

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 COMMENTS OF THE MOVING PARTIES

The Joint Sports Claimants (“JSC”),¹ NCTA-The Internet & Television Association (“NCTA”), and American Cable Association (“ACA”) (collectively, the “Moving Parties”) submit the following comments in response to the Copyright Royalty Judges’ (“Judges”) notice published at 83 Fed. Reg. 36,509 (July 30, 2018) (“Notice”).

BACKGROUND

The purpose of this proceeding is to adjust the cable royalty rates in 17 U.S.C. § 111(d)(1)(B) to account for the Federal Communications Commission’s (“FCC”) 2014 repeal of its Sports Blackout Rule, which required cable systems to delete out-of-market live telecasts of sports events under certain circumstances. *See* 47 C.F.R. § 76.111 (2014). Under Section 801(b)(2)(C) of the Copyright Act, 17 U.S.C. § 801(b)(2)(C), the Judges are authorized to adjust the Section 111 royalty rates “to assure that such rates are reasonable in light of the changes” to, among other FCC rules, the Sports Blackout Rule. Adjustments adopted pursuant to Section 801(b)(2)(C) may apply only to “the affected television broadcast signals carried on those [cable] systems affected by the change.” *Id.*

On July 2, 2018, the Moving Parties — the only parties that filed timely motions to participate in this proceeding — requested the Judges to adopt a rule establishing a separate per-

¹ “JSC” refers collectively to the Office of the Commissioner of Baseball, National Football League, National Basketball Association, Women’s National Basketball Association, National Hockey League and National Collegiate Athletic Association.

telecast royalty surcharge (“Sports Surcharge Rule”) to account for the repeal of the FCC Sports Blackout Rule. *See* Joint Motion of the Participating Parties to Suspend Procedural Schedule and to Adopt Modified Settlement, No. 15-CRB-0010-CA-S (July 2, 2018) (“Motion”). Major League Soccer (“MLS”) — which had objected to an earlier version of that rule (“Original Proposal”) — advised the Moving Parties that it had no objection to the newly proposed Sports Surcharge Rule. *See id.* at 1-2.² The Judges’ Notice seeks comment on the proposed Sports Surcharge Rule, as required by 17 U.S.C. § 801(b)(7)(A). The Notice requests “general comments for or against” the proposed rule; it also specifically asks whether the rule is “consistent with Section 111 of the Copyright Act” and whether non-JSC members “would qualify for a share of royalties from the Sports Surcharge.” Notice at 36,511.

DISCUSSION

The Moving Parties support adoption of the proposed Sports Surcharge Rule, as set forth in Appendix A to their Motion, and submit the following comments in response to the specific questions raised by the Judges’ Notice.

I. The Proposed Sports Surcharge Rule Is Consistent With Section 111 Of The Copyright Act.

The Judges request comment on whether the proposed Sports Surcharge Rule is

consistent with Section 111 of the Copyright Act which provides that the applicable license granted in that section is the license to retransmit by cable beyond the local service area the works of “any . . . owner whose work was included in a secondary transmission made by a cable system . . . in whole or in part. . . .” 17 U.S.C. 111(d)(3), and consistent with the Judges’ interpretation of that section as elaborated in the Order Reinstating Case Schedule.

² MLS filed a late motion to participate, which the Judges granted on July 20, 2018. The Moving Parties have shared these Joint Comments with MLS, which has again advised that MLS has no objection to the proposed Sports Surcharge Rule set forth in Appendix A to the Motion.

Notice at 36,511.³ As discussed below and in the Motion, the proposed Sports Surcharge Rule is consistent with Section 111 as well as the Judges’ interpretation of that provision in their Order Reinstating Case Schedule, No. 15-CRB-0010-CA-S (Jan. 12, 2018) (“January 12 Order”).

In their January 12 Order, the Judges determined that the Original Proposal was inconsistent with Section 111 and therefore could not be adopted. The Judges believed that the Original Proposal rendered non-JSC members “ineligible to receive any portion of the sports programming surcharge” royalties because the collection of those royalties was triggered only by the retransmission of an “eligible professional sports event” — a term defined as encompassing only events of specific JSC members. *See* January 12 Order at 1-2. According to the Judges, this “proposed regulatory configuration provide[d] for licensing royalties from Form 3 cable systems for some sports leagues to the express exclusion of other leagues that own or represent owners of protected works” and would confine non-JSC members to a “zero rate.” *Id.* at 2. The Judges concluded that: “As proposed, the regulation for the exclusive benefit of [JSC members] is contrary to the applicable section 111 license.” *Id.*

The Moving Parties have sought to address the Judges’ concerns, as expressed in the January 12 Order, by making changes to the text of the Original Proposal. Specifically, they have removed from the proposed Sports Surcharge Rule all references to the term “eligible” sports events and to specific JSC members, and they have added a new provision to the proposed rule, Section 387.2(e)(9), which provides that:

³ 17 U.S.C. § 111(c)(1) affords cable systems a statutory license to make “secondary transmissions” of broadcast stations both within and outside the stations’ local markets — provided they pay the statutorily-prescribed royalty fees and comply with applicable FCC rules and other statutory conditions. 17 U.S.C. § 111(d)(3), cited in the Judges’ Notice, states that the Section 111 royalties shall be distributed to, among others, any copyright owner “whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter;” it does not define or otherwise limit the scope of the Section 111 license set forth in Section 111(c)(1).

Nothing [in the Sports Surcharge Rule] 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.

