

**Before the  
COPYRIGHT ROYALTY JUDGES  
The Library of Congress  
Washington, D.C.**

<b>In the Matter of</b>	)	)	<b>Docket No. 15-CRB-0010-CA-S</b>
<b>37 C.F.R. Part 387</b>	)	)	<b>(Sports Rule Proceeding)</b>
<b>Adjustment of Royalty Rates for Cable Statutory Retransmission License</b>	)	)	

**REPLY COMMENTS OF MAJOR LEAGUE SOCCER, L.L.C.**

Pursuant to the Notice published at 82 Fed. Reg. 44368 (September 22, 2017) (“Notice”), Major League Soccer, L.L.C. (“MLS”) submits its reply comments in the above-referenced proceeding related to proposed regulations to require covered cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to other royalties that cable systems must pay under Section 111 of the Copyright Act. MLS expresses its gratitude to the Judges for their efforts to protect the integrity of the Copyright Royalty Board’s (“CRB”) rules, and its intent to treat and protect all copyright holders equitably. MLS’s Reply Comments pay particular attention to why entities not expressly addressed in the proposal appear to be bound by the rates and terms of the proposal, and are otherwise affected by the proposed rules.

MLS programming clearly falls within the “Joint Sports Claimants” (“JSC”) programming category definition adopted by the Copyright Royalty Judges (“Judges”) in recent

cable royalty distribution proceedings.<sup>1</sup> MLS provides live telecasts of professional teams' sports broadcasts by U.S. and Canadian television stations, exclusive of programs in the Canadian Claimants' category.<sup>2</sup> For many years, a coalition of certain (but not all) professional and collegiate sports leagues meeting the JSC category definition has acted as a *de facto* category representative for the JSC category (the "JSC Members").<sup>3</sup> Notwithstanding its eligibility as a part of the JSC category, and despite MLS' attempts to join the JSC Members' coalition on a formal basis,<sup>4</sup> the JSC Members have yet not permitted MLS to become a part of their coalition, and now seek to have the Judges promulgate a new cable rate that would exclude MLS, and other similarly situated, eligible copyright owners from participation by definition. *See* Notice at 44368 (limiting the definition of "eligible professional sports events" that would qualify for the Sports Surcharge exclusively to JSC Members). Promulgating a rule and definition that excludes an eligible claimant, such as MLS, from participation in the Sports Surcharge royalties is both contrary to law, and inequitable.

MLS's Reply Comments are separated into four parts. The first part responds to the Judges' request for reply comments related to why the proposal is "contrary to the provisions of

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<sup>1</sup> *See* Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), In re Distribution of Cable Royalty Funds, Exhibit A (Nov. 25, 2015) (defining the JSC category as "Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except programs in the Canadian Claimants category.").

<sup>2</sup> *See* Declaration of William Z. Ordower, attached at Exhibit B in MLS Comments filed June 19, 2017.

<sup>3</sup> The JSC Members are comprised of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, the National Collegiate Athletic Association and the Women's National Basketball Association.

<sup>4</sup> *See* Exhibit A, which contains two examples of correspondence between JSC representative, Tom Ostertag (retired, former General Counsel of Major League Baseball), and MLS counsel discussing MLS' desire to become one of the JSC Members. This information is provided relative to the Judges' comment in the Notice at 44369, footnote 5, which mentioned, "MLS asserted without evidence that it made 'attempts to join the JSC'." MLS provides such evidence herewith.

the applicable license(s),” which would permit the Judges to decline to adopt portions of the agreed-upon regulations. The second part addresses why the specified provisions are contrary to applicable law. The third part addresses why entities excluded from the proposed provisions are effectively bound by them, including addressing factors justifying different rates for entities that would have a zero rate from those who would receive the proposed Sports Surcharge rate. The fourth and final part reiterates proposed language for 37 C.F.R. § 387.2(e)(4).

It is not MLS’s intention to undermine the JSC Members’ efforts to obtain additional compensation from cable systems for eligible copyright owners. MLS simply wants to be recognized as a claimant with programming that falls within the JSC category and treated equally to JSC Members with regard to the Sports Surcharge rate.

