

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D. C.

In the Matter of

Cable Royalty)
Distribution Proceedings)

MEMORANDUM OF AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers (ASCAP) submits this memorandum in response to the Copyright Royalty Tribunal's notice of October 17, 1979 (44 FR 59930) directing interested parties to submit a legal brief or memorandum concerning certain issues of copyright ownership which might affect claims for cable compulsory license fees under 17 U.S.C. §111.

INTRODUCTION

Although several hundred claimants have filed claims for cable compulsory license fees for 1978, there are only four major types of claimants: 1) music performing rights organizations, including ASCAP; 2) motion picture and other program producers; 3) sports interests; and 4) broadcasters.

Throughout 1979, spokesmen for these four groups attempted to reach a voluntary agreement which would render moot the necessity for a Tribunal distribution proceeding for 1978 compulsory license fees. The first three groups -- the music, motion picture, and sports interests -- recognized all four groups' rights to claim cable compulsory license fees. The bases for those claims were the commonly understood principles of copyright ownership which, it was thought, were apparent to everyone:

-
-
-

Copyright owners of musical compositions grant music performing rights organizations, such as ASCAP, the right to license nondramatic public performances of their works. The music performing right organizations in turn license to music users the non-exclusive right to perform publicly the copyrighted musical compositions in their repertoires. The performing right organizations thus made a claim for nondramatic public performances of music by means of the cable systems' secondary transmissions.

The motion picture and program producers similarly claimed a share of the cable compulsory license fees for the performances of their copyrighted works in cable secondary transmissions.

The sports interests claimed they were the owners of the rights to transmit their sporting events and so were entitled to a share of the cable compulsory license fees.*

These groups assumed that the broadcasters' claims would be for the programs they created -- principally news and public affairs programs -- which were carried by cable secondary transmissions.

Thus, going into the negotiations, it appeared to three of the four major groups of claimants that the only question to be decided was what portion of the total cable royalties each group should receive. The broadcasters, however, advanced

* A question arose concerning the ownership of copyright in such sporting events: was the copyright owned by the teams involved, or had the ownership of the copyright, including the right to claim cable royalties, been transferred by the sports interests to the broadcasters by contract? We are not addressing that question, which the Tribunal included in its notice of October 11, 1979, as it pertains solely to an issue in dispute between broadcasters and the sports interests, and will in no way affect ASCAP's claim to cable royalties.

claims which were based on previously unheard of principles of copyright ownership:

First, they claimed that they had the right to make a "compilation," which consisted of the entire broadcast day. They argued that the broadcast day -- the station's "signal" -- was what the cable systems carried. That, they said, gave them the right to collect royalties for secondary transmissions of each day's "compilation." They ignored the following facts:

-- The copyright owners had not granted any right to make a "compilation."

-- Even if a right to make a "compilation" were implied, the law would give them ownership only of the new material they added, and not ownership of the preexisting copyrighted works created by others.

-- Cable systems and their subscribers are interested not in any station's "signal," but in the content of the programs.

-- Any new material they added was, for cable royalty purposes, worthless compared to the value of the preexisting works which others had created.

Second, they claimed that, because certain stations were granted the exclusive rights to broadcast copyrighted works within their markets, they were copyright owners of those exclusive rights. Cable carriage of those works through distant signal importation, they said, violated their exclusive rights. And, they concluded, their recourse was to collect the compulsory license fees for those secondary transmissions. They ignored the following facts:

-- Insofar as music is concerned, they are not granted exclusive rights.

-- The broadcasters obtain only exclusive rights to broadcast over the air in their markets; no other right, such as the right to retransmit by cable or collect cable royalties, is granted to them.

-- Their recourse for cable violations of market exclusivity is not under the copyright law, but under FCC regulations.

These unprecedented claims stymied the voluntary negotiations. Accordingly, the parties suggested, and the Tribunal agreed, that the Tribunal should decide these ownership issues at the outset of the distribution proceedings, in the hope that its decision would lead the parties back to the bargaining table.

Before turning to the merits of these claims, a brief reference to the legislative history of the copyright law is in order, for it shows that Congress never intended to compensate broadcasters on either of these bases.

