

In the Matter of	}	
	}	
Distribution of the 1990, 1991 and 1992 Cable Royalty Funds	}	Docket No. 94-3 CARP CD 90-92
	}	
	}	

ORDER

On July 18, 1997, James Cannings and Can Can Music ("Cannings") filed a motion to compel document production from the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. ("SESAC") (collectively referred to as the "Music Claimants"). The pleading cycle for the motion now completed, the Library of Congress addresses the requests, seriatim, made in Cannings' Motion.

1. Cannings seeks documents from ASCAP, BMI and SESAC supporting their respective portions of the 99.99977% claimed by the Music Claimants in their written direct case. Music Claimants object to the request on several grounds, including relevancy of the proportionate shares to resolving this controversy and the impropriety of divulging confidential settlement agreements between ASCAP, BMI and SESAC. Cannings responds that the testimony appearing in the Music Claimants' written direct case is inadequate to prove the 99.99977% claim, and that Music Claimants must produce additional supporting documentation.

RULING: Cannings' request is denied. Music Claimants have submitted a single written direct case in this proceeding, and have stated a single percentage claim of the royalty funds, as required by 37 C.F.R. 251.43(d). The stated percentage, 99.99977%, represents the stated claim, not a factual assertion of a witness, and no discovery is therefore permissible. Furthermore, because the Music Claimants are presenting a joint case and have reached settlements amongst themselves, their relative claims or entitlements to the 99.99977% share are not in issue in this case and discovery is not permissible.

2. In his initial document request, Cannings requested the study underlying the statement of Alison Smith that Cannings' claim of \$1,200 per performance "is at least forty times more than can

be justified by evidence required under the Copyright Act." Music Claimants responded that no such study exists. In his motion, Cannings requests "documents" underlying this statement, as opposed to the "study" and, in addition, requests Music Claimants to "[k]indly illustrate mathematically, reference `the calculations...derived the numbers set forth in the Testimony of Alison Smith at pages 10-11 and 13-15.'" Music Claimants do not respond to Cannings' request for "documents" underlying the Smith statement, but do object to the request for mathematical calculations as amounting to an interrogatory, and further state that they have "already provided Mr. Cannings with information sufficient for him to make the calculations and explained these calculations in our letters." Cannings responds that the Federal Rules of Civil Procedure permit interrogatories, and that he must be able to thoroughly analyze Ms. Smith's mathematical calculations.

RULING: Cannings request is granted in part and denied in part. Cannings' initial request asked for the "study" that supported Ms. Smith's statement regarding the value of Cannings' claim. His request now asks for "documents" supporting the statement. The Office has been very clear that requests for documents that should have been made at the initial stage and were not, cannot be made at a later date. However, we believe the difference between initially asking for a "study" and later asking for "documents" supporting exactly the same statement to be one of semantics, and that Music Claimants should not be able to avoid producing underlying documents to Ms. Smith's statement, if any exist, simply because they do not constitute a "study." Music Claimants are, therefore, directed to produce any documents, if they exist, that underlie Ms. Smith's statement that "\$1,200 per performance on WWOR is at least forty times more than can be justified by evidence required under the Copyright Act."

Cannings' request for mathematical calculations used by Ms. Smith to calculate his royalty share is denied. The request is overbroad and untimely. To the extent that the request can be deemed an interrogatory, it is impermissible. The CARP discovery rules do not allow interrogatories, regardless of their permissibility under the Federal Rules of Civil Procedure.

3. Cannings makes certain requests regarding BMI's analysis of the programming and music aired on WWOR-TV during 1991. First, Cannings requests the Music Claimants to "[s]tate

sampling procedure used to obtain 50.04% e.g. probability samples or judgement samples (systematic sampling, stratified sampling, random sampling, quota sampling, cluster sampling, etc.)." Second, Cannings requests the Music Claimants to "[k]indly furnish a copy of the sample design, i.e. a definite plan, completely determined before any data was collected." Finally, Cannings requests the Music Claimants to "[k]indly furnish cue sheets including listing of minutes `for each of the programs for which BMI has cue sheets' in compliance with 37 C.F.R. 251.45(c)."

Music Claimants oppose the first request as untimely and amounting to an interrogatory. They also state that they explained the calculation of the 50.04% figure in their response to Cannings' follow-up requests, and that no statistical sampling method was used. Music Claimants oppose the second request as untimely, and on the grounds that there are no underlying documents regarding sample design. Music Claimants oppose the third request as unduly burdensome, stating that it would cost approximately \$11,500 to photocopy the cue sheets and deliver them to Cannings; a cost which far exceeds the value of Cannings' claim. Music Claimants state their willingness to make the microfilm and hard copies of the cue sheets available in their Nashville, Tennessee office for Cannings' inspection and copying, or will, in the alternative, produce 300 cue sheets selected at random by Cannings from the list of programs on WWOR-TV.

In response, Cannings asserts that his first two requests are one in the same, and were not untimely because he asked for the sampling procedures in his follow-up requests. With regards to the third request, Cannings asserts that it is too expensive to travel to Nashville to examine the cue sheets, that the \$11,500 cost of production is not burdensome relative to the number of copyright owners comprising the Music Claimants, and that he is entitled to production.

RULING: Cannings request is denied in part and granted in part. The first request, for the sampling procedure used to derive the 50.04% figure, is denied

because Music Claimants have explained how they derived the figure, and no sampling procedure was used. The second request is denied because there are no underlying documents regarding sample design and, since according to Cannings the first and second requests are one in the same, the Music Claimants have explained derivation of the figure.

