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Docket: 15-CRB-0010-CA-S (SPORTS RULE PROCEEDING)
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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
	)	
	)	**Docket No. 15-CRB-0010-CA-S**
ADJUSTMENT OF CABLE STATUTORY LICENSE ROYALTY RATES	)	**(Sports Rule Proceeding)**
	)	
	)	

REPLY COMMENTS
OF THE PARTICIPATING PARTIES

The Joint Sports Claimants ("JSC"),[1] NCTA−The Internet & Television Association ("NCTA") and American Cable Association ("ACA") (collectively, the "Participating Parties") submit the following response to the Copyright Royalty Judges' ("Judges") notice published at 82 Fed. Reg. 44,368 (Sept. 22, 2017) ("Notice").

INTRODUCTION

The Participating Parties represent all parties who have filed timely notices of intent to participate in this proceeding to adjust the royalty rates payable by cable systems under Section 111 of the Copyright Act, 17 U.S.C. § 111. On January 11, 2017, the Participating Parties jointly requested the Judges to adopt rules that would resolve all issues in this proceeding. These rules are set forth in Appendix A to the Joint Motion Of The Participating Parties To Suspend Procedural Schedule And To Adopt Settlement (filed Jan. 11, 2017), subject to the correction of the typographical error noted in the Joint Comments of the Participating Parties at 2-3 (filed June 20, 2017) ("June 2017 Joint Comments"). The rules proposed by all the Participating Parties, as corrected, are referred to herein as the "Proposed Rules." If adopted, the Proposed Rules would

[1] "JSC" refers collectively to the Office of the Commissioner of Baseball, National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League and National Collegiate Athletic Association.

establish a separate and additional Section 111 royalty rate (a per-telecast "Sports Surcharge") for the secondary transmission by "covered" cable systems of certain JSC telecasts that would have been blacked out under the Federal Communication Commission's ("FCC") former sports exclusivity rule ("FCC Sports Rule").[2]

All of the Participating Parties support adoption of the Proposed Rules without modification; none of the Participating Parties objects to any portion of the Proposed Rules.[3] Only Major League Soccer ("MLS"), which neither petitioned the Judges to adopt a rate adjustment based on the repeal of the FCC's Sports Rule nor filed a notice of intent to participate in this proceeding, has submitted comments opposing the Proposed Rules. *See* Comments of Major League Soccer, L.L.C. (filed June 19, 2017) ("MLS Comments"). MLS argues that the Proposed Rules are "unfair" and "unjust" because they do not require payment of the Sports Surcharge for the secondary transmission of MLS telecasts that would have been subject to blackout under the former FCC Sports Rule. *Id.* at 3 & 4. MLS asks the Judges to amend the Proposed Rules to include MLS telecasts in the definition of "eligible professional sports event" agreed upon by the Participating Parties. *See id.* at 4.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to "adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding . . . ." 17 U.S.C.

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[2] The FCC adopted its Sports Rule in 1975. *See Report and Order in Doc. No. 19417*, 54 F.C.C.2d 265, 277-85 (1975). It repealed that rule effective November 24, 2014. *See Sports Blackout Rules,* 79 Fed. Reg. 63,547 (Oct. 24, 2014). The Sports Rule generally required certain cable systems within approximately 35-miles of a stadium to black out the distant signal (out-of-market) broadcast of a game played at that stadium under certain circumstances – but only if the "home" team or its agent provided those systems with the advance notice required by FCC rules.

[3] *See* June 2017 Joint Comments at 2. The Notice states that only JSC filed comments "by the June deadline" supporting the proposed rules and offering a correction of a typographical error. *See* Notice, 82 Fed. Reg. at 44,369. In fact, all of the Participating Parties (JSC, NCTA, and ACA) joined in those comments.

§ 801(b)(7)(A). In a 2009 decision entitled to precedential effect, the Register of Copyrights confirmed that under Section 801(b)(7)(A), the Judges may alter the terms of proposed rules to which all proceeding participants have agreed only if those terms are "contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law." *[Register of Copyrights] Review of Copyright Royalty Judges Determination*, Docket No. 2009-1, 74 Fed. Reg. 4,537, 4,540 (Jan. 26, 2009) ("2009 Register's Opinion"); *see also Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. 6,832, 6,832 (February 11, 2009) ("2009 CRJ Order") ("The Register stated that once the agreement is vetted for errors of law, the remaining portions of the agreement may be adopted" where no participant in the proceeding has submitted an objection to the agreement.); Notice, 82 Fed. Reg. at 44,369.

