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Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

ORIGINAL

In The Matter of)
) Docket No. 79-1
1978 Cable Royalty)
Distribution Proceeding)
_____)

BRIEF OF NATIONAL PUBLIC RADIO
IN SUPPORT OF REINSTATEMENT OF AWARD

The Copyright Royalty Tribunal ("the Tribunal") has asked whether "the record of the 1978 distribution proceeding supports an award of 0.25% to National Public Radio." National Public Radio ("NPR") believes that it does and urges the Tribunal to reinstate that award.

1. The Evidence Supports an Award

The Tribunal established three primary and two secondary factors as guides to its allocation of royalty shares. The primary factors were the harm caused to copyright owners from cable retransmission of their work; the benefit derived therefrom by cable systems; and the marketplace value of the works transmitted. The secondary factors were the quality of the copyrighted work and time-related considerations. 45 Fed. Reg. 63035; Slip op. at 11. Applying those criteria to the record, an award should be made to NPR.

a. Harm

NPR identified two specific harms resulting from the retransmission of its signals. The first is harm to the public radio system, which was designed to develop local public radio stations around the country; the majority of programming on NPR stations is locally originated and is intended to serve particular community needs. Tr. 5/6/80, pp. 91-92 (Mankiewicz). ^{1/} Mr. Mankiewicz testified that cable importation of distant NPR signals "is a handicap . . . to the formation in that community of a full-service public radio station." Ibid. The second harm is to the financial well-being of public radio stations. The importation of distant NPR signals can reduce local support for existing NPR stations, thereby thwarting local fundraising and causing distinct "dollar harm" (Tr. 5/6/80, p. 98 (Mankiewicz)):

[I]f a public radio station is, for example, the only classical music station in its community, as many, many, many public radio stations are, and similar signals, similar format, is then brought by a cable system, it would then be much more difficult for that station, at the time of its annual fund-raising drive, to be as successful as it had been, which would not only inhibit its programming capability, but also its budget for the following year . . .

See also, Tr. 5/6/80, p. 135 (Moody). Both harms were specifically noted by the Court of Appeals. Slip op. at 31 n.29.

^{1/} References to the transcript indicates the date, page and witness.

As the Court of Appeals also noted, the Tribunal has not generally required quantitative proof of harm. Slip op. at 30 n.29. The Court quoted the Tribunal's finding that (45 Fed. Reg. 63035):

[a]lthough some claimants offered no specific financial evidence but only generalized statements in support of their claim of harm from the importation of distant programs, we conclude that most claimants in varying degrees have sustained harm . . .

We would ask that this presumption similarly be applied to NPR, especially in light of the specific types of financial harm proved by NPR.

b. Benefit

The Tribunal similarly assumed benefit to cable systems from retransmission (45 Fed. Reg. 63036; quoted in Slip op. at 31 n.29):

The Tribunal concluded that there is no readily available measure or gauge in quantitative terms of the benefit derived by cable systems from the carriage of particular programs.

NPR did introduce evidence that cable systems benefit from the retransmission of its signals. Testimony showed that one-third of NPR's claiming stations were retransmitted on a "select signal" basis, which requires a cable system to maintain a separate antenna costing between \$400 and \$1,000 per signal. Tr.

5/6/80, p. 114 (Moody); Cable Radio Report and Order, 67 F.C.C.2d 491, 500 (1978). These signals must have some value to justify the expense. Even to receive and transmit signals via "all-band" costs a cable system about \$1,000, an expense that cable operators similarly would not incur if radio were not of value to their subscribers. Ibid. There was also evidence that some cable systems receive additional fees for radio service. Tr. 5/6/80, p. 68 (Mankiewicz). See Addendum B, Statement of NAB. NPR programming had been requested by a new cable system which reported customer inquiries about public radio. NPR Exhibit D.

Most significantly, NPR introduced substantial evidence of the value of its programming to cable operators because it is unique and more likely to offer an alternative to the radio broadcasts that are locally available (Tr. 5/6/80, p. 72 (Mankiewicz), quoted in Slip op. at 24-25):

Almost all commercial radio systems, or radio stations, have the same sound. I mean -- what I'm saying is this, I don't see the value of a cable system, a cable operator, taking the signal of a rock and roll station from Cincinnati; and sending it to, let's say, Detroit, because there are rock stations in Detroit which provide exactly the same sound.

But I would guess that in neither community are there the sounds that can be heard on NPR member stations.

c. Marketplace Value

The third primary standard for royalty distribution is the marketplace value of the transmitted work. As a non-commercial entity, NPR, like the Public Broadcasting Service ("PBS"), does not have ratings or license fees which can establish marketplace value. In awarding royalties to PBS, even though that claimant did not demonstrate the actual marketplace value of its signals, the Tribunal acknowledged the difficulty for public broadcasting of ascertaining the market value of its programming. 45 Fed. Reg. 63040. A similar approach can and should be taken with NPR's claim. NPR's programming is mandated by statute to be costly and to supplement commercial audio programming. 45 Fed. Reg. 63031. Like PBS, NPR's unique programming gives it special value to cable operators. The 1979 Carnegie Commission Study found that 85 percent of commercial radio stations fall into one of five major format categories, while 98 percent of NPR stations provide alternatives to those categories. 45 Fed. Reg. 63031; Tr. 5/6/80, pp. 72-73 (Mankiewicz). Moreover, cable systems are less likely to originate their own audio programming than they are to create video programming; in 1977, cable systems originated only 18 percent of their audio programming compared to 54 percent of their video programming. 45 Fed. Reg. 63031; Statement and Testimony of NPR, pp. 2-3.