The third request, regarding production of music cue sheets for music performed on WWOR-TV in 1991, is granted in part. As we have noted in other proceedings, *see* Order in Docket No. 96-3 CARP SRA (February 7, 1997), discovery in CARP proceedings is not unlimited, and the expense of production must be considered. Although Cannings represents that the cost per copyright owner represented by the Music Claimants may not be significant, we are concerned with the total cost of production. Music Claimants have attached an affidavit to their opposition from George Schuh, who is the head of the BMI department responsible for generating music works and cue sheet databases. Mr. Schuh represents that the cost of assembling, copying and delivering all cue sheets for music broadcast on WWOR-TV during 1991 will "be at least \$11,500." Music Claimants have offered to make the records of the cue sheets available for Cannings' inspection at BMI's office in Nashville, Tennessee, the location of the documents. In the alternative, Music Claimants offer to produce a significant number of cue sheets (they suggest 300, Opposition at 10; or 360, Opposition at 11, n 3.) randomly selected by Cannings.

Cannings resists the Music Claimants offer, stating that it is financially burdensome for him to travel to Nashville, Tennessee to inspect the cue sheets, and that access to the cue sheets is essential to his case.

In ruling upon Cannings' request, the Library must balance the cost of discovery production against the relevance and significance of the documents to the CARP proceeding. While every party requesting documents will undoubtedly represent that they are important, if not critical, to that party's presentation, the real issue is what bearing the documents, if produced, will have on the determination of the CARP. While it will not often be easy to make this determination, the Library will not order a costly production of documents where the relevance and significance of the sought-after documents is negligible to the over-all determination of the CARP.

The Library has determined that ordering full scale production of the WWOR-TV music sheets cannot be justified, particularly where the cost of production is more than four times the asserted value of Cannings' claim of royalties. Nevertheless, the Library has determined that Cannings should be afforded an opportunity to determine the veracity of the cue sheets and the amount of music performed on WWOR-TV in 1991. Consequently, the Library is granting Cannings' request under the following limited conditions. The Music Claimants shall make available all cue sheets for Cannings' inspection and copying at the Nashville, Tennessee of BMI. In the alternative, Cannings may request a

sample, to be determined by him, of no more than ten percent of the total cue sheets for music broadcast on WWOR-TV in 1991 to be made available for his inspection and copying at BMI's New York City office. BMI shall supply Mr. Cannings with the necessary information to make his selection, that is the total number of cue sheets produced in 1991 for music broadcasts on WWOR-TV. Inspection and copying shall be made at Cannings' expense, and at a time mutually agreeable to both parties.

4. Cannings requests the program listings for WWOR-TV and the music cue sheets demonstrating the music use for the programs on WWOR-TV selected by BMI for its analysis. Music Claimants oppose the request for the cue sheets for the same reasons it opposes production of the cue sheets in request #3 above. With regards to the program listings, Music Claimants state that Exhibit 8 to their written direct case contains the program lists, and that they have already produced a list of the program episodes for which BMI had music duration information. In response, Cannings does not address the sufficiency of the program listings provided by the Music Claimants, but instead attaches a sample music cue sheet produced by the Music Claimants and insists that he must have access to the cue sheets to determine the total amount of music, and its duration, appearing on programs on WWOR-TV during 1991.

RULING: Cannings' request is granted in part and denied in part. The request is granted with respect to the music cue sheets in accordance with the ruling in #3 above. The request is denied with respect to the program listings, since it appears from Cannings' Reply that sufficient listings have already been produced and/or appear in Exhibit 8 of the Music Claimants' written direct case.

5. Cannings requests documents supporting the statement of Alison Smith that "the total for a WWOR performance increased from approximately \$3.00 to more than \$32.00." and BMI's special rate cards for distant signal performances on superstations during the first two quarters of 1991. With respect to the first request, the Music Claimants advise that they have previously produced the rate card showing BMI's distant signal rate for WWOR-TV, and that the \$32 figure is Alison Smith's calculation based upon her knowledge and expertise. With regards to the second

request, Music Claimants assert that there was no superstation rate in effect for the first two quarters of 1991 and that, consequently, no underlying documents exist. Cannings does not reply to Music Claimants' assertions.

RULING: Cannings' request is denied. Music Claimants have produced the rate card which, coupled with Ms. Smith's testimony, demonstrates how she reached a value of \$32 for a WWOR-TV performance. There are also no documents underlying BMI's rate card for superstations in 1991 because there was not a superstation rate in effect for the first and second quarters of 1991.

Mr. Cannings also submitted testimony from Mr. Marc Sardy (Exhibit 3) in his reply to the Music Claimants' July 29, 1997, Opposition. Written direct testimony may only be submitted in a party's direct case, 37 C.F.R. 251.43(b), or in a party's written rebuttal case, 37 C.F.R. 251.43(f). Because the parties to this proceeding have no opportunity to respond to this new material, the Office reviews the submission of Mr. Sardy's testimony *sua sponte* and finds the submission of the testimony untimely and outside the scope of the discovery phase of this proceeding. Consequently, the Office strikes exhibit 3 from Mr. Cannings' August 5 reply.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: William J. Roberts, Jr.
Senior Attorney

DATED: August 15, 1997