**I. The Proposed Rules Are Contrary to the Provisions of the Applicable Licenses.**

The proposed Sports Surcharge rules are contrary to the statutory license for secondary transmissions by cable systems set forth in 17 U.S.C. § 111, because they are too narrowly tailored. The Copyright Act does not appear to permit the Judges to allow certain subsets of copyright owners within a particular claimant group to receive remuneration from a particular cable statutory license rate to the detriment of other qualified copyright holders within the same claimant group. *See* 17 U.S.C. § 111(d)(3)(A)-(C). Moreover, the discriminatory definition of “eligible professional sports events” set forth in the Notice conflicts with 17 U.S.C. § 801(b)(2)(C), because the rules and regulations changed by the Federal Communications Commission with respect to syndicated and sports program exclusivity applies to all eligible non-network programs’ affected television broadcast signals, not only those self-selected by JSC Members. As drafted, these rules appear to be designed to prevent any potential “Distribution

Phase” (formerly Phase II) disputes with regard to the Sports Surcharge between JSC Members and any eligible claimant who is not a part of their coalition, since those copyright owners would very likely not be considered “eligible” to participate in the Sports Surcharge rate *by definition* under the proposed rules.

MLS acknowledges that the Judges may adopt rules contained in settlement agreements, subject to Section 111 licenses. Fortunately, however, the Judges are not required to adopt the rules as contained in the JSC settlement agreement, and can (and *should*) alter those rules to correct the discrimination against non-JSC Members, such as MLS. *See* 17 U.S.C. § 802(f)(1)(D); *see also* [Register of Copyrights] Reviews of Copyright Royalty Judges Determination, Docket No. 2009-1, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009) (Register’s Opinion). To clarify, MLS does not object to the idea of a settlement or the majority of the proposed rules. In fact, MLS agrees with the JSC Members that the proposed sports surcharge rate is reasonable—provided that it applies to all statutory license claimants who represent programming that falls in the JSC category. MLS contends that the November 23, 2015 Rate Adjustment Petition filed by the self-selected JSC Members should benefit all JSC-eligible entities.<sup>5</sup> Unless the JSC Members act as category representatives and provide MLS and others a portion of the Sports Surcharge royalties, then MLS and all other truly eligible sports leagues shall be harmed financially.

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<sup>5</sup> MLS was not named as a participant in this proceeding because the JSC Members unilaterally excluded MLS from their coalition; however, MLS is qualified to be a participant based on its programming and as a copyright holder eligible to enjoy the benefits afforded to all entities that fall under the JSC definition.

## II. The Proposed Rules Are Contrary to Applicable Law.

The Copyright Act directs that the Judges provide (1) an opportunity to comment to nonparticipants who would be bound and (2) an opportunity to comment and object to participants who would be bound by new regulations. 11 U.S.C. § 801(b)(7)(A)(i). The Judges may decline to adopt an agreement as a basis for statutory terms and rates for “participants that are not parties to the agreement” if a participant objects to the agreement and the Judges conclude that the settlement “does not provide a reasonable basis for setting” rates and terms. *Id.* at § 801(b)(7)(A)(ii). MLS is not a participant to this proceeding, but clearly meets Judges’ description of Joint Sports Claimants,<sup>6</sup> and most certainly is an affected party, who along with other similarly situated claimants could be harmed by the proposed regulation. MLS argues that the proposed provisions are contrary to statutory law. These promoted rules constrict the rules to benefit a very specific subset of claimants. In contrast, the former FCC sports-broadcast rules and current copyright law apply to all eligible professional sports league’s broadcasts. *See Report and Order in Doc. No. 19417*, 54 F.C.C.2d 265 (1975); *repealed*, 79 Fed. Reg. 63547 (Oct. 24, 2014).

The Judges may decline to adopt portions of the agreed, proposed regulations that would be “contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.” See 17 U.S.C. § 802(f)(1)(D); See [Register of Copyrights] Reviews of Copyright Royalty Judges Determination, Docket No. 2009-1, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009) (Register’s Opinion).

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<sup>6</sup> See Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), In re Distribution of Cable Royalty Funds, Exhibit A (Nov. 25, 2015).

The Section 111 license was created to compensate all eligible copyright owners for the right of cable systems to copy broadcast signals, not a certain subset of eligible claimants. Section 801(b)(2)(C) of the Act states that any rate adopted in this proceeding “shall apply only to the affected television broadcast signals carried on those systems affected by the change.” MLS and other eligible professional sports leagues’ non-network television broadcasts are affected too. With that in mind, Section 801(b)(2)(C) authorizes the Judges to adjust only the royalty rates in Section 111(d)(1)(B) of the Act. Enacting the rule as currently proposed results in discrimination by omission of actual eligible professional sports league’s broadcasts, including those of MLS.

