

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

SUPPLEMENTAL REPLY COMMENTS
OF THE JOINT SPORTS CLAIMANTS

The Joint Sports Claimants (“JSC”)¹ submit the following comments to supplement the Reply Comments of the Participating Parties, which JSC is filing jointly with NCTA–The Internet & Television Association (“NCTA”) and American Cable Association (“ACA”) in response to the Copyright Royalty Judges’ (“Judges”) notice published at 82 Fed. Reg. 44,368 (Sept. 22, 2017) (“Notice”). The purpose of JSC’s supplemental comments is to address Major League Soccer’s (“MLS”) erroneous contention that, in this rate adjustment proceeding, JSC are required to “represent the interests” of MLS and other sports organizations that never filed notices of intent to participate. *See* Comments of Major League Soccer, L.L.C. at 3 (filed June 19, 2017) (“MLS Comments”).²

For more than three decades, the JSC members have agreed to serve as the representatives of the “Joint Sports Claimants” category in the Phase I (now called “Allocation Phase”) cable royalty distribution proceedings; to bear the full expense of litigating and

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.

² While MLS claims that JSC had an obligation to represent all non-participating sports organizations whose programming comes within the “Joint Sports Claimants” category, it asks the Judges to amend the rules proposed by JSC, NCTA and ACA in this proceeding (the “Proposed Rules”) only to include MLS. *See* MLS Comments at 4. JSC focuses these supplemental comments on MLS but the comments apply equally to all sports organizations that chose not to participate in this rate adjustment proceeding.

negotiating over the royalties allocated to the Joint Sports Claimants category; and to share with those having valid claims the royalties allocated to that category.³ But JSC have never agreed to “represent the interests” of MLS in this rate adjustment proceeding or any other proceeding outside the Phase I (Allocation Phase) proceedings. Nor have the Judges (or their predecessors) ever adopted any rule or order requiring JSC to do so.

MLS asserts that it “made attempts to join JSC on a formal basis.” MLS Comments at 2. But MLS never approached JSC about representing it in this rate adjustment proceeding. The only “attempts” MLS has made concern the Phase I (Allocation Phase) royalty distribution proceedings. However, MLS’s “attempts to join JSC on a formal basis” in royalty distribution proceedings were unsuccessful because of JSC’s concerns about MLS’s ability to document the validity of its claims. Indeed, although MLS originally filed a petition to participate in the 2010-13 cable (and satellite) royalty distribution proceeding, MLS withdrew its claims in the Joint Sports Claimants category shortly after the Judges compelled MLS to comply with discovery requests concerning the validity of MLS’s claims; and MLS is no longer pursuing a claim in that proceeding for programming within the Joint Sports Claimants category. *See* Major League Soccer, LLC Withdraw [*sic*] of Certain Claims Relating to the Distribution of the 2010-2013 Cable and Satellite Royalty Funds, No. 2014-CRB-0010 CD (2010-2013) (filed Sept. 21, 2016);

³ In the pending 2010-13 cable royalty distribution proceeding, all parties have agreed (and the Judges have accepted) that the “Joint Sports Claimants” category consists of “Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except programs in the Canadian Claimants category.” *Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order*, Docket No. 14-CRB-0010-CD (2010-13), Ex. A (Nov. 25, 2015). This is the same definition of the “Joint Sports Claimants” category to which the Phase I (Allocation Phase) parties have historically agreed. It should be noted that the term “Joint Sports Claimants” has been used (perhaps somewhat confusingly) both as a short-hand reference to the sports organizations identified in note 1 *supra* and to an Allocation Phase (Phase I) category. JSC agree with MLS that that category encompasses a range of live sports programming in to addition to the programming of the entities identified in note 1.

Order Granting In Part Multigroup Claimants' First Motion To Compel Production Of Documents By Major League Soccer LLC, No. 14-CRB-0010-CD (2010-13) (Sept. 14, 2016).

Furthermore, JSC were not even aware that MLS had any interest in the Sports Rule or this proceeding until months after JSC had already entered into their settlement agreement with NCTA and ACA.⁴ MLS never participated in the FCC proceedings involving repeal of the FCC Sports Rule. It never opposed that repeal or demonstrated how, if at all, repeal would affect MLS (or that it ever even invoked the blackout protection that the FCC Sports Rule accorded during the nearly forty years that the rule was in effect).⁵ MLS did not file a petition requesting an adjustment of the Section 111 rates to account for the FCC's repeal of the Sports Rule. It did not file any petition or notice of intent to participate in this proceeding. And it did not participate in (or support) JSC's protracted negotiations with NCTA and ACA or JSC's development of an evidentiary case (in the event that such negotiations were unsuccessful).

