

Before the
COPYRIGHT ROYALTY TRIBUNAL
1111 20th Street, N.W.
Washington, D.C. 20036

IN THE MATTER OF)
)
CABLE ROYALTY DISTRIBUTION)
PROCEEDING)

MEMORANDUM BRIEF

I

PRELIMINARY STATEMENT

This memorandum brief is submitted on behalf of Golden West Broadcasters, licensee of television broadcast station, KTLA, Los Angeles, California. KTLA timely filed its claim for cable copyright royalties. This brief is filed pursuant to the notice published by the Copyright Royalty Tribunal (CRT) 44 Federal Register, No. 202, October 17, 1979.

This brief will discuss the following issues:

1. Whether KTLA may assert a claim for cable copyright royalties as the copyright proprietor of the entire broadcast day as a "compilation."
2. Whether KTLA, as the exclusive licensee of television rights in the Los Angeles market is a copyright owner which may assert a claim for cable copyright royalties for distant cable retransmission of such programs within its exclusive-licensed area.

II

KTLA IS THE COPYRIGHT OWNER OF ITS ENTIRE BROADCAST DAY AS A
COMPILATION

A. THE PROGRAMMING OF A TELEVISION BROADCAST STATION
CONSTITUTES A COMPILATION REFLECTING ORIGINALITY AND CREATIVE
EFFORT

Section 103 of the Copyright Act of 1976, 90 STAT 2545,
17 U.S.C. §101 et seq, (herein '76 Act") provides that "The sub-
ject matter of copyright as specified by section 102 includes
compilations..." Subparagraph (b) of §103 states that "the
copyright in a compilation...extends only to the material contri-
buted by the author of such work..." And section 102 of the '76
Act still imposes the requirement of originality.

We submit that the programming of a broadcast day con-
stitutes a compilation.

The 76 Act defines a "compilation" as "a work formed by
the collection and assembly of preexisting materials or of data
that are selected, coordinated or arranged in such a way that the
resulting work as a whole constitutes an original work of author-
ship."

The broadcast day for KTLA, an independent station,
consists primarily of local programming created and produced by
the station and syndicated and film or tape product; and the copy-
right owner of such syndicated and film fare is generally a busi-
ness entity other than KTLA.

The local programming of KTLA consists of the following:

1. newscasts;
2. documentaries and interviews;
3. public affairs programs;
4. instructional and informational programs;
5. sports programs;
6. religious programs;
7. entertainment programs;
8. public service announcements;
9. commercial announcements;
10. station identification;
11. children's programs and other broadcast material

Other than entertainment and children's programs, the categories listed above are for the most part locally created and produced. KTLA operates 24 hours per day. We estimate that 80 to 85% of its programming consists of entertainment and children's programming and these categories use syndicated and filmed product. But an hour classified as an entertainment or children's program will have integrated into the tape or film fare, locally produced commercial and public service announcements, etc.

The basic role and responsibility of a television broadcast station is to produce, select and arrange programs, advertisements, announcements and other broadcast matter into an attractive daily package responsive to the needs and tastes of its listening-viewing audience. This calls for originality and creative effort on the part of the television station.

The critical element in television broadcasting is the selection and arrangement of material to create a cohesive, attractive blend of program material which conveys to its listening-viewing audience the "image" of the station.

A 24 hour broadcast day may include as much as 45 individual programs and hundreds of commercial, promotional and public service announcements. Programming is available from hundreds of syndicated programs offered by producers as well as numerous film packages. We have previously listed the considerable amount of local programming produced by KTLA which may be exhibited separately and is also integrated into the syndicated and film product owned by others. Any television operator, and this is particularly true of KTLA, an independent station, is primarily concerned with the flow and character of its programming and the first ingredient for proper flow and character is the selection of the program. KTLA and the three other independent VHF stations licensed to Los Angeles are competing against the three network-owned stations. In order to create an image it must engage in alternative programming. KTLA's news programming cannot compete with the network news. Thus it engages in alternative or counter-programming by exhibiting a motion picture or situation comedy against the network news.

In selecting programs, KTLA and other television stations are concerned with the flow of programming; i.e., KTLA will retain its listening-viewing audience if the "Dinah Shore Show" is preferably followed by the "Mike Douglas Show". On the other hand,

there is generally a loss in the flow of the programming if an action-packed dramatic series is programmed after a variety talk show. The action-packed dramatic series generally attracts a different listening-viewing audience. Thus an important ingredient in the selection of programming is to effect the proper sequence and transition from one program to another. This must be effected in a professional manner calling for creative skills. The same creativity is required for children's programming. The "Popeye" cartoons enjoy a high rating. KTLA would lose its listening-viewing audience if it followed the cartoons with a religious program. On the other hand, a family type of program would more likely retain this listening-viewing audience.

The demographics of a station's actual and potential audience is extremely important in the selection of programming exhibited over a station and the ultimate "image" of the station. A television operator in creating this "image" must consider its market, competition, ratings of the station, audience reaction to programs, etc.