As the Judges have correctly recognized, MLS did not make any argument in its comments that the Proposed Rules violate any law. Notice, 82 Fed. Reg. at 44,369. However, the Judges have solicited reply and sur-reply comments on whether adoption of the Proposed Rules "is contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law." Notice, 82 Fed. Reg. at 44,369. The Judges also ask (1) whether "entities not expressly addressed in the" Proposed Rules would be "bound" or "otherwise affected" by them; (2) if so, whether the Judges are "effectively adopting a zero sports surcharge rate" for those entities; and (3) what factors would justify "different rates" for those entities. *Id.* The Judges make clear that the reply comments should be "limited to legal analysis of the issue as the Judges express it." *Id.*

ARGUMENT

The Participating Parties believe that MLS and other sports organizations that chose not to participate in this proceeding are not "bound" or "otherwise affected" by the Proposed Rules.[4] The Participating Parties also believe that the Judges are not required to adopt any Sports Surcharge, including a "zero sports surcharge rate," for MLS and other non-participant sports organizations.[5] But even if these non-participants were somehow considered to be "bound" or "affected" by the Proposed Rules and even if the Proposed Rules could be considered as setting a "zero surcharge rate" for non-participants, the Rules are not be "contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law." Notice, 82 Fed. Reg. at 44,369. Thus, they should be adopted by the Judges without modification.

I. The Proposed Rules Are Not Contrary To Section 111 Or Any Other Statutory Law.

In the 2009 Register's Opinion, the Register of Copyrights identified the types of proposed rules that could not be adopted because they contravened statutory law:

[4] Section 801(b)(7)(A)(i) of the Copyright Act, 17 U.S.C. § 801(b)(7)(A)(i), directs the Judges to provide non-participants who would be "bound by the terms, rates, or other determination set by any agreement" an "opportunity to comment on the agreement." The Act does not define the term "bound." Generally, however, to "bind" a party means "to impose one or more legal duties on" it. *Bind*, Black's Law Dictionary (10th ed. 2014). The Proposed Rules, if adopted, would not impose any legal duty upon the MLS to do (or not to) anything; only JSC members and "covered cable systems," as defined in the Proposed Rules, would have duties under those rules. Indeed, MLS's complaint is that MLS is *not* bound by the Proposed Rules.

[5] As discussed below, the Proposed Rules will implement Section 801(b)(2)(C) of the Copyright Act, 17 U.S.C. § 801(b)(2)(C); and nothing in Section 801(b)(2)(C) requires the Judges to adopt royalty rates for secondary transmissions of all sports telecasts that would have been blacked out under the former FCC Sports Rule. To the extent that cable systems make secondary transmissions of broadcast stations that carry such telecasts, they will pay the Basic and (if applicable) 3.75 rates to do so; and the copyright owners of those telecasts will be eligible to share in the Basic and 3.75 royalty funds. Moreover, the legislative history of Section 801(b)(2)(C) confirms that the Judges may adopt different "royalty schedules for particular classes of cable systems." H.R. Rep. No. 94-1476 at 177 (1976). Requiring different "royalty schedules" for different telecasts subject to the former FCC Sports Rule is consistent with that legislative history.

- Altering statutory terms. One of the definitions in the proposed rules reviewed in the 2009 Register's Opinion "was in error because it altered the statutory terms of the section 115 license." 2009 CRJ Order, 74 Fed. Reg. at 6,832; *see* 2009 Register's Opinion at 4,541.

- Impermissible retroactive rulemaking. A second provision amounted to "impermissible retroactive rulemaking" because it set rates for certain activity during the period prior to publication of the rules where rates covering that activity had previously been established. 2009 CRJ Order, 74 Fed. Reg. at 6,833; *see* 2009 Register's Opinion, 74 Fed. Reg. at 4,542.

