

ORIGINAL

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

In the Matter of)
)
DISTRIBUTION OF CABLE) Docket No. CRT 79-1
ROYALTY FEES)

RESPONSE IN OPPOSITION TO NAB MOTION
FOR STAY AND REQUEST FOR PARTIAL
DISTRIBUTION OF 1978 CABLE ROYALTY FUND

By Motion dated October 22, 1980, the National Association of Broadcasters (NAB) requested a stay of the Copyright Royalty Tribunal's (Tribunal) Final Determination issued September 23, 1980 (45 Fed. Reg. 63026) in the captioned proceeding and for the postponement of the distribution of any and all cable royalties pending final resolution of the NAB appeal of the Tribunal's order. The Motion Picture Association of America, Inc., its member companies, and other companies engaged in the production and/or distribution of programming exhibited by television broadcast stations ^{1/} (Program Syndicators) hereby respond in opposition to NAB's motion and request that a minimum partial distribution of 50% of the cable royalty fund be made immediately to the Program Syndicators' category on the basis that such amount is not subject to an appeal.

A. Opposition to Stay

NAB advances two major arguments for justifying the issuance

^{1/} The member companies and other program producer/distributor companies are listed in Attachment A.

of a stay: (1) a stay is automatic under the statute whenever an appeal is filed; and (2) in the alternative, NAB has met the necessary criteria for issuing a stay. Program Syndicators submit that NAB's motion fails on both counts to justify granting a stay.

NAB relies upon 17 U.S.C. §809 as providing the ground for its claim that a stay should automatically be granted whenever an appeal of a final determination of the Tribunal has been filed. Section 809 states:

Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication in the Federal Register as provided in Section 803(b), unless prior to that time an appeal has been filed pursuant to Section 810, to vacate, modify, or correct such determination and notice of such appeal has been served on all parties who appeared before the Tribunal in the proceeding in question. Where the proceeding involves the distribution of royalty fees under Section 111 or 116, the Tribunal shall, upon the expiration of such thirty-day period, distribute any royalty fees not subject to an appeal filed pursuant to Section 810.

NAB relies upon the language, "unless prior to that time an appeal has been filed" along with Section 301.77 of the Tribunal's Regulations as providing an automatic stay provision in these actions. Clearly, for the purpose of determining the intent and purpose of that section, NAB's reliance on the quoted phrase is misplaced. The last sentence of Section 809 is determinative of the Tribunal's duties to grant or to deny a stay; contrary to NAB's view, the Tribunal must distribute that portion of the fund not subject to an appeal immediately after the thirty day period expires.

NAB's claim that an automatic stay would issue under Section 809 contravenes any reasonable reading of the section and is inconsistent as well with similar provisions of other regulatory statutes. The phrase upon which NAB relies, "unless prior to that time an appeal has been filed," refers not to when a stay should issue, but rather to when the Tribunal's order becomes final. Once a petition for review has been filed the record in the proceeding is transferred to the Court and the Court then has the ultimate power to close the record, to remand, or to take whatever other action it deems appropriate. It would virtually be impossible for an order to become final and effective when the Court still has the matter before it. Thus the language to which NAB refers resolves this possible difficulty by stating that a Tribunal's order, which would otherwise become effective, does not become final upon the filing of a petition for review and remains open pending its ultimate outcome before the Court: it does not operate to grant an automatic stay.

Other regulatory statutes do not operate to grant an automatic stay in similar circumstances. These statutes, for example, the National Gas Act, 15 U.S.C. §717 et seq. and the Federal Power Act, 16 U.S.C. §825 et seq., specifically indicate that filing an appeal will not operate as an automatic stay. E.g., 15 U.S.C. 717r(c). The last sentence of Section 809, specifically addressing distribution of royalty fees under Section 111, as is the case here, has the same effect on the Tribunal in that it requires a distribution of any portion of the fund not subject to an appeal. The

plain meaning of this sentence as well as consistency with similar statutes make clear that an automatic stay does not lie here. Program Syndicators would urge the Tribunal to reject the claim that an automatic stay would issue in the present circumstances.

