COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DISTRIBUTION OF SATELLITE ROYALTY FUNDS	**DOCKET NO. 16-CRB-0010 SD (2014-17)**

ORDER STAYING PROCEEDING PENDING RULEMAKING

On March 20, 2019, the Copyright Royalty Judges (Judges) issued an Order for Preliminary Action to Address Categories of Claims (Order).[1] Pursuant to the Order, on April 19, 2019, the Judges received an initial submission (Initial Brief) from, respectively, Program Suppliers, Multigroup Claimants (MC) and, jointly, Joint Sports Claimants (JSC), Commercial Television Claimants/Broadcaster Claimants Group (CTV), Broadcast Music, Inc. (BMI), the American Society of Composers, Authors and Publishers (ASCAP), and the Settling Devotional Claimants (SDC) (collectively Joint Participants). On May 3, 2019, each of these parties submitted a responsive brief (Responsive Brief).

For the reasons set forth herein, the Judges hereby stay this proceeding and announce the beginning of a rulemaking process to define the Allocation Phase categories and to determine the issue of "unclaimed funds" – *i.e.*, the proper treatment of claims that are not valid or not validly represented (invalid claims) in the allocation of royalties. The Judges will initiate this process shortly by issuing a Notice of Inquiry (NOI), seeking responses from interested parties to specific questions and inviting interested parties to submit proposed regulatory language.[2]

I. Background

As noted in the Order, the Judges sought briefing "to formalize the definition of claimant categories for purposes of initial allocation of funds …." Order at 2. By way of relevant historical background, in 1980, the Copyright Royalty Tribunal (CRT), a predecessor of the Judges, ruled that cable distribution proceedings would be conducted in two phases, determining in Phase I the allocation of cable royalties to specific groups, and determining in Phase II the distribution of those royalties to individual claimants within each group. *See In re 1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63027 (Sept. 23, 1980) (*1978 Determination*) (summarizing a February 14, 1980 ruling by the CRT).[3] More particularly, the

[1] The Order was combined with a Notice of Participants.

[2] The issues regarding the definition of Allocation Phase categories and the treatment of invalid claims also arise in the proceedings for the distribution of *satellite* royalties. Accordingly, the NOI will also seek responses from interested parties to specific questions and invite interested persons to proposed regulatory language in the context of *satellite* distribution proceedings under both 17 U.S.C. § 111 and 17 U.S.C. § 119.

[3] The Judges and their predecessors have conducted satellite distribution proceedings in the same manner since the enactment of 17 U.S.C. § 119.

1978 Determination discussed, *inter alia*: (1) the identification of the Phase I categories; and (2) the impact of invalid claims on the ultimate distribution of royalties.

A. The Identification of the Phase I Categories

In the 1978 Proceeding, and in all subsequent Phase I/Allocation proceedings, the division of royalties was accomplished through a categorization of claims that was the product of a *stipulation* among the proposed allocation claimants. These categorizations were adopted by the CRT, and its successors, by their adoption of the participants' *stipulations* (subject, on occasion, to minor modifications). The Judges have made it clear that their adoption of the claimants' categories has never constituted a *finding* by the Judges. *See Memorandum Opinion and Order following Preliminary Hearing on Validity of Claims*, Docket No. 2008-02 CRB 2000-2003 (Phase II), at 14 (Mar. 21, 2013); *id.* (Phase I), 6/11/09 Tr. 41-42 (former Chief Judge Sledge noting that the program claimant categories were the result of a "stipulation" and "have never been determined" or the subject of a "finding.").

B. The Treatment of Invalid Claims

In the 1978 Proceeding, the CRT also considered a separate issue – whether to address the economic impact of invalid claims in Phase I or in Phase II. In that regard, the CRT stated:

> During Phase I there was some random testimony to the effect that not all eligible claimants had submitted claims. The Tribunal determined that this subject was not appropriate to Phase I, but that it would be considered subsequently in the proceeding. The Tribunal therefore determined that the Phase I allocations to categories should be made *as if* all eligible claimants in each category had filed.

1978 Proceeding, 45 Fed. Reg. at 63042 (emphasis added). The CRT requested and received further briefing on the "legal issues" regarding this issue and, in Phase II, the CRT "accorded each claimant the opportunity to present any relevant evidence on this subject … [but] [n]o claimant presented any such evidence." *Id.* After reviewing the legal briefing, the CRT – without referencing any of the legal points briefed – concluded that the eligibility, *vel non*, of claims would not affect the Phase I allocations. Specifically, the CRT stated that royalties would be "allocated to categories of claimants *as if* all eligible claimants in each category had filed valid claims." *Id*. (emphasis added). The CRT found that the record before it "*provid[ed] no objective basis* for redistribution of royalty fees among categories of claimants to[] reflect unclaimed royalties in particular categories," and concluded that its disposition of unclaimed royalties constituted an "*equitable allocation*." *Id.* (emphasis added).