THE LEGISLATIVE HISTORY IS CLEAR:
BROADCASTERS ARE ENTITLED TO COLLECT
CABLE ROYALTIES ONLY FOR THE COPYRIGHTED
PROGRAMS WHICH THEY THEMSELVES CREATE AND OWN.

Congress intended cable royalties to be divided among owners or representatives of owners of copyrighted works carried on secondary transmissions by cable systems: music performing right organizations, motion picture and other program-producers,

sports interests, and broadcasters. At no time during the long revision process did broadcasters suggest that they were entitled to royalties for "compilation" or "syndicated exclusivity" reasons. Rather, on virtually every page of the legislative history, one finds the assumption that the traditional copyright owners would share in cable royalties.

For example, during the 1973 Senate Hearings, Jack Valenti, President of the Motion Picture Association of America, Inc., traced the history of separate payment to copyright owners for separate uses of their works, and noted that cable systems should pay copyright owners their fair share:

"Multiple uses of copyrighted works have traditionally led to the payment of separate royalties for each income producing use . . .

. . .

The history of the motion picture industry illustrates this point well. The sources of the industry's income have varied over the years. In pre-television days, motion picture income came primarily from exhibition in theatres. When television became a commercial fact, the feature films produced by the motion picture companies and already shown in theatres were licensed under copyright law to television stations and networks for broadcasting into the nation's homes and additional fees were paid for the separate broadcasting use. Fees for television and network use did not include the right to use the films for non-network broadcasting. The subsequent showing of films in local stations (called "syndication" in the trade) provided an additional source of income for the program producers.

The same pattern of separate payments for different uses was applied when films made for television (as distinct from theatrical exhibition) began to come into widespread use. Thus original films made for television were licensed to television networks and then to local stations. These licenses did not permit use of the TV films by CATV, a use reserved to the licensor as a future source of income.

. . .

In order to permit producers to amortize their investment and to at least break even, it would seem natural that CATV contribute a fair share out of the cable systems' income from their use of copyrighted films. The addition of license fees from cable systems as a new source of income will be an incentive to increase and improve the production of programs." Hearings on S.1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Sen. Jud. Comm., 93d Cong., 1st Sess. (1973) (hereafter, "1973 Senate Hearings") at 305-306.

Commissioner Brennan, then chief counsel to the Senate Subcommittee, noted the motion picture program producers' interest in the cable provision in a question to Mr. Valenti:

"Mr. Valenti, movie companies and program producers have an interest in other sections of the bill, in addition to Section 111" 1973 Senate Hearings at 289 (emphasis added).

The notion that the copyright owners in the works carried on cable retransmissions -- and not broadcasters, except to the extent that they owned particular programs -- should receive a share of the cable royalties runs through the 1975 House Hearings as well. Thus, for example, in discussing the ownership of copyrighted works, particularly motion pictures, with Mr. Valenti, Congressman Kastenmeier stated that the motion picture company would be the owner of copyright. The broadcaster would only be a licensee, and its rights would be limited to the rights conveyed by contract. The colloquy was as follows:

"Mr. Kastenmeier. What rights in the program series, what rights does a network customarily have in that program-- that is to say, each of the programs? Does it have an exclusive? Does it have a right to sue others for infringement?

Mr. Valenti. Absolutely. Yes, sir, it has rights under its license agreement.

Mr. Kastenmeier. What is the nature?

Mr. Valenti. One of our companies holds the copyright, and it licenses the film for a contractual use of that particular series. The licensee may have it under various options of successive year use with possible incremental increases in the rental fee, or whatever. But it is a contractual right, just as I contract with you to rent my house. You have a contract, a lease arrangement.

But, the ownership of the copyright rests with the copyright owner, not with the network, except where the network owns the program itself.

Mr. Kastenmeier. In this case, the copyright owner would be probably a Hollywood production company.

Mr. Valenti. It could be Paramount, MGM, Universal, any one producer or distributor who may have acquired the copyright.

Mr. Kastenmeier. So, it licenses the network for certain uses, maybe it is probably exclusive for periods of time; but the network would not customarily be able to license others to use that program." Hearings on H.R. 2223 Before the Subcomm. on Courts, Civ. Libs., and the Admin. of Justice of the House Jud. Comm., 94th Cong., 1st Sess., Ser. No. 35, Pt. 2 (1975) (hereafter, "1975 House Hearings") at 73 (emphasis added).

