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Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re **NOTICE OF INQUIRY REGARDING CATEGORIZATION OF CLAIMS FOR CABLE OR SATELLITE ROYALTY FUNDS AND TREATMENT OF INELIGIBLE CLAIMS**	**Docket No. 19-CRB-0014-RM**

Comments of the Canadian Claimants Group
Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims

The Canadian Claimants Group ("CCG") submits these comments in response to the Notice of Inquiry Regarding Categorization of Claims for Cable and Satellite Funds and Treatment of Ineligible Claims published by the Copyright Royalty Judges ("Judges") at 84 Fed. Reg. 71852 (December 30, 2019) ("NOI").[1]

I. Introduction

At the onset, the CCG is concerned that a rule-making that locks in category definitions will create numerous problems in determining relative valuation, will endanger the proper representation of copyright holders, will lead to additional Allocation and Distribution Phase litigation, and will necessitate future rulemakings to adjust the categories.

[1] The deadline to respond was extended to March 16, 2020, in notices published at 85 Fed. Reg. 5182 (January 29, 2020) and 85 Fed. Reg. 6121 (February 4, 2020).

The CCG also opposes any handling of invalid claims that is premised on the elimination of the "presumption of validity." Assuming claims are invalid unless proven otherwise through a regulatory process—or worse a litigation process—will substantially increase the costs associated with royalty distribution and reduce the net royalties available for distribution to copyright holders.

For these reasons, which are discussed further below, the CCG opposes the initiation of a rule-making process regarding categorization of claims for cable or satellite royalty funds and treatment of ineligible claims.

II. The Identification of the Allocation Phase Categories.

A. Claimant-centric categories developed naturally at the beginning of these proceedings and remain the best way to organize the claims of copyright holders.

Not since its earliest years has the cable and satellite television industry changed at the pace seen over the last ten years as streaming services compete with traditional broadcast television to distribute content. The rate and nature of change suggest that the next ten years may be equally disruptive with outcomes we simply cannot predict. The growing trend towards cord-cutting is moving households away from the traditional cable and satellite subscriptions that form the basis of Sections 111 and 119 royalties. At the same time, systems continue to consolidate and use multicasting to improve their competitiveness. In this dynamic environment, defining claimant groups by regulation limits the parties' ability to adapt to changes.

The existing eight major Allocation Phase claimant groups have all participated in these proceedings since or shortly after the first royalty distribution proceeding in 1978.[2] The definitions of the categories and the structure of the participants representing those categories have shifted slightly and been refined over the years and the distant signal marketplace and the television industry has changed.[3] But there has never been a significant dispute about the basic categories. Instead, these categories have proven resilient and allowed the parties to focus on changes in the cable and satellite television industry and refine the tools offered to evaluate relative marketplace value.

Indeed, given the stability of the eight major Allocation Phase litigants, it seems that the NOI responds to the contentions of only one litigant. In the NOI, the Judges acknowledge: "**Most participants** advocated use of the claimant-centric categories that had been used in prior distribution proceedings, arguing that doing so would provide 'efficiency and certainty both in the preparation of evidence . . . and in the ultimate distribution of royalties to all eligible claimants.'' *NOI*, 84 Fed. Reg. at 71853, citing Joint Comments of 2014–17 Cable Participants on Allocation Phase Claimant Category Definitions, Docket No. 16–CRB–0009–CD (2014–17), at 2 (Apr. 19, 2019) (emphasis added). It would be more accurate to say, "**All but one participant** advocated use of the

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[2] The eight major claimant groups are (1) "Program Suppliers" or "PS," (2) ''Joint Sports Claimants" or "JSC," (3) ''Commercial Television or "CTV," (4) ''Devotional Claimants'' (5) ''Public Television'' or ''PTV," (6) ''Canadian Claimants Group or "CCG" (7) National Public Radio or ''NPR,'' and (8) ''Music Claimants.'' *See*, *NOI*, 84 Fed. Reg. 71852, n.1. Of the eight categories, only the first six categories are collections of television programs. Music Claimants seek royalties for music played across all types of programs and NPR seeks royalties for retransmission of its radio programming by cable systems.

[3] The Judges have previously stated: "The categories are mutually exclusive and, in aggregate, comprehensive." Copyright Royalty Board, *2010-2013 Distribution of Cable Royalty Funds*, 84 Fed. Reg. 3552, n.1 (Feb. 12, 2019), corrected at 84 Fed. Reg. 5505 (Feb. 21, 2019) ("*2010-2013 Proceeding*").

claimant-centric categories…" because only Multigroup Claimants ("MC") advocated the use of alternative, "program-centric category definitions." *Id*. Responding to this lack of unanimity, the Judges concluded:

> The failure of all participants to stipulate to claimant categories as well as the stated concerns with the historically-stipulated category definitions underscore the need for a procedure by which copyright owners and their representatives are afforded the opportunity to propose specific category definitions and provide legal and economic arguments and factual evidence to support their respective positions, enabling the Judges to act on the basis of an adequate administrative record. Id.

