

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re)
)
)
 Notice of Inquiry Regarding) **Docket No. 19-CRB-0014-RM**
 Categorization of Claims for Cable)
 or Satellite Royalty Funds and)
 Treatment of Ineligible Claims)

COMMENTS OF NATIONAL PUBLIC RADIO

Introduction

In response to the above-captioned Notice of Inquiry ("NOI"), National Public Radio, Inc. ("NPR") hereby files its comments on the issues raised as they concern the joint cable royalty claims of NPR and NPR's participating Member public radio stations. *See Notice of Inquiry*, Docket No. 19-CRB-0014-RM, 84 Fed. Reg. 71852 (Dec. 30, 2019) ("NOI"); *Extension of Comment Period*, 19-CRB-0014-RM, 85 Fed. Reg 5182 (Jan. 29, 2020) (extending comment deadline to March 16, 2020).

NPR is a non-profit membership corporation that produces and distributes noncommercial educational ("NCE") programming through more than 1,100 public radio stations nationwide. In addition to broadcasting award winning NPR programming, including *All Things Considered*[®] and *Morning Edition*[®], NPR Member stations are themselves significant program producers and community institutions. NPR has been a participant in proceedings to determine the distribution of cable royalties since the earliest distribution proceedings following

enactment of Section 111 of the Copyright Act (the "Act") as part of the Copyright Act of 1976. 17 U.S.C. § 111; *see* 47 Fed. Reg. 9879 (1982). NPR and its Members do not participate in the satellite royalty claim proceedings.

The existing approach to claims categorization and unclaimed funds reflects a careful and well established balance of interests among a diverse group of copyright owners. The financial imperative among individual claimants to maximize a share of royalties is tempered by the collective benefits associated with encouraging settlement and avoiding undue expense and burden. Fundamentally altering the approach, particularly with respect to unclaimed funds, would upend this balance by favoring claimants with the deepest pockets, imposing substantial expense and burden on all claimants, and virtually eliminating the prospects for partial and global settlements. NPR therefore urges the Judges to approach any proposed change carefully both with regard to the significant practical implications of the change and Congress's clear intent to encourage settlements and minimize the cost for copyright owners to recover a fair return for the cable retransmission of their works.

I. The Judges Should Not Fundamentally Reinvent The Process For Distributing Cable Royalties, Which Has Proven Successful Over More Than Four Decades

In recounting the history of the current approach to the claims categorization and unclaimed funds issues, the *NOI* signals the Judges' intention to (1) establish by regulation the categories for allocating royalties among groups of either claimants or programs and (2) the manner by which the Judges will address the issue of unclaimed funds. 84 Fed. Reg. at 78153-54. *See also Order Staying Proceeding Pending Rulemaking*, Docket No. 16-CRB-0009 CD, at 1 (2014-17). NPR urges the Judges to retain the existing approach to both issues subject only to narrow revision if and as clearly warranted by the record developed in this proceeding. To fundamentally change a process that has successfully accomplished the distribution of many

billions of dollars in cable royalties over more than four decades threatens the prospect of voluntary settlements, which would be devastating for small claimants, such as NPR and its participating public radio stations.

A. The Claims Categorization Issue Is Narrow, And The Judges Should Tailor Any Proposed Regulatory Solution Narrowly

With respect to the claims categorization issue, it is unclear why a fundamental reevaluation is warranted based on a challenge by a single claimant -- Multigroup Claimants -- to a single claimant category -- sports programming. *NOI*, 84 Fed. Reg. at 71853. Assuming, for the sake of argument, the Judges decided to alter the contours of the sports programming category, it is not self evident that all the other categories warrant reevaluation or revision. To the extent the Judges perceive a misalignment between the claims categories and the evidence used to determine category values, every other claimant group representative, save one, has argued in favor of the existing approach to claims categorization. *See NOI*, 84 Fed. Reg. at 71853. It is fair to presume that claimant representatives are acting in the best interests of the claimants and claims they represent, which collectively encompass the vast universe of compensable royalty claims.

In properly calibrating the scope of the claims category issue, moreover, there is no distinction between the claimant and the programming for which the claimant is entitled to cable royalties for at least some claims categories. In the case of the National Public Radio claimant category, in particular, royalties are based on the distant cable retransmission of radio programming of NPR and public radio stations. *See NOI*, 84 Fed. Reg. at 71852 n.1. At least with respect to the National Public Radio Category, there is no confusion regarding the correct claimants for this category of programming.

Finally, to the extent the Judges are contemplating a single catalog of claims categories for both cable and satellite funds, not all cable claimants participate in satellite royalty distribution proceedings. *See NOI*, 84 Fed Reg. 71853 ("In light of the need to establish Allocation categories, for use in both cable and satellite distribution proceedings, the Judges now seek input on how the Allocation Phase categories should be defined."). The National Public Radio claimant category is one such cable-specific category. To avoid unnecessarily disrupting well-settled expectations, therefore, the Judges should seek to align any new regulatory approach with past practice as much as possible and address the distinction between program type and claimant group only where clarification is clearly demonstrated to be warranted.

