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March 6, 1981

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Honorable Clarence L. James, Jr.
Chairman, Copyright Royalty Tribunal
1111 Twentieth Street, N.W.
Washington, D.C. 20006

Dear Mr. Chairman:

We are writing for the Joint Sports Claimants and the National Collegiate Athletic Association in response to the Tribunal's February 23, 1981, Federal Register notice about a partial distribution of the 1978 fund.

We enclose herewith a proposed form of final order which reflects the position of the sports interests: Given the pendency of several appeals from the Tribunal's September 23, 1980, decision, Section 809 of the Copyright Revision Act of 1976 precludes any distribution, in whole or in part, of the fund at this time. Section 809 seems to us clear and unambiguous. An appeal which challenges the fundamental lawfulness of the Tribunal's decision renders any distribution prior to final resolution unlawful.

We believe that recent events, after the Tribunal considered the matter of partial distribution on November 25, 1980, confirm that no distribution can be made at present. The appellants in the Court of Appeals have filed their initial briefs, which do challenge specific awards made by the Tribunal. Beyond that, however, broadcast appellants have attacked the lawfulness of the proceeding itself. They argue, for example, that since the Tribunal allegedly failed to give prior notice of the standards on the basis of which it ultimately based the September 23, 1980, final determination, the Tribunal must start with new hearings after articulating new standards which arguably will be required by the Court's decision. If the broadcasters' view, which the sports interests do not endorse, should prevail, this proceeding will be no further along than it was when, on September 11, 1979, a controversy was declared. Although

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each party might have conceded to each other party some portion of the fund at that time, no one would have suggested that a partial distribution would have been lawful; and, indeed, the Tribunal made no such partial distribution.

MPAA has sought to slice the case up into disputed and undisputed pieces; it claims that it is entitled to receive immediately the lowest award that any other party proposed for it in the distribution proceeding that has been conducted. This position contains a logical fallacy, as well as legal infirmity. As noted, it simply overlooks the prospect that the broadcasters' challenge to the administrative proceeding itself will prevail. Moreover, it does not address the prospect that more than one of the present appellants might prove successful.

For example, if the sports interests succeed in their quest for a thirty-percent award and NAB prevails in its quest for an award greater than twenty percent, it can hardly be said that MPAA's final award will approximate what it says should now be conceded it; music and public broadcasting additionally must be accommodated. Similarly, CBC proposed an award of fifty percent (before consideration of the compilation and syndicated exclusivity issues) to MPAA and an award of twelve percent to the Joint Sports Claimants. It cannot be fairly said that CBC would continue to propose fifty percent for MPAA if sports is awarded the thirty percent which the Joint Sports Claimants seek. These are the types of controversies which are still present.

We understand the Tribunal's concern to distribute at least a portion of the fund at the earliest moment. Nevertheless, for the reasons stated above and previously, statutory provisions preclude distribution at this time. Moreover, the Tribunal has invested the funds in interest-earning securities, the benefit of which will go to all claimants. Retention by the Tribunal of control over the fund is the only way in which ultimate lawful treatment can be insured. Who can say, for example, if MPAA distributes funds to the hundreds of copyright owners for which it is representative, that such owners will remit such funds later,

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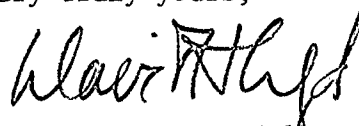
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with appropriate interest, should the final resolution of this case require that they do so.

Accordingly, we urge again that the Tribunal adopt an order in the form of the enclosed determining that no partial distribution of the cable royalty fund will be made.

Mr. Philip R. Hochberg, counsel for the National Basketball Association, the National Hockey League, and the North American Soccer League, and Mr. Ritchie Thomas, counsel for the National Collegiate Athletic Association, have authorized us to sign this submission on behalf of their clients.

Very truly yours,



James F. Fitzpatrick

David H. Lloyd

Robert A. Garrett

Enclosure
HAND DELIVERY

cc w/enclosure:
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Parties listed on attachment

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FINAL ORDER REGARDING REQUEST FOR
PARTIAL DISTRIBUTION OF THE
1978 CABLE ROYALTY FUND

Date: _____

The Copyright Royalty Tribunal has been requested by the Motion Picture Association of America, the authorized representative of syndicated program and motion picture copyright owners, to make a partial distribution of the 1978 cable royalty fund notwithstanding the fact that five parties have appealed the Tribunal's September 23, 1980, decision on distribution of that fund to the United States Court of Appeals for the District of Columbia Circuit.

MPAA argues in favor of a partial distribution in the face of these appeals and in the face of Section 809 of the Copyright Revision Act of 1976, which prohibits the Tribunal from distributing any royalty fees "subject to an appeal."

The statute contains no suggestion that the Tribunal seek to identify issue by issue what the likely result will be should any appeal be successful. The statute contemplates that if there is an appeal challenging the fundamental lawfulness of the proceeding, there is a stay of distribution until the appeal is resolved. Since the funds are invested in interest-bearing securities and since no single entity can be said to have a vested interest in any part of the fund until there is a final order which is no longer subject to further administrative or judicial review, it can hardly be contended that delaying distribution as contemplated by the statute works a hardship on any entity. Should funds be distributed to parties ultimately determined not to be entitled to them, moreover, recovery with appropriate interest assessments could be enormously troublesome, if not impossible, to achieve.

MPAA's position contains a logical fallacy, as well as the legal infirmity; it rests its request on its own self-serving assessments of the positions of other parties before the Tribunal

and on appeal. Essentially, MPAA says that it is entitled to receive now the lowest award any other party proposed for it below. MPAA does not address the prospects that (1) more than one of the present appellants might prove successful, or (2) the challenge to the administrative proceeding itself will prevail. If the sports interests succeed in their quest for a thirty-percent award and NAB prevails in its quest for an award greater than twenty percent, it can hardly be said that MPAA's final award will approximate what it says should now be conceded it; music and public broadcasting additionally must be accommodated. Similarly, CBC proposed an award of fifty percent (before consideration of the compilation and syndicated exclusivity issues) to MPAA and an award of twelve percent to the Joint Sports Claimants. It cannot be fairly said that CBC would continue to propose fifty percent for MPAA if sports is awarded the thirty percent which the Joint Sports Claimants seek. These are the types of controversies which are still present.

Beyond that, the broadcast interests have challenged the entire proceeding. They argue, for example, that since the Tribunal allegedly failed to give prior notice of the standards on the basis of which it ultimately based the September 23, 1980, final determination, the Tribunal must start with new hearings after announcing the new standards which arguably will be required by the Court's decision. Should this view prove correct, of course, the Tribunal will be no further along with this proceeding than it was when it declared a controversy on September 11, 1979. Although each party might have conceded to each other party some portion of the fund at that time, no one would have suggested that a partial distribution would have been lawful.

We simply find no statutory authority for making a partial award at this time. Given the nature of the issues before the Court and given the lack of hardship which any entity can lay claim to under the scheme presently in force, we today deny MPAA's request for partial distribution.

Clarence L. James, Jr.
Chairman