The CCG urges the Judges not to elevate MC's argument with a rulemaking. MC with its various alter egos, Independent Producers Group ("IPG") and Worldwide Subsidy Group (collectively referred to throughout as "WSG"), is an aberration in these proceedings because it asserts what are essentially Distribution Phase claims in the Allocation Phase. By its nature, the two-phase approach established by the Copyright Royalty Tribunal ("CRT") decades ago was based on the belief that parties would participate in good faith by asserting their claims in the proper phase. WSG's behavior does not justify changing the entire historical approach to the claimant group structure. If WSG believes that its hodge-podge of sports, Canadian, U.S. series, and devotional programming—hardly a program-centric category—make up an Allocation Phase claim, it can present an Allocation Phase direct case like the other parties. Historically, however, it has not presented a material direct case and its claims have been resolved through intra-claimant negotiations or intra-claimant Distribution Phase proceedings—as all Distribution Phase disputes should.

Finally, the Judges appear to make an assumption that underlies much, perhaps all, of the rationale for the NOI. Towards the end of section II.B of the NOI, the Judges write:

> For instance, one rationale for intra-category re-apportionment of royalties attributable to invalid claims (the status quo) is that the invalidly claimed programs have more in common in terms of value creation with the

> validly-claimed programs in the same category than with the validly claimed programs in the other categories (which also implicates the above-stated inquiry regarding whether the categories should be claimant-centric or program-centric). If the former, the argument for maintaining intra-category re-allocations of invalid claims may be weaker, **because claimant-centric categorization is based on common representation, not common relative program value**. *NOI*, 84 Fed. Reg. at 71854 (emphasis added).

This passage implies that the Judges have already concluded that program-centric categorization creates categories where intra-category programming has common relative program value while claimant-centric categorization does not. If that were true, it might make sense—at least from an evidentiary standpoint—to reorganize the categories because categories that are more internally homogenous might be more amenable to an Allocation Phase valuation process. But no empirical data support this assumption and the Judges should not embrace this assumption as fact. The assumption is incompatible with the fact that the existing categories were built by claimants whose content was relatively homogeneous in value giving them relatively equal bargaining power in intra-category distributions. That is, the existing categories were self-selected by the copyright holders. For example, as discussed below, the Canadian broadcasting claimants split from the broadcasters" category led by the National Association of Broadcasters ("NAB") "because they had more in common from a valuation and identity perspective with other Canadian copyright holders than they did with American broadcasters.

That this self-selection led to categories with homogeneous intra-party valuation is further supported by the relative rarity of Distribution Phase proceedings which suggests the copyright owners' relative parity is leading to fair distributions. Given the long acceptance of the existing categories, the Judges should not conclude, without hard

evidence, that program-centric categorization is superior to claimant-centric categorization in producing common intra-category relative program value.

Because claimant-centric parties reflect the natural grouping of copyright holders and their selection of participants to represent their interests as parties in these proceedings, claimant-centric categories are superior to program-centric category definitions and the potential regulatory ossification of such definitions should be rejected.

B. "*The merit of aggregating the Allocation Phase categories by program type rather than by claimant groups, and whether doing so may result in a distribution of royalties that more accurately reflects the relative value of different programming*."[4]

The eight major Allocation Phase cable claimant groups are voluntarily organized collections of copyright holders.[5] As the Judges note, these groups developed early in the history of these proceedings and have remained largely stable over time. *NOI*, 84 Fed. Reg. at 71852 n.1. This stability exists because the groups are not arbitrary collections of program-centric content. Rather, the groups developed naturally from the organizational efforts by claimants whose programming shared one or more *defining characteristics* that

[4] Quoted headings in italics are taken directly from the NOI and are the questions raised for comment by the Judges.

[5] Only a subset of the eight cable participants are involved in satellite royalty proceedings.

made the category relatively homogenous with respect to the nature, focus, and value of its programming for Allocation Phase purposes.[6]

This organization around defining characteristics arose naturally at the time of the earliest distribution proceedings and has been refined without radical change over time. And while the parties have litigated vigorously about the relative value of their categories, there have been no serious disputes over the definitions of the categories themselves.

1. Each Allocation Phase category needs an advocate and so additional categories will require additional parties who have not organically appeared in the 40 years these proceedings have taken place.

The Allocation Phase claimant categories are and must be both comprehensive and mutually exclusive to ensure that all royalties are accounted for in a distribution proceeding.

Under the existing rules, any claimant or their representative has the right to appear and participate in the Allocation Phase and file a direct case in support of an Allocation award. 47 CFR § 351.1 *et seq*. Over the years various parties have done both. The categories were organized over the first proceedings of the CRT by major industry players: the Motion Picture Association of America (now the Motion Picture Association ("MPA")) on behalf of program suppliers, the professional team sports leagues and the National Collegiate Athletic Association, the National Association of Broadcasters ("NAB") for commercial

[6] Programming may have more than one defining characteristic but generally, one characteristic makes the most sense for categorization purposes. For example, while one could group items on a restaurant menu according to their content, such as a "chicken" category that includes roast chicken, chicken soup, and chicken nuggets, it makes far more sense to organize those dishes into categories that correspond to their defining characteristic of purpose in the meal: soups, entrees, and kids' meals. In these proceedings, the existing claimant-centric categories are analogous to the latter, more holistic approach to categorization.

broadcasters, the music societies, and the Public Broadcasting System and educational broadcasters and programmers. The Canadian Broadcasting Corporation (now a member of the CCG) and public Canadian broadcaster T.V. Ontario presented written submissions in the Allocation Phase (then Phase I); however, their awards were included with that made to the U.S. television broadcasters represented by NAB. Various religious program producers participated as Distribution Phase (then Phase II) claimants in the MPA category. Copyright Royalty Tribunal, *1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63031, 63042 (Sept. 23, 1980) ("*1978 Proceeding*").[7]

