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Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of	
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 PUBLIC BROADCASTING SERVICE

The Public Television Claimants' category should not be changed.[1] No participants have requested any change to the Public Television category definition. It remains agreed on by stipulation. The Public Television category is also perfectly aligned with cable operator decision-making: The category is defined in terms of entire broadcast signals—the product that cable operators actually choose when deciding what programming they wish to carry. Moreover, the Public Television category has proven to be an efficient and effective mechanism for distributing royalties to the Public Television Claimants. There has never been a litigated Phase II/Distribution dispute within the Public Television category. For these reasons, it would be myopic and needlessly destructive to redraw a well-functioning category—whose claimants have built up mutual trust over decades—merely because of unrelated tactical jockeying from certain claimants that represent a tiny fraction of distantly retransmitted "sports" programming.

[1] Public Broadcasting Service ("PBS") submits these comments on behalf of copyright owners of programs broadcast on U.S. noncommercial educational television stations that are retransmitted by cable operators (the "Public Television Claimants"), in response to the Judges' Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims. *See Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, Docket No. 19–CRB–0014–RM*, 84 Fed. Reg. 71852 (Dec. 30, 2019) ("*Notice of Inquiry*"). PBS does not currently participate in satellite royalty proceedings because public television programming is retransmitted by satellite carriers under commercial license.

The Judges also should not overhaul the longstanding ruling regarding the treatment of unclaimed funds (the "Unclaimed Funds Rule"). *See In re 1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980) ("*1978 Determination*"). Eliminating the Unclaimed Funds Rule would indisputably impose significant discovery and litigation costs on all parties, while any purported benefits remain entirely speculative. PBS is not aware of any substantial invalid claims in the Public Television category, so it is possible that the Public Television Claimants would benefit from eliminating the Unclaimed Funds Rule—*if there were substantial invalid claims in other categories, and if there were no associated costs.*[2] But the Public Television Claimants would strongly prefer to forego the potential benefit of discovery and litigation regarding possible invalid claims in other categories to avoid the enormous costs and litigation that all parties would be forced to incur if all parties were permitted to take discovery and dispute the validity of every claim regarding every copyrighted work in every category. The consequences of these added costs—ranging from the direct costs of additional claims-validity litigation for thousands of works, the costs of developing new valuation methodologies, and the practical costs to claimants from the added delays in receiving payment—all ultimately undermine the efficiency of these proceedings, resulting in reduced awards to claimants.

In any event, if the Judges were to redefine the Public Television category or undo the Unclaimed Funds Rule, the Judges should apply any new rules only prospectively—to royalties deposited with the Copyright Office after such rules would go into effect—to limit the unfairness to claimants who relied on existing law in formulating their litigation strategies, reaching

[2] As defined by the Judges, the term "invalid claims" encompasses both claims that are filed but invalid and claims that are not validly represented in a distribution proceeding. *See Notice of Inquiry*, 84 Fed. Reg. at 71854.

settlements, and making partial-distribution payments to claimants. For example, PBS already has made partial distributions to the Public Television Claimants that were premised on those claimants belonging to the Public Television category. If the category were redrawn, those amounts might have to be recalculated, somehow all reclaimed by PBS from various claimants (who may have already expended some of the funds), and then redistributed among the newly defined category's members. This daunting task would be both extremely burdensome and costly under the best circumstances—and riddled with conflict under all others.

I. The Public Television Category Should Remain Unchanged.

The Public Television category is particularly well-suited to achieve the accurate and efficient valuation of public television programming in both the Allocation and Distribution Phases. Because the Public Television category consists of entire signals, rather than a subset of programming on a signal, the Public Television category readily reflects actual cable operator decisions. Cable operators choose to carry (or not to carry) entire signals. This fact makes it difficult to measure the extent to which *subsets* of programming on a given signal were relatively more valuable to the cable operator. For example, it may not be immediately obvious whether or to what extent a cable operator may have chosen to carry a particular channel for its sports or for its movie programming if the channel has both. That difficulty, which afflicts the other Allocation Phase categories, does not apply to the Public Television category because the Public Television category consists of entire signals. Moreover, history demonstrates that the Public Television category has served as an efficient and effective mechanism for minimizing litigation and distributing royalties to the category's copyright owners. The Public Television Claimants have been able to settle their intra-category distributions internally without needing to participate in a single Distribution Phase proceeding over the past forty years. Changing the Public Television category in the face of that success would be counterproductive, upsetting

expectations and undermining the trust and efficiencies developed within this category and among its claimants.

