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**Before the**
**COPYRIGHT ROYALTY JUDGES**
**Washington, DC**

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| **In the Matter of**<br><br>**Distribution of the 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds** | **Docket No. 2012-6 CRB CD 2004-2009 (Phase II)** |
| **In the Matter of**<br><br>**Distribution of the 1999-2009 Satellite Royalty Funds** | **Docket No. 2012-7 CRB SD 1999-2009 (Phase II)** |



## JOINT MOTION FOR RECONSIDERATION OF THE JUDGES' ORDER RESCHEDULING HEARING

The MPAA-represented Program Suppliers ("MPAA"), Settling Devotional Claimants ("SDC"), and Independent Producers Group ("IPG") (collectively, the "Phase II Parties"), hereby move for reconsideration of the Judges' Order Rescheduling Hearing, entered on January 10, 2017 ("Rescheduling Order"). In particular, the Phase II Parties disagree with the Judges' understanding that "[t]here is no statutory deadline for the determination in this matter." The Phase II Parties understand and respect that the Judges have a busy 2017 calendar, but submit that the Judges nonetheless erred in reaching this conclusion. Further, the Judges' decision to push the hearing from March 6, 2017 to February 5, 2018 in accordance with their incorrect conclusion is not reasonable when this Phase II proceeding began over three years ago. As recently as November, 2015, the Judges determined to limit bifurcation of the 2010-2013 proceeding, in part because they "*abhor the distribution delays* inherent in a bifurcation giving rise to consecutive proceedings." Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation) and Scheduling Order, *In re Distribution of Cable Royalty*

*Funds*, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (Nov. 25, 2015) at 3 (emphasis supplied). In this 1999-2009 proceeding, the claimants that the Phase II Parties represent have been waiting, and continue to wait, to receive royalty fees owed on programming that aired nearly *two decades* ago. The Phase II Parties respectfully request the Judges to reconsider the new delays built into the Rescheduling Order, and request a scheduling conference to enable the Judges to reset the hearing for an earlier, mutually-agreed upon date.

**Standard of Review**

The Judges have previously determined that 17 U.S.C. § 802(f)(1)(A) grants them implied statutory authority to consider and rule on motions for reconsideration. *See, e.g.*, Order Denying IPG Motion to Reconsider Preliminary Hearing Order Relating to Claims Challenged by SDC, Docket No. 2008-2 CRB CD 2000-2003, 1 (May 14, 2013). The Phase II Parties seek reconsideration of the Rescheduling Order because the Judges erred in finding that "[t]here is no statutory deadline for determination in this matter," and failure to correct that clear error will work a manifest injustice on the parties.[1]

**Argument**

The one-page Rescheduling Order does not provide the basis for the Judges' conclusion that their determination in this proceeding is not subject to a statutory deadline. But the Judges stated in a footnote to an order entered simultaneously with the Rescheduling Order that "the

[1] Because the matter of rescheduling the hearing in this case was not raised by any party and was not litigated before the Judges, the Phase II Parties submit that this motion for reconsideration is not governed by the heightened standard of review that the Judges have adopted for reconsideration of other interlocutory orders, namely: that the Judges will grant such motions only where "(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns, Docket No. 2005-1, 1 CRB DTRA (May 3, 2006). Regardless of the standard that is applied to this motion, the Phase II Parties submit that a schedule that does not prioritize a date for resolution of the distribution of these royalties, but instead ensures that this case will not be concluded before 2018, the sixth year after its commencement and the fourth year after the running of the statutory deadline for a final decision, is in fact clear error and manifest injustice.

parties stipulated to, and the Judges ordered, extended deadlines." Order on IPG Motion for Leave to File Amended Written Direct Statement, n.2 (January 10, 2017). Accordingly, the Phase II Parties infer that the Judges' position may be based in part on the parties' Joint Motion to Extend the Deadline for Filing Written Direct Statements and Adopt Revised Procedural Schedule (July 20, 2016). With due respect, that request does *not* support finding that no statutory deadline applies to the Judges' determination in this proceeding. First, even though the complexity of assembling relevant expert testimony required a brief extension of the filing date for the written direct statement, the Phase II Parties actually proposed, and the Judges agreed, to have the hearing in March, 2017—a month earlier than the April, 2017, hearing date that the Judges' original schedule called for. *See* Order Reopening the Record and Scheduling Further Proceedings (May 4, 2016). Second, if it is true that the eleven-month delay is predicated on this original schedule adjustment, it is both very disappointing and profoundly disproportionate to the parties' request.

Further to the merits of the instant motion, the Phase II Parties' right to a timely resolution of this matter cannot be set aside simply because they required a modest schedule adjustment to absorb the impact of the Judges' decision to reopen the proceeding and solicit further evidence. Especially in light of the fact that both the SDC and MPAA have offered methodologies very similar to those that they previously propounded, the Phase II Parties respectfully suggest that an expedited approach to resolution of the distribution of these royalties, not an eleven month delay, would be a more appropriate response, consistent with the statutory obligations of the Judges and the Judges' stated abhorrence of delay in distributing royalties.

The Judges' conclusion about the absence of a deadline may also have roots in the SDC's and MPAA's accommodation of IPG's request for continuance of a hearing in February, 2015.

The SDC's and MPAA's agreement to IPG's requested three-week continuance is reflected in the Joint Stipulated Order Amending Procedural Schedule (Feb. 26, 2015) ("Stipulated Order").