After that first proceeding, Canadian broadcasters created a new category separate from that of NAB-represented U.S. broadcasters and added Canadian production companies and other non-U.S. copyright holders to form the CCG. Similarly, the Devotional Claimants separated from the MPA-represented Program Suppliers ("PS") to create their own category. The CRT recognized the evolution of new categories in the early proceedings. *See, e.g.*, Copyright Royalty Tribunal, *1979 Cable Royalty Distribution Determination*, 47 Fed. Reg. 9879, 9894 (CRT March 8, 1982) (making a separate Phase I allocation to the CCG after finding that the Canadian claim was different from that of U.S. commercial stations, because the Canadian claim was not limited to local station produced programming but instead

[7] The two-stage structure was established in the first proceeding. Phase I (now the Allocation Phase) allocates cable royalties to specific groups of claimants. Phase II (now the Distribution Phase) allocates royalties to individual claimants within category groups when internal disputes exist. *1978 Proceeding*, 45 Fed. Reg. 63026.

included Canadian network programming);[8] see also Copyright Royalty Tribunal, *1980 Cable Royalty Distribution Proceeding*, 47 Fed. Reg. 24768 (CRT June 8, 1982) (establishing a new Phase I category for Devotional Claimants).

These categories were successful because they represented uniquely different claimant groups bound together by a defining characteristic such as non-U.S. programming appearing on Canadian signals, or programming belonging to equally powerful sports leagues such as the NBA, MLB, NFL, NHL, and NCAA, or all programming appearing on educational signals. These distinct categories grew naturally from similarly situated parties whose programming shared a defining characteristic gathering behind a common representative, such as the CCG, Joint Sports Claimants ("JSC") or Public Television Claimants ("PTV").[9]

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[8] In essence, the CCG replicates the organization of PTV in that the claims are confined to a single signal type. The difference between the groups being that PTV claims for all programming on PTV signals in the Allocation Phase, while the CCG claim is limited to the non-US programming on Canadian signals. It should be noted that in some ways the Allocation Phase mirrors the real-world cable market, because just as cable operators select cable networks for their bundles of programming, cable operators select distant signals for their bundles of programming. The value of PTV programming to cable system operators is reflected in the demand for PTV signals; similarly, the value of Canadian Claimant programming is reflected in the demand for Canadian signals, and the values of PS, JSC, CTV and Devotional programming is reflected in the demand for the various US commercial stations.

[9] In 2010-2013 cable royalty distribution proceedings, a dispute arose over the treatment of "Other Sports" as a component of the Program Suppliers' claim. *2010-2013 Proceeding*, 84 Fed. Reg. 3552, at 3584-91. While this may be cited as example of ambiguity in the categories, it is not. The inclusion of the "Other Sports" category in the survey was ostensibly an attempt to improve the survey to more accurately address the components of Program Supplier's category rather than an attempt to introduce a new claimant category. In fact, in most every case, the disputes that arise among the parties during Allocation Phase proceedings involve the question of whether the studies offered as evidence fairly address the existing categories rather than whether the categories are correct in and of themselves. Indeed, this particular dispute was resolved by the Judges through an analysis of the evidence without changing the category definitions. *Id*. at 3588-3591.

WSG sought to add a new Allocation Phase category for 2003 royalties at the first cable royalty distribution proceeding before the Copyright Royalty Judges. WSG (then appearing as IPG) asked for a modification of the Allocation Phase claimant category definitions for 2003 to allow for a "Spanish Language Producers" category. The Judges, after receiving comments demonstrating that Spanish-language programming was already being represented by several of the Allocation Phase claimant categories, declined to cut the Spanish-language programming from those categories and place it all into a new Allocation Phase category. Copyright Royalty Board, *Order Granting Partial Distribution of 2003 Cable Royalty Fund*, Docket No. 2005-4 CRB CD 2003 (Jan 23, 2008), at 3. The Judges found that rejecting WSG's request to redefine the Allocation Phase categories was "in the interests of promoting certainty and future settlements." *Id*.

WSG's effort to create a new category, though unsuccessful, illustrates the flexible nature of the existing approach to claimant group definitions and the need to avoid the rigidity that would come from a rulemaking.

The 40-year history of distribution proceedings has fostered maturation in both the process and substances of these proceedings. The current system, which relies on custom and practice rather than rulemaking to identify participants and categories, provides maximum flexibility for the modification, creation, or even elimination of categories as the distant signal television marketplace evolves. Any claimant has the right to seek to participate and submit evidence to support their claim, demonstrate their entitlement to be a leading participant in an existing category, oppose the continued standing of any historical categories, or demonstrate the relative value of a whole new category. Using rulemaking to define the categories will remove the flexibility of the existing system.

Further, any changes to the categories established by regulation may necessitate a whole new rulemaking and potential administrative and judicial delays before substantive Allocation Phase cases are developed or funds distributed.

2. Imposed alternative categories would undermine the existing parties' due process rights and could result in categories that have no natural, unconflicted advocate.

The existing Allocation Phase claimant groups are voluntary collections of participants that have grown naturally around content that is similar, resulting in categories represented by inherently aligned representatives. If the categories are defined exclusively by arbitrary program-centric definitions, there is no reasonable expectation that a party representative will emerge as the sole advocate for such a category and that therefore the category will be zealously represented. For example, programming categories that are strictly based on programming types such as religious programming could pull programming from the CCG, PTV, CTV and Devotional Categories. A generic sports category could pull from CCG, PS, JSC, and CTV. A movie category could pull from CCG, PTV, Devotional, and PS. Content that CCG currently represents would be allocated among all of these categories, but CCG could not appear before the Judges to advocate for any of the categories without creating a conflict of interest.