And again, in a similar colloquy with Congressman Danielson, the copyright ownership of the program producer was affirmed, and the limited right of the broadcaster noted:

"Mr. Danielson. You mentioned, for instance, Universal would sit down and make this business arrangement. Would Universal--I assume that Universal would buy the copyrightable interest of the artist or the writers, and it would own that interest. Would they retain ownership in the copyrightable interest?

Mr. Valenti. Almost without exception, they have the copyright, or they have the right to license and bargain in that copyright's name. It is theirs.

Mr. Danielson. May I call this type of person the producer?

Mr. Valenti. Yes, sir.

Mr. Danielson. The producer retains the bundle of property. They retain not only--they retain all the copyrightable interest in the production, and the agreement with the broadcasting system is simply a licensing agreement under whatever terms they come to?

Mr. Valenti. Yes, sir." 1975 House Hearings at 742 (emphasis added).

Perhaps most significant in the legislative history were the statements of broadcasters' representatives themselves that they did not own the copyright in most of the programs they broadcast.

For example, during the 1973 Senate Hearings, Vincent T. Wasilewski, the NAB President, said broadcasters had ownership interests in only some programs. He never claimed any broadcaster right to collect compulsory license fees for a "compilation" of the "broadcast day". He was concerned with the compulsory license because cable systems were in competition with broadcast stations: his point was that cable operators should not get a "free ride" under the law by being able to use the copyrighted works of others for free while the broadcasters had to pay for such rights:

"Now, broadcasters have at least two different interests in CATV copyright. First, broadcasters themselves have ownership interests in some copyrighted material that CATV systems continue to take from broadcast stations without payment and sell to the public for a fee. Second, CATV systems are in direct competition with broadcast stations for viewers, listeners, and advertising revenue. This competition is increasing and will continue to increase. Indeed, leading CATV spokesman state repeatedly that they hope and intend cable television will largely, if not entirely, replace free broadcast television.

A law that confers a compulsory copyright license on cable television inherently gives CATV an unfair competitive advantage over free broadcasters, who must bargain for material they use . . ." 1973 Senate Hearings at 377 (emphasis added).

In the 1975 House Hearings, John E. Summers, General Counsel of the National Association of Broadcasters, admitted that creators, and specifically motion picture producers, should be entitled to claim royalties:

"Mr. Chairman, we appear here this morning in favor of reasonable copyright legislation covering all secondary transmissions of cable television systems. As broadcasters, we stand in two sets of shoes this morning--we are copyright owners and we are users of copyrighted material--but our position on the basic tenets of this legislation is the same in regard to both those roles.

. . .

The cable television industry agreed that it ought to pay some royalty for its use, for profit, of copyrighted material. If any element of the Consensus [Agreement] can be termed basic, it is the acceptance, by the parties, of the principle that copyright royalties are legitimately owed to the proprietors of copyrighted material. Creative endeavors, whether the product of motion picture producers or of local and national broadcasters, should not go unrewarded due to the failure to provide for their protection in a copyright law fashioned before the advent of broadcasting and cable television." 1975 House Hearings at 774-775 (emphasis added).

During the course of copyright revision, then, broadcasters agreed that copyright proprietors whose works were used in cable secondary transmissions should share in the cable compulsory license royalties. The Congressional intent is clear: Broadcasters are entitled to cable royalties only to the extent that copyrighted programs which they own are carried on cable secondary transmissions.

As far as music is concerned, the right of performing right organizations to collect cable royalties was never in doubt. Indeed, versions of the copyright revision bill from 1969 through 1973 allocated a specific percentage of compulsory license fees --

15% -- to music. S.543 (Committee Print), 91st Cong., 1st Sess. (1969), §111(d)(3)(C); S.644, 92d Cong., 1st Sess. (1971) §111(d)(3)(C); S.1361, 93d Cong., 1st Sess. (1973), §111(d)(3)(C). This provision was deleted in 1973 to allow the Tribunal to determine the share for music. S.1361 (Committee Print), 93d Cong., 2d Sess. (1973).

