RECENT CASES

Blanket licenses issued by BMI to entertainment establishments do not violate antitrust or copyright laws, Federal District Court rules

ASCAP and BMI are organizations which probably are more well-known than understood by the entertainment industry. Together, ASCAP and BMI conduct virtually all licensing of performing rights to musical compositions in the United States. ASCAP, which was founded in 1914, now controls rights to approximately three million compositions. BMI, founded in 1939, controls the rights to license approximately one million compositions. A third performing rights organization called SESAC controls the rights to about 150,000 compositions. These organizations were formed in response to the need of a large number of owners of copyrights in musical compositions who wished to license the rights to their music to a large number of music users, including television networks, television and radio stations, hotel, dance studios, colleges, concert halls and various small establishments that present live music such as bars, nightclubs and restaurants.

One such establishment, the Triple Nickel Saloon in Bear, Delaware, owned by Robert Moor, has been found liable for copyright infringement by a Federal District Court in Delaware in a longstanding action brought by BMI (see ELR 1:4:5, 1:22:2, 3:13:4) in which the Triple Nickel raised ultimately unsuccessful antitrust and copyright misuse challenges to BMI's licensing practices.

In order to gain "immediate, unplanned, indemnified" access to all musical compositions in the BMI repertory, the Triple Nickel was required to obtain a blanket license. BMI bases the annual fee for such a license on the user's total entertainment expenses which are primarily the cost of hiring musicians. The Triple Nickel's 1979 estimated entertainment expenses were $75,000, resulting in a license fee of $400.

The Triple Nickel maintained that BMI's failure to offer an alternative to its General Licensing Agreement was an illegal tie-in in violation of Section 1 of the Sherman Act. The tie-in allegedly consisted of the club being coerced into purchasing music it did not wish to have performed in order to obtain access to music it did wish to have performed. The Triple Nickel also claimed that the blanket license and BMI's fee structure constituted an illegal restraint of trade.

The court first determined that BMI's licensing practices would be analyzed under the "rule of reason" rather than according to a per se standard, citing Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.

441 U.S. 1 (1979) (ELR 1:1:1) in which the United States Supreme Court held that the issuance of a blanket license in connection with the use of music by television networks was to be analyzed under the rule of reason. In conducting its analysis, the court observed that price competition among those whose compositions are in BMI's "pool of music" is indeed eliminated. However, the package sale by BMI is likely to result in the sale of more "product" than in a competitive market. But copy-right buyers, faced with a license whose cost is based on factors other than the quantity of BMI music performed, are not able to reduce their total obligation to BMI by using fewer of its compositions. Nevertheless, several justifications have been advanced for the use of the blanket license. The parties agreed that performing rights societies, via licensing, reduce the otherwise pro-hibitive transaction costs which would result both from certain natural monopoly characteristics in the

performing rights market and from the difficulty of locating, and reaching agreements with, establishments whose frequently changing owners often are unaware of, or resistant to, their obligations to copyright owners. Further, because club owners usually do not know in advance which compositions will be performed on any night, and because audience requests are often entertained, the blanket license, providing access to an almost unlimited number of compositions, is particularly valuable.

These factors appear to give BMI substantial monopoly power over price, especially since General License Agreement buyers do not possess a countervailing bargaining power. But Judge Stapleton noted that BMI's rates are tempered by the fact that undetected, unlicensed users who may be considering entering into a licensing agreement will be more likely to do so at a realistic price.

The Triple Nickel's principle argument was that BMI should be ordered to offer an alternative form of license based on a particular category of music such as country and western, or a limited repertory license based on a family of music like country, bluegrass, folk or gospel. The license price would then be based on the same percentage of the full repertory license which the compositions in a designated category bear to the compositions in BMI's total repertory.

These alternatives were found to be impractical and unworkable by the court because of the difficulty of categorizing compositions which often become popular in a variety of performance styles. The Triple Nickel admitted that the music played at the club included rock and roll, folk, bluegrass and gospel. Further, the court determined that BMI should not be required to offer a reduced price for a mini-license because the benefit derived from the use of its repertory would not vary and the categorization and monitoring costs of administering such a license would be considerable. A full repertory blanket license therefore was determined to be "fairly necessary" to serve the relevant market.

