

Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

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

**JOINT MOTION OF THE PARTICIPATING PARTIES TO SUSPEND  
PROCEDURAL SCHEDULE AND TO ADOPT MODIFIED SETTLEMENT**

In response to the Order issued by the Copyright Royalty Judges (“Judges”) on January 18, 2018<sup>1</sup>, the Joint Sports Claimants (“JSC”),<sup>2</sup> NCTA– The Internet & Television Association (“NCTA”),<sup>3</sup> and the American Cable Association (“ACA”) (collectively, the “Participating Parties”) have agreed on the terms of a revised sports surcharge rule (“Sports Surcharge”) that they hereby submit to the Judges for adoption pursuant to 17 U.S.C. Sections 801(b)(2)(C) and 801(b)(7)(A).

The Participating Parties are the only parties that filed timely notices of intent to participate in this proceeding. On April 12, 2018, Major League Soccer (“MLS”) filed a Petition to Participate and a Motion to Accept Late Petition to Participate.<sup>4</sup> The Participating Parties have consulted with

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<sup>1</sup> *Order Reinstating Case Schedule*, Docket No. 15-CRB-0010-CA-S (January 18, 2018) (“January 2018 Order”). Pursuant to the January 2018 Order, the Participating Parties notified the Judges on April 12, 2018, that as of that date they had not reached a new settlement but were continuing to negotiate over the terms of a revised rule.

<sup>2</sup> The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women’s National Basketball Association, the National Hockey League and the National Collegiate Athletic Association.

<sup>3</sup> NCTA filed its notice of intent to participate in this proceeding (jointly with ACA) on May 26, 2016 under the name “National Cable & Telecommunications Association.” Subsequent to the initial filing, NCTA changed its name to “NCTA–The Internet & Television Association.”

<sup>4</sup> MLS’s motion is pending. No other party has sought leave to file a late petition to participate.

MLS regarding the revised proposed Sports Surcharge, and MLS has authorized the Participating Parties to state that MLS has no objection to its adoption.

The revised Sports Surcharge, a copy of which is attached hereto as Exhibit A, differs from the January 11, 2017 version of the proposed rule rejected by the Judges in the January 2018 Order in two important respects:

- First, the Sports Surcharge, as modified, contains a new provision expressly stating that no copyright owner of a telecast of a sports event telecast the retransmission of which would have been subject to deletion under the former FCC Sports Blackout Rule is precluded from seeking a share of the Sports Surcharge royalties (the “pay-out”).
- Second, a cable operator is obligated to pay the surcharge with respect to the retransmission of a telecast of a sports event involving any sports organization where certain enumerated conditions are met (the “pay-in”); the prior references to specific JSC members and “eligible” sports events have been removed.<sup>5</sup>

In order to move this proceeding to a prompt conclusion, the Participating Parties respectfully request that the Judges expeditiously seek comment on the modified Sports Surcharge and thereafter adopt it and terminate this proceeding.<sup>6</sup> The Participating Parties further request that

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<sup>5</sup> The rule as originally submitted to the Judges in January 2017 applied to the retransmission of telecasts of “eligible” sports events by “covered” cable systems; the only “eligible” sports events were those involving JSC members. By its terms, Section 801(b)(2)(C) of the Copyright Act limits surcharges adopted pursuant to that provision to the retransmission of broadcast signals and cable systems “affected” by the FCC’s elimination of the Sports Blackout Rule. *See infra* note 11 and accompanying text. The “pay-in” provision of the revised version of the proposed Sports Surcharge submitted herewith thus focuses on those cable systems and sports event telecasts “affected” by the FCC’s repeal of the Sports Blackout Rule.

<sup>6</sup> The Participating Parties have agreed to a new effective date for the Sports Surcharge. As initially proposed, the Sports Surcharge would have taken effect commencing with the first semi-annual accounting period of 2018. The modified settlement assumes that the Judges will approve the proposed rule expeditiously so that it can be given prospective effect beginning with the first semi-annual accounting period of 2019 and can be “reconsidered” in 2020 pursuant to Section 804(b)(1)(B) of the Copyright Act.

the Judges suspend, pending resolution of the present motion, the procedural schedule set forth in Attachment A to the January 2018 Order.<sup>7</sup>