Recognizing the infirmities of its initial claim, NAB attempts to argue that it meets the judicially-established criteria for judging when a stay should be issued. Program Syndicators agree that the applicable standards are those set forth in Virginia Petroleum Jobbers v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1977), but deny that NAB has made a sufficient showing for granting the stay.

The four factors for granting a stay are:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? ...
- (2) Has the petitioner shown that without such relief, it will be irreparably injured? ...
- (3) Would the issuance of a stay substantially harm other parties in the proceeding? ...
- (4) Where lies the public interest? ...

Virginia Petroleum Jobbers, supra, 259 F.2d at 925. The Court's interpretation in Holiday Tours does not upset these factors; rather it places less emphasis on a "wooden" application of petitioner showing a greater than 50% chance of prevailing on the merits. The Court indicated the seriousness of the showing that would necessarily be required to prevail on the stay request:

Instead, we hold that under Virginia Petroleum Jobbers a court, when confronted with a case in which the other three factors strongly favor

interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.

559 F.2d at 843 (emphasis added). This sets up a two-fold test: a strong showing of harm to movant and lack of harm to other parties or the public and, once this is met, the showing of a serious, legal question. NAB fails on each side of this test.

The first issue, whether NAB will suffer irreparable harm, does not weigh in favor of staying distribution of the entire fund. NAB sets a scenario where the fund will be scattered to the corners of the nation, thus making it difficult to retrieve. NAB claims that recovery of such refunds would involve costly and protracted litigation throughout the country. Assuming arguendo that NAB were right on this point, this would not show irreparable injury. As the Court made clear in Virginia Petroleum Jobbers:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

259 F.2d at 925 (emphasis in original). More important, it is doubtful that the worst case scenario presented by NAB will occur. The Court has sufficient equitable power to provide NAB with an easy means of recovering any monies refunded to other claimants, should NAB prevail on the merits of its claims and should such a favorable decision mean that NAB is entitled to a higher award. The presence of a 1979 cable royalty fund, to be followed by

creation of a fund for each successive year, indicates that a ready pool of monies involving virtually the same claimants will be available. This pool can provide a central means for redistributing the fund should the need ever arise. As to NAB's claim that copyright ownership is at stake, the status quo is preserved already by virtue of the fact that the Tribunal's determination cannot become effective prior to final court action. Thus there is no final determination of any legal rights which have been challenged by NAB's appeal. As a result, no prejudice to NAB's legal position will result if a stay is denied.

Other parties will suffer substantial harm by issuance of a stay. The royalty fees in question relate to a period that is two years past. Program Syndicators who rely heavily upon sale in syndication to recover their costs and return for programs they have produced and for the production of new programs have thus been denied access to these monies, which the Tribunal has found to be rightfully theirs, during the entire period. Where it was reasonable to keep this money pending adjudication before the Tribunal, it becomes unreasonable after the Tribunal has judged the matter and its determination as to this share is not subject to appeal. While Program Syndicators recognize that the fund is collecting interest, the value of the money in hand during these inflationary times is obviously much greater than continuance of collecting interest. This is particularly so where distribution will likely be delayed for another year or more pending review.

As will be shown, a very substantial portion of the fund is not subject to an appeal as a result of NAB's or other parties' petitions for review, and thus to stay distribution results in very substantial harm.

The public interest weighs in favor of distribution here. Section 111 of the Act is intended to provide for owners of copyright programs some measure of relief from the retransmission of their programs by cable systems. This is best accomplished by distribution of those portions of the fund not subject to an appeal to the parties who have been determined to be entitled to the fund after a full evidentiary hearing. This is strengthened by the Act where Section 809 shows a clear intention to have distributed as soon as possible all portions of the fund that have not been challenged upon appeal. NAB's claim that it fosters the public interest by seeking an appeal which seeks to affirm its view of the case does not outweigh the other public interest factors which weigh in favor of distribution of the fund.

The remaining question before the Tribunal is whether NAB has presented a serious legal question which has a substantial likelihood of prevailing on the merits. This latter factor must be addressed because, as shown above, NAB has not shown that the other three factors weigh in favor of granting a stay. Review of NAB's argument shows that it is essentially rehashing points made time and again to the Tribunal on the exact issues raised; our answer opposing NAB would essentially be a restatement of our

earlier arguments against NAB's position. The Tribunal knows these arguments well, and has ruled several times against NAB's position. Quite simply, Program Syndicators believe that in these circumstances the Tribunal cannot rule, as it must if a stay were to be granted, that NAB is likely to prevail on the merits of these well-worn arguments.