As noted in the Stipulated Order, the SDC initially opposed IPG's motion for this extension, which was designed to accommodate the scheduling conflict of IPG's expert witness, Dr. Laura Robinson. The SDC and MPAA reluctantly agreed on a conference call with the Judges to a compromise schedule accommodating IPG's request. In the course of that conference call, Chief Judge Barnett pointed out that even a short extension might affect the Judges' ability to meet the statutory deadline of August 14, 2015 due to the Judges' then-upcoming hearing schedule. However, there was no suggestion on that call or in the Stipulated Order that the good-faith accommodation to the extension would constitute a wholesale waiver of the Phase II Parties' right to a timely resolution of this proceeding. As stated in the Stipulated Order:

> In light of the impact on the CRB's docket of the Phase II Parties' requested changes to the case schedule for this proceeding, the Phase II Parties have acknowledged that they have no objection to the Judges issuing their Initial Determination after the date specified in 17 U.S.C. § 803(c)(1) [i.e., August 14, 2015], should additional deliberation time be required.

In any event, reconsideration is warranted here because the Judges erred in concluding that their determination in this proceeding is not subject to a statutory deadline. Section 803(c)(1) of the Copyright Act directs that the Judges "shall issue their determination in a proceeding not later than 11 months after the conclusion of the 21-day settlement conference period[.]" 17 U.S.C. § 803(c)(1). The Judges themselves acknowledged in July 2014 that "[c]ommencement of the statutory settlement conference period is significant, as it starts an 11-month clock, at the end of which the Judges must issue a determination." Order Suspending Case Schedule, Docket Nos. 2012-6 CRB CD 2004-09, 2, 2012-7 CRB SD 1999-2009, 2 (July

23, 2015). The Judges' determination to the contrary is therefore clear error, as nothing in the record or statute supplies any basis for the Judges to disregard Section 803(c)'s mandate. While the parties orally consented to a short, reasonable delay "should additional deliberation time be required," such consent cannot reasonably be interpreted to constitute a waiver beyond its clear and limited purpose to accommodate a witness's schedule and to allow the Judges additional time for "deliberation."

Moreover, even if there were no statutory deadline set forth in the Copyright Act, the Judges would still have a duty to conclude promptly this proceeding under the Administrative Procedure Act, which provides for resolution of this dispute "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. § 555(b); *see also* 5 U.S.C. § 706(1) (permitting reviewing court to "compel agency action ... unreasonably delayed"); 17 U.S.C. § 803(d)(3) (applying 5 U.S.C. § 706 to review of determinations of Copyright Royalty Judges). "[T]he time agencies take to make decisions must be governed by a 'rule of reason,' ... where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason ...." *AHA v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (quoting *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).[2]

Pushing the hearing date to February 5, 2018, is especially unreasonable here, where (1) the Judges initiated the distribution phase of this proceeding more than four years earlier on August 16, 2013, (2) the parties fully presented their cases in April 2015, submitted proposed

[2] Indeed, in the Judges' Second Stipulated Order Amending Procedural Schedule (March 13, 2015), which repeats the parties' consent to the Judges issuing their decision after the statutory deadline "should additional deliberation time be required," the parties also agreed and the Judges ordered that "the parties shall abide by the following guidelines (*subject, as always, to the rule of reason*) ...." (emphasis added). The rule of reason controls all.

findings of fact and conclusions of law in August 2015 and replies in September 2015, and (3) the Judges reopened the record for further evidence on May 4, 2016.

These mounting delays have already taken a substantial and adverse toll on the claimants the Phase II Parties represent. These claimants have been waiting for a final determination on royalties owed for programming that aired as many as eighteen years ago. Indeed, even the most recent programming at issue in this proceeding aired more than seven years ago. The protracted life of this proceeding has already compromised the parties' ability to produce certain evidence requested by the Judges, and underscores precisely why reconsideration of the Rescheduling Order is necessary to "prevent manifest injustice."

The Phase II Parties acknowledge that the Judges enjoy wide discretion to control the case schedule, to request additional evidence as needed, and generally to manage their docket. However, any discretion to impose extended delay in the distribution of these long-deferred royalty awards must be exercised in line with the duties imposed by the Copyright Act's statutory deadline strictures and the APA's obligation to proceed to a final decision within a reasonable time. Mindful of the Judges' "abhorrence" of delay in distributions, this latest eleven-month extension fails in these duties.

**Conclusion**

For the foregoing reasons, the Phase II Parties respectfully request that the Judges grant this Joint Motion for Reconsideration of the Rescheduling Order, hold a scheduling conference with the Phase II Parties to reset the schedule, and ultimately adopt a more reasonable time table for this proceeding.

Dated: January 27, 2017 Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jessica T. Nyman, hereby certify that a copy of the foregoing "JOINT MOTION FOR RECONSIDERATION OF THE JUDGES' ORDER RESCHEDULING HEARING" was sent electronically, and sent via First Class Mail, this 27th day of January, 2017 to the following:

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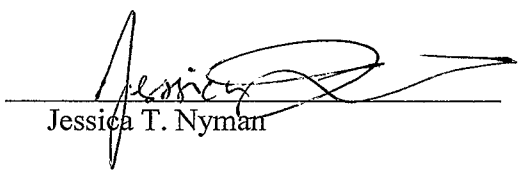

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