More broadly, Allocation Phase categories generally should be identified by the voluntary alignment of claimants to the greatest extent possible, rather than a rule requiring those claimants to re-sort their claims based on program type or some other metric. Of course, if certain sports-related claimants dispute the boundaries of the categories to which they belong, the Judges must resolve the dispute that is presented to them. But claimants who have aligned themselves based on their own perceptions of shared incentives and common interests are more likely to work together efficiently during Allocation Phase proceedings and to settle intra-category disputes than are claimants who have been required to work together based on some artificial construct. The added transaction costs of a mandatory re-sorting are particularly unwarranted where, as with the Public Television category, such a realignment would not meaningfully enhance the accuracy of relative valuations during the Allocation Phase.

A. The Public Television Category Is Clearly Defined and Accurately Reflects Actual Cable Operator Decisions.

The Public Television category is clearly defined. It consists of "[a]ll programs broadcast on U.S. noncommercial educational television stations." *Distribution of Cable Royalty Funds, Docket No. 14–CRB–0010–CD (2010–2013)*, 84 Fed. Reg. 3552, 3552 n.1 (Feb. 12, 2019) ("*2010–13 Determination*"). To determine whether a claimant (or claim) should be included within the Public Television category, one need only ask whether the underlying program was broadcast on a noncommercial educational station based in the United States. These terms are defined by federal law and are unambiguous. *See* 17 U.S.C. § 111(f)(8) (defining "noncommercial educational station"); 47 U.S.C. § 397 (defining "noncommercial educational broadcast station" and "public broadcast station"); 47 C.F.R. § 73.621 (addressing permitted

activities for noncommercial educational television stations). As a result, and perhaps unlike certain other categories, the Public Television category has served as an unambiguous means of classifying claimants and their claims in the Allocation Phase.

The Public Television category is particularly well-suited for achieving accuracy and efficiency in these proceedings for at least two reasons.

First, the Public Television category is a natural fit for the Allocation Phase's objective of measuring the relative value of retransmitted programming. In their most recent Allocation Phase decision, the Judges concluded that relative market value is best measured by focusing on actual cable operator behavior. *See* 2010–13 Determination, 84 Fed. Reg. at 3558–3569. Regression analyses, for example, have focused on which signals cable operators actually chose to retransmit. *Id.* The cable operators' actual decisions are clearly reflected with respect to the Public Television category because, unlike other signals, Public Television signals are, by definition, composed entirely of Public Television programming. Each Public Television signal does not need to be broken down further to parse out the relative value of certain types of programming on that signal, but instead may be analyzed directly as a reflection of a cable operator's choice to carry the entire signal.

Second, the Public Television Claimants are naturally aligned. Most Public Television stations are members of PBS. Although member stations and third-party producers are free to develop their own programming and programming lineups, PBS provides financial support for new programming and develops initiatives and strategies for stations and other Public Television Claimants, while also distributing programming to member stations. Most Public Television Claimants, therefore, already have forged relationships—beyond the confines of these proceedings—with PBS and with one another. The interests and incentives of PBS, its members,

and other Public Television Claimants are further aligned because they generally share certain core traits, including their educational and cultural missions and their reliance on nonprofit financing. Given these mutual interests and relationships, it is unsurprising that the Public Television Claimants have never litigated a Phase II/Distribution Phase proceeding. Rather, the Public Television Claimants have been able to resolve any intra-category disputes cooperatively through PBS's internal distribution process.

Although there may be tradeoffs between fairness and efficiency with respect to other category definitions, *cf.* Order Staying Proceeding Pending Rulemaking, *In re Distribution of Cable Royalty Funds*, Docket No. 16-CRB-0009 CD (2014-17), at 5 (Dec. 20, 2019), that is not the case with the Public Television category. Preserving the Public Television category definition would best promote both fairness *and* efficiency.