Further, it is submitted that the Tribunal should consider the posture of the supplicant before it. The NAB is almost singlehandedly responsible for the claimed confusion as to allowable royalty distributions at this time. (NAB Motion pp. 5-7) As Program Syndicators have shown, Section 809 only applies to funds subject to an appeal. The NAB's contention that the entire cable copyright royalty fund is the subject of this appeal^{2/} is absurd. If there is any "question" remaining as to the appropriate distribution of funds, it was caused by the total failure of the NAB to submit any sort of proof regarding the amount of its claims. While the Tribunal rejected the broadcasters' claims regarding the "broadcast day" as a compilation and the ownership of copyright in exclusively syndicated programming as a matter of law, it still allowed the NAB full opportunity to present evidence on these issues, including the proper valuation of these two categories. As the Tribunal properly stated in its decision, "We find that this testimony and the record as a whole

^{2/} NAB Motion for Stay at p. 6.

provides no basis for establishing the value of the broadcast day nor does it provide any basis for a distribution of royalties to broadcaster claimants on this theory."^{3/} The identical conclusion was reached as to the syndicated exclusivity claim. As for the NAB's claims regarding the valuation of local non-network programming (a category in which the broadcaster was concededly the copyright holder), the Tribunal's decision adopted the characterization of MPAA:

The direct case of NAB consisted of a bewildering procession of inconsistent and contradictory exhibits which were formally proffered as the definitive basis and justification for NAB's claim, only to be renounced and disavowed, followed by other exhibits which suffered the same fate. As a result, NAB's direct case was littered with the debris of replaced and substituted exhibits, and at the conclusion of its presentation, it left the record in such a state of utter confusion and disarray so as to preclude any reliance by the Tribunal upon that presentation. ^{4/}

It may thus be seen that regardless of the reviewing Court's ultimate rulings on the issues of law presented, there can be no different outcome to this proceeding because NAB has absolutely nothing to prove on remand (nor could there be any basis for the Court to prescribe an allocation of the fund). This may readily be seen from Appellant's Proposed Conclusions submitted to the Tribunal as part of its Findings of Fact and Conclusions of Law, attached as Appendix B hereto. They are, in a word, gibberish.

^{3/} Decision at 54 (emphasis added).

^{4/} Decision at 56.

Accordingly, it must be concluded that NAB has failed completely to present a serious legal question which has a substantial likelihood of prevailing on the merits.

B. Request for Distribution

Section 809 of the Act, which was set out earlier herein, requires the Tribunal to distribute all portions of the cable royalty fund not subject to an appeal. Program Syndicators believe that, at a minimum, this requires the Tribunal to distribute 50% of the 1978 fund to Program Syndicators immediately. Should the Tribunal determine a larger portion of the fund is not subject to appeal, Program Syndicators would, of course, request that such larger amounts be distributed. In support of our motion, Program Syndicators state:

The effectiveness of the Tribunal's determination and the distribution of the fund are governed by 17 U.S.C. §809. This section is an explicit direction to the Tribunal to distribute that portion of the cable royalty fund not subject to an appeal thirty days after its final determination has been published in the Federal Register. Distribution of a minimum of 50% of the fund to the designated agent of Program Syndicators as a partial distribution of its allocated share is required under this section.

As the Tribunal is aware, Program Syndicators have not filed a petition for review of the Tribunal's determination of their allocated share. Thus they have not placed the full amount of that share in issue. To date, Program Syndicators have received copies of petitions for review of the Final Determination filed on behalf of the National Association of Broadcasters (NAB), the Joint Sports Claimants (JSC), and National Public Radio (NPR).