In sum, JSC were neither obligated, nor were they the appropriate parties, to negotiate with the NCTA and ACA over what surcharge (if any) might be applicable to MLS programming due the repeal of the FCC Sports Rule. If MLS wanted to seek such a surcharge, it could (and should) have participated in this proceeding. MLS did not do so and its belated contention that JSC were required to negotiate (and litigate) on MLS's behalf is simply wrong.

⁴ A few days before filing the MLS Comments, MLS's counsel gave JSC's counsel a "heads up" that he would be doing so. That was the first contact that MLS had with JSC concerning this proceeding.

⁵ The FCC Sports Rule did not automatically require cable systems to black out any sports programming. It only required such programming in limited circumstances and only where the affected sports organization provided cable systems with the advance notice specified by the rule. The Proposed Rules to which all of the participating parties have agreed in this proceeding require at least certain JSC members to demonstrate that they actually provided such notice while the FCC Sports Rule was in effect. *See Adjustment of Cable Statutory License Royalty Rates*, 82 Fed. Reg. 24611, 24614 (May 30, 2017) (Proposed Rule limits "eligible collegiate sports event[s]" to football or men's basketball telecasts of NCAA Division I teams "on whose behalf the FCC Sports Blackout Rule (47 CFR 76.111) was invoked during the period from January 1, 2012 to November 23, 2014").

MLS has retained its own separate copyright royalty counsel, and it was the responsibility of that counsel (not JSC) to “represent the interests” of MLS in a proceeding such as this one.

CONCLUSION

The Judges should adopt without modification the Proposed Rules to which all of the parties participating in this proceeding have agreed.

Respectfully submitted,

JOINT SPORTS CLAIMANTS

/s/ Robert Alan Garrett

Robert Alan Garrett (D.C. Bar No. 239681)
M. Sean Laane (D.C. Bar No. 422267)
Michael Kientzle (D.C. Bar No. 1008361)
Elliott C. Mogul (D.C. Bar No. 1009860)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
202.942.5000 (voice)
202.942.5999 (facsimile)
Robert.Garrett@apks.com
Sean.Laane@apks.com
Michael.Kientzle@apks.com
Elliott.Mogul@apks.com
*Counsel for the Office of the Commissioner of
Baseball*

/s/ Philip R. Hochberg

Philip R. Hochberg (D.C. Bar No. 5942)
LAW OFFICES OF PHILIP R. HOCHBERG
12505 Park Potomac Avenue
Sixth Floor
Potomac, MD 20854
301-230-6572
Phochberg@shulmanrogers.com
*Counsel for the National Basketball Association,
National Football League, National Hockey League
and Women’s National Basketball Association*

/s/ Iain R. McPhie

Iain R. McPhie (D.C. Bar No. 473951)
Ritchie T. Thomas (D.C. Bar No. 28936)
SQUIRE PATTON BOGGS (US) LLP
2550 M St., N.W.
Washington, D.C. 200037
202.626.6600 (voice)
202.626.6780 (facsimile)
Iain.McPhie@squirepb.com
Ritchie.Thomas@squirepb.com
*Counsel for National Collegiate Athletic
Association*

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2017, a copy of the foregoing Supplemental Reply Comments of the Joint Sports Claimants was served electronically and by Federal Express overnight to the following:

Edward S. Hammerman
HAMMERMAN, PLLC
5335 Wisconsin Avenue, NW
Washington, DC 20015
ted@copyrightroyalties.com

Seth Davidson
Ari Moskowitz
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
sadaavidson@mintz.com
azmoskowitz@mintz.com

Ross J. Lieberman
AMERICAN CABLE ASSOCIATION
2415 39th Place, NW
Washington, D.C. 20007
rlieberman@americancable.org

/s/ Troy Strunkey

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:

National Cable & Telecommunications Association (NCTA), represented by Seth Davidson served via Overnight Service

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

Signed: /s/ Robert A Garrett