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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of REGULATIONS FOR COPYRIGHT OWNER ACCESS TO PHONORECORD PLAYERS (JUKEBOXES) AND CERTAIN ESTABLISHMENTS

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers (ASCAP) submits these comments in response to the Copyright Royalty Tribunal's notice of proposed rulemaking of April 6, 1981 (46 FR 20566). The Tribunal proposes deletion of location list filing requirements (37 CFR §303.3) from the jukebox access regulations (37 CFR Part 303). We are strongly against that proposal.

INTRODUCTION

The necessity for location list requirements was recognized by the Tribunal in its decision adopting the jukebox access regulations. 43 FR 40498 (September 12, 1978). After noting that the Copyright Law mandates that copyright owners be given a right of access to locations where licensed jukeboxes are located, 17 U.S.C. §116(c)(5), the Tribunal succinctly concluded, "There can be no right of access to an establishment if one does not know where the establishment is located." 43 FR 40499. Accordingly, jukebox operators are required to file location lists with the Tribunal. 37 CFR §303.3.

The Tribunal now proposes to delete the location list requirement for two related reasons:

> 1) "[I]t is apparent that copyright owner claimants will not have occasion to use information from the list to establish their entitlement to

jukebox fees [in the 1979 royalty distribution proceedings]"; and

2) "Since the adoption of the rule, the Tribunal has not received a single request from any claimant in accordance with the resolution of November 9, 1978 for information from the list." 46 FR 20567.

Neither reason is valid and the second is simply wrong. The reasons to maintain the location list requirement are just as compelling now as when they were adopted.

I. JUKEBOX OPERATORS FAILED TO LIST LOCATIONS OF MORE THAN 80% OF LICENSED JUKEBOXES, MAKING USE OF LOCATION LISTS FOR A VALID SURVEY IMPOSSIBLE

Jukebox operators have ignored the regulations. Only about 25,000* locations have been filed with the Tribunal, out of 130,000-140,000 jukebox registered with the Copyright Office annually since 1978.

This noncompliance means that the purpose of the location list -- to allow a valid scientific sample to be drawn and an accurate survey of performances on licensed jukeboxes to be made -- has not been possible. A perfectly designed and conducted survey

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* This number is based on information provided by the Tribunal on October 17, 1979 in response to our request of October 11, 1979.

would be valid only for the 18% of licensed jukeboxes represented by the location list. Such a survey would not present a valid picture of performances on all licensed jukeboxes. As we said when we urged adoption of the regulations, a listing of all locations is necessary to conduct a proper survey:

> "A sample of jukebox performances, which would entail logging of performances on specified machines for specified periods of time, cannot be made without knowledge of the location of all licensed jukeboxes. Thus, a listing of all such locations is vital." Joint Statement of ASCAP and SESAC, July 21, 1978, 13-14

The principles of survey design have not changed since the adoption of the regulation. The point is still valid.

That the jukebox operators refuse to comply is not our doing and should not be the ground for precluding even the possibility of a survey; nor should the jukebox operators be rewarded, by deleting the location list requirements, for their unlawful refusal to comply with the Tribunal's regulations.

II. IN ADDITION TO THE INADEQUACY OF THE LOCATION LISTS, THE AMOA'S LAWSUIT TO OVERTURN THE ACCESS REGULATIONS AND THE VOLUNTARY AGREEMENT FOR 1978 ROYALTY DISTRIBUTION, WERE REASONS THE LOCATION LISTS WERE NOT USED. THESE REASONS NO LONGER APPLY.

The Amusement and Music Operators Association (AMOA) challenged the Tribunal's access regulations in court and dragged the litigation out as long as it could, all the way

to the Supreme Court.

We thought it best to refrain from requesting use of a location list which was the subject of pending litigation and which we knew to be inadequate.