Program Syndicators are aware that petitions for review on behalf of other parties may be filed. Although it is not possible to determine from the various petitions for review exactly what portion of the fund is subject to appeal, it is possible to determine the minimum amounts to which each party believes that the Program Syndicators category is entitled through their statements in the "Proposed Findings and Conclusions" submitted on July 7, 1980, to the Tribunal. Program Syndicators summarize the parties' proposals below:

	<u>Share To Be Allocated to Program Syndicators Category</u>	<u>Page Reference in Proposed Findings</u>
ASCAP/SESAC	68.6%	37
BMI, Inc.	50.0%	36
Character Claimants	45.0%	Separate Letter
Joint Sports Claimants	61.75%-69.35% <u>5/</u>	71-72
NAB	68.0%	19
NCAA	71.52%	76
NPR	69.3%	8
PBS	66.0%	87

Program Syndicators believe that it would clearly be disingenuous and, in any event, legally invalid for any party to claim that the appeals involve a greater amount in dispute than what that party stated to the Tribunal as its conclusion of the share to be allocated to the program syndicators category. In arriving at our request for distribution of a minimum of 50% of the fund, Program Syndicators took note of Character Claimants'

5/ Assumes lowest figures advances by Joint Sports Claimants

conclusion that our category should receive only 45% of the fund. This factor is offset by the claim of Character Claimants in the same document for only 3% of the fund for themselves. Thus, should Character Claimants petition for review of the Final Determination, it is highly doubtful and totally unrealistic that their action could bring greater than 50% of the fund into dispute.

BMI concluded that 50% of the fund should be allocated to Program Syndicators in its Findings while all other parties indicated that our category should receive at least 60%, with the average of these parties' recommendations being approximately 67%. These recommendations indicate that probably substantially more than 50% of the fund will not be in issue as a result of any appeals. To provide a cushion, Program Syndicators have requested only that a minimum of 50% of the fund be distributed to our agent. The benefits -- private and public -- of immediately partial distribution are obvious.

Further, it is clear that no other group of claimants will be adversely affected by such partial distribution nor will any party's appellate rights be prejudiced. As to NAB specifically, Program Syndicators has been unable to determine exactly what share NAB requests relating to compilation and exclusivity -- the only claims that would possibly affect Program Syndicators' category by virtue of NAB's appeal. NAB's Proposed Findings suggest that broadcasters claims based on compilation and exclusivity should

be in the Phase II determinations of the Tribunal. However, NAB presented no evidence during Phase II as to what share they should be allocated as an "individual claimant" for exclusivity and compilation. In these circumstances, it is appropriate to hold the NAB to its earlier representations about the full extent of its claim in order to judge the broadest amount that is possibly subject to an appeal. The overall NAB claim was expressed by Mr. Popham, its Deputy General Counsel, at the hearing held December 6, 1979, before the Tribunal:

During the course of the negotiating process, the broadcast position is that the final negotiations was a figure of 25 percent of the royalties. This 25 percent figure included the royalties attributable to broadcasters' local programming to the value of compilation, to the syndicated programming which broadcasters could claim pursuant to their exclusive rights and the claim for the radio broadcast stations.

It was a percentage figure which frankly represented a compromise of our position. Ultimately, we feel, we might range into the 25 to 35 percent range, if we were to prevail on all three issues.

(Tr. II-4 - II-5.)

This indicates that NAB's full litigation position, on all four bases of programming (local, compilation, exclusivity, and radio broadcast stations) is worth at most 35% of the fund. This represents the full extent as a part of the entire fund of their claims at issue in their appeal. Distribution of 50% of the fund to Program Syndicators immediately will not affect NAB's claim; at the same time, it leaves a sufficient residue available to

satisfy NAB's complete litigation position in the extremely unlikely event it should prevail on the merits of every issue it raises on its appeal.

WHEREFORE, Program Syndicators request that the Tribunal, pursuant to 17 U.S.C. §809, distribute immediately a minimum of 50% of the 1978 cable royalty fund, including interest, to the designated agent of the Program Syndicators et al. category as partial distribution and as "royalty fees not subject to an appeal filed pursuant to Section 810."^{6/} Should the Tribunal determine that the amount subject to appeal is less than 50% of the fund, Program Syndicators would wholeheartedly endorse immediate distribution of any larger share. The 50% figure requested here represents the lowest percentage which can be distributed, in Program Syndicators' opinion, under any conditions. A stay of distribution for any larger portion of the fund cannot be supported in light of the parties' prior representations as to the percentage to be allocated to Program Syndicators.

