

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*  
**DISTRIBUTION OF CABLE ROYALTY FUNDS**

*In re*  
**DISTRIBUTION OF SATELLITE ROYALTY FUNDS**

**CONSOLIDATED DOCKET NO.**  
**14-CRB-0010-CD/SD**  
**(2010-13)**

**[REISSUED]**  
**ORDER GRANTING IN PART ALLOCATION PHASE PARTIES’**  
**MOTION TO DISMISS MULTIGROUP CLAIMANTS**  
**AND DENYING MULTIGROUP CLAIMANTS’ MOTION FOR SANCTIONS**  
**AGAINST ALLOCATION PHASE PARTIES**

**The following Order was signed and disseminated to parties in the captioned proceeding on or about August 11, 2017. As issued, the Order bore the wrong case caption. This Reissued Order does not change the substance or intent of the August 11, 2017, Order; it merely replaces the case caption to assure an accurate case record.**

On January 25, 2017, the Joint Sports Claimants, Program Suppliers, Commercial Television Claimants, Public Television Claimants, Canadian Claimants Group, and Settling Devotional Claimants (collectively, the Allocation Phase Parties) filed with the Copyright Royalty Judges (Judges) a Motion to Dismiss Multigroup Claimants (Motion) from the allocation phase of the captioned proceeding. The Multigroup Claimants (MGC) filed a timely opposition and cross motion to compel production of discovery materials and for sanctions (Opposition), and the Allocation Phase Parties filed a timely reply in support of the Motion and opposition to MGC’s cross motion (Reply).

For the reasons set forth below the Judges **GRANT** the Motion, in part, and **DENY** MGC’s cross-motion for sanctions.

**I. Background and Arguments of the Parties**

Unlike past distribution proceedings, where allocation and distribution issues were adjudicated as separate “Phase I” and “Phase II” proceedings, the Judges initiated the instant distribution proceeding to determine all issues relating to the royalty funds for 2010-2013. *See Notice Announcing Commencement of Distribution Proceedings with Request for Petitions to Participate*, 79 Fed. Reg. 76396 (Dec. 22, 2014) (2010-12 Cable and Satellite); *Notice Announcing Commencement of Distribution Proceedings with Request for Petitions to Participate*, 80 Fed. Reg. 32182 (Jun. 5, 2015) (2013 Cable and Satellite). MGC stated in its Petitions to Participate that it intended “to participate in any Phase I proceedings in connection with its representation of claimants with devotional programming claims, and to the extent that

such proceedings address the appropriate definition of Phase I categories” as well as “any Phase II proceeding involving syndicated programming, sports programming, devotional programming, and Canadian Claimant categories.” Multigroup Claimants’ Petition to Participate in Distribution Proceedings at 1 (Jul. 2, 2015); Multigroup Claimants’ Petition to Participate in Distribution Proceedings, Docket No. 14-CRB-0007-CD (2010-2012) at 1 (Jan. 20, 2015).<sup>1</sup> Notwithstanding this stated intent, MGC did not file a written direct statement in the allocation phase (WDS-A) by the applicable deadline.<sup>2</sup> See Opposition at 6.

The Allocation Phase Parties seek MGC’s dismissal from the allocation phase due to MGC’s failure to file a WDS-A. Citing 37 C.F.R. § 351.4(a) and prior decisions of the Judges and (under the former CARP system) the Librarian of Congress, the Allocation Phase Parties argue that “MGC’s failure to file a timely written direct statement mandates its ‘automatic dismissal’ from the Allocation Phase.” Motion at 1.

MGC argues in opposition to the Motion that none of the precedents the Allocation Phase Parties cite are applicable or relevant, since they predate the Judges’ decision to combine the allocation and distribution phases into a single proceeding. Opposition at 5. MGC notes that, “[i]n this proceeding, the Judges have consistently clarified that while claims categorization, claims validation, allocation, and Distribution issues will be considered separately, they remain indistinguishable as part of a single, consolidated proceeding.” *Id.* at 1. Specifically, MGC points to the Judges’ order requiring parties to exchange discovery materials related to the validity of claims with parties “with whom no adversarial position exists” as demonstrating the Judges’ intent that MGC remains entitled to participate in the allocation phase of the proceeding and receive discovery materials relating to that phase, notwithstanding its failure to file a WDS-D. See *id.* at 3, 6-7.

In addition, MGC moves for the Judges to direct the Allocation Phase Parties to produce all allocation phase discovery materials to MGC and to impose sanctions against the Allocation Phase Parties for failing to provide those materials during the post-WDS-A discovery period. See *id.* at 8-9. MGC argues that a “substantial sanction” against the Allocation Phase Parties is warranted because they demonstrated bad faith by changing their previously articulated position on the exchange of documents and “covertly conspired” to withhold discovery from MGC. *Id.* at 8.<sup>3</sup>

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<sup>1</sup> Spanish Language Producers (SLP), another fictitious name of the same individual participating as MGC, made similar statements in its Petitions to Participate. See Spanish Language Producers Petition to Participate in Distribution Proceedings at 1 (Jul. 2, 2015); Spanish Language Producers Petition to Participate in Distribution Proceedings, Docket No. 14-CRB-0007 CD (2010-2012) at 1 (Jan. 20, 2015). SLP subsequently “transferred” its claims to MGC and withdrew from the proceeding. See, Joint Notice of Settlement of Controversy (March 22, 2016).