The voice of the announcer and of other personnel employed by the station in conjunction with its local and syndicated and film program is an important ingredient of the station's image; it can effect changes in the ratings or popularity of the station. The manner in which station identifications are made, the introductions to commercials and from commercials back to programming are elements of the station's image. The selection of the personnel and format for news and weather broadcasts and the

introduction and outgoing for news and weather is extremely important.

Similarly, the acceptability of commercial announcements must likewise be considered. KTLA imposes limitations on the number of commercials it will broadcast and the duration of the same. The "intrusive commercial" is objectionable. The station in passing upon the acceptability of a commercial may suggest to the advertiser that the commercial be "equalized." In other words, the "intrusion value" can be lessened by deleting background noises.

The intertwining of local programs with promotional announcements, commercial and public service announcements and other program material, reflecting KTLA's image and style lends cohesiveness and distinctiveness to the presentation of the station's daily array of programming. This is a continuous process of selection and arrangement requiring originality, creativity, skill and expertise by the television operator.

The foregoing demonstrates that an FM or television station's broadcast day and significant portions thereof fall squarely within the definition of a compilation. A compilation has previously been defined in 17 U.S.C. §101 as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship..."

House Report No. 94-1476 94th Cong. 2d Sess to S.22 (1976)
at 57 states:

"Section 103 complements section 102; A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Section 103(b) is also intended to define, more sharply and clearly than does section 7 of the present law, the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The

most important point here is one that is commonly misunderstood today; copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works" which are defined in section 101, comprehend every copyrightable work that employs preexisting material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts.

A "compilation" results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright. A "derivative work," on the other hand, requires a process of recasting, transforming, or adapting "one or more preexisting works"; the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted."

Thus a compilation which is copyrightable as a "new version" may consist only of the selection and arrangement of preexisting material. See Warner, Radio & Television Rights (1953) §30 at page 46; §31a at page 51 ff. But as discussed above, a broadcast day contains much more than the selection and arrangement of preexisting material and data; it contains all of the elements of a copyrightable "new version" and thus it is subject to copyright protection separate and independent from any copyrights that may subsist in the preexisting material. See House Report, supra.

As discussed above, the broadcast day constitutes a compilation reflecting originality and creativity on the part of the station operator.

The phrase "original works of authorship" 17 U.S.C. §102, which is not defined in the '76 Act, incorporates without change the standard of originality established by the courts under the Copyright Act of 1909. House Report at page 5.

"Obviously no rule can be prescribed to measure and define originality, other than to state that it requires independent labor plus some creative ability, skill and discretion.... Statutory copyright embraces such items as a city directory, trade catalogues, code books, cable and telegraph code compilations, character analysis charts of handwriting, a freight tariff index, a new arrangement of a musical composition, horse-racing charts, race-results stud book of brood mares, race track programs, etc. But these works are original and hence copyrightable because they 'ordinarily result from the labor or assembling, connecting and

categorizing disparate facts which in nature occurred in isolation. A compilation in short is a synthesis' which reflects 'individuality of expression or must reflect peculiar skill and judgment'." Warner, supra §30 pp 46-47. See also L. Batlin & Son, Inc. and Snyder, 536F2d. 486 (2d Cir. 1976).

We submit that the broadcast day falls squarely within the parameters of a compilation as set forth in §103 of the '76 Copyright Act; and the selection and arrangement of programming for a broadcast day demands independent labor, creative ability, skill and discretion.

B. A STATION OWNER IS THE COPYRIGHT PROPRIETOR OF ITS ENTIRE BROADCAST DAY

Various sections of the '76 Copyright Act explicitly recognize a station's status as the copyright owner of its entire broadcast day; as such, the station licensee should receive royalty fees pursuant to the provisions of §111(d) (4) (A) and (C).

Sections 102 and 103 when read together explicitly recognizes that copyright protection subsists in a compilation (broadcast day) and that the broadcast day is protected as an independent work. The House Report at page 57 refers to the copyright as a "new version" but limits the copyright only to the material added by the later author. The copyright in the new work..."does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. §103(b).

We submit that the station operator is the copyright proprietor of its entire broadcast day as a compilation; and as

such, it is entitled to royalty fees pursuant to §111(d)(4)(A) and (C). This is reinforced by the express language of §408(a) which provides that... "the owner of copyright or of any exclusive right in the claim may obtain registration of the copyright claim..." with the Copyright Office. And see House Report at 152 wherein it is stated:

"Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by 'the owner of the copyright or of any exclusive right in the work' at any time during the copyright term."

Since a station operator can register a compilation; i.e., the broadcast day with the Copyright Office pursuant to §408(a), the copyright proprietor of the broadcast day enjoys all of the exclusive rights in copyrighted works as set forth in 17 U.S.C. §106, including the royalty fees prescribed by §111(d)(4)(A) and (C).