B. The Allocation Phase Categories Should Be Identified Based on the Voluntary Alignment of Claimants.

Where there is no dispute regarding the definition of a claimant category, claimants should be permitted to align themselves voluntarily based on their own perceived common interests and incentives. That is the best means of achieving the compulsory license's goal of fairly compensating copyright claimants while minimizing transaction costs. The compulsory license was enacted in part to reduce the transaction costs associated with the usual scheme of private negotiation for the right to use copyrighted materials. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 603 (D.C. Cir. 1988) (noting that "the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of high transaction costs"); *id.* at 612 (observing that "[m]ethodological wrangles and monitoring expenses" can "thwart the congressional goal of minimizing transaction costs"); H.R. Rep. No. 94-1476 (1976), at 89 (recognizing that "it would be impractical and

unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted"). At least with respect to the Public Television category, replacing the current system of voluntary alignment with a rule requiring all claimants to sort their claims based on more fuzzily defined "program types" would undermine the efficiency of distribution proceedings without improving the accuracy of relative valuations.

1. The Copyright Act Provides for Flexibility in How Claimants Organize and Categorize Themselves.

The Copyright Act itself facilitates efficiency and settlement in distribution proceedings by allowing claimants flexibility to organize themselves into claimant groups. *See* 17 U.S.C. § 111(d)(4)(A) ("[A]ny claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf."). Through this flexibility, claimants are able to exercise their informed judgment in identifying which other claimants' interests and incentives most closely align with their own, thereby allowing those claimants to trust one another and work efficiently towards common objectives as a cohesive claimant group.

If certain claimants wish to work jointly to present their claims, they should be permitted to do so. A functional claimant group generally need only identify a cohesive categorization to connect its claims and not include a substantial number of claimants who do not wish to be included. This approach has and should continue to result in a manageable number of claimant groups whose programming is mutually exclusive and who together cover all eligible copyrighted works retransmitted on distant signals.

2. Reorganizing Categories Based on Program Type Would Be Inefficient and Costly.

The current system of voluntary alignment is more efficient than a system requiring claimants to sort their claims together based on program type for at least three reasons.

First, voluntary alignment facilitates settlement. If the Public Television Claimants were broken up and divided among other categories, or if other claimants were consolidated into the Public Television category, there would almost certainly be Distribution Phase disputes regarding the relative values of the claimants' respective programming in the newly defined categories. By contrast, claimants that have voluntarily aligned themselves are much more likely to cooperatively settle disputes among themselves. This is borne out by the historical record of these proceedings. Voluntarily aligned groups have often been able to settle their Distribution Phase disputes without intervention by the Judges or their predecessors. Indeed, for most categories, including the Public Television category, there have been few to no litigated Distribution Phase disputes over the past forty years.

Second, voluntary alignment allows claimants with common interests to cooperatively develop evidence of relative market value. For example, in the most recent proceeding, the Commercial Television Claimants sponsored a regression analysis built from a vast array of data regarding the actual decisions of cable system operators. *See* 2010–2013 Determination, 84 Fed. Reg. at 3558–3569. This evidence required considerable resources to compile, and would have been impossible to develop without the coordinated effort of a substantial claimant group. Such an endeavor would have been cost-prohibitive for a small claimant—like, for example, a local arts program on a small PBS station with regional carriage. A rule that forced certain claimants to present their case jointly based on their similar program content would be fraught with

collective action issues, and almost certainly would lead to Distribution Phase disputes because those claimants did not share a view as to their relative program values in the first place.

Third, voluntary alignment provides predictability. Over the past forty years, the core claimant groups have been largely consistent. This has made settlement negotiations in Allocation Phase proceedings manageable by allowing claimant groups to begin preparing their cases for the proceedings, and negotiating settlements, years in advance. It has also allowed claimant groups to develop internal distribution processes for identifying, communicating with, and fairly compensating eligible copyright owners within the group, both from partial and final royalty distributions. These arrangements—decades in the making and the product of substantial investment and practical experience—would be severely undermined if the current categories were materially altered by the Judges. Indeed, the work that has already been done in ongoing distributions based on current procedures, such as partial distributions already made, would essentially need to be reversed and completely reworked, leading only to delays and costs suffered by individual claimants.