The Triple Nickel also objected to BMI's pricing system, suggesting, among other alternatives, that the price of a blanket license be based on the amount of BMI music actually performed, measured after the fact. But a per use price would not account for a significant benefit provided by the license - again, the immediate and unlimited access afforded to one million musical compositions. And increased costs would be incurred under this system due to the presently unnecessary sampling and monitoring which would be required to determine which BMI compositions were indeed performed. Most significantly, Judge Stapleton found that per use pricing would not "materially" affect the alleged restraint on trade, because licensees still would not be able to control the quantity of BMI music used and paid for because they would not necessarily know which compositions in the BMI repertory had been performed.

Also rejected was the possible imposition of a court determined "proxy price" to be charged for each performance of a BMI composition. Price regulation in the field of music licensing under legislative authority might eventually be required in order to address the lack of price competition in the performing rights field, suggested the court. Until such time, the court declined to establish a price based upon BMI's rate for a radio user in the same geographical area as the Triple Nickel.

With respect to the Triple Nickel's other claims, the court rejected the claim BMI's license fee system unlawfully extended the scope of its copyright monopolies. Also unsuccessful were the allegations that BMI and ASCAP conspired to stabilize prices and preclude competition in violation of Section 1 of the Sherman Act, and that BMI and its affiliates conspired to bring "factually inadequate" copyright infringement actions in order to coerce licensees into accepting blanket licenses. Claims of monopolization in violation of Section 2 of the Sherman Act failed, because there was no proof that any of the challenged BMI practices were motivated by, or had the effect of, impeding a potentially competing performing rights organization from entering the market.

Broadcast Music, Inc., v. Moor-Law, Inc., Case No. 77-325 (D.Del. November 24, 1981) [ELR 3:18:1]

Defendant in Atlanta murder prosecution fails in bid to enjoin media and law enforcement officials from allegedly invading his privacy and harassing him

Wayne B. Williams, the defendant in the on-going Atlanta murder prosecution, has failed in his efforts to enjoin all three television networks and several television stations and newspapers, as well as a dozen law enforcement officials, from allegedly invading his privacy and harassing him. Williams' novel action was filed in Federal District Court and alleged the violation of his constitutional rights of privacy and fair trial. The court conducted two days of hearings on Williams' application for a temporary restraining order barring the defendants from engaging in a variety of activities. But the court has denied his application and has declined to issue the order Williams requested.

In so ruling, the court held that Williams' arrest for one of the Atlanta murders made him a public figure, and as a result, his right to be free of invasions of his privacy was necessarily lessened. Furthermore, the court found that the official comments of most law enforcement officials were cautious and restrained, and that even the statements attributed to unnamed "sources" focused on Williams' connection to the then-pending investigation, a matter which the court found to be "of considerable public interest." Any invasion of his privacy which may have occurred, the court said, did not amount to a violation of Williams' constitutional right of privacy.

While the court recognized that Williams' has a constitutional right to a fair trial, it ruled that it knew of no cause of action to prevent adverse publicity. In any event, the court said, Williams' claims in this regard should be heard in the same court where the criminal prosecution against him is pending, which is a Georgia state court, not federal court.

The court also acknowledged that videotapes from the first week in June 1981 did show "camera persons swarming in droves around Williams and his home ready to pounce at any sign of activity. It appears to the

Court that during that period the media by its constant and unrelenting 'coverage' of Williams' every move rendered him a virtual prisoner in his own home." However, the court noted that by virtue of Williams' arrest, he no longer needs injunctive protection from physical intrusion by the media into his privacy, because he is now in jail. Furthermore, the court noted that Williams' claims were based on a federal civil rights law which would have required him to show that the media were acting under color of state law. That would have been a "significant hurdle," the court ruled, even if injunctive relief were otherwise warranted.