In short, existing claimant categories are not arbitrary collections of programming content—rather they are made up of copyright holders who have a right to organize as they choose, select representatives, and have those representatives appear before the Judges to advocate for a share of royalties. And, these categories have a long history of contractual relations with copyright holders that have allowed them to settle on internal distribution methodologies, legal representation, and legal strategies. Creating new program-centric

claimant categories would disrupt the rights of copyright holders who are contractually represented by the existing participants, create new burdens and administrative costs for those copyright holders, and endanger their ability to collect royalties.

3. There is no legal authority for the Judges to create new categories through a rule-making process.

Under 17 USC 111, "every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Copyright Royalty Judges." The Judges may establish requirements for filing by regulation. 17 USC § 111(d)(5)(A). The statute goes on, however, to give the claimants the freedom to organize themselves into groups and designate common agents to accept payment on their behalf. *Id*. Section 111 does not give the Judges authority to pre-determine by regulation how the claimants may organize themselves.[10]

The powers of the Judges regarding royalty distributions are set out in 17 USC § 801(a), which, in part, grants the Judges the power to:

> (3) (A) To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy.
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> (B) In cases where the Copyright Royalty Judges determine that controversy exists, the Copyright Royalty Judges shall determine the distribution of such fees, including partial distributions, in accordance with section 111, 119, or 1007, as the case may be.
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> …
>
> (4) To accept or reject royalty claims filed under sections 111, 119, and 1007, on the basis of timeliness or the failure to establish the basis for a claim. 17 USC § 801(a)(3)-(4)

[10] Section 119(b)(5) dealing with distribution of satellite royalties contains similar language. 17 U.S.C. § 119.

Nothing in this section suggests the Judges have the authority to define claimant categories—essentially pre-define the parties—by regulation. Further, nothing in sections 111 or 119 prevents an individual claimant from appearing in an Allocation Phase proceeding and putting on evidence of the relative value of its one copyrighted program. Therefore, even if the Judges defined categories by regulation, individual copyright owners or groups of copyright owners could still decide to appear in the Allocation Phase if they followed the process set out in 17 U.S.C. § 803(b)(2).

C. "*The likely impact any particular set of Allocation Phase categories may have on (a) the cost and efficiency of distribution proceedings and (b) the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies*."

1. Any change to categories must be prospective and not retroactive to avoid significant harm to copyright holders.

Many of the parties undertake and develop studies and other evidence over several years. Some of the studies, like surveys, must be done during or just after the royalty year in question. Any change in categories that has a retroactive effect, covering years 2014 through the present, could result in parties having to discard their studies and start over. Also, the re-allocation of all royalties previously distributed through partial distributions that have already been made would be enormously difficult to unwind and redistribute to entirely new categories. Accordingly, any change in categories must be prospective and done with significant advance notice.

The type of evidence relied upon by the CRT, Copyright Arbitration Royalty Panels ("CARP"), and Judges, has changed over time depending on the quality and reliability of studies submitted in the proceedings. The history of the cable proceedings shows that it takes many proceedings for evidence to become refined enough for the Judges to rely on it.

In the early proceedings, the CRT primarily relied upon the viewing studies submitted by PS. *See*, *e.g.,* Copyright Royalty Tribunal, *1983 Cable Royalty Distribution*, 51 Fed. Reg. 12,792, 12,808 (Apr. 15, 1986) Then, JSC were successful in convincing the CARPs and the Judges to rely more heavily on cable operator surveys while placing less importance on a regression study sponsored by CTV. *See Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 401 (D.C. Cir. 2005); *Report of the Copyright Arbitration Royalty Panel to Librarian of Congress,* Docket No. 2001-8 CARP CD 98-99 (Oct. 21, 2003) ("*1998-99 Determination"*) Finally, in the most recent proceeding, the Judges found that CTV's newest regression study had successfully addressed criticisms of previous regression studies and was now the most important piece of evidence. *2010-2013 Proceeding,* 84 Fed. Reg. at 3587–90.

The history of the evidence submitted and relied upon by the CRT, the CARPs and the Judges, establishes that the evidence in these proceedings is not static. At the same time, that evidence is rooted in what the Judges and parties have learned from prior proceedings. The Judges should hesitate to upend that learning and should certainly not uproot it retroactively.

2. Allocation Phase distribution proceedings are expensive and may be made more so by disruptions to the identity of the participants and the organization of the claimant groups.

As the Judges must know, the preparation and conduct of these proceedings are extraordinarily expensive. Dozens of lawyers and expert witnesses spend months gathering data, designing studies, and drafting written testimony to create written direct cases. Then, that work is subject to review and scrutiny by those same teams who test opposing studies and evaluate testimony to provide rebuttal testimony and studies. Then, weeks of oral hearings are held, attended by many attorneys for the parties. The results of

those hearings are organized into proposed findings of fact and conclusions of law and reply findings of fact and conclusions of law. The Allocation Phase parties to even one cable distribution proceedings invest in thousands of hours of attorney time plus the time of paraprofessionals and expensive expert witnesses, along with the cost of support services such as court reporters and courtroom audio-visual specialists.