3. Reorganizing Categories Based on Program Type Would Not Improve Relative Value Determinations.

Assuming Allocation Phase proceedings continue to focus on the measurement of actual behavior to estimate relative value, the reorganization of claims based on program type would not improve the accuracy or fairness of the Allocation Phase shares.

Of the major types of expert analyses that have been presented in recent proceedings, *only attitudinal surveys* require the categories to align with cable operators' own conceptions of program categories. A cable operator survey is accurate only if the cable operators who responded to the survey properly understood the actual distantly retransmitted programming that fell within each category.

In contrast, all of the other major types of expert analyses in these proceedings have relied on *actual marketplace behavior*. This type of analysis includes viewing studies and regressions focusing on cable operators' actual carriage decisions. The accuracy of these analyses does not depend on whether the cable operators' own conceptions of the program categories has any similarity to the categories that are defined in this proceeding.

For example, in the most recent Allocation Phase proceeding, Dr. Gregory Crawford submitted a regression analysis that measured the relationship between system operators' expenditures on distant signal retransmission royalties and the programming content of the particular signals that the system operators chose to distantly retransmit. *See* 2010–2013, 84 Fed. Reg. at 3558–3569. Dr. Crawford's regression identified the *revealed* preferences of carriage decision-makers, based on their actual market behavior, rather than relying on their *stated* preferences as reported in a survey response. Revealed preferences based on actual observable marketplace behavior are generally considered by economists to be more accurate than the stated opinions or perceptions of industry participants.[3] Indeed, "it is recognized by surveyors that how people say they behave and how they do behave are quite different." *1983 Cable Royalty Distribution Proceeding, Docket No. CRT 84-1 83CD,* 51 Fed. Reg. 12792, at 12807-09 (April 15, 1986); *Copyright Arbitration Royalty Panel Cable Royalties for the Years 1990-92, Docket No. 94-3 CARP CD-90-92,* at 66 (May 31, 1996).

To the extent that the Judges continue to rely primarily on actual marketplace behavior (including regression evidence) rather than after-the-fact survey responses, the specific definitions used to define categories in Allocation Phase proceedings will be less important for

[3] *See generally, e.g.*, Peter A. Diamond & Jerry A. Hausman, "Contingent Valuation: Is Some Number Better than No Number?," 8 J. Econ. Perspectives 45 (1994).

accurately estimating relative market value. Regressions—in contrast to after-the-fact surveys—do not require system operators to have any understanding of what category definitions happen to be used in distribution proceedings because they already expressed their preferences by purchasing particular signals in particular quantities. Thus, changing the current categorization structure will not improve the accuracy or fairness of relative value determinations under these preferred models.

II. The Unclaimed Funds Rule Avoids Enormous Costs, Whereas the Only Benefits to Overturning the Rule Are Entirely Speculative.

There is no evidence of any substantial imbalances between the categories with respect to unclaimed funds, so it is entirely speculative whether eliminating the Unclaimed Funds Rule would have any material impact on fairness. What we do know for certain is that it would be extremely burdensome and costly for all of the parties to engage in the discovery and litigation necessary to identify, dispute, resolve, and value each purportedly unclaimed program or invalid claim. Only after the parties incurred that burden and expense would we know whether there are or are not any substantial imbalances between the categories with respect to unclaimed funds. And given that this lengthy process would need to be repeated for each allocation, the bottom line for claimants is that not only will their portion of funds be further reduced because of the added costs, but also withheld from them for an even longer period of time.