**III. Parties Excluded from the Proposed Provisions are Effectively Bound by Them.**

**A. Different Royalty Rates for Analogous Entities is Impractical.**

MLS maintains that the Copyright Act does not permit the Judges to promulgate a rate that would benefit only particular copyright owners within a claimant group. However, even if the rate were consistent with the statute—which it is not—it would be bad policy to promulgate the rule as proposed. Applying different rates to different sub-classes of copyright owners in the JSC category is an impractical use of the Judges limited resources and economically unfeasible to defend or eventually enforce by smaller, eligible professional sports leagues. MLS is aware of no factors that justify different rates (or a zero rate) for eligible JSC copyright owners, such as MLS, simply because they were not allowed to join the self-appointed coalition of JSC Members involved in this proceeding. The proposed provisions are unfair to other professional sports leagues, including, but not limited to MLS.

**B. Zero Rates for Excluded Eligible Copyright Holders Could Become the Norm.**

If the Judges do not address excluded, but eligible claimants' sports surcharges at this time, then those copyright holders will effectively receive a zero surcharge. Eligible claimants will not have the financial resources to track down Form 3 cable system operators to enforce their surcharge fees. It would be inequitable if the Judges obligate cable systems to remunerate only certain sports programs and not all qualified programming. By accepting the proposed language *verbatim*, it appears that Judges could adopt a zero sports surcharge rate with respect to those entities not part of the settlement. The cost for an independent, qualified claimant to attempt to enforce a surcharge against cable systems would be cost prohibitive. The Judges should either include MLS as a named entity in 37 C.F.R. § 387.2(e)(4) or revise the language so that it applies to all claimants who have JSC programming and not only particular sports leagues who are JSC Members.

**IV. Proposed Regulation.**

**A. A Fairly Proposed Regulation Addresses All Qualified Parties.**

MLS reiterates that it continues to favor a rule that would require cable systems to pay separate per-telecast, sports surcharge royalties in addition to other royalties paid under the Copyright Act for eligible television broadcasts of eligible professional sport events. However, the proposed regulation unfairly excludes MLS and any other eligible professional league that broadcasts live team sports. Since the JSC Members are the *de facto* representatives for, and custodians of the funds of, all programs falling within JSC agreed category, it should represent the interests of the entire category, not only a few, self-selected sports leagues. The benefits of

the regulation should apply to all copyright owners whose programming falls into the JSC category and who are eligible to participate in the Sports Surcharge rate.

**B. Proposed Section 387.2(e)(4).**

MLS qualifies to be a Joint Sports Claimant by definition<sup>7</sup>, but the JSCs excluded MLS in this rule section. MLS should be entitled to its receive its fair share of royalties, and be included with the above-noted JSC members in 37 C.F.R. § 387.2(e)(4).

MLS proposes the following revised language for Proposed Section 387.2(e)(4) (with the proposed additional language shown in bold):

An “eligible professional sports event” is a game involving teams that are members of the National Football League, Major League Baseball, **Major League Soccer**, the National Hockey League, the National Basketball Association, or the Women’s Basketball Association;

The Judges should not exclude any eligible and qualified entities from the “eligible professional sports event” definition. To do so would be unjust.

**Conclusion.**

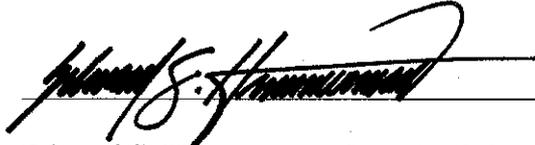
MLS appreciates this opportunity to provide Reply Comments to the Judges in response to this Notice. For the reasons set forth above, MLS respectfully requests that the Judges include MLS as an eligible professional sports league in rule 37 C.F.R. § 387.2(e)(4).

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<sup>7</sup> See Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13), In re Distribution of Cable Royalty Funds, Exhibit A (Nov. 25, 2015); See also e.g., 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408, 8416 (Mar. 17, 1987); Advisory Opinion, Docket No. CRT 85-4 84 CD (May 16, 1986).

Respectfully submitted,

**MAJOR LEAGUE SOCCER, L.L.C.**

A handwritten signature in black ink, appearing to read "Edward S. Hammerman", is written over two horizontal lines.