Williams v. NBC, 7 Media Law Reporter 1523 (N.D.Ga. 1981) [ELR 3:18:3]

Networks did not violate Fairness Doctrine by refusing to broadcast programming to "balance" United Way public service announcements

"Thanks to you it works for all of us ... The United Way." That at least is the opinion of the United Way. It is an opinion the United Way effectively and pleasantly communicates to millions of television viewers every weekend during football season, through a series of 60-second spots which are broadcast during NFL games and which feature professional football players.

The United Way's opinion is not unanimously held, however. According to the National Committee for Responsive Philanthropy, the United Way unfairly pressures contributors and does not serve all elements of society. The Committee contends that the United Way has a policy of avoiding controversial activities, and that as a result it does not benefit such charitable causes as abortion clinics, pregnancy counseling centers, environmental groups, neighborhood associations, activist groups and minority run agencies.

The Committee also contends that the 60-second spots broadcast by the networks present only one side of a "controversial issue of public importance, namely 'whether the United Way of America's system of collecting and distributing funds serves all elements of society.'" The Committee therefore asked the networks to balance their programming in this area by presenting opposing viewpoints.

All three networks refused on the grounds that the spot announcements did not meaningfully address a controversial issue of public importance. And the FCC agreed that the networks had not been unreasonable in reaching that conclusion. The FCC characterized the spots as "institutional advertising" presenting a favorable image of the United Way, and the FCC dismissed the Committee's Fairness Doctrine complaint. (ELR 2:7:3).

The Committee then petitioned the Federal Court of Appeals in Washington, D.C., to review the FCC's dismissal of the complaint. But that court has denied the Committee's petition in a brief opinion. It concluded that the FCC had not violated the Fairness Doctrine, which applies only when the broadcast in question "amounts to advocacy of a position on one side of an ongoing public debate and obviously and substantially addresses that issue in a meaningful way."

National Committee for Responsive Philanthropy, v. FCC, 7 Media Law Reporter 1530 (D.C.Cir. 1981) [ELR 3:18:4]

NFL was not required to blackout TV broadcasts in Denver while Colorado high school championship football game was being played

Television "blackouts" of National Football League games are exceedingly controversial. In 1973, Congress enacted a law prohibiting the blackout of games that were sold out 72 hours in advance. Though that law has since expired, the NFL has continued to broadcast all such games, as a matter of league policy, no doubt aware that a resumption of blackouts would likely lead to re-enactment of the anti-blackout law. Congress was not always as opposed to television blackouts as it became in 1973, however. In fact, in 1961, Congress passed a law actually requiring blackouts under certain circumstances, and in 1966, Congress amended that law to broaden the circumstances under which blackouts were required. The 1973 antiblackout statute made an exception for blackouts required by the 1961 and 1966 laws, and those required blackouts remain in the law to this very day.

In a nutshell, the 1961 and 1966 laws require professional football games to be blacked out on Friday evenings and Saturdays within 75 miles of the "game site" of any college or high school football game, if the game and its "site" are announced in a newspaper ad prior to the August before the game. This law is part of what is known as the Professional Sports Telecasting Act (15 U.S.C. sections 1291-1295), the actual details of which are quite convoluted. The original purpose of the act simply was to permit the NFL to sell the television rights to all of its teams' games in a single package to a network, despite a federal court ruling that doing so would violate the antitrust laws. Thus, the law was designed to provide the NFL with a limited exemption from the antitrust laws.

However, the National Collegiate Athletic Association was disturbed that the football games of its member colleges had to compete against NFL telecasts. And thus the NCAA persuaded Congress to write an exception into the exemption law so that NFL games broadcast in competition with local college games would not be exempt from the antitrust laws. In 1966, this exception-to-the-exemption scheme was extended to high school games as well.

In 1977, 1978 and 1979, the Colorado High School Activities Association sought to protect its state high school championship game from NFL television competition by publishing an announcement that the championship games for those years would be played on particular dates "in Denver" or "in the Denver metropolitan area." The Association was not more particular about the locations of the "game site" where the championship games would be played because it was traditional to play the championship game on the field of one of the two finalists, and the Association could not know prior to August - when the announcement had to be published - who the finalists would be.