The CRT further noted that its ruling "may not necessarily control any subsequent distribution proceeding." *Id.*

The Judges later discontinued use of the terms Phase I and Phase II, and substituted the terms Allocation Phase and Distribution Phase in cable and satellite distribution proceedings. *See, e.g., Second Reissued Order Granting In Part Allocation Phase Parties' Motion to Dismiss Multigroup Claimants and Denying Multigroup Claimants' Motion For Sanctions Against Allocation Phase Parties*, Docket No. 14-CRB-0010-CD (2010-13) at 3 & n.5 (Apr. 25, 2018). In this Order, the Judges use the former and latter phrases separately or jointly, as contextually appropriate.

II. Discussion and Analysis

A. The "Category" Issue

Unlike in previous proceedings, the participants in this proceeding have not stipulated as to the definitions of the Allocation Phase categories. In particular, MC declined to enter into a stipulation in this proceeding (proposed by other participants and substantively identical to the recent stipulations). MC declined to stipulate because it asserted that the proposed stipulated categories, like the historic stipulated categories, are "arbitrary, produce counterintuitive results, and are contrary to common understanding." MC Initial Brief at 6. Despite its broad attack on the stipulated categories, MC "only challenges the definition of 'sports programming' at this juncture." *Id.* at 7. Specifically, MC challenges the usual stipulated definition of a sports category, which is limited to:

> Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category ….

Id. at 9.

According to MC, this definition is too narrow, in that it ignores the absence of any "inherent difference" between these types of programs and: (1) tape-delayed sports broadcasts; (2) rebroadcasts of games; (3) non-college amateur team sports; (4) FIFA (World Cup football (soccer) matches; (5) Olympics and U.S. Olympic Trials; (6) individual sports (*e.g.*, golf, ice skating and boxing); (7) sports broadcasts originating in Mexico; and (8) sports highlight shows. *Id.* at 9-12. MC asserts – albeit without any evidentiary support – that the narrow sports programming category, comprising only the sports programming of the Joint Sports Claimants, and the other historically stipulated categories, are "misaligned with system operator decision making." *Id.* at 13.

This criticism is potentially pertinent. The Judges have recently allocated royalty percentages in the Allocation Phase of a cable distribution proceeding[4] based on: (i) evidence from surveys of cable system operators regarding their ranking of types of programming; and (ii) evidence from regressions identifying the actual mix of programming on stations that cable system operators chose to retransmit, in both cases based on the categories *stipulated* by the participants. If the effect of the stipulated categories is to aggregate programs within categories in a manner inconsistent with the cable system operators' (or satellite carriers') usual decision making process, the valuation process may be affected adversely. In this regard, MC notes – by way of a hypothetical example – that the dollar amount of royalties that a copyright owner of a program receives could vary significantly depending upon whether the program was placed within one category versus another. *Id.* at 13-14.

In response, the Joint Participants emphasize that MC's arguments regarding the Allocation Phase categorization of sports is defective because: (i) MC's proposed new sports-related category is "undefined"; and (ii) MC's assertions lack "factual support." Joint Participants' Responsive Brief at 16. The Judges agree with these criticisms. However, these deficiencies only underscore the need for a procedure by which copyright owners and their representatives are afforded the opportunity to propose specific category definitions and provide

[4] The Judges have never conducted a satellite allocation phase proceeding that resulted in a final determination; rather the allocation phase parties have always settled.

factual support for their respective positions, enabling the Judges to act on the basis of an adequate administrative record.

More broadly, the Joint Participants further assert that MC's criticism of the stipulated categories is "fundamentally in error" because it proceeds from the incorrect premise that the previously stipulated categories are "categories of *program content*," whereas, according to the Joint Participants, the stipulated categories are distinguished by "*claimant type*." *Id.* (emphasis added). The Judges agree that MC's proposed categorizations are premised on "program content," and that the previously and proposed stipulated categories are distinguished by "claimant type."