Four decades ago, the CRT adopted the Unclaimed Funds Rule, through which it would allocate to the claimant groups in the Allocation Phase proceeding all of the funds collected by the Copyright Office "as if all eligible claimants in each category had filed valid claims," allowing those claimant groups to then distribute those funds among their claimants who submitted valid claims. 1978 Determination, 45 Fed. Reg. at 63042. The Judges should not replace a rule that has generated efficient, predictable results for so long where, as here, there is

no compelling evidence that an alternative rule would generate meaningful improvements in accuracy or fairness.

The Unclaimed Funds Rule resolves in a simple and predictable way the issue of how to distribute the portion of funds already collected by the Copyright Office that were generated by retransmitted works that have not been claimed in a given proceeding. *See Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 911 (D.C. Cir. 1998). In doing so, the Rule advances two key purposes of the statutory license: minimizing transaction costs and encouraging settlement. *See* Order Granting Phase I Claimants' Motion for Partial Distribution of 2004 and 2005 Cable Royalty Funds, No. 2007-03 CRB CD 2004-2005, at 3 (Apr. 10, 2008) (observing that "the policy of the Copyright Act [is] to promote settlements."); *Cablevision Sys.*, 836 F.2d at 612 (noting "congressional goal of minimizing transaction costs").

A. Replacing the Unclaimed Funds Rule Would Be Inefficient.

Replacing the Unclaimed Funds Rule with a rule providing blanket license for all claimants to attack the validity of all other claimants' claims in an Allocation Phase proceeding would greatly increase the complexity and costs of the proceedings.

The attempted actions of the Program Suppliers claimant group in the Allocation Phase of the 2010–13 proceeding illustrate the extreme burdens the parties would face without the Unclaimed Funds Rule. There, the Program Suppliers served discovery requests on all other categories seeking discovery of information identifying every one of the hundreds of thousands of copyrighted works for every claimant in every other category and documents supporting each category representative's authority to represent each claimant. Without the Unclaimed Funds Rule, not only would each claimant potentially bear the heavy burden of producing all such information and documentation in response to the Program Suppliers' requests, but each claimant might have to repeat this effort for the inevitable requests from all other claimants, then

sort through the massive collection of responsive information and documents that it received from all the other claimants to determine whether to challenge the validity of any other claimants' claims—for every year, in every proceeding.

No claimant group could realistically opt out of this process because, without the Unclaimed Funds Rule, each claimant would have an incentive to eliminate every invalid claim through the discovery process because of the marginal increase that would result for its own share. Any one claimant could unilaterally declare a direct dispute with every other claimant—as Program Suppliers attempted to do in the 2010-2013 proceeding.

The burdens would not end at the discovery phase. The Judges would need to resolve inevitable disputes over the adequacy of discovery, the validity of various claims, and the value of each claim that is determined to be invalid. Historically these types of issues have been resolved within each category, usually through an internally agreed-upon process, a negotiated resolution, or a settlement. That would no longer be an option. Instead, the Judges likely would be required to resolve each such dispute. Although it is impossible to know without actually undertaking the burdensome and costly discovery, the number of disputes could well be orders of magnitude greater than what the Judges have experienced in the past during the Distribution Phase.

Beyond the obvious litigation burdens on the claimants and the Judges, these added steps at the outset of an Allocation Phase proceeding would make settlements extremely difficult, if not impossible. *See* Order Granting Phase I Claimants' Motion for Partial Distribution of 2004 and 2005 Cable Royalty Funds, No. 2007-03 CRB CD 2004-2005, at 3 (Apr. 10, 2008) (observing that "the policy of the Copyright Act [is] to promote settlements."). Under the

Unclaimed Funds Rule, claimant groups are able to enter into settlement negotiations for future years using the allocation shares from the prior proceeding as guideposts.[4]

If there were no Unclaimed Funds Rule, those guideposts would be of diminished value because the number and nature of claims for a given claimant group could change from year to year, even based on simple happenstance surrounding the timely submission of claims. For example, the Program Suppliers category would have diminished in value in 2001 because two major movie studios' claims (which likely would have been worth millions of dollars) were held to be untimely and thus invalid when the studios could not produce postal receipts reflecting that the claims received by the Copyright Office on August 2 and 3 had been mailed by the July 31 deadline. *See, e.g.*, *Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1239–41, 1244 (D.C. Cir. 2005).