- Creating a conflict with statutory provisions setting the timing of payments. A third provision, which addressed the timing of royalty payments, was violative of a statutory provision specifying when such payments must be made. 2009 CRJ Order, 74 Fed. Reg. at 6,833; *see* 2009 Register's Opinion, 74 Fed. Reg. at 4,542-43.

- Contravening the Register's authority. A fourth provision contravened the Register's "authority to prescribe regulations for statements of account" by providing that certain information did not have to be included in such statements. 2009 CRJ Order, 74 Fed. Reg. at 6,833; *see* 2009 Register's Opinion, 74 Fed. Reg. at 4,543.

Adoption of the Proposed Rules, to which all of the participants in this proceeding have agreed, would not alter any statutory terms of the Section 111 license, constitute retroactive rulemaking, violate any provisions of Section 111 or contravene the Register's authority. The effect of adopting the Proposed Rules would simply be to adjust the existing Section 111 cable compulsory license royalty rates to account for the repeal of the FCC's Sports Rule by establishing a new and additional Section 111 royalty rate (the Sports Surcharge). The separate Sports Surcharge would not apply to the secondary transmission of all sports telecasts under all circumstances but only to certain sports telecasts in certain circumstances. Thus, for example, while secondary transmissions of MLS telecasts would not generate a Sports Surcharge under the Proposed Rules, the copyright owners of MLS telecasts could continue to claim a share of the

Basic and any 3.75 royalties that cable systems pay to retransmit broadcast stations carrying those MLS telecasts – just as those copyright owners are able to do now.[6]

It is clear that the Judges have the authority to adopt the Proposed Rules without modification. Section 801(b)(2)(C) of the Copyright Act authorizes the Judges to adjust the Section 111(d)(1)(B) royalty rates to account for changes in the Sports Rule:

> In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

17 U.S.C. § 801(b)(2)(C). The Proposed Rules would implement Section 801(b)(2)(C) by establishing the Sports Surcharge to account for the FCC's November 2014 repeal of its Sports Rule. *See supra* note 2. Moreover, it is uncontroverted that the Judges may implement Section 801(b)(2)(C) by establishing a separate and additional Section 111 royalty rate (a surcharge) covering only the affected secondary transmissions. For example, in 1983 following the FCC's repeal of the syndicated program exclusivity rules, the Copyright Royalty Tribunal ("CRT") adjusted the Section 111 royalty rates pursuant to Section 801(b)(2)(C) by establishing a separate Syndex Surcharge; the Syndex Surcharge is payable by certain cable systems (in addition to Basic and 3.75 royalties) that retransmitted syndicated programming subject to black out under the former FCC syndicated exclusivity rules. *See Adjustment of the Royalty Rate for Cable*

[6] There are currently three separate Section 111 royalty funds – the Basic Fund, 3.75 Fund, and Syndex Fund. Adoption of the Proposed Rules would result in a fourth fund, the Sports Surcharge Fund. While all copyright owners are eligible to receive royalties from the Basic Fund, not all copyright owners are eligible to receive royalties from the 3.75 Fund or the Syndex Fund. *See, e.g., Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57,063, 57,071, 57,079 (Sept. 17, 2010).

Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 Fed. Reg. 52,146 (Nov. 19, 1982).

Nor is the authority of the Judges' to adopt the Proposed Rules impacted by the fact that the application of the Sports Surcharge is limited to telecasts of certain "eligible professional sports events" and certain "eligible collegiate sports events," as defined in the Proposed Rules.[7] Notice, 82 Fed. Reg. at 44,368 & n.2. Section 801(b)(2)(C) does not require the Judges to adopt a surcharge that applies to all copyright owners whose telecasts may have been eligible for blackout protection under the former FCC Sports Rule. When Congress wanted the Judges to adjust royalty rates to cover all copyright owners, it knew what language to use; and no such language appears in Section 801(b)(2)(C) (or Section 111).[8]

In addition, Congress contemplated that there would be no rate adjustment at all under Section 801(b)(2)(C) unless "an[] owner or user of a copyright work whose royalty rates are specified by section 111" filed a petition requesting such a rate adjustment – and did so within

[7] As the Judges also correctly note, only "Form 3" systems (those with semi-annual "gross receipts" greater than $527,600) would pay the Sports Surcharge. *See* Notice, 82 Fed. Reg. at 44,368, n.1. That is because Section 801(b)(2)(C), by its terms, only authorizes adjustment of the royalty rates in Section 111(d)(1)(B) of the Copyright Act, 17 U.S.C. § 111(d)(1)(B), and only Form 3 systems pay those rates. The Proposed Rules also contain several provisions to ensure that they comply with the mandate in Section 801(b)(2)(C) that any rate adjustment "shall apply only to the affected television broadcast signals carried on those systems affected by the change" in the FCC Sports Rule.

