game wrap-up" program and is entitled to receive royalties attributable to this program, such royalties are not determined from the share of the of the N.C.A.A." As is clear from paragraph 5 of CBC Exhibit No. 2, the "post-game wrap up" program is a program which can be syndicated to a variety of Canadian stations.

Third, CBC Exhibits Nos. 4, 5, 6 and 7 are contracts which involve sports telecasts other than those for which the Joint Sports Claimants and the NCAA have claimed. Thus, any royalties attributable to those telecasts which have been properly claimed by a broadcaster could come only, if at all, from the share of the pool awarded to the broadcasters, and not the Joint Sports Claimants and the N.C.A.A.

The Joint Sports Claimants have repeatedly emphasized that the final distribution must reflect a comparison of only that programming for which valid claims have been filed. Accordingly, the focus of the Joint Sports Claimants' proof in Phase I was upon the live telecasts of the professional sports clubs which they represent -- specifically, they discussed the value of this programming in light of the primary criteria which the Tribunal ultimately adopted. The broadcasters, on the other hand, presented no evidence of the value, in light of this criteria, of any of the sports telecasts for which they were claiming.^{*/}

Based upon the record the Tribunal allocated 12% to the "Joint Sports Claimants and the N.C.A.A." and 3.25% to the "U.S. and Canadian Television Broadcasters." To the

^{*/} As noted, with the exception of a handful of pre-season football telecasts mentioned only during the hearings on May 22, the broadcasters did not identify during Phase I any sports telecasts for which they were claiming. It should also be noted that there was an objection on the basis of timeliness to the broadcasters' offering evidence of these preseason football telecasts during the May 22 hearing (see Tr. 5/22 at 151-52). The Tribunal sustained this objection (Id. at 152). However, it allowed the broadcasters to proceed based upon the representation that the contracts concerning these telecasts were "relevant" to the broadcasters' understanding of the contracts with the clubs represented by the Joint Sports Claimants. (Id. at 152-53).


extent that the broadcasters established any entitlement to the sports programming for which they were the proper claimants, it would appear that any royalties attributable to this programming must necessarily have been included in the 3.25% share awarded to them.

CONCLUSION

For the reasons stated above, there is nothing in the CBC's "offer of proof" or anywhere in the record establishing that any broadcaster is entitled to any portion of the 12% of the royalty pool awarded to the "Joint Sports Claimants and N.C.A.A."

Respectfully submitted,

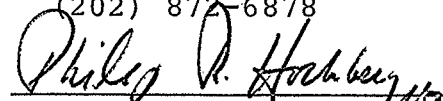
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Dated: August 29, 1980

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August, 1980, copies of the foregoing "Response Of The Joint Sports Claimants To The Canadian Broadcasting Corporation's Offer Of Proof" were served upon parties to this proceeding at the addresses shown, by first class mail, postage prepaid:

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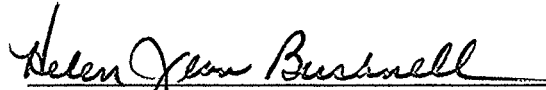
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