These tremendous expenditures are premised on (1) the parties' understanding of the risks and benefits of litigation derived from the prior history of these proceedings; (2) the parties ability to amortize these costs over several years of cable royalties (e.g., 2004-2005, 2010-2013, 2014-2017); and, (3) the understanding that rulings of the Judges may guide the possible settlement of subsequent years (e.g., 2006-2009). Ultimately the goal of the claimants is to maximize net royalties recovered for their member copyright holders. With these considerations in mind, over the last 40 years, most royalty distribution proceedings tended to be precipitated only by significant changes in the cable TV market which changed the relative value of programming. For example, the conversion of WTBS in 1998 (see, *1998-99 Determination*) and WGN in 2015 from retransmitted distant signals to cable networks directly impacted the mix of programming retransmitted by cable systems causing changes in relative marketplace value. Such "organic" changes in the marketplace can lead parties to re-evaluate the values of their claims and lead to new litigation, but the parties are responding to actual industry change.

In contrast, establishing the claimant categories by regulation is an artificial change to the process that essentially invalidates the experience of 40 years in these proceedings. It increases the likelihood of litigation as new participants and older participants representing different claimant groups attempt to exploit changes in the structure of the

process for their advantage. Indeed, exploitation of the new system would come at great cost to the underlying copyright holders without materially changing the merits of the underlying goal of these proceedings, which is the fair distribution of royalties with minimal transaction costs.

3. Additional Allocation Phase categories strain the limits of methods like regression and surveys, historically the best tools for Allocation Phase distributions.

An ostensible goal of introducing new program-centric claimant categories would be to add greater precision to the categories by separating content into smaller and more clearly defined buckets. Doing so would increase the overall number of categories significantly while making each one narrower.

As a general matter, both regression and survey approaches to Allocation Phase distributions depend on clear and mutually exclusive categories that are neither too numerous nor too narrow. Ambiguity or overlap in the classification of programs can bias both regression coefficients and survey results. Current claimant categories are mutually exclusive and reasonably clear. Program-centric categories, whether based on genre, format, or other content-based factors, however, are likely ambiguous and overlapping. This can be seen in the primary data sources used in prior proceedings, such as FYI, Gracenote, and Canadian Radio-Television and Telecommunications Commission ("CRTC") logs, which all classify substantial numbers of programs in multiple genres, formats, and other categories. In a regression context, ambiguous Allocation Phase categories introduce measurement error, which tends to bias regression coefficients toward zero. If categories are too numerous or too narrow, there may not be sufficient independent variation in total

category minutes across cable systems for valid inference. In a survey context, ambiguous categories reduce the reliability of responses.

Thus, replacing the existing six television claimant-centric categories (excluding Music Claimants and NPR) with numerous, if more "precise," program-centric categories reduces the accuracy of survey and regression methodologies. Ultimately, that reduces the value of this information for determining shares and undermines the whole point of this endeavor. Even merely substituting the six existing television program categories with six new categories may introduce unpredictable problems with surveys and regressions and thus introduce confusion and doubt. As the Judges know from the history of viewing, survey and regression studies, it can take a generation of distribution proceedings for new methodologies to prove they are accurate and reliable.

4. The likelihood of settlements will be diminished if additional Allocation Phase categories are introduced.

Historically, the eight major claimant groups have settled about half of the potential distribution proceedings. The settlements occur because the parties long experience has led to a deep understanding of the issues and evidence in these proceedings, the costs and risks associated with litigation, and an approximate sense of the value of their programming based on prior rulings and changing circumstances.

Creating new categories by regulation means that all of the cumulative learning about the relative market value of these existing categories that has occurred over the last four decades will become less useful and entirely new studies and approaches will need to be introduced. Creating new categories by regulation also destroys the value of that experience by adding numerous new participants and changing the relationship of the participants to each other. The vast amount of uncertainty introduced into this process will

likely necessitate substantial new litigation as the parties evaluate the relative values of these new categories. Moreover, just the sheer number of additional parties decreases the likelihood of settlements because of the number of negotiations needed and the increased likelihood of holdouts.

Without question, the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies will be diminished with the creation of new categories.

D. "*The need for mechanisms and standards to resolve any disputes as to the identity of participants seeking to represent a particular Allocation Phase category in an Allocation Phase proceeding*."

1. There is no need for new mechanisms and standards regarding the identity of participants.

The current rules permit any claimant to file a notice of participation and submit a direct case. See. 47 CFR § 351.1 *et seq*. Arbitrary new claimant groups created by regulation may well create a land rush as opportunistic parties seek to take control of the new categories. This will create disputes among these groups as different participants vie for control and attempt to prove that they have the authority to represent other claimants. This can only increase the complexity and costs of these proceedings, decreasing the net amount distributed to copyright holders.

Establishing "mechanisms and standards to resolve any disputes as to the identity of participants seeking to represent a particular Allocation Phase category" simply adds to the litigation burden on the parties and the Judges. There is no statutory authority for such standards and if the "relative marketplace value" standard for Allocation Phase proceedings is any indication, these new standards will be re-interpreted and re-defined

through years of subsequent litigation. The best approach to "mechanisms and standards" is to avoid hard regulatory approaches and instead continue to rely on the presumption that participants represent the copyright holders they purport to represent. Participants and their counsel who improperly purport to represent copyright holders before the Judges can be dealt with through the procedural and substantive sanctions already available to the Judges.