### DISCUSSION

In January 2017, the Participating Parties' jointly submitted to the Judges a notice of settlement accompanied by a proposed rule establishing a per-event royalty surcharge rate and setting forth the conditions under which such surcharge would apply. After receiving and considering comments on the proposed Sports Surcharge from the Participating Parties and MLS, the Judges issued a "Request for Comment" on September 22, 2017, in which the Judges asked whether the proposed rule "was contrary to the provisions of the applicable license[] or otherwise contrary to law."<sup>8</sup>

The Participating Parties (jointly), the Joint Sports Claimants (individually), and MLS responded to the Judges' September 22 Comment Request. Thereafter, the Judges issued the January 2018 Order declining to accept the Participating Parties' settlement, citing in particular the fact that the proposed rule defined an "eligible professional sports event" for purposes of triggering a cable operator's surcharge payment obligation as including only events involving specific JSC members.<sup>9</sup> The Judges interpreted this definition as meaning that "MLS and any other professional league scheduling team sports events for telecast (and retransmission by those affected cable systems) would be ineligible to receive any portion of the sports programming surcharge negotiated by the [JSC]" and that accepting the proposed rule would bind "non-

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<sup>7</sup> The January 2018 Order sets a case schedule that begins with the filing of written direct statements and commencement of discovery on August 13, 2018 if no settlement has been reached and accepted by that date.

<sup>8</sup> *Request for Comments*, Docket No. 15-CRB-0010-CA-S, 82 Fed. Reg. 44368, 44369 (Sept. 22, 2017) ("September 22 Comment Request").

<sup>9</sup> January 2018 Order at 1-2.

participants” to a “zero rate” that would prevent them from sharing in any of the Sports Surcharge royalties.<sup>10</sup>

The Participating Parties’ revision of the proposed Sports Surcharge addresses the Judges’ concerns by expressly clarifying and confirming that the “pay-in” provision – which establishes the amount of the per-event surcharge and the conditions under which a cable operator is required to pay that surcharge – is entirely separate from, and does not limit or otherwise define how (or to whom) the “pay-out” of any such royalty payments are made. Consistent with the intent underlying Section 801(b)(2)(B) of the Copyright Act, an affected cable operator will be required to pay the surcharge only for certain telecasts of sports organizations that had actually availed themselves of the FCC Sports Blackout Rule prior to its repeal.<sup>11</sup> However, nothing in the proposed rule would require the Judges to distribute the Sports Surcharge royalties to only those sports organizations. The determination of the recipients of those royalties (and the amount of royalties those recipients should receive) would be addressed by the Judges in future allocation and distribution proceedings (absent a settlement among the parties claiming a share of the royalties).

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<sup>10</sup> *Id.* at 2.

<sup>11</sup> Section 801(b)(2)(C) of the Copyright Act provides:

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) (emphasis added).

## **1. The “Pay-Out” of Sports Surcharge Royalty Payments.**

The revised proposed Sports Surcharge adds a new provision (e)(9) that expressly clarifies the distinction between the “pay-in” element of the rule (*i.e.*, the calculation of an operator’s royalty payment obligation) and the “pay-out” element (*i.e.*, the distribution of the Sports Surcharge royalty payments). It does so by stating that “[n]othing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under FCC Sports Blackout Rule, from receiving a share of the royalties paid pursuant to [the Sports Surcharge “pay-in” provision].”

Thus, the revised version of the proposed Sports Surcharge expressly addresses the Judges’ concern that the rule as initially proposed in January 2017 could have been read as automatically disqualifying any sports organization that was not part of the JSC from seeking a share of the Sports Surcharge royalties. As modified, the rule draws a bright line between the “pay-in” methodology by which affected cable systems will compute their surcharge royalty payment obligations and the process by which those royalty payments are distributed.

## **2. The Revised Sports Surcharge “Pay-In” Calculation Methodology.**

The revised Sports Surcharge does not change the previously agreed upon per event royalty rate of 0.025 percent of an affected cable system’s gross receipts. Moreover, the definition of which cable systems may have to pay the surcharge has not changed (*i.e.*, systems that would have been subject to the FCC Sports Blackout Rule prior to its repeal).

However, as originally proposed, the pay-in obligation of the Sports Surcharge applied only when a cable operator retransmitted the telecast of a sports event involving a JSC member team. As revised, the Sport Surcharge pay-in provision no longer draws a distinction between sports events based on whether or not the participants in the event are affiliated with a JSC member.

Instead, under the revised rule, a cable operator's obligation to make a per-event surcharge royalty payment can arise with respect to the retransmission of the telecast of any professional or non-professional sports event provided that a showing is made that the repeal of the FCC Sports Blackout Rule affected the sports entity seeking to require that payment.

