

BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL
WASHINGTON, D.C.

AUG 15 1980 REG.

ORIGINAL

In the matter of)
Cable Royalty)
Distribution Proceedings)

CRT Docket No. 79-1

NCAA'S MOTION TO STRIKE THE AUGUST 13, 1980
MOTION OF THE PROFESSIONAL SPORTS CLAIMANTS

The NCAA moves to strike the August 13, 1980 motion of the professional sports claimants ("PSC") which seeks to limit, as a matter of law, the NCAA's share of the 1978 cable royalty fees heretofore allocated to the PSC and the NCAA to \$3,382.79.

The PSC's eleventh-hour motion, filed only two business days before the Phase II hearings are scheduled to begin, constitutes a heavy-handed attempt to muscle the NCAA out of the Phase II hearings without any opportunity to present evidence respecting its entitlement to 1978 royalty fees, and to expropriate to the PSC royalties attributable to secondary transmissions of copyrighted telecasts of collegiate sports events to which they have no right.

The impetus for the PSC's motion to deprive the NCAA of its Phase II "day in court" is the fact that NCAA's evidence will establish that:

- (a) the NCAA's claim encompasses well over 750 qualifying intercollegiate sports event telecasts assigned to it by its members;
- (b) the secondary transmissions of these telecasts by cable systems on a distant signal basis have been more harmful to the copyright owners, and at least as beneficial to cable operators, than have been the secondary transmissions of the 2,288 professional sports event telecasts covered by the PSC's claims; and
- (c) the NCAA, as assignee of its members' rights, is entitled to at least 25 percent of the \$1,500,000.00 plus allocated to sports.

The PSC moves this Tribunal to foreclose the NCAA from presenting this evidence in Phase II. By so moving, the PSC is effectively asking this Tribunal to ignore the more than 750 qualifying telecasts of intercollegiate sports events whose retransmission has harmed the colleges, benefited the cable operators, and generated substantial royalties, and award the totality of the \$1,500,000.00 plus allocated to sports to the four professional sports organizations represented by the PSC.

The PSC's motion is patently unconscionable.* More importantly, it ignores Congress' express intention that the

* In tacit recognition of the patent unconscionability of their motion to limit the NCAA to \$3,382.79, the PSC suggests, as a "fall-back" position, that the most the NCAA is entitled to is about \$60,000 based on the alleged fact that "[t]he Nielsen study shows that all of the non-network collegiate sports telecasts had a distant cable audience which accounted for 3.6 % of the total sports audience". PSC Motion at 3. Without conceding that there is any logic or merit to this argument, it suffices to note that there is absolutely no evidence in the record which supports the quoted factual allegation upon which it is based.

royalty pool be distributed so as to compensate copyright owners equitably for the use of their works by cable systems. See H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 89 (1976).

The PSC's motion is grounded on three super-technical arguments:

- (1) That since the NCAA's claims were limited to royalties for "NCAA-copyrighted works", for the first half of 1978, and royalties for "NCAA-,BCAA- [Boston College Athletic Association], or University of Kentucky-copyrighted works", for the second half of 1978, the NCAA cannot claim for works assigned to it by its other members.
- (2) That the NCAA's claims cannot be expanded to include qualifying copyrighted events assigned to it by its member institutions because those assignments were made after the time for filing claims had expired; and
- (3) That since the NCAA valued the five example events it identified in its claims at \$3,382.79, it is foreclosed from claiming any more.

As shown below, these arguments -- designed to deprive the colleges, and give to the pros, royalties which cable retransmission of intercollegiate sports event telecasts generated in 1978 -- are as insufficient in law as they are inequitable in fact.

I. Background

On July 16, 1978 and July 3, 1979, the NCAA filed claims pursuant to Section 111 of the Copyright Act for

cable royalty fees attributable to secondary transmissions of NCAA-copyrighted works in the first and second half of 1978, respectively. The claim filed for the second half of 1978 listed the Boston College Athletic Association and the University of Kentucky Athletics Association as joint claimants with the NCAA. In accordance with 37 C.F.R. Part 302, each claim identified at least one secondary transmission establishing the basis for the claim. Each claim specifically stated that the examples were "not intended, and should not be understood, to be a complete or final listing of qualifying secondary transmissions" of NCAA works.