As the Motion explains, the purpose of these changes is to “expressly clarify and confirm” that the proposed Sports Surcharge Rule “does not limit or otherwise define how (or to whom)” the royalty payments are made. Motion at 4. Rather, the proposed rule simply specifies the circumstances under which a cable system must pay a Sports Surcharge (the “pay-in” methodology) and does not predetermine which entities are eligible to share in the distribution of these royalties and what share they should receive (the “pay-out” methodology). The conditions imposed on the “pay-in” methodology⁴ do not carry over to the pay-out methodology for distributing Sports Surcharge royalties to copyright owners or otherwise restrict in any way the Judges’ ability to determine who should or should not receive a share of the Sports Surcharge royalties collected pursuant to the pay-in methodology.

In short, the proposed Sports Surcharge Rule does not operate “for the exclusive benefit” of JSC members, does not “confine” non-JSC members to a zero share of the collected royalties, and does not implicate any of the concerns expressed in the Judges’ January 12 Order.

II. Nothing In The Proposed Sports Surcharge Rule Precludes Non-JSC Members From Receiving Royalties Paid Pursuant To That Rule.

The Judges also have requested comment on whether Section 387.2(e)(9)

could apply to the secondary transmissions of the live television broadcasts of any entity *other than* a current member of the JSC. In other words, would the phrase “the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule” enable any entity beyond the current members of

⁴ The Moving Parties negotiated the conditions that apply to the pay-in methodology (but do not apply to the pay-out methodology) in order to give effect to Section 801(b)(2)(C)’s directive that the adjusted royalty rate may apply only to “the affected television broadcast signals carried on those [cable] systems affected by the change.” See Motion at 4 & n.11. Nothing in the Copyright Act requires cable systems to pay an adjusted royalty rate, adopted pursuant to Section 801(b)(2)(C), for all copyrighted works that they retransmit under Section 111 and, indeed, the language of Section 801(b)(2)(C) precludes such a requirement.

the JSC to qualify for a share of royalties from the Sports Surcharge? If the answer is yes, which entities' transmissions would qualify for a share? If the answer is no (*i.e.*, only JSC members could qualify), then is the current proposal nevertheless still consistent with the Section 111 license? If so, why?

Notice at 36,511 (emphasis in original) (footnote omitted). The answer is “yes.” Both JSC members and non-JSC members (*e.g.*, MLS) may own copyrights in live broadcasts of sports events “the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule.” Thus, both JSC and non-JSC members may qualify for a share of royalties paid pursuant to the Sports Surcharge Rule.

The FCC Sports Blackout Rule did not distinguish between JSC and non-JSC events. It provided in relevant part that no cable system

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 shall . . . carry the live television broadcast of that event if the event is not available live on a [in-market] television broadcast station . . .

47 C.F.R. § 76.111 (2014). Both JSC and non-JSC members may own copyrights in future broadcasts that come within the above-quoted language, *i.e.*, out-of-market live broadcasts of sports events that are not broadcast live by an in-market station. Any and all such broadcasts “would have been subject to deletion under the FCC Sports Blackout Rule” had that rule remained in effect. Under the proposed Sports Surcharge Rule, copyright owners of all such broadcasts made in 2019 and beyond may qualify for a share of Sports Surcharge royalties — regardless of whether they are JSC members and regardless of whether the secondary transmissions of those broadcasts trigger the “pay-in” methodology of the Sports Surcharge Rule.

As the Moving Parties previously explained, under the Sports Surcharge Rule, the secondary transmission of live broadcasts of sports events involving entities that did not request

protection under the FCC Sports Blackout Rule during the two years prior to its repeal does not trigger the pay-in methodology. *See* Section 387.2(e)(7)(ii).⁵ While the Moving Parties are not aware of any entities other than certain JSC members that sought such protection, if there are any such entities, the Sports Surcharge pay-in would be triggered with respect to secondary transmission of their events. Moreover, even entities that did not invoke the protection of the FCC Sports Blackout Rule in the past may qualify for a share of future Sports Surcharge payments. That share will be determined either by settlement or by the Judges based upon the record before them in future allocation or distribution proceedings and not in this proceeding.

CONCLUSION

While the Moving Parties (for reasons previously stated) respectfully disagree with the Judges' conclusion that the Original Proposal is inconsistent with Section 111, they have nonetheless agreed to changes in that proposal in order to address the Judges' concerns. The resulting Sports Surcharge Rule responds to those concerns, is consistent with Section 111 and should be adopted. Moreover, consistent with the Congressional intent of promoting settlement and in light of the extended period of time during which this rate adjustment proceeding has been pending, the Moving Parties respectfully request that this proceeding be resolved expeditiously so that the proposed rule may become effective in 2019.

⁵ The pay-in methodology can be revisited in 2020 upon petition by any interested stakeholder pursuant to 17 U.S.C. § 804(b)(1)(B).

Date: August 29, 2018

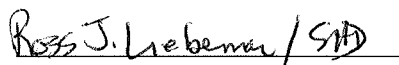
Respectfully submitted,

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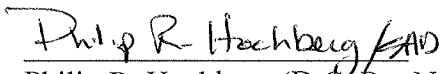


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Proof of Delivery

I hereby certify that on Wednesday, August 29, 2018 I provided a true and correct copy of the Joint Comments of the Moving Parties on Modified Proposed Rule (83 FR 36509) to the following:

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

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

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Signed: /s/ Ari Moskowitz