2. Claimant-centric categories have evolved to efficiently distribute royalties to their members.

Over many years, the CCG has developed an infrastructure for collecting and distributing royalties to copyright holders who are signatories to its agreements. This process involves careful record-keeping and annual outreach to members to ensure they file timely claims. It is an involved and complicated process that CCG attempts to do as efficiently and inexpensively as possible. The process has evolved as technology has improved the ability to identify and communicate with claimants. CCG has never participated in a Distribution Phase proceeding primarily because its intra-category distribution processing is considered fair, efficient, and carefully administered by its members. Similarly, the other major parties in these proceedings have developed mechanisms that reduce overhead costs and largely avoid Distribution Phase disputes. These parties have consistently enjoyed the presumption of validity concerning their claims. The only exception to this presumption has been the claims brought by WSG (as IPG and more recently as MC) and resulting claims validity disputes.

One of the interesting problems revealed by WSG's participation in these proceedings has been its failure to reliably establish that it has the authority to represent the copyright owners it purports to represent. Over the last several Distribution Phase

proceedings MPA, JSC, Settling Devotional Claimants ("SDC"), and WSG participated in extensive and protracted discovery, motions, and hearings concerning WSG's right to represent numerous copyright holders, resulting in the Judges' determinations that WSG's claims were not entitled to a presumption of validity. *See e.g.*, Copyright Royalty Board, *Ruling And Order Regarding Objections To Cable And Satellite Claims 2010-2013*, Docket Nos. 14-CRB-0010-CD; 14-CRB-0011-SD, at 12, (October 23, 2017) (denying MC and Spanish Language Producers the presumption of validity). The disproportionate amount of CRB resources devoted to resolving claims validity disputes and the uncompensated costs it has imposed on the other claimants are a foreshadowing of the challenges that would arise if the claimant-centric categories were arbitrarily replaced with program-centric categories. Without well-established participants to organize a group and advocate for it before the Judges, each new participant in a regulatory program-centric regime will need to establish their right to represent each category, likely in the face of competing claims over the right to do so.

III. The Identification of Invalid Claims

In section II.B of the *NOI*, the Judges inquire about the identification and treatment of invalid claims. The Judges indicate that they are revisiting an issue resolved on a non-binding basis by the CRT in the *1978 Proceeding*. *NOI*, 84 Fed. Reg. at 71854, citing *1978 Proceeding*, 45 Fed. Reg. at 63042. However, a distinction needs to be drawn between the issue faced by the CRT and the inquiry posed by the Judges.

In the *1978 Proceeding*, the CRT wrote:

> During Phase I there was some random testimony to the effect that not all eligible claimants had submitted claims. The Tribunal determined that this subject was not appropriate to Phase I, but that it would be considered subsequently in the proceeding. The Tribunal therefore determined that the Phase I allocations to categories of claimants should be made as if all eligible claimants in each category had filed.
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> On May 7, 1980 the Tribunal requested claimants to brief "the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligibile [sic] claimants." Copyright Royalty Tribunal, *1978 Proceeding*, 45 Fed. Reg. at 63042.

The CRT was thus considering the question of "unclaimed funds" which exists when not every copyright owner whose programming fits into a claimant group files a claim. For example, if there are 1 million minutes of programming that fall within a category and claims were only filed by copyright holders within that category representing 950,000 minutes of that programming, the remaining 50,000 minutes, which belong to copyright holders who did not file claims, are part of the "unclaimed funds."

The question before the CRT was what to do with the unclaimed funds theoretically allocable to these copyright holders. The briefing of the claimant parties on this issue fell into two camps, either "(a) the 'unclaimed fund' in a particular category of claimants be distributed among the eligible claimants within the same category"—i.e., an intra-category distribution, or "(b) that the total 'unclaimed fund' in all categories be distributed among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the royalty fund"—i.e., a pro-rata distribution to all claimants, essentially an inter-category distribution. *1978 Proceeding*, 45 Fed. Reg. at 63042.

The CRT concluded, "We find that the record provides no objective basis for redistribution of royalty fees among categories of claimants tod [sic] reflect unclaimed royalties in particular categories. We conclude that our disposition of the unclaimed

royalties issue provides an equitable allocation of the fees available for distribution." *Id*. In effect, the CRT accepted the first position, treating all categories as if every copyright owner had filed a claim when determining the Allocation Phase share. Then, within a category, any amount remaining unclaimed could be allocated within that category by agreement among the members of the category or through a Distribution (then Phase II) Proceeding. *Id.*

The CRT ended its discussion where the Judges now begin, noting that "[f]inally, we observe that our disposition of the unclaimed royalty issue in this proceeding may not necessarily control any subsequent distribution proceeding." Compare *1978 Proceeding*, 45 Fed. Reg. at 63042 with *NOI*, 84 Fed. Reg. at 71854. However, the Judges take the CRT's observation in a different direction: "the Judges also revisit the identification and treatment of funds that are unclaimed **because a filed claim is invalid or not validly represented** in a distribution proceeding (invalid claims)." *NOI*, 84 Fed. Reg. at 71854 (emphasis added). That is, the Judges NOI is directed at the treatment of invalid *claims*—filed claims that are invalid or not validly represented—while the CRT was talking about claims *that were not filed at all*. This is an important distinction and addressing the Judges' questions does not address the issue resolved by the CRT in the *1978 Proceeding*.[11] Below the CCG addresses the Judges' questions about invalid claims.