Program Syndicators urges further that the Tribunal deny NAB's request for stay on the basis that a stay is not automatic under Section 809 and that NAB has failed to meet the established criteria for granting a stay.

^{6/} Program Syndicators believe that the Tribunal should determine whether 50% of its costs should be deducted from the partial distribution now or whether costs should be deducted at the time when the remainder of the fund is distributed, based upon its own convenience and efficiency.

Respectfully submitted,

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October 24, 1980

Member Companies of Motion Picture Association of America, Inc.

Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Walt Disney Productions
Filmways Pictures, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corporation
United Artists Corporation
Universal Pictures, a Division of Universal City Studios, Inc.
Warner Bros. Inc.

Other Program Producer/Distributor Companies

Celebrity Productions, Inc.
Filmways Enterprises Inc.
Filmways Feature Productions, Inc.
Filmways International, Ltd.
Filmways Motion Pictures, Inc.
Filmways TV Productions, Inc.
Goodson-Todman Enterprises, Ltd.
G-T Programs, Inc.
Hanna-Barbera Productions
Heatter-Quigley Distribution Corp.
Heatter-Quigley, Inc.
ITC Entertainment, Inc.
Lakeside Television Company
Marvel Comics Group, a Division of Cadence Industries Corporation
MTM Enterprises, Inc.
Panel Productions, Inc.
Price Productions, Inc.
Q-M Productions
Rhodes Productions Company
Ruby-Spears Productions, Inc.
T.A.T. Communications Company
Tandem Productions, Inc.
Viacom International
Lassie Television, Inc.
Lone Ranger Television, Inc.

CONCLUSIONS OF LAW

1. The First Amendment and the Copyright Act prohibit the distribution of cable royalties based upon such subjective factors as quality and popularity.

2. The issue of copyright ownership between competing claimants has been reserved for Phase II of these proceedings (5/5 at 123; 4/24 at 54-55; 5/6 at 36-37).

3. Accordingly, the NAB is permitted to allocate royalty percentages attributable to the heretofore excluded claims of syndicated exclusivity and ownership of sports copyrights during Phase II of these proceedings.

4. A number of claimants, including National Public Radio and the NCAA, have not provided the Tribunal an allocation of royalty shares due to programming in which they claim copyright.

5. During these proceedings it is determined that National Public Radio would be permitted to present a percentage share prior to September 11, 1980 (5/6 at 113-115).

6. Accordingly, the NAB is permitted to allocate a percentage of share due to the broadcast day as a compilation during Phase II of these proceedings.

7. The royalty shares allocable to the respective claimant groups is as follows:

- | | | |
|--------------------|---|------|
| (1) MPAA | - | 68% |
| (2) NAB-Television | - | 21% |
| (3) NAB-Radio | - | 1.5% |
| (4) PBS | - | 4% |

(5) Sports Claimants	-	4%
(6) CBC	-	1%
(7) National Public Radio	-	<u>.5%</u>
		100%

8. From the total royalty pool, there will be deducted the following shares:

(1) Music	-	3.9%
(2) Character Claimants	-	.03%

which shares shall be prorated among the claimants recited in (7) above in accordance with their usage of copyrighted music and characters.

Respectfully submitted,

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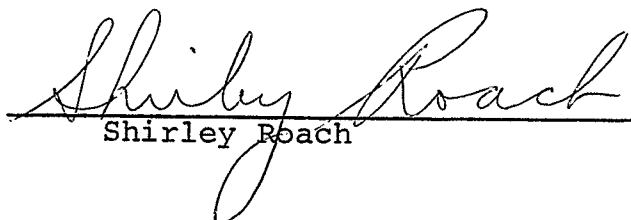
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CERTIFICATE OF SERVICE

I, Shirley Roach, a secretary in the law firm of Wilner & Scheiner, hereby certify that copies of the foregoing "Response in Opposition to NAB Motion for Stay and Request for Partial Distribution of 1978 Cable Royalty Fund" have been sent by first-class United States mail, postage prepaid, to the attached list on this 24th day of October, 1980.


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