Indeed, the 1978 decision reflects the Tribunal's apparent conclusion that public radio signals have value to cable systems. Although the Tribunal found no evidence that commercial

radio had such value, it noted the unique quality of public radio programming, which "provides a service not otherwise available". 45 Fed. Reg. 63040.

d. Extent of Carriage

The 1978 decision did indicate concern over whether the "extent" of radio carriage had been established in the record. Ibid. The Court of Appeals noted that NPR had made "a stronger showing" that its signals were the subject of distant cable carriage than had commercial radio. Slip op. at 29. Moreover, the Court suggested that "the way is open . . . for the Tribunal to reinstate its initial allocation to NPR," indicating that the record could support an allocation. Slip op. at 36.

NPR cited at least one instance of distant carriage for each of the sixty-one NPR member stations submitting claims. NPR Letter of July 31, 1979; Slip op. at 29. Each claim represented that that station's signal was carried "beyond the station's primary coverage area" by one or more named cable systems, which constitutes distant retransmission under the Copyright Act. 2/

2/ For radio, the "local service area" is the "primary service area" as defined by the FCC. 17 U.S.C. § 111(f). That term is defined by the FCC only with respect to AM stations as "the area in which the ground wave is not subject to objectionable interference or objectionable fading." 47 C.F.R. § 73.11(a). Although no such definition directly applies to FM broadcasters, the House Report accompanying the Copyright Act (H.R. Rep. No. 94-1476, supra, at 100) refers to FCC regulation 47 C.F.R. § 73.311, which sets forth similar requirements for FM stations. This is a term which generally means the area effectively served by a station. One of the Act's proponents, (Cont'd)

Testimony before the Tribunal confirmed that each station listed cable systems outside their primary coverage area carrying their signal. Tr. 5/6/80, p. 122. This is concrete evidence of carriage.

There is also data in the record which would enable the Tribunal to evaluate generally the extent of distant carriage of radio generally. The 1977, Federal Communications Commission Cable Radio Report and Order, 67 F.C.C.2d 491, 501 (1978), found that 51 percent of all cable systems then carried all-band FM signals; in larger communities, 56 percent carried all-band and 27 percent selected particular signals for carriage; only 10 percent did not carry radio. NPR Exhibit E. "All-band" carriage is the retransmission of all FM signals "generally receivable" by a cable antenna. 37 C.F.R. §§ 201.17(d)(10), 201.11(a)(4). A cable receiver collecting all FM signals generally receivable off-air will retransmit many signals considered distant under the Copyright Act. The cable system antenna is much more sensitive than those in ordinary household radios and is usually located at a specifically selected point, ordinarily one of great height, so as to receive as many signals as possible, including those out-

side the range of community households. ^{3/} See Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366 (1965); Note, Community Antenna Television: Survey of a Regulatory Problem, 52 Geo. L. J. 136, 137 (1963); S.H. Robb, Television/Radio Age Communications Coursebook, p. 4-2.

Further evidence that cable systems carried distant -- as opposed to local -- radio signals is found in a 1976 National Association of Broadcasters Study in which 58 percent of the radio stations polled reported cable importation of "distant radio signals" into their local markets. ^{4/} Ninety-seven percent

^{3/} On cross-examination of Ms. Moody of NPR about this data, one claimant -- relying upon language in the FCC Order characterizing as "locally available" all FM signals receivable "off-air" -- appeared to argue that "all-band" carriage is "local," not "distant." Tr. 5/6/80, p. 126; App. 1646. Such an assertion is unsupported by the definitions and uses of those terms. See p. 6 & n.2, supra. Congress understood that signals received off-air by a cable antenna would naturally include "distant" as well as "local" signals. In fact, Congress specifically rejected an attempt to define as "local" any signals receivable off-air. An opponent of that amendment stated (122 Cong. Rec. 32010 (1976) (Rep. Danielson)):

To include as "local signals" those receivable off the air by direct interception of a free space radio wave would permit signals received from over 100 miles distant using a 1,000 foot antenna to be considered "local signals" even though such places are clearly beyond the local market area of the primary transmitters.

See also, H.R. Rep. No. 94-1476, supra, at 362-363 (concurring views of Rep. Danielson).