Specifically, under the revised rule, a cable system's retransmission of a sports event telecast that would have been subject to deletion under the FCC Sports Blackout Rule triggers a Sports Surcharge pay-in by the system's operator – as long as the holder of the broadcast rights in the event (or its agent) provides the affected system: (1) written notice containing information comparable to that required to invoke the former FCC Sports Blackout Rule; and (2) documentary evidence that the sports entity giving the notice required to trigger the Sports Surcharge pay-in provision previously invoked the FCC Sports Blackout Rule between January 1, 2012 and November 23, 2014 (the day before the repeal of the rule took effect).<sup>12</sup>

As was the case with the version of the Sports Surcharge initially proposed in January 2017, the Participating Parties do not intend for the agreed-upon methodology for calculating a cable system's pay-in obligation to be accorded any precedential effect or to be regarded as representing any agreement as to the fair market value, now or in the future, of the secondary transmission of any sports event or of the economic or other impact of the repeal of the FCC Sports Blackout Rule. The Participating Parties entered into negotiations with markedly different positions on the extent to which, if at all, the repeal of the FCC Sports Blackout Rule warranted

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<sup>12</sup> In addition, consistent with the version of the Sports Surcharge initially proposed in January 2017, with respect to certain collegiate events, the pay-in rule caps the maximum number of events involving a specific team that can trigger an affected cable system's surcharge payment obligation in a particular accounting period based on the largest number of events as to which the FCC Sports Blackout Rule was invoked by that specific sports entity during any of the accounting periods occurring during the January 1, 2012 through November 23, 2014 period.

the adoption of a royalty surcharge. In resolving those differences, the Participating Parties have agreed to limit the circumstances under which cable operators are required to pay the Sports Surcharge but have imposed no limitation on how Sports Surcharge royalties should be distributed.

The proposed per event surcharge rate of 0.025 percent of an affected cable system's gross receipts (which is unchanged from the initial settlement) represents a compromise reached by the Participating Parties to bridge the gap between their respective positions regarding the adoption of a royalty surcharge. In addition, to resolve the Participating Parties' different views on whether or not every sports organization and sports event is equally impacted by the repeal of the FCC Sports Blackout Rule, and as an alternative to the adoption of different rates for different types of sports events and sports organizations, the Participating Parties have agreed to the establishment of a single rate. They also have agreed to certain neutral (as to the identity of the sports organization) conditions that must be satisfied in order for a cable operator's pay-in obligation to be triggered. The application of these conditions does not turn on whether the sports organization that triggers a cable system's Sports Surcharge pay-in obligation is or is not a member of JSC. The conditions also serve as a means of finding a reasonable middle-ground among the Participating Parties with respect to the administrative and logistical burdens associated with the implementation of the Sports Surcharge.

## **CONCLUSION**

As previously noted, a key Congressional objective underlying the Judges' rate-setting authority is the promotion of voluntary settlements rather than litigation. *See* H.R. Rep. No. 108-408 at 24, 30 (2004) (referring to the legislative policy of "facilitating and encouraging settlement agreements for determining royalty rates"). Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to accept a settlement reached by "some or all of the participants" in a rate proceeding.

17 U.S.C. § 801(b)(7)(A). *See also Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2014–CRB–0001–WR (2016–2020), 80 Fed. Reg. 58201, 58203 (Sept. 28, 2015) (emphasis in original); *accord, Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2014–CRB–0001–WR (2016–2020), 80 Fed. Reg. 59588, 59589 (Oct. 2, 2015).

The Participating Parties believe that the revised Sports Surcharge is consistent with law and represents a reasonable settlement that will avoid the uncertainty, cost, and delay of a litigated proceeding.<sup>13</sup> The modifications to the version of the Sports Surcharge submitted in January 2017 address the concerns identified in the January 2018 Order by expressly confirming that all sports organizations will have an opportunity to make their case for a share of the Sports Surcharge royalties in a distribution proceeding, while also ensuring that the methodology for calculating a cable operator’s pay-in obligations takes into account the statutory requirement that the adjustment be limited to “affected” telecasts and cable systems. Therefore, the Participating Parties urge the Judges to promptly seek comment on and then adopt the modified Sports Surcharge rule as set forth in Exhibit A. The Participating Parties also request that the Judges suspend the procedural schedule in the January 2018 Order while the Judges seek public comment on the proposed rule.