THERE IS NO BASIS FOR THE BROADCASTERS'
"COMPILATION" COPYRIGHT CLAIM

A "compilation" copyright is defined in the copyright law. It is a new work formed of preexisting works:

"A 'compilation' is 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. The term 'compilation' includes collective works" 17 U.S.C. §101.

But the fact that a "compilation" copyright exists in the law does not mean that the broadcasters own a "compilation" copyright in the broadcast day.

The right to take a preexisting copyrighted work and incorporate it in a new work, whether that new work be called a "derivative work," a "collective work," or a "compilation," belongs to the copyright owner of the preexisting work. 17 U.S.C. §103(a).

ASCAP's license agreements with local television stations are very specific as to the rights granted. The television broadcaster obtains only, "a license to perform publicly by

television broadcasting on licensee's local television program from [licensee's] television station . . . nondramatic performances of the separate musical compositions [in Society's repertory]."

ASCAP's license agreements with local radio stations are equally specific. They grant, "a license to perform publicly by radio broadcasting on Licensee's local radio programs from [Licensee's] radio station . . . nondramatic performances of the separate musical compositions in the Society's repertory."

Thus, ASCAP's agreements with all broadcasters are limited: ASCAP grants licenses only to perform its members' copyrighted musical compositions. If the broadcasters had been given the right to make a "compilation" -- a new copyrighted work -- incorporating ASCAP compositions, that right would have been expressly granted. It was not.* And, under the normal rules of contract interpretation, in the absence of an express grant, no conveyance of a right should be inferred.

That, we think, should settle the matter. But even if such a right were to be implied, the law is explicit that the rights of a "compilation" owner would not include any right to copyright ownership in preexisting works incorporated in the "compilation", such as the right to make a claim for cable royalties:

* Indeed, ASCAP could not grant such a right even if it wanted to under the Amended Final Judgment in U.S. v. ASCAP, Civ. Action No 13-95 (S.D.N.Y. March 14, 1950), Section IV(A). The members grant ASCAP only the right to license nondramatic performances and ASCAP is prohibited from obtaining any other right from members, or licensing any other right to users.

"The copyright in a compilation or a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and 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).

The Senate and House Reports also emphasize that the "compilation" copyright covers only the material added by the "compiler", and has absolutely no effect on the copyright status of the preexisting material:

"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 another on the copyright or public domain status of the preexisting material." S.Rep. No. 94-473, 94th Cong., 1st Sess. (1975), at 55; H.Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), at 57.

Thus, even if the broadcasters could be said to own a "compilation" copyright in their broadcast day, their rights in that "compilation" would extend only to the material they contribute, as distinguished from the preexisting copyrighted material created by others.

If we assume that the new material added to the preexisting copyrighted works in the broadcast day "compilation" has the requisite degree of originality and creativity to be "an original work of authorship" -- by no means an indisputable assumption -- and also assume that every broadcast day has been "fixed" -- again, a questionable proposition -- the questions then would be what has been added, and what is the new material worth?

⋮

The broadcasters can claim to have added promotional announcements for programs, station identification, and "bumpers" which say things like "NBC -- Proud as a Peacock". Experience teaches that home viewers would rather these items be omitted from the broadcast day and from the secondary transmission. (Indeed, from time to time the networks make attempts to rid the airwaves of much of this "clutter.")

The broadcasters try to make a virtue of necessity by claiming that the very selection and arrangement of the programs they broadcast has copyright value. If broadcasters were entitled to something for these "contributions", at the expense of copyright owners of preexisting works, that something must be insignificant indeed.

There is a curious paradox in their position. They speak of the importance of selection and arrangement in terms of "audience flow," "an attractive daily package responsive to the needs and taste of [the] audience," and so on. What they are saying elliptically -- and what any broadcaster will tell you directly -- is that programs are purchased and schedules arranged to get the largest possible audience, and the highest revenue from advertisers.

The broadcasters are therefore saying that audience size is a determinant of cable royalty distribution. But, throughout the discussions for a voluntary agreement, they have adamantly refused to agree to any distribution on the basis of audience size or similar "qualitative" tests. They know that the programming they create and own -- news and public affairs -- is of little or

no interest to distant cable audiences. Clearly, the programs that do pull audiences and ratings are those created and owned by others.

