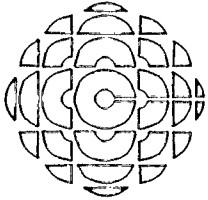


13 August 1980



Honorable Mary Lou Burg
Chairman
Copyright Royalty Tribunal
1111 20th Street N.W.
Washington, D.C. 20036

Dear Madam Chairman:

This submission by the Canadian Broadcasting Corporation is in response to the statement of the Copyright Royalty Tribunal in 45 FR 50621 that:

"There are pending before the Tribunal a number of claims filed by copyright owners who are not associated with a joint claim or joint representation before the Tribunal. These claimants shall submit not later than August 15 any entitlement justification which they wish to have considered by the Tribunal in the determination of their share of the royalty fees."

The Canadian Broadcasting Corporation has previously stated⁽¹⁾ that its claim is not part of a joint claim or joint representation.

CBC notes that in the allocation to categories set out in 45 FR 50621 there is no mention of CBC non-commercial radio. CBC radio has had a wide international reputation for many

(1) CBC's letter to Chairman, CRT, dated 22 May 1980.

years as one of the best two or three services in the world. During 1978 CBC radio produced some 35,000 hours of programs of high quality, covering the broadest possible range of subject matter from the widely popular to the deliberately esoteric.

The contrast between CBC and US commercial radio is even greater than the difference between NPR and US commercial radio. Many subscribers to US cable services welcome the availability of CBC radio as an alternative choice to NPR and commercial radio. In addition to offering a wide selection of excellent programs in two languages, CBC produced radio programs do not carry commercials.

The Tribunal has found that it "has broad discretion in determining the distribution of cable royalties to eligible claimants ..." (2). However, CBC respectfully submits that no body created by statute can exercise powers that transcend the law which brought that body into existence.

The distribution procedures for the cable royalty fees deposited by cable system owners are clearly and unambiguously set out in 17 USC 111 (d) (4) and (5). The wording of the statute indicates that the procedure is mandatory rather than discretionary:

"(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause 5, be distributed to those among the following copyright owners ...".

(Emphasis added.)

"(5) (B) The Tribunal ... shall ... distribute such fees to the copyright owners entitled ...".

In the case of §111 (d) (5) (B), the distribution to copyright owners can only be made if the Tribunal determines that no controversy exists. If there is a controversy, the Tribunal

(2) 45 FR 50621

conducts a proceeding in accordance with §803. However, the existence of a controversy and the requirement to conduct a proceeding does not carry with it any means by which the qualifying requirements that each and every claimant must be able to demonstrate, as set out in §111 (d), can be ignored or waived.

CBC has noted these requirements in other submissions to the Tribunal.⁽³⁾ They are:

1. Proof of ownership

So far, in Phase I, no claimant has submitted proof of copyright ownership except in the case of a number of sports programs. No person who is not a qualified copyright owner is entitled to share in the cable royalty fund, and conversely, every qualified copyright owner is entitled to a share.

Further, the Tribunal has not given a ruling on the exclusive ownership issue set out by CBC in documents previously submitted.⁽⁴⁾ CBC asserts that the exclusive licensing of a right confers ownership of that right on the licensee. This is not the proposition advanced by NAB and rejected by the Tribunal in 45 FR 50621.

2. Proof of fixation

If requested by the Tribunal, this can be done by affidavit, as provided for in the Tribunal's rule 302.9.

(3) CBC's letter to Chairman, CRT, dated 14 March 1980.

(4) CBC's letter to Chairman, CRT, dated 14 March 1980, pp 3 - 4.

3. Proof that a primary transmission of the copyrighted work occurred

CBC will submit exhibits on primary transmission in Phase II.

4. Proof that a secondary transmission of the copyrighted work occurred

This information has been filed with the Copyright Office in the semi-annual statements of account required of all cable systems. It would not, of course, be shown on forms CS/SA-1 filed by cable systems whose semi-annual "gross" is \$41,500 or less.

In providing proof of secondary transmissions, CBC has relied on the service provided by bi Associates Inc. During the testimony of bi's President, Mr. Roger Wagner, it became apparent that there were errors in the company's data base. As a result, all the computer output documents were checked back by bi Associates with the originals of the Statements of Account filed by the cable systems pursuant to 17 USC 111 (d) and the requirements of the Register of Copyrights. Permission to examine the originals, rather than having to rely on photocopies of the Statements, was of material assistance in locating errors. Subsequently, a computer program was written to analyse each of the approximately 4,000 cable systems reporting in the first three accounting periods. Call letters were verified against data provided by the Federal Communications Commission. Errors in the Statements were corrected by having the cable systems refile on instructions of the Copyright Office.

In sum, the errors uncovered by this meticulous re-checking of the entire data base totalled less than 1/10 of 1% (one in 1,000).

5. Proof that the copyrighted work for which a royalty share is claimed was included in a secondarily transmitted distant signal

All CBC's signals are distant with respect to US cable systems.

6. Proof that the copyrighted work for which a royalty share is claimed was included in a non-network broadcast

With respect to 17 USC, all CBC broadcasts are non-network. CBC has covered this point in detail.⁽⁵⁾ All CBC television stations are, by definition, independent.

