

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**

**JOINT SPORTS CLAIMANTS' MOTION FOR LEAVE TO REPLY**

The Copyright Royalty Judges (“Judges”) commenced this proceeding to provide copyright owners an opportunity to present “factual evidence” in order to create “an adequate factual record” concerning the categorization of claimed programming and the identification and treatment of invalid claims. Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, 84 Fed. Reg. 71,852 (Dec. 30, 2019). The Judges indicated an intent to publish a formal notice of proposed rulemaking concerning these procedural issues after reviewing the evidence submitted by the parties. *Id.* at 71,854. The Joint Sports Claimants<sup>1</sup> (“JSC”) respectfully request that the Judges provide interested parties an opportunity to submit reply comments prior to the commencement of any formal rulemaking proceeding.<sup>2</sup>

Ten parties have submitted comments for the Judges’ consideration, the significant majority of which support the current claimant category definitions and the Judges’ current

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<sup>1</sup> The Joint Sports Claimants are the Office of the Commissioner of Baseball, National Basketball Association, Women’s National Basketball Association, National Football League, National Hockey League, and National Collegiate Athletic Association.

<sup>2</sup> On April 13, 2020, JSC emailed counsel for each party that has filed comments in the above-captioned proceeding in order to inform them of JSC’s intention to seek leave to file reply comments and asking whether any party would object. No party raised an objection.

procedure for treating invalid claims (*i.e.* the “Unclaimed Funds Ruling”). JSC respectfully submits that reply comments would assist the Judges in evaluating the relative merits of the various comments submitted. This would in turn further the Judges’ goal of creating a factual record that informs any rulemaking process. If permitted to reply, JSC intends to submit additional comments and testimony of survey, industry, and economic experts addressing the significant problems with the declarations submitted by Program Suppliers’ witnesses Howard Horowitz and Jeffrey Gray, Ph.D. *See* Program Suppliers’ Notice of Inquiry Comments, 19-CRB-0014-RM at Exs. B & C (Mar. 16, 2020). Other than Program Suppliers, no party has presented witness testimony that purports to support a change to the Judges’ long-standing procedures concerning the categorization of claims and the Unclaimed Funds Ruling, and it is therefore important that the Judges have the benefit of a full discussion of the significant flaws in these witnesses’ testimony.

Mr. Horowitz purports to have interviewed a small number of cable industry executives, but does not provide any detail regarding how he selected his interviewees, the full scope of questions they were asked, how they responded to specific questions, or what efforts, if any, were taken to determine whether the small number of responses are representative of the views of cable and satellite programming executives as a whole. Moreover, Program Suppliers’ suggestion that Mr. Horowitz’s vague testimony somehow supports changing the current JSC definition is directly at odds with Mr. Horowitz’s own prior findings, which, while deeply flawed in many respects, demonstrated that cable executives view live professional and collegiate team sports differently than so called “other sports.” *See* Corrected Written Direct Testimony of Howard Horowitz, No. 14-CRB-0010-CD (2010-13) (Apr. 25, 2017). Mr. Horowitz’s vague declaration is also contradicted by the actual, first-hand testimony of senior cable and satellite industry executives, who have explained that live professional and collegiate team sports play a different and especially

valuable role as compared to other sports-related content in cable system operator decision making. *See* Comments of the Joint Sports Claimants, 19-CRB-0014-RM, at Exs. A & B (Mar. 16, 2020) (declarations of Allan Singer, former SVP, Programming at Charter Communications, and Daniel Hartman, former SVP, Programming Acquisitions at DirecTV). If permitted to submit a reply, JSC will present testimony from a survey expert, industry experts, and an economics expert addressing the significant problems with Mr. Horowitz’s testimony and why it does not support a change in claimant categories.

Similarly, Dr. Gray purports to have performed a number of quantitative analyses but does not disclose the data underlying the analyses. JSC has not been able to replicate the analyses based on Dr. Gray’s terse descriptions. Moreover, even if the analyses are correct, they do not support Program Suppliers’ request to change the JSC definition. Dr. Gray’s testimony merely purports to present several measures of program volume. For example, he testifies that Program Suppliers allegedly have a significant volume of “other sports” programming. If permitted to reply, JSC will present the testimony of industry and economic experts explaining that Dr. Gray’s purported volume measurement, even if correct, proves nothing. Live professional and collegiate team sports programming plays a fundamentally different role in decision making than does “other sports.” Even if there is a relatively large volume of Program Suppliers’ “other sports” programming, the volume does not imbue such programming with the characteristics that render live professional and collegiate team sports distinct from and much more valuable than other sports-related programming.

JSC therefore requests that the Judges provide interested parties with an opportunity to file reply comments prior to the Judges’ commencing of the formal rulemaking proceeding.