A. "*[T]he necessity and feasibility of proposed approaches to the identification and treatment of invalid claims*."

There are two basic approaches to identifying invalid claims: (1) *presume* claims are valid until there are plausible grounds for questioning their validity and then require the

[11] For the record, however, the CCG believes that the CRT's approach to unclaimed royalties in the *1978 Proceedings* was both practical and equitable and should not be disturbed.

claimant to prove validity (in either Phase) or (2) *assume* claims are invalid and require every claimant to prove the validity of their claims as part of the Allocation Phase process. The difference between a presumption and an assumption is that the first is based on a reasonable probability or evidence while the second is just a guess.

In these proceedings, the eight major Allocation Phase claimant groups have been appearing before the CRT, the CARPs, and now the Judges for decades and collectively represent tens of thousands of claims filed each year. Their conduct and the nature of the royalty system require a presumption that the claims they are bringing are valid and that they have the authority to represent those claims. This "presumption of validity" has been clearly expressed by the Judges on several occasions:

> The sheer volume of claims at issue in royalty distribution proceedings creates a particular requirement that participants act with honesty and integrity, in addition to the general ethical duty in all proceedings. Each year, tens of thousands of copyright owners file claims to the royalties deposited by cable systems and satellite services. The Copyright Act and the CRB regulations permit claimants to file claims individually or jointly, represented by an entity that is authorized by the claimants to receive and distribute the royalties on deposit. In prior proceedings, the Judges and their predecessors have relied upon the integrity of the system to manage orderly distribution. The requirements for authenticating claims and asserting authority to collect on those claims are now codified at 37 C.F.R. § 360.4(b)(1)(vi), & (b)(2)(vi) (2017). Based upon the filers' certifications, the Judges afford a **presumption of validity** to claims and assume authority of the claims representative appearing in a distribution proceeding. The presumption may be lost if a participant can "produce evidence sufficient to show facts or circumstances to rebut the presumption of validity." Copyright Royalty Board, *Ruling and Order Regarding Objections to Cable and Satellite Claims 2010-2013*, Docket Nos. 14-CRB-0010-CD; 14-CRB-0011-SD, at 5-6, (October 23, 2017) (emphasis added).

And:

> As a general rule, the Judges presume a claim to be valid if it is filed during the month of July of the year following the year for which the claimant seeks distribution of royalties and includes the specified elements required on the claim form. The Copyright Royalty Board (CRB) royalty claims form

> includes and requires a certification by the filing entity that it has authority to file the claim. In the absence of evidence to challenge the honesty or correctness of the certification, the Judges do not look behind a timely filed claim to confirm the filing party's authority. That is, the Judges afford the filed claim a "**presumption of validity**," subject to competent evidence challenging the filer's authority that would rebut the presumption. A claim filed by an unauthorized representative is not a valid claim. Copyright Royalty Board, *Memorandum Opinion and Ruling on Validity and Categorization of Claims*, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II), at 7-8 (March 13, 2015) (emphasis added).

And:

> The **presumption of validity** exists principally because (as noted previously) it would be unwieldy and impractical to require participants to haul thousands of claimants into a hearing, or even to obtain fresh affidavits from the numerous claimants, in order to support otherwise unobjectionable claims. Thus, the structure of the system of distributing royalties in these section 111 proceedings necessitates a presumption that the participants will make their filings in good faith. Copyright Royalty Board, *Ruling and Order Regarding Claims and Separate Opinion*, Docket No. 2008-1 CRB CD 98-99 (Phase II), at 10 (June 18, 2014) (emphasis added).

The Judge's past approach to the presumption of validity was well-reasoned and should not be disturbed. There is no factual record for assuming that the eight major Allocation Phase claimant groups are asserting invalid claims. Of course, some of the claims out of the many thousands that have been filed might prove invalid but there is no indication that the invalid claims are knowingly filed by or disproportionately belong to any one of the Allocation Phase groups such that it would affect their Allocation Phase award. Absent a history of filing invalid claims or evidence that a party has recently embarked on such a course, the eight major Allocation Phase groups are entitled to a presumption of validity.

B. *"[T]he likely impact any proposed rule for the identification and treatment of ineligible claims may have on (a) the cost and efficiency of distribution proceedings and (b) the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies*."

1. A regulatory process for validating every claim asserted by the participants is infeasible and will harm copyright owners.

CCG checks copyright holder claims as part of its process of collecting and distributing royalties and in doing so relies in great part on the integrity of the individual copyright holders to provide accurate information. It would be extraordinarily expensive, however, for CCG to produce formal evidence in a contested distribution proceeding sufficient to establish the validity of every program title claimed and defend those claims from challenges of the other parties while also reviewing those other parties' claims. The cost of legal counsel alone for such a process would destroy the value of many copyright holders' claims. Moreover, there is no basis to believe that doing so will result in a material change in CCG's Allocation Phase valuation.