Since the NCAA filed these claims, a number of its member colleges, universities and athletic conferences have assigned it their copyrights covering qualifying telecasts of intercollegiate athletic events in 1978. The NCAA claim now encompasses more than 750 of these qualifying telecasts.

The NCAA claims were intended to cover all telecast events as to which the NCAA holds the copyright; and they do, in fact, cover all of those events for two separate reasons.

II. The NCAA Is Entitled To Claim On Its Own Behalf The Royalty Interests Assigned To It By Its Own Members

The NCAA owns the copyright to the 750 plus telecasts its members have assigned to it. These assignments were

made to assure that the colleges, universities and collegiate conferences are fairly represented in this proceeding and receive a fair distribution of royalty fees for cable retransmission on a distant signal basis of the television broadcasts of their sports events (a distribution which the NCAA in turn, will pass through to them).*

It is clear that the NCAA may claim for the rights it holds by assignment. Section 111(d)(4) of the Copyright Act provides that the royalty fees shall be distributed to "copyright owners", a term which includes those who are owners by reason of bequest, succession or assignment, as well as those who are owners by reason of authorship. See 17 U.S.C. §§ 111(d)(4), 201(a), (d).

III. The Fact That NCAA Members Assigned Their Copyrights To The NCAA After July 1979 Does Not Foreclose The NCAA's Right To Claim Royalties For Those Events

As both Sections 201(a) and (d) of the Copyright Act and applicable case law make clear, the fact that many NCAA-member institutions and conferences assigned their rights in the telecasts of their sports events to the NCAA after the NCAA filed its claims does not affect the NCAA's right to claim for those assigned rights.

* By thus clearly expressing their desire and intention that the works concerned be considered in the distribution made to the NCAA, its member institutions also ratified the NCAA's claims on their behalf. See Am. Jur. 2d Agency § 162.

At the time its claims were filed, the NCAA intended that they would cover works the copyright to which it either held then or acquired at any later time prior to the distribution of the 1978 royalty fees. Such assigned interests constitute a valid element of a claim previously filed where: (1) the claimant possessed in its own right some "interest at the critical [filing] date aside from any thereafter acquired by assignment"; and (2) others are not prejudiced by admission of the assignment (except, of course, for whatever naturally flows from the mere inclusion of additional interests in the claim concerned). El Ranco, Inc. v. First National Bank, 406 F.2d 1205, 1209 (9th Cir. 1968) (holding that the jury properly considered assigned rights in assessing damages although the rights were assigned after the filing of the complaint). Here the NCAA clearly possessed, and stated, a claim in its own right at the time of filing; and neither the professional sports group nor any other party can claim that admission of the assignments affects their claims or otherwise prejudices them.

IV. The NCAA Is Entitled To Claim As Representative Of Its Members The Royalty Interests They Have Assigned To It

The NCAA is a representative of its member colleges, universities and allied athletic conferences. As such, its claims properly cover each of its members' copyright interests in the absence of a separate claim by that member.

The evidence will establish that a large number of NCAA members -- whose telecasts constituted substantially all qualifying intercollegiate sports event telecasts in 1978 -- have formally recorded their desire that their events be covered by the NCAA's claims by assigning their copyrights to those telecasts to NCAA. In so doing, each has ratified the NCAA's representation of its copyright interest in this proceeding. Under well-established precepts of the law of agency, that ratification relates back to the original filings and is equivalent to prior authorization. 3 Am. Jur. 2d Agency § 610; Mecham, Agency § 195 (4th Ed. 1952). Thus, the NCAA is legally entitled to claim, as the representative of its members, those rights they have assigned to the NCAA.