In addition, we reached agreement with other claimants on distribution of 1978 jukebox royalties, principally because no one had adequate survey data of 1978 performances and because the total royalties paid for 1978 were very small compared to what they will be in future years.*

A survey -- an expensive proposition at best -- was simply not economically justifiable in 1978. The same circumstances continued for the 1979 fund.

Thus, the reason no survey has been made for 1978, 1979 or, indeed, 1980, is clear. It is because of the unique circumstances of the past three years and not because the Tribunal's regulations are unwise or unnecessary.

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* The royalty fund was small because of jukebox operators' noncompliance with the compulsory license, and because the fee was at the temporary low $8 rate.

Indeed, because of these factors we agreed, on a without-prejudice basis, to an even division of royalties with BMI -- an agreement we would not have made if performance data existed, if the royalty fund had been more substantial, or if we had thought that BMI (and the Tribunal) would refer to this agreement in the cable distribution proceeding.

Those circumstances have now changed and we expect them to continue to change. The AMOA lost on appeal, no voluntary agreement has been reached, and the jukebox fund should increase substantially with an increase in the compulsory license fees. The location list requirement will be increasingly important and useful in the future, if compliance improves.

III. WE HAVE REQUESTED LOCATION LIST INFORMATION FROM THE TRIBUNAL

There have been requests for location list information, and other contacts with the Tribunal concerning use of the location list.

On January 10, 1979, and again on May 7, 1979, we obtained a list of those operators who had complied with the Tribunal's regulations. On July 5, 1979, we wrote to inform the Tribunal that we had put that list in alphabetical form on our computer, and furnished a printout, in the hope the Tribunal would find it useful. Chairman Coulter wrote on July 10, 1979, acknowledged receipt of the printout, and said he was "sure it would prove helpful to us."

On October 11, 1979, we wrote to the Tribunal and requested a meeting to discuss the location list information, and whether it could be used for survey purposes. The meeting took place on October 23, 1979, attended by representatives of ASCAP including

our outside economic consultants, and Commissioners Brennan, Coulter and Burg. Our economic consultants concluded that, because of the widespread noncompliance by operators, a survey of the locations listed would probably not be representative of all licensed jukeboxes. The Tribunal members present agreed.

On April 8, 1981, after the Supreme Court refused to hear the AMOA's appeal, and after the AMOA had moved for reconsideration of the access regulations, we again sought information on the location list.* And, we understand that BMI requested location list data from the Tribunal in January, 1981.

We have not yet asked the Tribunal to draw a sample of locations for the reasons given above. We have no desire to waste the Tribunal's time or our members' money in what, up to now, would have been a futile exercise. But we have requested information concerning the location list. Indeed, our request of April 8, 1981 was made in the hope that some use of location information would be possible. The Tribunal has not yet responded.

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* Although that letter was sent two days after the Tribunal published its notice proposing deletion of the location list requirement, it had been prepared and mailed before the Federal Register with the notice of proposed rulemaking reached our office.

Thus, there is no justification for deleting the location list requirement on the ground of nonuse by claimants.

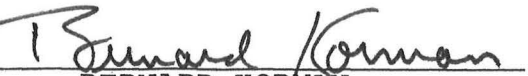
CONCLUSION

Deletion of the location list requirement would have the effect of foreclosing the only real possibility of a valid sample survey. It would set a terrible precedent by rewarding jukebox operators for noncompliance with the Tribunal's regulations. It would punish us for their disregard of the law.

The location list requirement is important for all the reasons the Tribunal gave when it was adopted. It should be maintained. The proposed rule should not be adopted.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

BY 
BERNARD KORMAN
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Of Counsel: Benjamin Zelenko
I. Fred Koenigsberg

Dated: May 15, 1981

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CERTIFICATE OF SERVICE

I, Benjamin L. Zelenko, hereby certify that I have, on this 15th day of May 1981, caused copies of the foregoing Comments of the American Society of Composers, Authors and Publishers, to be served via the United States Postal Service, first class postage prepaid on the following:

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