



The Comptroller General
of the United States

Washington, D.C. 20548

Seldin

Decision

Matter of: Propriety of Continuing Payments under Licensing Agreement
File: B-225039
Date: July 6, 1987

DIGESTS

1. Twenty-year agreement between the United States Information Agency (USIA) and a West German copyright agency was only valid for the first year of the agreement since USIA had no authority to enter into a multi-year agreement under a 1-year appropriation. The agreement violated the Antideficiency Act, 31 U.S.C. § 1341, since it created obligations in advance of appropriations.
2. Twenty-year agreement between the United States Information Agency and a West German copyright agency, though binding for only 1 year, was properly carried out for 11 years following the first year since yearly lump-sum appropriations were available for payment and USIA affirmatively continued the agreement for those years.

DECISION

The United States Information Agency (USIA) requests our decision on the propriety of continuing payment under a 20-year license agreement between it and the Gesellschaft fur Musikalische Aufführungs-Und Mechanische Vervielfältigungsrechte (GEMA), a German copyright collection agency. USIA also asks whether the agreement is severable if we do find it violative of United States law.

For the reasons given below, we find that the agreement was binding only for 1 year. Nevertheless, payments were proper for the next 11 years since USIA gave effect to the agreement, and yearly lump-sum appropriations were available for payment. Should USIA choose to discontinue this arrangement, we find nothing in United States law that would prevent it from doing so.

BACKGROUND

The questions raised pertain to a longstanding controversy between USIA and GEMA. In June 1952, the United States and the Federal Republic of Germany (FRG) entered into an

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agreement, called the ARBIE agreement, which permitted the United States to operate the Voice of America (VOA), a branch of USIA, in the FRG. Agreement on Operation of Radio Installations, June 11, 1952, United States-Federal Republic of Germany. T.I.A.S. No. 3559. Article I of the agreement allows the United States to receive, prepare and transmit radio programs in FRG territory.

USIA informs us that all radio stations licensed by the FRG have license agreements with GEMA to make payments covering royalties to composers of the music broadcast by the stations. GEMA first made a claim to royalty payments for copyrighted music broadcast by the VOA in 1957. USIA apparently resisted paying for some years. However, in 1970 the issue became more pressing with the German Foreign Office intervening on behalf of GEMA. Although an arbitration panel earlier had determined that Radio Free Europe was liable to GEMA for payment, USIA maintained that VOA was different since it merely was relaying broadcasts that originated in the United States. During the latter half of 1970, USIA explored the possibility of settlement to avoid protracted litigation. Finally, in 1973 USIA and GEMA entered into the license agreement that is the basis for USIA's inquiry.

The agreement, dated February 14, 1974, licenses USIA "to perform music from any material or source, in any technical manner, by the broadcast and rebroadcast of all manner of radio waves, micro-waves, line channel, telecast, satellite beam, and the like," from the VOA's Munich transmitters if broadcast for the primary reception by receivers and audiences outside the FRG. In consideration for this license USIA agreed to pay GEMA the fixed sum of \$10,000 per year over a 20-year term. Two separate articles of this rather brief agreement provide that the 20-year term is inviolate and not subject to renegotiation. It appears that the 20-year term provisions were included at the insistence of the United States, which wanted to insure that the payments, which it apparently regarded as nominal, would not change for a lengthy period. In this regard, USIA suggests that the agreement cannot be viewed as a license that is annually renewable at will.

Thus far, USIA had paid \$120,000 on the agreement. Recently, however, it suspended payment, justifying its suspension on various legal grounds. In this regard, USIA has asked us to determine whether the agreement violated the Antideficiency Act, 31 U.S.C. § 1341, and, if so, whether

agreement is severable for the 12 years for which payments have been made and for future payments.^{1/}

LEGAL DISCUSSION

The Antideficiency Act, 31 U.S.C. § 1341, prohibits agencies from making expenditures or incurring obligations in excess of available appropriations, or in advance of appropriations, unless authorized by law. It follows that without statutory authority agencies cannot enter into multi-year agreements or contracts.

In reliance on the Antideficiency Act, in Leiter v. United States, 271 U.S. 204, 207 (1926), the Supreme Court held that a lease to the Government for a term of years made without specific authority of law under a 1-year appropriation is binding on the United States for only that 1 year, that is, the first year of the lease. To make the lease binding for any subsequent year it is necessary both that an appropriation be available for payment, and that the Government by its duly authorized officers affirmatively continue the lease. The Court said that this would result effectively in adopting the original lease as a new lease for each subsequent year under the authority of the available appropriation. Id. at 207. In Leiter the leases being considered were for terms of 4 and 5 years.

We think the principles of Leiter, apply here. The United States Information and Educational Exchange Act of 1948, ch. 36, 62 Stat. 6,12, codified at 22 U.S.C. §§ 1471, 1472, authorized United States agencies to enter into contracts ^{2/}

^{1/} USIA also asked us to determine whether GEMA is authorized to charge USIA for transmission of broadcasts originating in the United States, and whether United States or FRG law governs resolution of that issue. As these questions, however, raise copyright and conflict of laws issues more typically addressed by the Civil Division of the United States Justice Department, we will abstain from their resolution and recommend referral to that agency.

^{2/} In 1982 the Act was amended to authorize contracts for a maximum of 5 years when such contracts are funded from annual appropriations. Pub. L. No. 97-241, § 304(b), 96 Stat. 273, 292. The amended legislation also provided for cancellation of these multi-year contracts if funds were not made available for their continuation in fiscal years subsequent to the year in which they were concluded. Pub. L. No. 97-241, 96 Stat. 273, 292.

for property and services with foreign governmental entities in carrying on activities that further the purpose of disseminating abroad information about the United States. These activities include operation of facilities for radio transmission and reception.

As with the leases in Leiter, USIA had no authority to enter into the 20-year agreement. At the time the agreement was concluded, the United States Information and Educational Exchange Act of 1948 only authorized USIA to enter into agreements for 1 year. The fiscal year 1974 appropriation to USIA that provided initial funding for the agreement was only available for the usual 1 year period.^{3/} Pub. L. No. 93-162, 87 Stat. 636, 657, 659. It follows that the agreement was binding only for the first year.

Nevertheless, the yearly payments over the subsequent 11-year period were legally proper. Lump-sum appropriations were available for payments for each fiscal year and USIA affirmatively gave effect to the agreement. Thus, for each year following the first year of the agreement, in essence USIA adopted the original agreement, making a new agreement under the authority of the yearly lump-sum appropriation. Should USIA wish to discontinue this arrangement, there is nothing in United States law that would prevent it from doing so. Since the agreement was only valid for 1 year, the question about severability does not arise.^{4/}

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^{3/} This is also true of the current appropriation. Pub. L. No. 99-591, 100 Stat. 3341-71, 73.

^{4/} Nevertheless, it would appear that the agreement by its terms, would not be severable if it was otherwise legally sufficient. In two separate articles the agreement states that the 20-year period is inviolate and not subject to renegotiation. What information we have also suggests USIA would not have entered into the agreement but for inclusion of the 20-year term.