Indeed, the NCAA should be permitted to claim for all of its members, including those members who have not yet assigned their copyrights to it. Otherwise, the rights of those member institutions will be cut off, contrary to the express intention of Congress that the distribution compensate all copyright owners whose works are used by cable systems. See H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 89 (1976). This is particularly true in respect to this proceeding, covering, as it does, the first year of entitlement; for many deserving copyright owners were unaware of their rights prior to the filing deadline.

This Tribunal has already made clear its sensitivity to this problem by its stated intention that claims filed for 1978 royalty fees are to be construed liberally so as to widen, rather than narrow, the access of copyright holders to the royalty pool. Specifically, in its October 22, 1979 Order regarding the filing of copyright royalty fee claims, the Tribunal stated that:

Because 1978 was the first year in which the compulsory copyright licensing of cable took effect, the Tribunal feels that some leniency with regard to the filing of cable royalty claims for that year is warranted and will not constitute a precedent for the filing of claims in subsequent years."

44 Fed. Reg. 60,726 (1979), 1 Copyright Law Rep. (CCH) § 13,032 (October 22, 1979). Consistent with this philosophy, the NCAA's 1978 royalty fee claims should be recognized as constituting valid claims for all qualifying sports event telecasts of NCAA-member colleges or allied conferences so as to insure the fulfillment of Congress' intent that a truly equitable distribution be made.

The PSC argues that to permit the NCAA to include in its claims qualifying events assigned to it after July 1979 "would mean that any person might file a claim for all otherwise unclaimed programming and then attempt to legitimize its claim by receiving belated authorization". PSC Brief at 9. Our response to this argument is twofold.

First, the NCAA is not "any person"; it is the established representative of its member institutions duly authorized to file royalty claims on their behalf by virtue of the assignments. Second, what (may we ask) is wrong with an association bringing the unclaimed programming of its members to the attention of this Tribunal. After all, the goal of this proceeding is to try to allocate the royalty pool as equitably as possible between the copyright owners of qualifying events; and to the extent a claimant, such as the NCAA, identifies those owners and asserts their claims on their behalf, it is advancing that goal.

V. The NCAA's Entitlement Is Not Limited To \$3,382.79

The PSC argues that the NCAA "is entitled to no more than the \$3,382.79 of the 1978 cable royalty pool", the "estimated compulsory license fees" the NCAA attributed to the example events it specified in its claims. The PSC's argument is without merit.

The express purpose of the requirement that claimants estimate their claim was to "enable the Tribunal to establish simply and expeditiously if there . . . [was] a controversy." 44 Fed. Reg. 20,220 (Apr. 4, 1979). It was never intended by the Tribunal, and it should not be so interpreted now, to be a limitation on potential recovery. Once the Tribunal determined that there was a controversy and

instituted a distribution proceeding, the initial estimates filed by the parties were and are of no further effect.

Moreover, it would be unreasonable and unjust to limit the colleges to the amount stated by the NCAA for the purpose of the July 1979 filings. Those filings were made with very limited information, and on the basis of a formulation that took account only of the example telecasts listed by the claims. The claims clearly state, however, that the events listed "are not intended and should not be understood, to be a complete or final listing of qualifying secondary transmissions" of NCAA works. The filings also expressly stated that, although a particular methodology had been used in computing the sums listed for the purpose of the July 1979 filings to determine if a controversy existed, the NCAA reserved "the right to use other methods of computing copyright royalty fees in other cases, as may appear appropriate in the circumstance." In this case, it is exercising that right.

VI. Conclusion

In view of the foregoing, the PSC's August 13, 1980 motion should be denied and the NCAA's motion to strike granted.

Respectfully submitted



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ORDER

Upon consideration of the record, it is this ___ day
of August, 1980,

ORDERED, that the Motion of the National Collegiate
Athletic Association to strike the August 13, 1980 Motion
of the Professional Sports Claimants is granted.

Mary Lou Burg
Chairman, Copyright
Royalty Tribunal

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of August, 1980, copies of the foregoing Motion and proposed Order were served upon parties to this proceeding by first class mail, postage prepaid, addressed to each of the following:

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