[8] *See*, *e.g.*, 17 U.S.C. § 112(e)(4) (rates and terms determined by the Judges shall be "binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under [Section 112]," except those that negotiate a voluntary license); *id.* § 114(f)(1)(B) (rates and terms determined by the Judges shall "be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph [preexisting subscription and digital audio radio services]," except those that negotiate a voluntary license); *id.* § 114(f)(2)(B) (rates and terms determined by the Judges shall "be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph [eligible nonsubscription transmission services and new subscription services]," except those that negotiate a voluntary license); *id.* § 115(c)(3)(D) (rates and terms determined by the Judges shall "be binding on all copyright owners of nondramatic musical works and persons entitled to a compulsory license under [Section 115(a)(1)]," except those that negotiate a voluntary license); *id.* § 118(b)(4) (the rates and terms determined by the Judges "shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities," except those that negotiate a voluntary license).

twelve months of the change in FCC rules. *See* 17 U.S.C. § 804(b)(1)(B); H.R. Rep. No. 94-1476 at 178 (1976) (right to petition is "exercisable for a 12 month period following the date [the FCC Sports Rule] changes are finally effective"). While JSC did file such a petition (on the last day), MLS did not do so. Given MLS's failure to file a petition requesting a Section 801(b)(2)(C) rate adjustment (and its failure to file a notice of intent to participate in this proceeding), it is entirely consistent with the statutory scheme not to require payment of a Sports Surcharge for MLS telecasts. Adoption of the Proposed Rules would leave the MLS (and other non-participants) in precisely the same position as when they chose not to file a petition requesting a Section 801(b)(2)(C) rate adjustment.

Limiting the Sports Surcharge to telecasts made by only a subset of copyright owners, as set forth in the Proposed Rules, also is consistent with Section 801(b)(7)(A) of the Copyright Act and the Judges' precedent under that provision. As noted above, Section 801(b)(7)(A) authorizes the Judges to adopt rates to which "*some* or all of the participants in a proceeding" agree. 17 U.S.C. § 801(b)(7)(A) (emphasis added). And Section 801(b)(7)(A)(i) directs the Judges to afford only those who would be "*bound* by the terms, rates, or other determination set by any agreement . . . an opportunity to comment on the agreement . . . ." *Id.* § 801(b)(7)(A) (emphasis added). Congress thus contemplated the adoption of rate agreements that involve only a subset of copyright owners and do not bind all copyright owners who might be eligible for the rate adjustment.

Accordingly, even if MLS had taken the steps required to establish its status as a "participant" in this proceeding, the Judges would have the authority to adopt a settlement that applied to only a subset of interested parties. For example, the Judges have adjusted the Section 112 and 114 statutory licensing rates and terms applicable to a broad category of entities that

perform sound recordings over the Internet (webcasters). In doing so, the Judges have adopted settlement agreements applicable only to certain classes of these webcasters.[9] While this precedent involved agreements encompassing subsets of copyright users rather than copyright owners, Section 801(b)(7)(A) does not provide any basis for distinguishing between settlement agreements involving copyright users rather than copyright owners. In either case, approving settlements such as the one involved here furthers "the policy in Section 801(b)(7)(A) to promote negotiated settlements." 2015 CRJ Order, 80 Fed. Reg. at 58,203.