B. The Judges Should Retain The Longstanding Approach To The Unclaimed Funds Issue

Like the claims category issue, the unclaimed funds issue derives from the assertion of a single claimant representative that Section 111 of the Act only permits the distribution of cable royalties to copyright owners or their representatives that have filed valid claims, demonstrated entitlement to receive such royalties, and established their share of royalties. *See MPA*A Further Briefing Regarding Discovery, Docket Nos. 14-CRB-0010-CD (2010-13), 14-CRB-0011-SD (2010-13), at 5 & 7-8 (filed Apr. 29, 2016) (citing 17 U.S.C. §§ 111(d)(3), (4)(A)). That interpretation of the Act overstates the basic precepts of the royalty collection and distribution scheme,¹ and it completely ignores the important role that voluntary settlements play, which can

¹ Section 111(d)(3) of the Act provides for the distribution of fees “to those . . . who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period.” Section 111(d)(4)(A) provides for the filing of claims for statutory license fees for secondary transmissions during the month of July “in accordance with requirements that the Copyright Royalty Judges shall prescribe by regulation.”

Footnote continued on next page

obviate the need for a distribution proceeding entirely or in substantial part.² There is a fundamental difference between eligibility to receive royalties (which is based on distant cable retransmission of the broadcast of copyrighted works and the filing of a claim in accordance with the Judges' rules and instructions) and having to document every retransmitted program that underlies a claim, or account for claims not filed, as a condition to collecting royalties.

The prospect of allocating unclaimed funds on an inter-category rather than intra-category basis has profound implications for the Judges' obligation "[t]o afford the copyright owner a fair return for his or her creative work" in the administration of cable royalty distribution proceedings. 17 U.S.C. § 801(b)(1)(B). As a threshold matter, such a change would threaten to make each and every actual or potential claim subject to controversy, a critical determinant in the distribution of cable royalties. Under the Act, the Judges are authorized to resolve *controversies* in connection with the distribution of royalties. 17 U.S.C. § 801(b)(3) (*emphasis added*). Where there is no controversy, the task is simply to distribute the royalties. *Id.* § 801(b)(3)(A). Under the longstanding intra-category approach, claimant category representatives have every incentive and opportunity to challenge the relative value of any other claim category but no rational basis otherwise to seek discovery of or challenge actual or potential claims on a claim-by-claim basis.

Treating each actual or potential claim as a matter of controversy would embolden deep-pocketed claimants to seek discovery regarding each and every actual or potential claim, thereby rewarding scorched earth litigation over settlement. The incentive to settle would be further

² See, e.g., Phase I Parties' Notice of Phase I Settlement and Motion for Further Distribution, Docket Nos. 2007-3 CRB CD 2004-2005, 2008-4 CRB CD 2006, 2009-6 CRB CD 2007, 2010-6 CRB CD 2008, 2011-7 CRB CD 2009 (filed Nov. 4, 2011) (voluntary settlement of all Phase I allocation disputes); Phase I Claimants' Notice of Partial Settlement and Motion for Further Distribution, Docket Nos. 2002-8 CARP CD 2000; 2003-2 CARP CD 2001; 2004-5 CARP CD 2002 (filed Dec. 6, 2005) (distribution of substantially all of the cable royalties for the years 2000-2002 by private settlement).

reduced by rendering the outcomes of cable royalty distribution proceedings highly uncertain until the final judicial review of the Judges' final allocation decision. Such a fundamental recasting of cable royalty distribution proceedings is unwise as a matter of judicial economy and inimical to assuring a fair return to copyright owners.

It could particularly burden NPR, which historically has relied on settlements to resolve its cable royalty claims. As a small claimant, NPR is unquestionably affected by the expense and burden of participating in cable royalty proceedings. Royalty claims within the National Public Radio Category include program series with daily or weekly episodes, such as *Fresh Air*[®] or *Wait Wait . . . Don't Tell Me*[®], but many copyrighted works in the category are not readily identifiable by a branded program title. For instance, NPR produces *Morning Edition*[®] and *All Things Considered*[®], two of the most-listened-to programs on terrestrial radio, with program clocks specifically designed to permit public radio stations to insert locally produced news, feature, and other program segments. This longstanding feature of the NPR's newsmagazine programs is intended to make them responsive to the local needs and interests of a station's community of license, including an extended cable audience, but these locally produced program segments are not readily identifiable in an easy or efficient manner.

Potentially having to identify every program or individual program segment broadcast by each claimant or potential claimant would involve a substantial effort and reallocation of scarce public radio resources. Smaller claimants should not be forced to abandon a material copyright interest because the cost to collect their share of cable royalties has been made cost prohibitive.