However, that distinction begs a question at the heart of this dispute: How *should* the Allocation Phase categories be defined? Because (as noted *supra*) the *evidence* of relative value across categories in the Allocation Phase reflects the value assigned to program categories *by the cable system operators* (as demonstrated most recently by survey and/or regression evidence), there appears to be merit to MC's argument that a delineation of the Allocation Phase categories *by the cable system operators or satellite carriers* (rather than by claimant groups) could better reflect the relative value of different programming in the Allocation Phase.[5]

Of course, the fact that, at the present stage of this proceeding, the Judges find potential merit in MC's analysis does not suggest that its argument would ultimately prove dispositive. In particular, the Allocation Phase categorization by *claimant* type grouping (as in the proposed and historic stipulations) may result in important cost savings and/or efficiencies, as explained by the Joint Participants:

> [T]he [stipulated] category definitions principally define groups of owners or distributors, <u>not</u> program content. The reason for this structure – and its effect – is that a manageably finite number of industry groups, each with the scope and incentive to pursue the interests of a broad group of constituents, undertake [sic] the complex job of gathering the necessary data and resources, identifying all claimants, establishing their respective Allocation Phase shares, and distributing all of the category's royalties.

Id. at 2-3 (underlining in original; footnote omitted). Although the foregoing assertion likewise has arguable merit, it – like MC's *content*-centric categorization argument – lacks supporting factual detail. That is, there may be efficiencies or cost savings in the stipulated *claimant*-centric categorization, but those economic benefits should be demonstrated by supporting evidence. Further, in the subsequent administrative proceedings contemplated by this order, the Joint Participants should identify and describe the "interests" of the broad group of constituents (as referenced in the above quote), to allow interested parties and the Judges to determine how, if at all, the use of the previously stipulated categories might conflict with the interests of other claimants.

The relative merits and faults of *claimant*-centric and *content*-centric categorizations are captured in Program Suppliers' Responsive Brief, in which they note:

[5] The Judges recognize that an Allocation Phase party may propose other methods of estimating relative value, including viewership-based approaches. In any event, regardless of the proposed valuation methodology, there remains potential merit in MC's assertion that the contours of the Allocation Phase categories should be consonant with the categorizations undertaken by those whose real-world decisions provide the evidence of the value of programs distantly retransmitted on cable systems.

> There is some merit to [MC's] proposal that the Judges eliminate the [JSC] Allocation Phase category and replace it with a generic "Sports Allocation Phase category" …. [citation omitted]. … *[T]he [JSC] Definition as it currently exists is confusing because cable and satellite operators do not routinely make distinctions between JSC programming and all other sports and sports-related programming when making programming decisions for their systems.* Therefore, adopting a catch-all "sports" category, as [MC] suggests, would alleviate the confusion that abounds regarding the value of JSC versus non-JSC claimed sports programming in the Allocation Phase.
>
> *[H]owever,* [MC's] proposed approach … would defer all controversies regarding valuation of sports-related programming to the Distribution Phase of this proceeding. Such a deferral would have far-reaching consequences, creating significant Distribution Phase [Phase II] controversies between JSC, MPAA and other parties in the new "sports" category … which have not existed in recent royalty distribution proceedings before the Judges. … [Therefore,] [MC's] proposal … would likely impose significant Distribution Phase litigation expenses on certain participants.

Id. at 5-6 (emphasis added; footnotes omitted). Accordingly, Program Suppliers ask the Judges to "carefully consider the implications of their decision in evaluating [MC's] proposal." *Id.* at 6. The Judges find Program Suppliers' caution to be well-founded and supportive of the Judges' decision to initiate a rulemaking. Further, the Judges require evidence and analysis from the participants regarding the tradeoffs, if any, between the purported greater efficiencies and/or cost-savings of a claimant-centric categorization and the asserted greater fairness and accuracy of a content-centric categorization.[6]

Accordingly, the Judges shall presently issue and cause to be published an NOI seeking regulatory proposals to address the Allocation Phase categorization process.

B. The Issue of Invalid Claims

In its *1978 Determination*, the CRT also considered whether unclaimed funds within a Phase I category should be set aside or reallocated to other claimants. To reiterate, the CRT's entire discussion of this issue is as follows:

> During Phase I there was some random testimony to the effect that not all eligible claimants had submitted claims. The [CRT] determined that this subject was not appropriate to Phase I, but that it would be considered subsequently in the proceeding. The [CRT] therefore determined that the Phase I allocations to categories of claimants should be made ***as if*** all eligible claimants in each category had filed.