And without the Unclaimed Funds Rule, once a new proceeding is underway, settlements among the free-for-all of claimants actively litigating the validity of one another's claims may be a practical impossibility. *Cf. Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F .2d 922, 939 (D.C. Cir. 1985) ("Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart."). Even within categories, the distribution processes that have been worked out over decades will need to be completely reworked, likely resulting in fewer intra-category settlements, and certainly resulting in greater delays in individual claimants receiving any funds due to the need to await a final ruling on the validity of claims within the overall category.

[4] *See* Hearing on H.R. 1417 Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 5, 7 (2003) (statement of Marybeth Peters, Register of Copyrights) (observing that settlement requires "reliable precedent upon which [parties] can base the settlement of their differences").

By contrast, for over forty years, the Unclaimed Funds Rule has promoted predictability, settlement, and efficient resolution of the vast majority of disputes. Indeed, within the Public Television category, there has not been a single litigated dispute for the entire history of the cable royalty funds.

B. Replacing the Unclaimed Funds Rule Is Unlikely to Lead to Improved Accuracy or Fairness With Respect to the Public Television Category.

Although PBS does not know how many unclaimed works there have been within other claimant categories, PBS is not aware of any substantial invalid claims in the Public Television category from year to year. Because PBS has established lines of communication and strong relationships with the claimants within the Public Television category that facilitate their participation in the royalty distribution proceedings, the vast majority of eligible claimants are unlikely to have invalid representation in these proceedings. And because PBS conducts reasonable due diligence to distribute royalties only to those covered by valid claims, ineligible claimants are unlikely to be invalidly awarded royalties.

Moreover, Public Television signals consist entirely of Public Television programming. Given that cable operators select the entire Public Television signal for carriage, it is appropriate and fair that the relative value of that signal is distributed among the Public Television Claimants that filed valid claims. When the quality of any one Public Television claimant is enhanced by virtue of additional funding, the increased likelihood that a cable operator would then select that claimant's Public Television signal extends to all the other Public Television Claimants on that signal.

III. Any Rule Changes Should Apply Only to Future Cable Royalty Years.

If, despite the concerns raised above, the Judges decide to adopt new rules for determining Allocation Phase categories or allocating unclaimed funds, they should apply any

such rules only prospectively to royalties not yet deposited by cable systems and satellite carriers. The retroactive application of any new rules would be inconsistent with principles of administrative law, would unfairly prejudice those claimants who have relied on the prior rules in developing their cases and implementing partial distributions received for years 2014–2017 and beyond, and would delay the receipt of partial or full distributions to individual claimants.

A. Principles of Administrative Law Discourage the Retroactive Application of New Rules.

It is well-settled that "an agency may not promulgate a retroactive rule absent express congressional authorization." *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 13 (D.C. Cir. 2011). This includes "not only the agency's process of formulating a rule, but also the agency's process of modifying a rule." *Id.* (internal punctuation omitted).

The D.C. Circuit has applied this principle to rulemaking procedures initiated by the Copyright Office, observing that "[a] rule promulgated by the [Copyright] Office can only be prospective." *Motion Picture Ass'n of Am., Inc. v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992). There, the MPAA asked the Copyright Office to engage in a rulemaking that would require cable operators to pay interest on royalty payments that had long before been paid to the Copyright Office under the Section 111 license. *Id.* at 1155–56. After initiating a rulemaking with a Notice of Inquiry and reviewing public comments, the Copyright Office promulgated a rule requiring interest on all future late payments, but determined that it would be inequitable to apply the rule retroactively due to the likely reliance of cable operators on the Copyright Office's prior practices. *Id.* at 1156–57. On review, the D.C. Circuit concluded that the Copyright Office reached the right result, but for the wrong reason. The issue was not one of *ad hoc* equitable considerations, but instead one of general administrative procedure:

> In adjudication, retroactivity is the norm; in legislation it is the exception. In rulemaking, the administrative analogue to legislation, exceptions are fewer still.

> Agency power is derived from statutes. If Congress has not conferred retroactive rulemaking power on an agency, the agency has none to exercise. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988). The Copyright Office has no such power and we therefore affirm.