Despite the Association's published announcements, NFL games were broadcast within 75 miles of Denver at the same time the high school championship games were played during all three of those years. The Association sued, alleging that the NFL agreements pursuant to which the games were broadcast violated federal anti-trust law. After substantial discovery, both the Association and the NFL moved for summary judgment. A Federal District Court in Colorado has granted the NFL's motion and has dismissed the Association's case.

The court ruled that the Association failed to give proper notice of the "game site," and thus the high school championship games did not qualify for protection from NFL broadcasts. The court reasoned that the words "game site" were plain, common and clear, and that there was no evidence that Congress intended them to have any meaning other than "their obvious, everyday sense. Thus, "game site" means a particular field or stadium, not an entire city or metropolitan area, the court said. This is so, the court concluded, because the 75-mile blackout radius must be measured from a point, and a city or area does not provide a geographical point from which the 75 miles may be measured.

In so ruling, the court did not comment on the fact that the NFL's own Constitution and By-Laws define the "home territory" of each of its teams to be the city in which the team is located and "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city." Apparently the NFL has no trouble in making such measurements on behalf of its own teams. Then again, Congress used only the words "game site" and did not specify that the 75-mile measurement was to be from the "exterior limits" of the city in which that site is located.

Colorado High School Activities Association v. National Football League, 524 F.Supp. 60 (D.Colo. 1981) [ELR 3:18:4]

Former employee of Las Vegas hotel was not bound by covenant not to compete because he did not accept retirement compensation

The Hotel Riviera in Las Vegas has learned the hard way that enforcing a former employee's covenant not to compete is not a sure bet.

The Riviera and Edward Torres had entered into an agreement under which Torres was to serve as the Riviera's chief operating officer for five years. Torres also agreed that upon the termination of his employment, he would not compete with the Riviera for the period during which he was being paid retirement compensation by the Riviera at a rate of between $25,000 to $50,000 a year. Torres brought a declaratory judgment action claiming that the covenant not to compete was unreasonable and unenforceable. A trial court agreed. The Nevada Supreme Court also found the covenant unenforceable, but on entirely different grounds.

The Nevada Supreme Court concluded that the employment agreement did not contain a postemployment agreement not to compete, thereby making the question of reasonableness "irrelevant." Torres had never been paid retirement compensation. Hence, there was no time period during which he was required to refrain from competitive activity.

The Riviera contended that it did not matter that Torres was not actually paid because once he completed his employment term, the Riviera was obligated to pay him retirement compensation. Torres then was required to accept the compensation and the obligation not to compete, according to the Riviera.

But the agreement stated only that Torres would be bound during such "period, if any" that he was actually being compensated. This gave Torres the option to receive the benefit of the contract as well as to assume its obligation, stated the court. If this were not the case, Torres could have been absolutely bound to a lifetime covenant not to compete upon completing his employment agreement - a losing proposition, indeed, for an individual who had enjoyed earnings in the Nevada gaming industry in excess of $500,00O per year.

Hotel Riviera, Inc. v. Torres, 632 P.2d 1155 (Nev. 1981) [ELR 3:18:5]

Flamingo Hotel required to report "markers" as taxable income, even though gambling debts are unenforceable under Nevada law

The Flamingo Hotel has crapped out again in its long-boiling battle with the Internal Revenue Service over when uncollected "markers" become taxable income. The issue is of significance to the entire Nevada gaming industry, because a very significant portion of Nevada casino play is the result of credit given by casinos to their patrons. In fact, in the Flamingo Hotel case, it was estimated that 60% of the Flamingo's casino play was based on credit.

Like other casinos, the Flamingo has its patrons sign a "pit marker" when they ;are given chips on credit. The marker is similar in appearance to a counter-check and has places for the insertion of the name of the gambler's bank and account number.