[6] The tradeoff between efficiency and fairness is a fundamental issue in all normative economic policymaking. *See, e.g.*, Joseph Stiglitz, *Economics of the Public Sector* at 93 (2000) (distinguishing an *efficient* economic outcome from one that raises *distributiona*l concerns). Here, MC apparently asserts that the process is neither efficient nor fair, because, it argues, the category definitions are themselves inaccurate, leading to inefficient as well as unfair distributions. The Joint Participants' argument, as the Judges understand it, is that it is less costly for groups of claimants to be aggregated into Allocation Phase categories that are then represented by a single agent, *i.e.*, a transaction cost efficiency. Of course, lower transaction costs do not necessarily equate with economic efficiency, if the transaction itself (here, the distribution of royalties) is undertaken in a manner inconsistent with marketplace valuations.

> [T]he [CRT] requested claimants to brief "the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants." During Phase II the [CRT] accorded each claimant the opportunity to present any relevant evidence on this subject. *No claimant presented any such evidence*.
>
> The briefs presented to the [CRT] on the subject of any "unclaimed fund" generally recommended either that (a) the "unclaimed fund" in a particular category of claimants be distributed among all eligible claimants within the same category or (b) that the total "unclaimed fund" in all categories be distributed among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the royalty fund.
>
> The [CRT] determined that it was *neither necessary nor feasible* to establish an "unclaimed fund" for the 1978 cable distribution. Rather, royalty fees will be allocated to categories of claimants ***as if*** all eligible claimants in each category had filed valid claims. The share of each individual claimant in a category will be determined by voluntary agreement or our Phase II decision.
>
> We find that the record provides no objective basis for the redistribution of royalty fees among categories of claimants to[] reflect unclaimed royalties in particular categories. We conclude that our disposition of the unclaimed royalties issue provides an *equitable* allocation of the fees available for distribution.
>
> Finally, we observe that *our disposition of the unclaimed royalty issue in this proceeding may not necessarily control any subsequent distribution proceeding*.

1978 Determination, 45 Fed. Reg. at 63042 (emphasis and boldface added). For the reasons set forth *infra*, the Judges find nothing in this aspect of the *1978 Determination* that prevents them from exploring, through an NOI, whether to issue a Notice of Proposed Rulemaking (NPRM) proposing regulations by which the present participants (and other interested persons or entities) may provide evidence and argument regarding the appropriate treatment of royalties associated with invalid claims.

First, the Judges find informative that, in the 1978 proceeding "no claimant presented any evidence" on this subject, despite an express invitation by the CRT. Thus, the Judges cannot treat this aspect of the *1978 Determination* as premised upon any factual record, and the absence of a supporting factual record precludes the Judges from relying on this aspect of the *1978 Determination* as persuasive. Alternately stated, despite the absence of an evidentiary record, the CRT simply *concluded* that an *inter*-category reallocation of unclaimed royalties through the establishment of an "unclaimed fund" was "neither necessary nor feasible," and the *intra*-category treatment of unclaimed royalties constituted an "equitable allocation," *1978 Determination*, 45 Fed. Reg. at 63042. The existence of such necessity and feasibility though would constitute *factual findings and policy decisions, not legal conclusions*. Moreover, the absence of any record evidence to support these rulings precludes the Judges from giving persuasive effect to the *1978 Determination*.

Second, the Judges note that the CRT decided explicitly to employ a *legal fiction*, allocating royalties among Phase I/Allocation categories "**as if**" all eligible claimants with programs within each category had filed valid claims. Then, pursuant to the *1978*

Determination, the consequence of any unclaimed funds within a category would be the reallocation of those royalties within the same category (*i.e.*, *intra*-category), rather than *inter*-category.

The classic definition of a "legal fiction" is a fiction: (1) propounded with a complete or partial consciousness of its falsity, and (2) recognized as having utility." Lon L. Fuller, *Legal Fictions* 9 (1967); *see also* Maksymilian Del Mar & William Twining (eds.), *Legal Fictions in Theory and Practice* 86 (2015) (identifying Fuller's language as the "classic definition" of the phrase). Critically, the use of a "legal fiction" replaces – explicitly in the present case – the phrase "as if" for the phrase "in fact." However, the replacement of "facts" with "fictions" can only be appropriate if the two phrases bear a sufficient "relation to each other" because, if no such relation exists, "jurists [who] … take this fiction to be an actual relation" will be committing "*a disastrous error*." *Del Mar & Twining*, *supra*, at 18-19 (emphasis added).

There may be a "sufficient relation" between the "as if" legal fiction and the "in fact" reality, provided the legal fiction serves both to: (i) "interpret reality"; and (ii) "impose order on the potential chaos of reality." *Id.* at 78. The Judges do not dispute that the "legal fiction" that all eligible claimants have filed valid claims has imposed a form of "order" on a process that might otherwise have been less orderly, perhaps even chaotic. However, the gravamen of the present dispute is whether that order, *i.e.*, that purported "efficiency," will reasonably serve – in this and future proceedings –adequately to "interpret reality," *i.e.*, the determination of relative value.