Id. at 1155. Although the Copyright Act clearly established the Copyright Office's power to manage the distribution of Section 111 royalties, it lacked the necessary express terms required to grant retroactive rulemaking authority. *Id.* at 1156. Thus, "[b]ecause MPAA wanted some sort of retroactive decision, it doomed itself from the beginning by asking for a rulemaking." *Id.*

The circumstances here are similar. The Judges have authority under the Copyright Act to manage the distribution of Section 111 royalties, but they have not been authorized by Congress to use these rulemaking procedures to promulgate a retroactive rule. Because an administrative agency has "the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct" and should instead develop new procedures "as much as possible through this quasi-legislative promulgation of rules to be applied in the future." *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *Retail, Wholesale and Dept. Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 389 (D.C. Cir. 1972).

B. Equitable Considerations Further Support Application of Any New Rules Only Prospectively.

Even if Congress had clearly intended for the Judges to engage in retroactive rulemaking in appropriate circumstances, it would be inappropriate to apply any newly developed rules or practices retroactively to claims already submitted or funds already deposited with the Copyright Office.

The Copyright Office has recognized several factors that may call for the application of new rules or practices only prospectively in copyright royalty proceedings:

(1) if the issue is one of first impression;

(2) if a new rule would represent an abrupt departure from well-established practice;

(3) if a party against whom the new rule would apply relied on the former rule;

(4) if retroactivity imposes burdens on a party; and

(5) if the inequities produced by retroactive application are not counterbalanced by sufficiently significant statutory interests.

Assessment of Interest Regarding the Cable Compulsory License, 54 Fed. Reg. 14217-01, 14217 (Apr. 10, 1989) (citing *Retail, Wholesale*, 466 F.2d at 380).[5]

Here, each factor calls for the application of any new rules governing the identification of the Allocation Phase categories or the allocation of unclaimed funds only prospectively.

With regard to the first and second factors, any changes to the Allocation Phase categories or the treatment of unclaimed funds would represent an abrupt departure from practices first established decades ago. The Judges' predecessor, the CRT, first confronted these issues over forty years ago, during the first proceeding to distribute cable royalty funds. *1978 Cable Royalty Distribution Decision*, Copyright Royalty Tribunal, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980). As the Judges have acknowledged, the practices adopted in that proceeding have been applied without exception in all subsequent proceedings. *See Notice of Inquiry*, 84 Fed. Reg. at 71852–71854 (noting only "minor modifications" to Allocation Phase categories "on occasion").

The uninterrupted application of these practices over the course of four decades has provided interested parties and the public-at-large with clear notice of the practices to which they

[5] Although these factors do not control where, as here, a rulemaking procedure is employed to develop new rules or practices, *infra* at Part III.A., a review of these factors illustrates the particular inequities that would result from retroactivity under the circumstances here.

should conform their conduct in connection with royalty distribution proceedings,[6] such that retroactive application of newly developed practices would punish those who have justifiably sought to conform themselves to these previously well-established practices. *See Retail, Wholesale*, 466 F.2d at 390–91. Retroactive application of any new rules would undermine the parties' and the public's confidence in the predictability of future distribution proceedings, which would be contrary to key tenets of the Section 111 statutory license, including the promotion of efficiency, settlement, and reduced transaction costs in the distribution of royalties to eligible copyright owners. *See, e.g.*, *Cablevision Sys. Dev. Co.*, 836 F.2d at 602–03, 612 (noting "congressional goal of minimizing transaction costs"); *Nat'l Ass 'n of Broadcasters*, 146 F.3d at 911 ("the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of high transaction costs"); Hearing on H.R. 1417 Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 5, 7 (2003) (statement of Marybeth Peters, Register of Copyrights) (parties require "reliable precedent upon which [they] can base the settlement of their differences").