In addition to the foregoing, §501(a) furnishes the station operator with a remedy for copyright infringement for "anyone who violates any of the exclusive rights of the copyright owner. And subparagraphs (c) and (d) of section 501 contain two provisions conferring standing to sue under the statute upon broadcast stations in specific situations involving secondary transmissions by cable systems. The first situation is where a local television broadcaster licensed to transmit a work sues a cable system importing the same version of the work in the broadcaster's local service area in violation of §111(c). The reason for this special provision is not clear since it would appear that a television station as the

copyright owner of the broadcast day with the right to transmit the work would have standing to sue as the copyright owner and/or the "owner of an exclusive right under a copyright." See Nimmer On Copyright, (1979) §12.02, page 12-26. The second situation (§501(d)(ii)) confers standing upon any radio station in whose local service area the secondary transmission takes place. See House Report at 159.

II

KTLA AS THE EXCLUSIVE LICENSEE OF TELEVISION RIGHTS IN THE LOS ANGELES MARKET IS THE COPYRIGHT OWNER OF THE SAME AND SHOULD PARTICIPATE IN CABLE ROYALTY FEES DEPOSITED WITH THE REGISTER OF COPYRIGHTS

KTLA exhibits syndicated product either on film or videotape and feature length film. A syndicated program is usually a half hour or hour in length and may be on film or videotape; a feature length motion picture can vary in length from sixty minutes to two and a half hours. The norm is usually ninety minutes. A feature length program can be exhibited via tape as well as film.

KTLA enters into licensing agreements for syndicated and feature length product. These licensing agreements grant KTLA exclusive television rights for such product to a specific geographic area; i.e., a 35 mile zone as determined by reference points contained in 47C.F.R. §76.53. See 47C.F.R. §76.658(m); and the licensing agreements are likewise restricted as to term -- a specified number of runs to be exhibited within a specified time period.

The Federal Communications Commission (FCC) has likewise adopted syndicated program exclusivity rules. These rules are intended to furnish protection for non-network programming of television stations in the major markets. The rules furnish exclusivity rights to major market television stations within their market; i.e., within a thirty-five mile zone.

Los Angeles is in the first 50 markets. In the first 50 markets, protection is afforded for the duration of the contract between a program producer and a local broadcaster, whether or not the broadcaster shows the program during the contract, 47C.F.R. §76.153(c).

Thus KTLA acquires the exclusive television rights to a syndicated show or a film package. Under the terms of the licensing agreements, the program supplier is precluded from licensing the syndicated or film product to any other television broadcast station and/or cable system located within 35 miles of Los Angeles. KTLA has thus acquired the exclusive television rights to exhibit specified syndicated and film product in a specific geographic area -- the 35 mile zone for the duration of the contracts.

Under the 1909 law, the doctrine of indivisibility of copyright precluded a transferee or a licensee of any of the bundle of rights comprising copyright from instituting an action for infringement unless the latter had joined the copyright proprietor as a party to the suit, Warner, supra, §53 at 130. And see Witmark & Sons v. Pastime Music Co., 298 Fed 470 (D.C.S.C. 1924), affirmed per curiam 2F2d 1020 (4th Cir 1924).

But section 201(d)(2) of the '76 Act removed this impediment from the statute and explicitly recognized the principle of divisibility of copyright.

We quote the text of §201(d) of the '76 Copyright Act:

"(d) Transfer of Ownership.--

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

This statutory provision has been clarified by the House Report supra at p. 123, underscoring ours:

"Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a

copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "Transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he or she owns, is entitled "to all of the protection and remedies accorded to the copyright owner by this title." It is thus, clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right."

Thus the Copyright Act of 1976 clearly and unequivocally recognizes KTLA's status as the copyright owner of the television rights in the Los Angeles market; and KTLA is entitled to receive the royalties for distant signal retransmission of programs embodying such exclusive television rights within its area of geographic exclusivity.

KTLA's status as the copyright proprietor of the television rights in the Los Angeles geographic area is confirmed by other statutory provisions. As previously discussed §408(a) provides that "the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim..." Similarly §501(c) confers standing on KTLA to sue in its own name as the copyright owner any person or other form of business entity which infringes any of the station's exclusive rights as set forth in §111(c) of the statute.

We submit that KTLA is entitled to all of the royalties resulting from distant signal retransmission into its geographic area, and the business entity which licensed the exclusive television rights to KTLA does not and should not participate in the receipt of such royalties. KTLA is the copyright proprietor of the television rights and not the program supplier. KTLA bargained for exclusivity in negotiating the licensing agreement with the program supplier; more importantly, the license fee paid the program supplier reflects payment for such exclusivity. Furthermore, KTLA bears the direct injury from a cable system's importation of the programs on a distant signal. The importation of distant signal derogate and compromise KTLA's exclusive rights.


CONCLUSION

For the foregoing reasons, it is submitted that KTLA should participate in the distribution of cable royalty fees for the following categories of programming:

1. as the copyright owner of all locally-produced programs. This is particularized in detail on page 3 of this memorandum brief;
2. as the copyright owner of its entire broadcast day; and
3. as the copyright owner of the exclusive television film rights for syndicated and feature-length film product exhibited over KTLA's facilities in the Los Angeles market.

Respectfully submitted,

Golden West Broadcasters,
licensee of KTLA

by 
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CERTIFICATE OF SERVICE

I, Shirley Aranda, do hereby certify that I have, this 14th day of November, 1979, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing Notice of Appearance to counsel listed in the attachment hereto.

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