This case stems from 1967 when the Flamingo excluded from its gross gambling receipts the face amount of the markers that were still unpaid at the end of that year. It did so because under Nevada law, gambling debts are not enforceable, even though of course gambling is legal in licensed casinos. Because the markers could not be collected in a court of law, ,the Flamingo reasoned that they were not taxable income unless and until they actually were collected.

The IRS disagreed. It contended that the markers were taxable income immediately for accrual taxpayers such as the Flamingo. The hotel paid the extra tax claimed by the IRS and sued for a refund in Federal District Court in Las Vegas. District Judge Roger Foley ruled against the Flamingo, however. (ELR 2:4:6) And the Court of Appeals has just affirmed that ruling.

The tax regulation that is at the heart of this case provides that when the accrual method of accounting is used, income is taxable "when all the events have occurred which fix the right to receive such income...." Treas.Regs. sec. 1.451-1(a). Thus the issue for the Flamingo was whether it had a "fixed right" to the income represented by the unpaid markers, even though they were unenforceable under Nevada law. The court held that the Flamingo did have such a "fixed right." According to the court, a right need not be legally enforceable in order to be "fixed." Instead, it ruled that whether a right to collect is "fixed" depends on the unique facts and practical considerations of each case.

Here the facts showed that as a practical matter, few if any of the Flamingo's patrons raised legal objections to the payment of their markers. Instead, the hotel's own estimates of the collectability of its markers ranged as high as 96%. Indeed, the court observed that "it is doubtful that legal enforceability of the 'markers' would or could increase its recovery rate."

"Under these circumstances," the court concluded, "the obligations of Flamingo's patrons are as 'fixed' as it is possible to be and, in fact, no less so than those of other businesses." Since the Flamingo's right to collect the markers was fixed, the amount of the markers was taxable income in the year they were received, even if they were not collected in that year.

Flamingo Resort, Inc. v. United States, Case No. 80-5318 (9th Cir., January 17, 1982) [ELR 3:18:5]

Libel suit by New York lawyer against The New Republic is dismissed for failure to state a claim

The Julius and Ethel Rosenberg case continues to reverberate through the halls of justice. The most recent echo was provoked by an article published in The New Republic magazine in 1979 entitled "The Hidden Rosenberg Case." The article, written by authors Sol Stern and Ronald Radosh, concluded that Ethel Rosenberg was completely innocent. In support of that conclusion, the authors revealed that "A lawyer for the present Rosenberg Committee, Bonnie Brower, mentioned to us that when Emanuel Block hired Tartakow as his driver, it was with Dennis's recommendation."

Brower was outraged by this statement, and wrote a letter to the New Republic telling it so. In her letter, which the magazine printed, Brower stated "unequivocally" that the statement was "an outrageous, bald-faced lie," that she never mentioned anything at all to the articles' authors on that subject. In fact she wrote, she had never even met one of the authors and had met the other only once, while he was interviewing an associate of hers.

In response to Brower's letter, the authors wrote a rebuttal, which The New Republic also published, in which they charged that Brower "either has a very short memory or is deliberately lying to cover up facts we weren't supposed to know or publish, and which she now finds too embarrassing to acknowledge." According to the authors, both were present when she made the statement attributed to her and in fact gave them copies of two letters from her own files, one of which was a letter from Jerome Tartakow to Emanuel Block. "Perhaps that will jog her memory," they concluded. In addition, the authors wrote a letter of their own to the editors of another magazine that had published an article about their exchange with Brower in The New Republic in which they allegedly described Brower as a "lying old Stalinist."

As frequently happens in circumstances of this sort, Brower's outrage was funneled into a libel suit against The New Republic and the article's authors. According to Brower, the statement attributed to her in the article implied unethical conduct on her part and a breach of her fiduciary duties of confidentiality in violation of the lawyers' Code of Professional Responsibility and Canon of Ethics. She also alleged that she was libeled by the later accusations that she was a "liar" and a "Stalinist."