Further, defending individual claims in a claims-validity process raises issues about the fairness of burdening other claimants within the category for the cost of doing so. The added legal costs of defending a half-hour claim would vastly exceed its royalty value.[12]

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[12] For example, according to the Copyright Office's Licensing Division, in 2010 a total of $203,455,605.96 was collected in cable royalties. (Licensing Division, Report of Receipts, 1/31/2020, Unaudited (https://www.copyright.gov/licensing/receipts.pdf accessed 3/9/2020).) The CCG's 2010 award was 5.0% of the Basic Fund and 5.9% of the 3.75% fund. 2*010-2013 Proceeding*, 84 Fed. Reg. at 3552. Using 5.2% as an approximate blended rate as its share of all royalty funds, the CCG was awarded a gross amount of $10,579,692 for 2010. According to evidence produced in the 2010-2013 Proceeding, distantly retransmitted Canadian signals broadcast 126,571 hours of programming allocable to the CCG category in 2010. (2*010-2013 Proceeding*, CCG Exhibit 4001, at page 99 (Direct Testimony of Danielle Boudreau).) A claim for a single half-hour program would be responsible for 0.000395% of that airtime. On a simple pro-rata basis, the copyright holder for that program would be entitled to a share of $41.79 of the gross $10,579,692 awarded to the CCG. (The net amount available for distribution to CCG members after all the costs

That cost would necessarily be covered by the whole distribution to the CCG, decreasing the distribution available to other valid claimants. Yet, if CCG were to specifically allocate its costs to the invalid claim and seek indemnification from the claimant, small claimants would be discouraged from filing at all because of the imbalance in risk and reward.

In the end, absent a strong showing that parties are filing material numbers of invalid claims, the Judges should continue to treat claims as presumptively valid during the Allocation Phase because litigating claims validity is not economically feasible.

2. The Judges should rely on copyright holders to raise questions about invalid claims through the Distribution Phase process.

While the presumption of validity should exist to streamline the Allocation Phase process, claims of invalidity may still be evaluated both on an informal intra-party basis or formally in the Distribution Phase. The infrequency of Distribution Phase disputes is most likely the result of informal, practical, and cost-effective intra-party dispute resolution processes relative to the amount at stake. Absent a mandated, regulatory, claims-validity process, it is likely that only large, material disputes would rise to the level of a Distribution Phase proceeding. In comparison, a mandatory claims validity process established by regulation is likely to be formal and costly and ultimately unnecessary to the just allocation of royalties.

C. *"[H]ow the treatment of invalid claims may interrelate with the establishment of Allocation Phase categories."*

Absent massive irregularities by a claimant group, the treatment of invalid claims has nothing to do with the establishment of Allocation Phase categories. The Judges can

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associated with litigating the 2010-2013 proceeding, the pending appeal, and CCG's internal administrative costs would be lower.) CCG simply cannot prove up and defend the validity of individual $42 claims in a litigated proceeding without destroying the value of such claims or unfairly burdening other copyright holders in its category.

presume that the major Allocation Phase groups are taking diligent reasonable steps to weed out invalid claims. Indeed, the decision by the CRT in 1978 to allocate funds as if all possible claims in a category had been made, encourages the claimants to self-police and weed out invalid claims, because all funds awarded to an Allocation Phase party will be distributed only to those parties asserting valid claims, increasing the amount available for such valid claims.

Further, the relative value of programming to cable system operators has nothing to do with whether a copyright owner properly filed a claim for royalties. Allocation Phase shares are currently based on the relative marketplace value of each Allocation Phase category. That relative valuation is not affected by whether a copyright claimant filed a claim correctly. There is no evidence that cable system operators or their subscribers are aware of let alone are influenced in their marketplace decisions by the validity of claims filed with the Copyright Office.

It is very important that the Judges not conflate the procedural obligations of copyright owners for collecting royalties with the underlying value of their works. Here again, it is important to distinguish between unclaimed royalties as discussed by the CRT and invalid claims identified by the Judges. There may be an economic reason that claims are not filed, such as the belief by the copyright holder that the value of its program is so low that the return is not worth the time to prepare and file a claim; a failure of the copyright holder to educate itself about the process, again presumably because the copyright holder knows that royalties will be insignificant and not worth pursuing; or ignorance about the need to file because of the complexity of tracking rights to these secondary royalty streams. These and other reasons may keep claims from being filed but also suggest that the relative

value of these programs is low and would not contribute materially to the Allocation Phase share.

In contrast, an invalid claim indicates that the copyright holder is aware of the right to royalties and believes that royalty payment will be worth the effort involved. This suggests that programming that is the subject of an invalid claim has more value than the programming for which no claim is filed. But, as discussed earlier, the frequency of invalid claims in most of the major categories should be immaterial to the overall relative value of the Allocation Phase shares.

IV. Conclusion

The Allocation Phase categories were all established nearly 40 years ago and have remained relatively stable throughout these proceedings. Only slight adjustments to the definitions have been made over the years as the cable and satellite television industry has evolved. Category definitions created by regulation would be unable to adjust to such changes in the market. More importantly, the claimant-centric approach has ensured that the programming in each category has a defining characteristic that distinguishes it from other programming and that each category is represented by an advocate that can participate zealously in these proceedings without conflicts. An arbitrary program-centric approach, on the other hand, would be organized around the superficial form of the programming and rely on the unproven assumption that such program-centric categories contain programming with common relative value. Moreover, new program-centric categories would struggle to find consistent and unconflicted leadership to effectively participate in these proceedings

Regulation is also inappropriate because the traditional categories are not arbitrary collections of programming. Rather, they are groups of copyright holders who have come together to collectively advocate for the value of their claims. That is, the categories are litigants and the Judges should not by regulation define how those litigants may assemble to present their claims.

Finally, there is no indication that invalid claims are a material concern in these proceedings for any of the eight major Allocation Phase parties nor do invalid claims have any bearing on how Allocation Phase claimants should be defined.

For the reasons set forth above, the CCG respectfully opposes a proposed rule-making that would create regulations to define Allocation Phase categories or mandate a claims validity process for all claimants.

Respectfully submitted,

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