<sup>2</sup> Prior to the deadline for filing WDS-As, MGC did not participate fully in the allocation phase. For example, MGC notified the Judges and the other participants that it would not challenge the program category definitions proposed by the other allocation phase participants in spite of its misgivings. See Multigroup Claimants’ and Spanish Language Producers’ Notice Regarding Category Definitions (Sep. 28, 2015).

<sup>3</sup> MGC points to a July 29, 2016, email from counsel for the Settling Devotional Claimants (SDC) to counsel for the Commercial Television Claimants (CTV), copied to all other counsel in the proceeding, concerning distribution phase discovery production. See Opposition at Ex.B. The email takes the position that parties participating in the distribution phase must exchange materials produced in discovery to all other parties participating in the distribution phase, regardless of whether they have claims in the same program category.

## II. Discussion

In this proceeding the Judges broke with past practice by combining what were formerly known as Phase I and Phase II distributions proceedings into a single proceeding in which the functions of allocating funds between program categories and distributing funds among claimants within those categories would proceed in parallel.<sup>4</sup> The Judges took this step in an effort to decrease the time between the filing of cable and satellite royalty claims and final distribution of all royalty funds. *See Order Regarding Discovery* at 4 (Jul. 21, 2016) (7/21/16 Order). An additional goal was to encourage greater participation in determining allocation issues by parties that had not participated in Phase I proceedings in the past, recognizing that the establishment of program categories and the division of the royalty pool among those categories in the allocation phase could have a direct impact on the ultimate distributions to claimants.

As the Judges made clear in the *7/21/16 Order*, determination of allocation and distribution phase issues continue to proceed on separate tracks under the new structure. *7/21/16 Order* at 8. For additional clarity, the Judges divided the case events on the revised case schedule into milestones related to the allocation phase and those related to the distribution phase. *Id.* at 9. Nothing in that order or any other stated—or even suggested—that the Judges were waiving any of the requirements for participating in either phase by putting the two phases under the umbrella of a single proceeding. Filing of a written direct statement in each phase remains an essential requirement for further participation in that phase of the proceeding. *See* 37 C.F.R. § 351.4(a); *see also Order Granting SoundExchange Motion to Dismiss Muzak LLC*, Docket No. 2006-1 CRB DSTRA (Jan. 10, 2007); *Order Granting SoundExchange’s Motion to Dismiss Persons and Entities That Did Not File a Written Direct Statement*, Docket No. 2005-1 CRB DTRA (Jan. 20, 2006); *Order*, Docket No. 2000-9 CARP DTRA 1&2 (Apr. 23, 2001). Articulating one’s allocation methodology and presenting the evidence supporting it is the most basic, indispensable element of any party’s participation in adjudicating allocation issues. Failing to do so is inimical to a party’s continued participation in the category allocation decision.

MGC’s argument that the Judges’ decision to combine allocation and distribution issues in a single proceeding overturns all prior precedents relating to the procedural requirements for participating in a distribution case is entirely unsupported. It runs counter to the Judges’ procedural rules. *See* 37 C.F.R. § 351.4(a). And it is illogical: Grouping formerly separate phases into a single proceeding does nothing to render irrelevant prior decisions relating to the required elements of a case.

MGC’s reliance on the Judges’ orders directing distribution phase participants to provide copies of discovery materials to parties representing claimants in other program categories is unavailing. The Judges’ March 14, 2016 *Order for Further Proceedings* applied to distribution phase participants. The order did not speak to the present circumstance of a party that has, through procedural default, forfeited its right to continue participating in the applicable phase of the proceeding.

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<sup>4</sup> The Judges also discontinued using the terms “Phase I” and “Phase II” in recognition of the fact that the separate functions of allocation and distribution could be completed in any order. Beginning with the present proceeding the Judges are employing the descriptive terms “allocation phase” and “distribution phase,” respectively.

### III. Conclusion and Rulings

MGC failed to file a WDS-A by the applicable deadline. MGC has thus forfeited its right to continue participating in the allocation phase of this proceeding, from and after the deadline for WDS-As (December 22, 2016). MGC's procedural default thus precludes MGC from, *inter alia*, participating in allocation phase discovery.

The Allocation Phase Parties' requested remedy—dismissal of a party from a portion of a proceeding—is not possible, however. Dismissal is an all or nothing proposition, and MGC remains a party to this proceeding. Consequently, the Judges **GRANT** the Motion to the extent of ordering that MGC may no longer participate in the allocation portion of this proceeding. The Allocation Phase Parties need not provide MGC with copies of materials responsive to discovery requests propounded in connection with WDS-As and WRS-As. All parties shall, however, continue to copy all other participants on the participant list on all pleadings that they file with the Judges.

In light of the foregoing discussion and rulings, the Judges **DENY** MGC's cross motion requesting an order directing the Allocation Phase Parties to produce allocation phase discovery materials to MGC and imposing sanctions against the Allocation Phase Parties. The Allocation Phase Parties have no obligation to provide allocation phase discovery materials to MGC; their decision not to do so is not sanctionable.

**SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
Suzanne M. Barnett  
Chief Copyright Royalty Judge

Dated: August 11, 2017

Reissued: December 15, 2017.

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Suzanne M. Barnett  
Chief Copyright Royalty Judge