II. Nothing In The MLS Comments Provides A Proper Basis For Modifying The Proposed Rules To Encompass MLS Telecasts.

As noted above, MLS does not expressly contend that the Proposed Rules are "contrary to the applicable license(s) or otherwise contrary to statutory law. . . ." MLS argues only that these rules are "unfair" and "inequitable." *See* MLS Comments at 2-3. At best, MLS is claiming that the Proposed Rules are not "reasonable," as required by Section 801(b)(2)(C). But the Judges have no authority to reject (or modify) a settlement agreement as not being "reasonable" unless a participant in the proceeding makes such a claim. *See* 17 U.S.C. § 801(b)(7)(A); 2009 Register's Opinion, 74 Fed. Reg. at 4,540. And MLS is not a participant in this proceeding because it chose not to file a notice of intent to participate. In any event, there is nothing "unfair," "unjust," or "unreasonable" about not requiring cable systems to pay the Sports Surcharge for telecasts of entities that failed to participate in this proceeding.

JSC, NCTA and ACA negotiated for more than one year (and, absent settlement, would have litigated) over several important issues surrounding adoption of a Sports Surcharge. Some

[9] *See, e.g.*, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 80 Fed. Reg. 58,201, 58,203 (Sept. 28, 2015) ("2015 CRJ Order") (adopting settlement agreement setting rates for certain internet transmissions by college radio stations and other noncommercial webcasters); *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 80 Fed. Reg. 59,588, 59,589 (Oct. 2, 2015) (adopting partial settlement regarding royalty rates and terms for certain internet transmissions by NPR and certain other public radio entities).

of the most significant issues concerned whether those seeking a Sports Surcharge had ever sought the protection afforded by the former FCC Sports Rule; the effect of the Section 801(b)(2)(C) requirement that any rate adjustment "apply only to the affected television broadcast signals carried on those systems affected by the change;" and the value of telecasts that were in fact blacked out under the former FCC Sports Rule.[10] By choosing not to become participants in this proceeding, MLS (as well as all other non-JSC entities) forfeited the right and opportunity to provide evidence concerning any of these issues in either negotiations or a litigated proceeding. The Participating Parties, on the other hand, did develop and exchange such evidence regarding the effect of the elimination of the FCC Sports Rule on JSC members as part of their extensive negotiations and their preparation for filing written direct statements.

In short, cable systems should not be required to pay the Sports Surcharge for MLS telecasts simply because MLS asserts in a four-page set of comments that it should be the beneficiary of a settlement of a rate adjustment proceeding that it chose to ignore until the settlement was announced. The mere fact that MLS (or any other copyright owner) may be entitled to receive a share of Basic and 3.75 royalties does not mean that it should have the right to receive additional royalties arising from (1) the repeal of an FCC rule which it has never shown to have had any effect upon it; and (2) a rate proceeding in which it chose not to participate.

[10] Under the negotiated Proposed Rules, cable systems do not pay a Sports Surcharge for all telecasts of NCAA member institutions and conferences even though NCAA is a member of JSC; and they do not pay that surcharge for any NCAA member telecasts without proof that those members had invoked the Sports Rule while it was in effect. *See* Proposed Rules Section 387.2(e)(5) & (10) Nothing in the MLS Comments suggests that MLS ever took advantage of the former FCC Sports Rule. Because MLS also chose not to participate in the FCC Sports Rule proceeding, there is no record in that proceeding establishing that MLS availed itself of the Sports Rule when the rule was in effect or that elimination of the Sports Rule would affect the MLS telecasts. The only sports organizations that did participate in the FCC Sports Rule proceeding were JSC members that had availed themselves of Sports Rule protection for more than four decades. While these JSC members strongly opposed elimination of the Sports Rule, no other sports organization (MLS included) did so.

CONCLUSION

For the reasons discussed above, the Participating Parties submit that the Proposed Rules should be adopted in their entirety without modification because (i) they are supported by all parties that filed a timely notice of intent to participate in this proceeding; and (ii) they are not contrary to Section 111 or any other statutory law. Indeed, awarding MLS its requested relief would be fundamentally at odds with both the letter and spirit of the process governing this proceeding and irreconcilable with the terms negotiated in good faith by the Participating Parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ari Z. Moskowitz, hereby certify that on October 23, 2017, copies of the Reply Comments of the Participating Parties were served electronically and via FedEx upon:

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Certificate of Service

I hereby certify that on Monday, October 23, 2017 I provided a true and correct copy of the Notice - Other to the following:

American Cable Association, represented by Ross J. Lieberman served via Overnight Service

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