A New York state trial court has dismissed Brower's action however. It found that Brower read into the article "far more than it actually states, based on her knowledge of the facts, persons, personalities and her perspectives, political and otherwise, not available to this Court or the average reader." According to the court, the article neither stated nor implied that Brower had breached any professional duty owed by her as a lawyer to her client. Indeed, the court emphasized that she had not substantiated her allegation as a matter of law, because she failed to specify the client whose confidence was violated or how the letters referred to in the authors' rebuttal could be deemed confidential. Furthermore, said the court, since Brower failed to plead special damages, her case was barred by New York's "single instance" rule. The "single instance" rule provides that a statement charging a professional person with ignorance or mistake on a single occasion, but which does not accuse him or her of general incompetence, is not defamatory unless special damages result.

The authors' rebuttal to Brower's letter to the editor was held to be "a classic example of the proper exercise of the right of retort or qualified privilege of reply," because it was "timely, relevant, responsive and limited in scope."

Finally, the authors' assertion that Brower was a "liar" and a "Stalinist" was held to be "pure opinion," and as such, protected by the First Amendment.

Brower v. The New Republic, 7 Media Law Reporter 1605 (N.Y.Sup.Ct. 1981) [ELR 3:18:6]

Briefly Noted:

First Amendment.

A school board in Vermont did not violate the constitutional rights of students, parents or a librarian when it removed "Dog Day Afternoon" and "The Wanderers" from school library shelves, a Federal Court of Appeals has ruled. The books were removed solely because in the opinion of the school board, they contained vulgar and indecent language, not for political reasons. Under such circumstances, the court concluded that the school board did not violate either the 1st Amendment or the Due Process clause of the 14th Amendment. On the other hand, the very same court, on the very same day, ruled that a school board in New York may have violated the 1st Amendment when it removed several books from the libraries of the schools in its district. Among the books removed from the libraries in that case were "The Fixer," "Slaughterhouse Five," "The Naked Ape" and "Soul on Ice." In this case it was alleged that the school board's action was based on its members' moral and political beliefs. This, combined with irregularities in the manner in which the books were removed, created a prima facie violation of the 1st Amendment, and thus the court reversed a summary judgment that had been rendered in the board's favor by the lower court. As a consequence, the case has been remanded to the lower court for trial.

Bicknell v. Vergennes Union High School Board, 7 Media Law Reporter 1357 (2d Cir. 1980); Pico v. Island Trees Board of Education, 7 Media Law Reporter 1360 (2d Cir. 1980), 7 Media Law Reporter 1363 (2d Cir. 1981) [ELR 3:18:7]

Privacy.

A professional model's privacy was invaded, in violation of Section 51 of the New York Civil Rights Law, when a photograph of her was published in "High Society Magazine" without her consent. According to the model, the photograph was taken only as a test, for practice, and was intended only for her portfolio. The photo featured the model sitting on a beach, dressed in a bathing suit, beside a mock-up of a book entitled "High Times Encyclopedia of Recreational Drugs." The photographer sold the photo to the book's publisher which then used it in a magazine ad for the book. The New York Civil Rights Law prohibits the use of a person's photograph for advertising purposes without his or her prior written consent. After extensive discovery, the defendants in this case acknowledged that the model had not given her written consent. The court ruled that it was irrelevant that the magazine did not know that the model had not given ber consent, because "knowledge" is not an element of a cause of action for violation of the New York law.

Moore v. Stonehill Communications, 7 Media Law Reporter 1438 (N.Y.Sup.Ct. 1981) [ELR 3:18:7]

Sports.

A Texas athletic league rule provided that a high school football or basketball player would be ineligible, for one calendar year after moving to another district, to participate in the same sport in the school to which he or she transferred. The rule was designed to deter recruitment of high school athletes.

When John Sullivan moved with his family from Vermont to Texas due to his father's employment transfer, John was found ineligible to play leaguesponsored basketball because of the one-year transfer rule. Sullivan sought declaratory and injunctive relief and damages under 42 U.S.C. section 1983. The Texas Supreme Court has determined that the enforcement of the transfer rule is unconstitutional, because the rule is not rationally related to the purpose of deterring recruitment, and therefore violates the equal protection clause of the Fourteenth Amendment.