The formula proposed by the Motion Picture Association of America, Inc. in Phase I was based on a "fee-generated" approach whereby the programs carried in the signals of distant independent TV stations would be given four times the weighting of non-network programs carried by network stations or any of the programs of PBS. The percentage allocation to MPAA seems to indicate that this line of reasoning (DSE weighting) is acceptable to the Tribunal.

Under the definitions of 17 USC 111, every secondarily transmitted CBC television signal qualifies for a DSE of one. The Form 3 cable systems (over \$160,000 gross semi-annually) calculate their royalty payments by a calculation based on the number and kind of distant television signals. Accordingly, every time a Form 3 cable system decides to carry a CBC television signal the choice is made in the knowledge that a premium royalty payment is committed.

This is probably the most tangible evidence available of the value placed on CBC broadcasts by the cable system operators, and in CBC's opinion is more persuasive than responses to hypothetical questions. Form 3 cable systems contribute more than 80% of the total royalty fund.

(5)

CBC's letter to Chairman, CRT, dated 14 March 1980.

In previous documents submitted to the Tribunal CBC has noted that it carries a relatively small percentage of US produced series and features. Some are scheduled on CBC's French network and stations in dubbed versions.

However, CBC television is markedly different from television seen in the US, even the excellent service provided by PBS.

CBC television is unique. It carries a limited number of commercials, and about \$100 - \$125 million dollars (net) of CBC revenue derives from television commercial activity. Nevertheless, it has been CBC policy since the inauguration of television service in Canada that certain programs may not have any kind of commercial sponsorship or have commercial announcements scheduled within them. In general, this prohibition extends to news and current affairs, and to programs that fall into the definition of "controversial". Thus, a series of CBC produced dramas may be broadcast with commercials, but if a particular episode happened to be particularly controversial or sensitive, it would be run on a sustaining basis.

In addition to the indigenous Canadian values developed by the two main language groups in Canada, CBC television includes and reflects the close ties with Britain and France.

Many US cable subscribers place a high value on CBC television because it provides a welcome and distinctive alternative to the domestic services.

Sports programming makes up about 10% of CBC's television schedule. In addition to producing and broadcasting Canadian events such as golf, tennis and Canadian football, CBC produces and broadcasts programs in "international" series such as hockey (NHL) and baseball (Toronto Blue Jays, Montreal Expos). These programs are another strong attraction for US cable system subscribers.

Unfortunately, in the case of CBC programs with distribution potential in the United States it is very difficult to comment on marketplace value. In other countries where CBC programs have sold well (Britain, French Europe, Germanic Europe, for example) the marketplace value is high. Unfortunately, of all the developed countries the US market is the most difficult for a foreign producer to penetrate. Despite the fact that

In previous documents submitted to the Tribunal CBC has noted that it carries a relatively small percentage of US produced series and features. Some are scheduled on CBC's French network and stations in dubbed versions.

However, CBC television is markedly different from television seen in the US, even the excellent service provided by PBS.

CBC television is unique. It carries a limited number of commercials, and about \$100 - \$125 million dollars (net) of CBC revenue derives from television commercial activity. Nevertheless, it has been CBC policy since the inauguration of television service in Canada that certain programs may not have any kind of commercial sponsorship or have commercial announcements scheduled within them. In general, this prohibition extends to news and current affairs, and to programs that fall into the definition of "controversial". Thus, a series of CBC produced dramas may be broadcast with commercials, but if a particular episode happened to be particularly controversial or sensitive, it would be run on a sustaining basis.

In addition to the indigenous Canadian values developed by the two main language groups in Canada, CBC television includes and reflects the close ties with Britain and France.

Many US cable subscribers place a high value on CBC television because it provides a welcome and distinctive alternative to the domestic services.

Sports programming makes up about 10% of CBC's television schedule. In addition to producing and broadcasting Canadian events such as golf, tennis and Canadian football, CBC produces and broadcasts programs in "international" series such as hockey (NHL) and baseball (Toronto Blue Jays, Montreal Expos). These programs are another strong attraction for US cable system subscribers.

Unfortunately, in the case of CBC programs with distribution potential in the United States it is very difficult to comment on marketplace value. In other countries where CBC programs have sold well (Britain, French Europe, Germanic Europe, for example) the marketplace value is high. Unfortunately, of all the developed countries the US market is the most difficult for a foreign producer to penetrate. Despite the fact that

13 August 1980

Canada is the best television and theatrical customer of the United States, there is virtually no traffic in the opposite direction.

There are indications that this situation is beginning to change as the relationships and tensions among the major groups in the program-entertainment business respond to the migrations of customers (viewers). The rapid growth of pay-TV has been a major influence, and the videogram (disk and cassette) will likely be another. Whatever the reason, CBC program sales in the US during the past two years have shown promising growth.

The possibility of a network sale in the US (other than a co-production agreement with PBS) is extremely remote for the present. Realistically, all CBC program sales in the US must therefore be by "syndication". The marketplace value of CBC's programs in a city like Boston, which is within the border licensing zone, is severely diminished by the fact that cable subscribers can see the program when it is first broadcast over a CBC transmitter.

Sincerely,



D.E. Lytle
Director
Corporate Program Services

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