Accordingly, the Judges examine the legal fiction adopted by the CRT in its *1978 Determination* to decide whether the "as if" treatment of royalties associated with invalid claims can be characterized as reasonably "interpreting reality" by providing a process for properly determining relative value. *See generally Del Mar & Twining*, *supra*, at 84-85 ("As with other methods of creative legal technique, legal fictions must be evaluated case-by-case in context."). The Judges do not find that the CRT's legal fiction is necessarily consonant with a proper establishment of relative value. Rather, the Judges will reexamine that legal fiction in light of evidence adduced in the course of the rulemaking contemplated by this order. Specifically, the Judges expect the participants in the rulemaking to provide an adequate factual record to support their respective positions as to the *necessity and feasibility* of their proposed approaches to the identification and treatment of invalid claims, and the consonance of their proposed approaches with the establishment of relative value.

Third, the Judges find no persuasive authority in the CRT's conclusory ruling that its "disposition of the unclaimed royalties issue provides an *equitable* allocation of the fees available for distribution," *1978 Determination*, 45 Fed. Reg. at 63042 (emphasis added). Such a conclusion is hardly self-evident; indeed, arguably *inequitable* allocations are certainly possible under the existing treatment of invalid claims.

Actual cases of inequitable allocations resulting from the CRT's treatment of invalid claims, supported by evidence, may support the reallocation on an *inter*-category basis of royalties otherwise attributable to invalid claims. On the other hand, the absence of adequate evidence demonstrating sufficient inequities may support instead the (continued) use of ***intra***-category reallocations – particularly if there is a contemporaneous finding that the cost of authorizing all category representatives *to identify* invalid claims across all categories ("all

against all") and/or the cost of *quantifying inter*-category reallocations would be disproportionate to any demonstrated inequities.

Accordingly, the NOI that the Judges shall presently issue and cause to be published shall also seek submissions regarding the allocation and distribution of royalties attributable to invalid claims.[7]

C. The CRT's 1978 Determination Anticipated the Present Disputes

Finally, the Judges understand that the final paragraph in the CRT's discussion of the unclaimed funds issue was not gratuitous, but rather foreshadowed future participants' joinder on the issues now identified in the present order. That is, cognizant of the participants' failure to present evidence on the issue in the 1978 proceeding, the CRT reasonably added the caveat that "the unclaimed royalty issue in this proceeding may not necessarily control any subsequent distribution proceeding." *1978 Determination*. 45 Fed. Reg. at 63042. For decades, these issues were avoided through the participants' repeated stipulations and decisions not to join on the invalid claims issue.[8] In this proceeding, Program Supplies have declined to so stipulate, and the issue that has long been circumvented is now upon us.[9]

III. Order

For the foregoing reasons, the Judges hereby **STAY** the present proceeding, pending the completion of the administrative process that the Judges shall initiate presently by issuing and causing to be published a Notice of Inquiry regarding the issues raised in this Order.

SO ORDERED.

Digitally signed by Jesse Feder
Date: 2019.12.20 12:14:51 -05'00'

Jesse M. Feder
Chief Copyright Royalty Judge

DATED: December 20, 2019

---

[7] The Judges note that the Joint Participants urge the Judges, if they do not summarily reject Program Suppliers' request, to go beyond the present "limited record, and "consider such a fundamental change … through notice-and-comment rulemaking." Joint Participants' Responsive Brief at 4. The present order sets in motion such a process.

[8] In the Allocation Phase of the 2010-2013 cable proceeding, Program Suppliers asserted that an *inter*-category reallocation of ineligible claims was appropriate. However, the Judges noted that Program Suppliers had previously agreed – *in that proceeding* – to apply the *intra*-category approach to ineligible claims. Therefore, the Judges ruled that Program Suppliers were estopped from making this argument, and were otherwise delinquent in making this argument. *In re Distribution of 2010-2013 Cable Royalty Funds, Order Regarding Discovery* at 5-7 (July 21, 2016). No such estoppel or delinquency exists in this proceeding.

[9] Program Suppliers also argue in this proceeding that the present *intra*-category allocation of royalties attributable to ineligible claimants violates the Copyright Act proscription on the payment of royalties to ineligible claimants. *Program Suppliers Initial Brief* at 3-6. The Judges reject this argument. *Reallocating* such royalties to *eligible* claimants on an *intra*-category basis clearly does not constitute the allocation of royalties to the owners of the ineligible claims.