Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

Filing of Claims to Cable Royalty Fees	]]]]]]

COMMENTS OF NATIONAL BASKETBALL ASSOCIATION

COMES NOW, the National Basketball Association (hereinafter sometimes "NBA" or "Basketball") and files the instant comments pursuant to the Advance Notice of Proposed Rulemaking, issued by the Copyright Royalty Tribunal. 1/

In issuing the Advance Notice, the Tribunal noted that pursuant to Section 111(d)(5)(A) of the Copyright Revision Act 2/, claimants to the pool of compulsory license contributions by cable television systems must file claims in July of each year. However, for the first half-year at least, the pertinent information filed by cable television systems 3/ will not have been reported to the Copyright Office. Pursuant to the regulations of the Copyright

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1/ 43 F.R. 6263 (Feb. 14, 1978).

2/ Codified as Title 37 of the United States Code.

3/ Section 111(d)(2)(A) requires the filing of a semi-annual statement of account by cable television systems, while Section 111(d)(2)(B) requires a semi-annual payment by the subject cable television system.

Office 4/, cable systems will not be required to file their Statements of Account (hereinafter "Statements"), Special Statements of Accounts (hereinafter "Special Statements") or their payments until sixty days after the end of the semi-annual accounting period -- i.e., the Statements, Special Statements, and payment for the period January 1 through June 30 will be due by August 29 and the Statement, Special Statements, and payment for the period July 1 through December 31 will be due by March 1 of each year.

It is obvious to Basketball that no reasoned claim to the compulsory license pool can be made before the filing in late August by cable television systems. Indeed, as the Copyright Royalty Tribunal stated as a basis for the instant rulemaking:

> It will be necessary...for the CRT to adopt regulations whereby copyright owners may make an initial filing of a claim during the month of July and subsequently make a supplementary filing after consideration of the information contained in the statement of account covering the period January 1 through June 30. 5/

Comments discussing this two-step filing procedure have been sought. Comments have also been sought on the types of information that should be required of claimants and the desirability of standard forms.

4/ 37 CFR § 201.17(c)(1).

5/ Supra note 1.

SUBSTANTIVE PROVISION

July 1978 Filing

Pursuant to Section 111(d)(5)(A), July filings are required in each year for a person "claiming to be entitled to compulsory licensing fees for secondary transmission." As the statutory history states, persons seeking participation "must" file during that month, although the Tribunal "may establish the relevant period covered." 6/ To that end, the Tribunal in fact should require a statement asserting a claim in order for a party to share in any of the fees collected for the first six months of 1978. The statute requires July 1978 filings and the NBA, for one, would object to parties being able to sit on their rights for a year. 7/ In other words, at such time as the Tribunal is called upon to distribute the fees from January-June, 1978, only those parties which have abided by the statutory requirement of making a claim would be entitled to anything for that period.

The filing should be a pro forma statement of claim. In terms of these claimants, the Tribunal could require, for instance, an identification of at least one instance of a claim basis. For example, an NBA team asserting a copyright claim should be able to identify at least one telecast in which it was

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6/ H. Rep. No. 94-1476, Copyright Law Revision, 94th Cong., 2d Sess. at 98 (1976).

7/ Given the fact that this will be the only July filing without benefit of the Statements or Special Statements, the Tribunal need not be concerned with the precedent.

the rights holder where distant signal carriage of that telecast took place. Such a policy would avoid the possibility of a party filing without actual knowledge of carriage 8/ and attempting to become a participant 9/ in distribution without having any legitimate basis for such asserted participation. 10/

Supplemental Filing

Complete information on the first six months of 1978 --- through the filing of Statements and Special Statements by cable systems -- will not occur until August 29, 1978 at the earliest. It will thereafter take some amount of time for an assimilation of these filings by the Copyright Office. Moreover, there will be additional "down time" as the various claimants attempt to analyze the data available for the first time. Given all of these factors, it is unlikely that any subsequent supplemental filing with the Tribunal could be made before the early part of 1979.

8/ For those events which are televised on a seasonal basis only during the second half of the year and which might be entitled to a claim -- e.g., NFL pre-season, non-national network telecasts and NCAA exception game telecasts -- a citation to 1977 carriage could suffice.

9/ Obviously, such a filing can also contribute toward identifying prospective parties for eventual negotiation.

10/ It is respectfully suggested that the Copyright Royalty Tribunal take the lead in attempting to negotiate a settlement. While not statutorily mandated -- as it is in Section 118(b) -- the Tribunal is the sole disinterested party which can effectively bring the claimants together.

There appear to be a number of reasons, however, for postponing the Supplemental Filing until July, 1979. 11/ In the first place, at the same time that an early 1979 Supplemental Filing would be made, cable systems will be preparing their Statements, Special Statements and payments for the second half of 1978, which will be filed by March 1, 1979. This information will form the basis of claims to be made in July of 1979. It hardly makes sense to file in early 1979 and then to file again in July of 1979 for the period July-December 1978.

In the second place, such a dual set of filings will necessitate some duplicative Tribunal efforts, thereby wasting the resources of the compulsory license pool.

Thirdly, given the choice of the January-June and July-December reporting periods, a filing once a year to cover a calendar year seems the most appropriate and convenient.

Moreover, the longer the distribution is reasonably postponed, the more chance any negotiated distribution will have of succeeding. These negotiations likely will be as complicated as those which created the compulsory license formula to begin with. Since the claimants reasonably will be known on July 31, 1978, work can commence immediately with some likelihood of success.

11/ Although Basketball once again reiterates that a July 1978 filing should be the subject of specific compensation because of the terms of the legislation.

Finally, the postponement will further allow the first distribution to be more comprehensive, in the manner in which Congress proposed when it stated that the Tribunal

> should consider all pertinent data and considerations presented by the claimants. 12/

Basketball for example, will, be better able to present the pertinent data dealing with the impact of cable importation on live events, the lack of any secondary markets in those telecasts, the value of the telecasts to the originating stations, the value of the sports telecasts to the cable systems themselves, and to reflect the specific recognition by Congress of the unique quality of sports telecasts retransmitted by cable. 13/

Information to be Required/Use of Forms

It is respectfully suggested that decisions on the information which will be required and the possible use of a specific form be delayed until the initial filing of the Statement and the Special Statements -- except for the July 1978 proforma claim described earlier. 14/ At such time as this material becomes available, all parties -- including the Tribunal -- will be better able to make these judgments.

12/ Supra note 6, at 97.

13/ Supra note 6, at 100. See also Staff of House Subcommittee on Communications, 94th Cong., 2d Sess., Cable Television: Promise Versus Regulatory Performance 50 (Subcomm. Print 1976).

14/ See text accompanying at pages 3-4, supra.

CONCLUSION

For the reasons stated above, the National Basketball Association urges the Copyright Royalty Tribunal to adopt regulations consistent with its proposals.

Respectfully submitted,

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