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<sup>13</sup> If, for any reason, the Judges do not adopt the modified proposed rule, each of the Participating Parties reserves the right to demonstrate that the Sports Surcharge originally proposed is not contrary to law and/or that the Judges should adopt a different rate adjustment to account for the repeal of the FCC Sports Blackout Rule.



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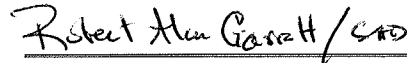


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Dated: July 2, 2018

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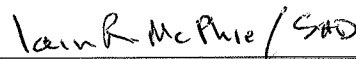
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## **CERTIFICATE OF SERVICE**

I, Ari Z. Moskowitz, hereby certify that on July 2, 2018, a copy of the Joint Motion of the Participating Parties to Suspend Procedural Schedule and to Adopt Modified Settlement was served electronically upon:

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Signed: /s/ Ari Z. Moskowitz

**EXHIBIT A**

AMEND 37 CFR §387.2 BY RENUMBERING PARAGRAPH (e) AS PARAGRAPH (f) AND ADDING A NEW PARAGRAPH (e), AS FOLLOWS:

(e) *Sports programming surcharge.* Commencing with the first semiannual accounting period of 2019 and for each semiannual accounting period thereafter, in the case of an affected cable system filing Form SA3 as referenced in 37 CFR 201.17(d)(2)(ii) (2014), the royalty rate shall be, in addition to the amounts specified in paragraphs (a), (c) and (d) of this section, a surcharge of 0.025 percent of the affected cable system's gross receipts for the secondary transmission to subscribers of each live television broadcast of a sports event where the secondary transmission of such broadcast would have been subject to deletion under the FCC Sports Blackout Rule. For purposes of this paragraph,

- (1) The term "cable system" shall have the same meaning as in 17 U.S.C. 111(f)(3);
- (2) An "affected cable system":
  - (i) Is a "community unit," as the comparable term is defined or interpreted in accordance with §76.5(dd) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(dd) (2014);
  - (ii) That is located in whole or in part within the 35-mile specified zone of a television broadcast station licensed to a community in which a sports event is taking place, provided that if there is no television broadcast station licensed to the community in which a sports event is taking place, the applicable specified zone shall be that of the television broadcast station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed; and
  - (iii) Whose royalty fee is specified by 17 U.S.C. 111(d)(1)(B);
- (3) A "television broadcast" of a sports event must qualify as a "non-network television program" within the meaning of 17 U.S.C. 111(d)(3)(A);
- (4) The term "specified zone" shall be defined as the comparable term is defined or interpreted in accordance with §76.5(e) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(e) (2014);
- (5) The term "gross receipts" shall have the same meaning as in 17 U.S.C. 111(d)(1)(B) and shall include all gross receipts of the affected cable system during the semiannual accounting period except those from the affected cable system's subscribers who reside in:
  - (i) The local service area of the primary transmitter, as defined in 17 U.S.C. 111(f)(4);
  - (ii) Any community where the cable system has fewer than 1000 subscribers;

- (iii) Any community located wholly outside the specified zone referenced in paragraph (e)(4) above; and
- (iv) Any community where the primary transmitter was lawfully carried prior to March 31, 1972;
- (6) The term “FCC Sports Blackout Rule” refers to §76.111 of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.111 (2014);
- (7) Subject to paragraph (e)(8), the surcharge will apply to the secondary transmission of a primary transmission of a live television broadcast of a sports event only where the holder of the broadcast rights to the sports event or its agent has provided the affected cable system:
  - (i) Advance written notice regarding such secondary transmission as required by §76.111(b) and (c) of the FCC Sports Blackout Rule; and
  - (ii) Documentary evidence that the specific team on whose behalf the notice is given had invoked the protection afforded by the FCC Sports Blackout Rule during the period from January 1, 2012 through November 23, 2014;
- (8) In the case of collegiate sports events, the number of events involving a specific team as to which an affected cable system must pay the surcharge will be no greater than the largest number of events as to which the FCC Sports Blackout Rule was invoked in a particular geographic area by such team during any one of the accounting periods occurring between January 1, 2012 and November 23, 2014;
- (9) Nothing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule, from receiving a share of royalties paid pursuant to this paragraph.

# Certificate of Service

I hereby certify that on Monday, July 02, 2018 I provided a true and correct copy of the Joint Motion of the Participating Parties to Suspend Procedural Schedule and to Adopt Modified Settlement to the following:

Major League Soccer, L.L.C., represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Signed: /s/ Ari Moskowitz