^{4/} NPR's Statement, Exhibit E, Attachment at p. 14 (emphasis in original). NAB member stations in six (of seventeen) NAB districts "most likely to have experienced the effects of cable" were polled. Id. at 13.
Although there is no explicit evidence of the definition of (Cont'd)

of the distant signals were FM. The reliability of those reports is indicated by the fact that 34 percent of the answering stations reported that cable radio carried distant signals offering the same network service as that of a local station. Moreover, 48 percent of the responding stations reported "that a distant station was being 'leapfrogged' into the market (i.e., that the imported station was further away than some stations not carried by the cable system)." NAB Study, Attachment to Exhibit E to NPR's Statement, p. 3.

NPR's own survey of radio carriage by 50 cable systems confirmed the frequency of distant carriage. NPR selected a random sample of cable systems according to the size of the market served by the system. ^{5/} NPR reviewed the Statements of Account for each of the sample systems, locating on radio contour maps each NPR station received either as a select signal or via FM all-band to determine whether the retransmission was distant or local. It found that 72 percent of the NPR stations carried by the sampled systems were imported from distant communities. ^{6/}

"distant" used by the NAB, the Study asked members about cable systems "operating in their local radio market" (Id. at 13) a definition that approximates the approach of the Copyright Act. See n.2, supra.

^{5/} For example, since 20 percent of all cable systems are in the top 50 markets for the country, 20 percent of NPR's sample were systems in those markets. Within each market category, NPR randomly selected the cable systems.

^{6/} NPR's survey also reviewed the other radio signals carried by the sampled systems, finding that NPR's programming provides an alternative to five standard formats offered by the generally available commercial stations. NPR Proposed Findings of Fact, p. 9.

NPR Proposed Findings of Fact, p. 8.

In sum, we believe that this record supports reinstatement of the Tribunal's initial allocation to NPR. See Slip op. at 36. In evaluating the evidence, it is appropriate, too, for the Tribunal to consider the difficulties imposed on radio claimants by the Copyright Office's "inadequacies in . . . information-gathering procedures." Slip op. at 24; see id. at 24 n.22. These inadequacies deny to radio claimants the kind of data on radio carriage that is readily available to television claimants. Slip op. at 24, n.22.

e. Secondary Factors

The record amply demonstrates the high quality of NPR's programming. NPR and its member stations are both producers and program syndicators. Tr. 5/6/80, p. 56. They provide extensive daily news programming, cover live major public events and produce classical, jazz and folk music shows, fine arts programs, original documentaries and dramas as well as educational and specialized audience programs. Tr. 5/6/80, pp. 54-56 (Mankiewicz). Public radio productions have won almost every award for broadcast programming. Exhibit C to NPR's Statement. The Tribunal has acknowledged the value of public broadcasting generally, 45 Fed. Reg. 63029, and the quality of public radio programming in particular, 45 Fed. Reg. 63031, 63040. See Slip op. at 29-30. With respect to time-related considerations, NPR submitted evidence that member stations produce approximately 59 percent of their daily programming, with another 21 percent,

on average, coming from NPR itself. 45 Fed. Reg. 63031.

2. There Is No Dispute as to the Magnitude of NPR's Claim

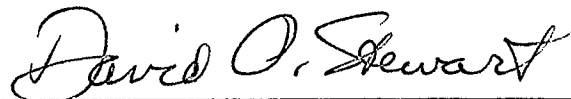
Originally, the Tribunal had to decide whether it was possible to ascertain an appropriate allocation for NPR. It was evident that the determination of an allocation between a radio claimant and the television claimants was necessarily somewhat arbitrary. And NPR acknowledged that there was no formula, no "comprehensive . . . data," no "hard and fast statistics" pointing to an obvious percentage. Tr. 5/6/80, pp. 63, 107 (Moody). But that question is virtually moot at this point in the proceeding because this remand is to determine whether or not to reinstate the initial 0.25% allocation -- not to assess the record anew to fix such a percentage. Moreover, the fact that this Tribunal has twice -- initially, in the 1978 proceeding, and again in the 1979 proceeding -- found NPR entitled to 0.25% clearly demonstrates that such an award is warranted.

3. Policy Considerations

There is yet another reason to provide an allocation of 0.25% of the 1978 Fund to NPR. To the extent that the Tribunal sits in a quasi-legislative role (Brief of the Copyright Royalty Tribunal, p. 18 n.12), it is wholly appropriate, and in fact necessary, for real world consequences and policy considerations to play a role in its determinations. The Tribunal and all of the parties appearing before it in these proceedings know that distant public radio signals are and were in fact carried by

cable systems. The situation would be different if the record subsequently developed before the Tribunal (at great cost) did not confirm substantial distant cable carriage of NPR signals; that record, in fact, strongly confirmed the previously submitted data. The Copyright Act is designed to compensate creative talents for the use of their work by cable systems. Even if the record before the Tribunal in 1978 was less than perfect, as long as that record may support an award, in fairness, NPR should receive an award in compensation for the commercial use of its programs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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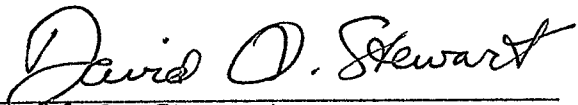
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