II. The Copyright Act, As Amended By The Copyright Royalty And Distribution Reform Act of 2004, Was Intended To Memorialize Well Established Practices, Avoid Undue Burden And Expense, And Promote Settlement Of Royalty Claims

In explaining why the Judges are permitted to revisit the intra-category approach to unclaimed funds, the *NOI* points to the original decision of the Copyright Royalty Tribunal ("CRT") as having constituted an "equitable allocation" not necessarily controlling in any subsequent distribution proceeding. 84 Fed. Reg. at 71853. While the *NOI* is correct as far as it takes the matter, the Judges must consider intervening events, including, in particular, enactment of the Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA"). The CRDRA established the current statutory framework for cable royalty distribution proceedings, and through it, Congress intended to maintain settled expectations regarding the resolution of controversies in the conduct of distribution proceedings. *See* 17 U.S.C § 803(b)(6)(C)(viii) (codifying the "rules and practices" governing discovery in distribution proceedings in effect on the day before the effective date of the CRDRA). The Judges should heed this Congressional intent as it considers how it would resolve future controversies regarding unclaimed funds, especially with regard to the use of discovery.

As explained in the rulemaking proceeding implementing the CRDRA, the reference in the Act to "rules and practices" refers to "the limited discovery in distribution cases set forth at 37 CFR 251.45(c) [such that] . . . discovery in distribution cases [§ 351.6] [sic] will allow only for production of documents underlying written direct and rebuttal statements." 70 Fed. Reg. 30901, at 30903 (May 31, 2005).³ Indeed, the CRDRA explicitly codified this limited

³ Section 251.45(c)(1) of the prior rules of the Copyright Arbitration Royalty Panel specifically provided as follows:

Discovery and motions filed with a Copyright Arbitration Royalty Panel. (1) A Copyright Arbitration Royalty Panel shall designate a period following the filing

Footnote continued on next page

opportunity for discovery by prescribing a period for discovery *after* the filing of written direct and written rebuttal statements. 47 U.S.C. § 803(b)(6)(C)(iv).⁴

Among the essential purposes for codifying the prior rules and practices limiting discovery, moreover, were the goals of promoting settlement and minimizing the burden and expense associated with distribution proceedings. As the legislative history makes clear, Congress “expects the participating parties to make good faith efforts to resolve their differences to the extent possible, either without engaging the process set forth in Chapter 8 or in the form of settlement during the process set forth in the bill as reported.” *House Report* at 38; *see also Independent Producers Group v. Library of Congress*, 759 F.3d 100, 102 (D.C. Cir. 2014) (“To promote the efficient distribution of royalty fees, Congress crafted distribution procedures that encourage the private resolution of fee disputes . . .”). Congress further intended “a system responsible for ratesetting and distribution of funds for compulsory licenses that minimizes costs to participants.” *House Report* at 18; *see also id.* (finding that the prior CARP process was “unnecessarily expensive”).

of written direct and rebuttal cases with it in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony.

37 CFR § 251.45(c)(1) (2005).

⁴ The legislative history underlying the CRDRA reinforces the limited use of discovery in distribution proceedings to resolve controversies. “The rules in place under the current regulations for discovery are codified in this subsection.” *Cable Royalty and Distribution Act of 2003*, H. Rep. 408, 108th Cong. 2d, at 33 (2004) (“*House Report*”). Thus, compared to ratemaking proceedings, for which far more extensive discovery is permitted under the Act, the House Judiciary Committee observed that “there has been a 25-year-plus history of cable royalty distribution proceedings among essentially the same participants in which a substantial body of precedent has been established.” *Id.* at 33; *see also id.* (“The Committee believes that the regulations for discovery currently in place function to achieve the desired goals of the Committee in relation to the distribution process.”).

While the Congressional intent is clear -- discovery in aid of a new inter-category unclaimed funds approach is not permitted until after the filing of written direct cases -- deferring the resolution of such unclaimed funds disputes until that point would have a pernicious effect: it would destroy the incentive to settle prior to that point. In lieu of settlement, each participant would be forced to present written direct and rebuttal cases at potentially great expense, incur additional costs documenting and defending claims and accounting for claims not filed, and await a final allocation of royalties made impossible to predict. Under such a system, each claimant would have every incentive to contest every claim in every proceeding with the hope of improving their share of royalties or simply to game the system (for instance, by forcing smaller claimants to substantially discount the royalties they might otherwise accept through voluntary settlement based on the cost of continued participation in the proceeding).

While the CRT did not purport to bind the Judges, retaining the current intra-category unclaimed funds rule remains the appropriate path forward. Congress clearly prioritized the resolution of distribution proceedings through voluntary settlement and intended to minimize the cost of distribution proceedings. Any change to the current approach to unclaimed funds must satisfy the statute and underlying congressional intent and assure all claimants, including small ones, a meaningful opportunity to recover their fair share of cable royalties, particularly through voluntary settlements.

Conclusion

For the foregoing reasons and as stated more fully above, NPR urges the Judges to retain its current and longstanding approach to the claims categorization and unclaimed funds issues subject to only narrow revision as truly warranted by a compelling basis.

Respectfully submitted,

Gregory A. Lewis /s/

Jonathan D. Hart
DC Bar No. 404828
Gregory A. Lewis
DC Bar No. 420907
NATIONAL PUBLIC RADIO, INC.
1111 North Capitol Street, NE
Washington, DC 20002
Telephone: (202) 513-2050
Fax: (202) 513-3021
glewis@npr.org

Dated: March 16, 2020