As to the third and fourth factors, the retroactive application of any newly developed rules to address the distribution of royalty funds already paid by cable operators would impose substantial burdens on claimants that have already begun preparing their cases for adjudication. The process of pursuing a royalty claim is lengthy and complex. Among many other necessary steps, claimants have already expended substantial resources in the lengthy, multi-year process of organizing themselves into claimant groups, identifying and securing the participation of

[6] Even if the application of these practices in prior determinations were viewed as non-binding for future proceedings, their unbroken application over the course of forty years' of proceedings clearly put the public on notice that such practices are both acceptable and, in fact, expected.

individual claimants, developing studies and evidence addressed to the relative market value of claimant groups' programming, implementing partial distributions, and pursuing settlement internally and with other claimant groups—with each such step necessarily guided by the practices and procedures established in prior royalty proceedings.

Beyond the fundamental unfairness of retroactively revising the foundation on which these steps have been taken, the application of new, retroactive rules to the allocation of funds already collected may require the claimants to revisit the continued viability of the steps taken at each juncture.

As one example, claimant groups may need to reverse partial distributions already made based on the treatment of claimant categories and unclaimed funds over the past four decades. This may require claimants to pay back funds they have already received (and likely relied on) to their claimant group's representative, await a recalculation of appropriate payments based on further litigation, then confront the uncertainty surrounding further proceedings and appeals before attaining any meaningful assurance that those funds can be used.

As another example, claimants may need to substantially revise or scrap their studies analyzing relative market value based on the claimant categories used over the past forty years. Moreover, claimants and their experts may need to consider for the first time in forty years whether adjustments can—or should—be made in the Allocation Phase to account for the relative market value of programming that may not have been validly claimed in a given proceeding. As another, even more fundamental, example, claimants may need to revisit the viability of their jointly filed claims. Novel categories may create a misalignment of incentives between formerly aligned claimants, or even potential conflicts of interest. *See, e.g., infra* at Parts I.A., I.B.1.

As to the fifth factor, the foregoing inequities are by no means counterbalanced by any strong statutory imperatives. To the contrary, the practices employed without issue over the past forty years do not conflict with any provisions of the Copyright Act.

The Copyright Act is highly permissive and deferential as to appropriate practices for establishing Allocation Phase categories. Under 17 U.S.C. § 111(d)(4)(A), "*any* claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf" (emphasis added). Whereas the system of voluntary claimant alignment used in every proceeding to date adheres to this guidance, a new system mandating claimant alignment based on program type may actually contravene Congress's guidance.

The Copyright Act provides even less guidance as to appropriate practices for the treatment of unclaimed funds. Congress did not set forth a statutory standard for cable royalty allocations—much less a specific standard for the treatment of funds attributable to programming for which valid claims have not been submitted. *See Distribution of Cable Royalty Funds*, Copyright Royalty Board, 84 Fed. Reg. 3552, 3555 (Feb. 12, 2019) ("Congress did not establish a statutory standard in section 111 for the Judges (or their predecessors) to apply when allocating royalties among copyright owners or categories of copyright owners."); *Distribution of the 2004 and 2005 Cable Royalty Funds*, Copyright Royalty Board, 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010) (same); *see generally* 17 U.S.C. §§ 111, 801, 803. All that the Congress has mandated is that the Judges distribute all funds in the royalty pool and only among the copyright owners who have submitted claims. *See* 17 U.S.C. § 111(d)(3) ("The royalty fees thus deposited shall . . . be

distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems . . . .").

Given the absence of any contrary statutory mandates, there is no reason to disturb the settled expectations surrounding the practices used over the past four decades to identify Allocation Phase categories and to allocate unclaimed funds by applying any newly developed rules retroactively to funds that were already collected—and in particular, to funds that have already been partially distributed. Any changes should apply only to cable royalty years after the new rule is finalized.

* * *

For the foregoing reasons, no changes should be made to the definition of the Public Television category or to the rules and procedures governing the identification and treatment of unclaimed funds. Because PBS believes that the existing rules and procedures should remain in place, PBS has chosen not to submit proposed amendments to 37 C.F.R. part 351. To the extent that the Judges decide to introduce new rules and procedures, the Judges should apply them only prospectively to claims not yet submitted and funds not yet deposited with the Copyright Office.

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Respectfully submitted,

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