The league has a rule specifically prohibiting the recruitment of high school athletes. The addition of the transfer rule was over-inclusive and harsh, stated the court, because in practical operation, the rule excluded from participation in varsity athletics the majority of students who transferred for reasons unrelated to recruitment. The case was remanded for further proceedings concerning damages.

Sullivan v. University Interscholastic League, 616 S.W.2d 170 (Tex. 1981) [ELR 3:18:7]

Previously Reported:

The United States Supreme Court has refused to hear an appeal by Reader's Digest from a Court of Appeals decision upholding a $1.75 million fine assessed against the magazine's publisher because it distributed deceptive facsimiles of checks in promotional mailings in violation of an FTC consent order. (ELR 3:12:5)

The California Supreme Court has declined to hear an appeal from a decision dismissing a suit against NBC filed by a nine-year-old girl who alleged that she was raped by three other minors who had been motivated by a similar rape depicted in the NBC movie "Born Innocent." (ELR 3:16:2)

[ELR 3:18:7]

NEW LEGISLATION AND REGULATIONS

Copyright royalty tribunal orders automatic future increases of compulsory music recording license royalty

Several months ago, the Federal Court of Appeals in Washington, D.C., affirmed the Copyright Royalty Tribunal's increase in the compulsory music recording license royalty. The court held, however, that the Tribunal had no authority to adopt, as it did, a complex procedure for discretionary annual adjustments of the royalty. As the court observed, Congress provided that the Tribunal may exercise such discretion only in response to petitions which may be filed "in 1978 and in each subsequent tenth calendar year." The Tribunal therefore was given an opportunity to adopt a permissible scheme of nondiscretionary interim rate adjustments. (ELR 3:10:4)

At a public meeting of the Tribunal on November 3, 1981, the Tribunal resolved to commence interim adjustment proceedings, and approved in principle a Joint Proposal for Automatic Interim Adjustments of Mechanical Royalty Rate. The Joint Proposal was submitted to the Tribunal on behalf of The Recording Industry Association of America, Inc., CBS, Inc., National Music Publishers Association, Inc., American Guild of Authors and Composers, and The National Songwriters Association International, Inc.

On November 9, 1981, the Tribunal published its proposed rule. The Tribunal observed that "While each of the parties believes that there exists other adjustment mechanisms which the Tribunal could adopt consistent with the Court's opinion, the parties also believe that a series of stepped increases clearly avoid the 'exercise of discretion' prohibited by the Court. Accordingly, consistent with the mandate of the Court of Appeals and the Tribunal's prior decision, the parties have urged the Tribunal to adopt a schedule of automatic stepped increases in the mechanical royalty rate."

The Tribunal's proposed automatic increases were the following:

(a) Effective January 1, 1983: 4.25 cents, or .8 cent per minute of playing time;

(b) Effective July 1, 1984: 4.5 cents, or .85 cent per minute of playing time; and

(c) Effective January 1, 1986: 5 cents or .95 cent per minute of playing time.

The Tribunal emphasized that these proposed automatic stepped increases "are not intended as, and should not constitute, a precedent in any rate adjustment proceedings in 1987 or thereafter."

The Amusement and Music Operators Association ("AMOA") and Shetland Sound submitted comments on the Tribunal's proposed rule. AMOA restated its earlier position that the Tribunal "is not authorized to prescribe interim rate adjustments, whether they are limited to automatic adjustments or not." On the other hand, Shetland Sound insisted that the proposed automatic increases are "distinctly inadequate and continue to reflect the injustices of the past 67 years." The Tribunal concluded simply that its proposed automatic increases "are reasonable and promote the statutory objectives." At a public meeting on December 15, 1981, the Tribunal adopted its proposed rules; and the final rule became effective January 31, 1982.

Assuming no further appeals are taken in this matter, the royalty rate is predesignated until 1987, at which time the Tribunal again will be able to exercise its authority, as it did in 1981, in adjusting the royalty rate.

Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords, 46 Fed.Reg. No. 246 (Dec. 23, 1981) [ELR 3:18:3]

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[ELR 3:18:8]