The cable compulsory license was intended to compensate copyright owners for performances of their works by cable systems. We believe the Tribunal should, in distribution proceedings, function as a surrogate of the marketplace in determining the relative values of the many copyrighted works carried by cable systems. In the marketplace, cable systems would pay a great deal for the programs without the "clutter" and "arrangement" added by the broadcaster -- as shown by the growth of pay cable. Cable systems would pay nothing for the things added by the broadcasters, without the copyright owners' works. In the open marketplace, the new material added to the broadcast day by the broadcasters -- even if it were entitled to copyright protection -- would be, literally, worthless.

ASCAP DOES NOT GRANT ANY EXCLUSIVE
RIGHTS TO BROADCASTERS AND BROADCASTERS CAN
HAVE NO CLAIM TO ROYALTIES BASED ON MUSICAL
WORKS IN PROGRAMS FOR WHICH THEY HAVE "SYNDICATED EXCLUSIVITY."

The 1976 Copyright Act made a significant change in the copyright law, in providing for divisibility of copyright. Under the new law, the owner of any exclusive right -- including an exclusive licensee -- is deemed to be a "copyright owner," but only of that particular right. 17 U.S.C. §§101, 201(d)(2).

The broadcasters claim that, because some copyright owners have made them exclusive licensees for a particular market, the importation of distant signals by cable systems in that market which may contain those copyrighted works gives them -- and not the copyright owners -- the right to claim for cable royalties.

This claim, even if valid for other copyright owners, cannot affect the right of ASCAP to claim cable compulsory license fees. The Amended Final Judgment* in U.S. v. ASCAP prohibits ASCAP from obtaining anything but a non-exclusive right to license nondramatic public performances of our members' copyrighted musical compositions. And it also prohibits ASCAP from licensing those rights on any but a non-exclusive basis. Simply put, ASCAP does not have exclusive rights, and cannot grant exclusive rights.

Thus, no broadcast station has exclusive market rights to perform any copyrighted musical compositions in the ASCAP repertory. Even if an ASCAP composition were included in a program licensed on an exclusive basis by the program owner, the broadcaster's right to perform that musical composition is non-exclusive. Any other broadcast station in that market holding an ASCAP license could also perform that composition. The broadcasters'

* Section IV(A)

"syndicated exclusivity" claim must fail insofar as ASCAP works are concerned.

The broadcasters' claim, however, is unsound even when applied to other copyrighted works for which they may have exclusive broadcast rights for their markets. We understand that the rights granted by program producers are exclusive rights to "broadcast" the program in the market. When cable systems import distant signals and retransmit them as secondary transmissions, those acts, by definition, are not "broadcasts". The secondary transmission thus does not violate the station's exclusive broadcast license.

And, we are told, program producers' contracts with broadcasters frequently include a provision promising that the program producer will not grant cable retransmission rights. That is very different from giving them the right to claim cable royalties, especially when the cable retransmissions occur without the copyright owners' consent because of the compulsory license.

Indeed, under FCC regulations, the broadcasters themselves had the right to prevent cable systems from importing programs for which the broadcasters had exclusive market rights.* We understand the only reason program producers give broadcasters the negative covenant concerning cable retransmission rights is so the stations can exercise their rights under the FCC rules. If they did not do so, they should not be entitled to benefit from their dereliction by being paid cable royalties. If they

* 47 C.F.R. §76.153(b). The FCC regulations grant the broadcasters the right to prevent distant signal importation in only some cases.

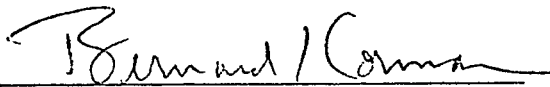
were concerned with harmful effects on their broadcasts, remedy was available under FCC regulations. Their remedy is not under the copyright law, which is designed to compensate creators.

CONCLUSION

The broadcasters' "compilation" and "syndicated exclusivity" arguments are technical and clever. But, like many such arguments, they are not sound, and are contrary to the intent and spirit of the copyright law. They should be rejected.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By 
Bernard Korman
General Counsel

Dated: November 15, 1979

Of Counsel:

I. Fred Koenigsberg, Esq.
Benjamin L. Zelenko, Esq.