October 23, 2017

Edward S. Hammerman, Esq. (D.C. Bar No. 460506)

Hammerman PLLC

d/b/a Intermediary Copyright Royalty Services

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E-Mail: [ted@copyrightroyalties.com](mailto:ted@copyrightroyalties.com)

*Counsel for Commenting Party*

# **EXHIBIT A**

**From:** Ostertag, Tom Tom.Ostertag@mlb.com  
**Subject:** RE: MLS 2014 Forward  
**Date:** June 9, 2016 at 9:44 AM  
**To:** Ted Hammerman ted@copyrightroyalties.com



Ted, ok. Tom

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**From:** Ted Hammerman [mailto:ted@copyrightroyalties.com]  
**Sent:** Thursday, June 09, 2016 7:27 AM  
**To:** Ostertag, Tom  
**Subject:** Re: MLS 2014 Forward

Tom:  
I'll call you at 10am on Thursday, June 16. Thank you.

Ted Hammerman

On Jun 8, 2016, at 5:57 PM, Ostertag, Tom <[Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)> wrote:

Ted,  
Both those mornings look fine for me. Call either morning.  
Best, Tom

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**From:** Ted Hammerman [mailto:ted@copyrightroyalties.com]  
**Sent:** Wednesday, June 08, 2016 5:41 PM  
**To:** Ostertag, Tom  
**Subject:** Re: MLS 2014 Forward

Hi Tom:  
Thanks for your note. I've been a bit busy. Could we please schedule a time to speak after June 15? Does June 16 or 17 in the morning work for you? Please let me know. Thank you.  
Ted

On Jun 1, 2016, at 5:59 PM, Ostertag, Tom <[Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)> wrote:

Ted,  
Sorry for the slow response. College graduation for my daughter yesterday has caused a slow start to my week. Feel free to call me tomorrow. I will be here.  
Hope all is well.  
Tom

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**From:** Ted Hammerman [mailto:ted@copyrightroyalties.com]  
**Sent:** Tuesday, May 31, 2016 11:47 AM  
**To:** Ostertag, Tom  
**Subject:** Re: MLS 2014 Forward

Hi Tom:  
Do you have time this week to discuss on the phone? Please let me know. Thank you.  
Ted

On May 27, 2016, at 12:09 PM, Ostertag, Tom <[Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)> wrote:

Ted,  
I am happy to talk (always happy to talk to you), but it seems to me that a resolution about the royalty ownership issue for 2010-13 needs to precede a discussion of 2014. I think it only makes sense. We don't want to be in the same position with 2014 that we have discussed about 2010-13.  
I hope you have a great holiday weekend.  
Best, Tom

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**From:** Ted Hammerman [mailto:ted@copyrightroyalties.com]

**Sent:** Thursday, May 26, 2016 9:09 PM  
**To:** Ostertag, Tom  
**Subject:** MLS 2014 Forward

Hi Tom:  
I hope you're doing well.  
What would you need from Major League Soccer to allow it to become a JSC starting with 2014?  
To me, it seems so much more efficient for them to become a member. Please let me know your thoughts.  
Thank you.  
Ted  
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**From:** Ted Hammerman [ted@copyrightroyalties.com](mailto:ted@copyrightroyalties.com)   
**Subject:** Fwd: 1 of 2 Courtesy Copy of Major League Soccer, L.L.C.'s Opposition to Multiclaimitant Group's First Motion to Compel Production of Documents (2010-2013)  
**Date:** July 29, 2016 at 9:35 AM  
**To:** Thomas Ostertag [Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)

TH

Tom:  
1 of 2.  
Ted

Begin forwarded message:

**From:** Ted Hammerman <[ted@copyrightroyalties.com](mailto:ted@copyrightroyalties.com)>  
**Subject:** Fwd: Courtesy Copy of Major League Soccer, L.L.C.'s Opposition to Multiclaimitant Group's First Motion to Compel Production of Documents (2010-2013)  
**Date:** July 29, 2016 at 9:32:47 AM EDT  
**To:** Thomas Ostertag <[Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)>

Hi Tom:

I hope you're well. The message I sent to you below was returned to me due to the file sizes exceeding MLB's limit. Attached are files in reduced sizes.

MLS reiterates its desire to join the JSCs. We can all agree that MLS is a qualified claimant. As the custodian for royalties collected on behalf of all live team sports programming, MLB and the other leagues should treat MLS equally and include MLS in all distributions in which relevant royalties are being collected. It would save all of us considerable time and expense if the JSCs admitted MLS before the 2010-2013 proceedings move further ahead. My suggestion would be for MLS to join before September 30, 2016, when the Satellite motions to for allowance of claims are due. Please let me know your thoughts. Thank you.

Ted

Begin forwarded message:

**From:** Ted Hammerman <[ted@copyrightroyalties.com](mailto:ted@copyrightroyalties.com)>  
**Subject:** Courtesy Copy of Major League Soccer, L.L.C.'s Opposition to Multiclaimitant Group's First Motion to Compel Production of Documents (2010-2013)  
**Date:** July 28, 2016 at 4:42:33 PM EDT  
**To:** John Stewart <[jstewart@crowell.com](mailto:jstewart@crowell.com)>, Ann Mace <[AMace@crowell.com](mailto:AMace@crowell.com)>, Cliff Harrington <[clifford.harrington@pillsburylaw.com](mailto:clifford.harrington@pillsburylaw.com)>, Matthew MacLean <[matthew.maclean@pillsburylaw.com](mailto:matthew.maclean@pillsburylaw.com)>, "Victoria L. Draper" <[victoria.lynch@pillsburylaw.com](mailto:victoria.lynch@pillsburylaw.com)>, Arnold Lutzker <[arnie@lutzker.com](mailto:arnie@lutzker.com)>, Ben Sternberg <[ben@lutzker.com](mailto:ben@lutzker.com)>, jeanette@lutzker.com, "Brian D. Boydston, Esq." <[brianb@ix.netcom.com](mailto:brianb@ix.netcom.com)>, Robert Garrett <[Robert.Garrett@aporter.com](mailto:Robert.Garrett@aporter.com)>, "M. Sean Laane" <[Sean.Laane@APORTER.COM](mailto:Sean.Laane@APORTER.COM)>, Michael Kientzle <[Michael.Kientzle@aporter.com](mailto:Michael.Kientzle@aporter.com)>, Thomas Ostertag <[Tom.Ostertag@mlb.com](mailto:Tom.Ostertag@mlb.com)>, [ritchie.thomas@squirepb.com](mailto:ritchie.thomas@squirepb.com), [iain.mcphie@squirepb.com](mailto:iain.mcphie@squirepb.com), Philip Hochberg <[phochberg@shulmanrogers.com](mailto:phochberg@shulmanrogers.com)>, Gregory Olaniran <[goo@msk.com](mailto:goo@msk.com)>, Lucy Plovnick <[lhp@msk.com](mailto:lhp@msk.com)>, "Dominique, Alesha" <[amd@msk.com](mailto:amd@msk.com)>, Greg Lewis <[glewis@npr.org](mailto:glewis@npr.org)>, [jdimona@bmi.com](mailto:jdimona@bmi.com), [michael.remington@dbr.com](mailto:michael.remington@dbr.com), [brian.coleman@dbr.com](mailto:brian.coleman@dbr.com), "Jennifer T. Criss" <[jennifer.criss@dbr.com](mailto:jennifer.criss@dbr.com)>, Sam Mosenkis <[smosenkis@ascap.com](mailto:smosenkis@ascap.com)>, "John C. Beiter" <[jbeiter@shackelfordlaw.net](mailto:jbeiter@shackelfordlaw.net)>, [cbadavas@sesac.com](mailto:cbadavas@sesac.com), Ronald Dove <[rdove@cov.com](mailto:rdove@cov.com)>, [ltonsager@cov.com](mailto:ltonsager@cov.com), Dustin Cho <[dcho@cov.com](mailto:dcho@cov.com)>, "L. Kendall Satterfield" <[ksatterfield@finkelsteinthompson.com](mailto:ksatterfield@finkelsteinthompson.com)>, [victor.cosentino@larsongaston.com](mailto:victor.cosentino@larsongaston.com)

Counsel:

Attached are courtesy copies of Major League Soccer, L.L.C.'s , restricted and public/redacted versions of its Opposition to Multiclaimitant Group's First Motion to Compel Production of Documents, which were filed today with the Copyright Royalty Judges in Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13).

Hard copies will follow to all parties on the service list via Federal Express.

Ted Hammerman



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