

Before the
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<i>In re</i> DISTRIBUTION OF CABLE ROYALTY FUNDS	CONSOLIDATED DOCKET NO. 14-CRB-0010-CD/SD (2010-13)
DISTRIBUTION OF SATELLITE ROYALTY FUNDS	
<i>In re</i> DISTRIBUTION OF CABLE ROYALTY FUNDS	CONSOLIDATED DOCKET NO. 14-CRB-0010-CD (2010-13)

**SETTLING DEVOTIONAL CLAIMANTS' NOTICE IN RESPONSE TO ORDER
DIRECTING PARTIES TO REVIEW CALCULATION OF FINAL DISTRIBUTION**

The Settling Devotional Claimants (“SDC”) hereby respond to the Judges’ *Order Directing Parties to Review Calculations of Final Distribution Shares* (Oct. 14, 2020). The SDC have examined the Licensing Division’s calculations carefully and have replicated all results. The Licensing Division’s calculations are clear, and they correctly implement Judges’ *Order Directing Calculation of Final Distribution Shares* (Oct. 2, 2020) for all allocation phase categories. Consistent with the Judges’ recent precedents on allocation of interest, the methodology correctly allocates earnings on the funds following partial distributions in proportion to the shares of the funds remaining following the partial distributions, to ensure earnings are apportioned to the party whose funds were responsible for earning them.

The SDC’s only requested correction concerns the calculations related to distributions within categories. Within the Devotional and Program Suppliers categories, the Licensing

Division rounded the shares to two decimal places, rather than applying the full fractional shares as awarded. The result of the rounding produces an unintended and unearned windfall for Multigroup Claimants (“MGC”) of \$47,308.03, with the SDC suffering a loss of \$24,251.35 over the course of four years, and MPA-Represented Program Suppliers losing \$23,056.70 over the course of four years. The SDC request that shares be calculated without rounding. No other categories would be affected.

I. The Licensing Division’s Calculations Correctly Follow the Judges’ Order.

The Licensing Division’s share calculations adhere precisely to the Judges’ instructions:

All amounts shall be net of the allocations of royalties paid to the Music Claimants and NPR and shall account for partial distributions of the 2010-2013 cable royalties previously ordered by the Judges. All other increases or decreases to the royalty funds (*e.g.*, due to administrative expenses incurred or investment earnings accrued while the funds were on deposit with the Copyright Office) shall be apportioned among the parties in accordance with their respective percentage shares as adjusted to rebalance the parties’ shares following any partial distributions those parties may have received.

Order Directing Calculation of Final Distribution Shares (Oct. 2, 2020), at 2.

At the heart of the Judges’ order is the need to correctly apportion interest earned by copyright royalty fees that are held in deposit. The Register of Copyrights, after deducting reasonable costs, deposits copyright royalty fees in the Treasury of the United States. 17 U.S.C. § 111(d)(2). All funds are “invested in interest-bearing United States securities for later distribution with interest” *Id.* Therefore, the copyright royalty fees deposited earn interest, and the resulting earnings from interest are then available for later distribution. By directing the apportionment of interest “among the parties in accordance with their respective percentage shares as adjusted to rebalance the parties’ shares following any partial distributions those parties

may have received,” the Judges’ order requires allocation of interest to the parties whose principal earned the interest, instead of to the parties who had removed their principal early.

II. The Judges’ Order Is Consistent with Precedent and Common Sense.

The Judges’ precedents relating to the allocation of earnings on copyright royalty funds flow from their decision in the 2000-2003 cable Phase II proceeding, where the issue was fully briefed and decided. In that proceeding, the Phase I parties (which included all of the same allocation phase parties that are now parties to the 2010-2013 cable proceeding) jointly provided estimates to the Judges of the dollar amounts that Independent Producers Group (“IPG”) and MPA-Represented Program Suppliers (“MPA,” fka “MPAA”) should receive based on the amounts held in reserve by the Licensing Division. IPG, a distribution phase party in the 2000-2003 cable proceeding, replied to the allocation phase parties’ dollar estimates, arguing that “the estimates did not fairly allocate an appropriate amount of interest to IPG’s claimants, which, unlike those represented by MPAA, have not received partial distributions over the last several years.” *Order Directing Accounting of 2000-2003 Cable Royalties Distributed to the Program Suppliers Category*, 2008-2 CRB CD 2000-2003 (Phase II) (Nov. 25, 2015), at 2. MPA, the only allocation phase party that opposed IPG’s argument, argued that IPG was not entitled to “retroactive, prejudgment interest on its awards.” *Id.* at 2.

The Judges disagreed with MPA’s position, and they ruled that interest should be awarded on the principal that earned it. As the Judges held, “The absence of a requirement in the Copyright Act that interest on an award be awarded does not mean that interest may not be awarded if there is a reasoned means for doing so.” *Id.* The Judges recognized that denying interest to a party to account for lost value for the period of time following distributions to other parties may “amount[] to a windfall to the claimants who had received their awards earlier.” *Id.*

at 3. In essence, denying a party an interest award to account for differences in partial distribution amounts would be equivalent to giving a party who received a larger partial distribution an award of interest on principal that was ultimately awarded to another party.

The Judges noted in their decision that when the allocation phase parties received partial distributions, they signed “payback agreements” providing that any overpayment in partial distribution amounts must be repaid “with interest according to the amount that would have accrued if the principal had remained in the fund.” *Id.* (quoting *Order Granting Partial Distribution of 2003 Cable Royalty Fund*, No. 2005-4 CRB CD 2003 (Jan. 23, 2008)). As the Judges held, “[t]he requirement in the payback agreement to repay accrued interest on overpaid principal is intended to ensure that the interest will be paid to the claimant(s) whose principal earned it, or would have earned it, had that principal remained in the fund.” *Id.* In the 2010-2013 cable distribution proceeding, as in the 2000-2003 distribution proceeding, every party that received partial distributions signed agreements with payback provisions.

The Judges directed that interest would be allocated “as if the distribution allocation the Judges ordered had been applied to each year’s fund from the date funds were deposited until the date any portion of those funds was disbursed (or from which Copyright Office expenses were deducted). Interest ceases to accrue on funds when they are disbursed.” *Id.* After reviewing the Licensing Division’s calculation of IPG’s award, which applied an interest allocation methodology substantially similar to the methodology applied to all claimant groups here, the Judges confirmed that “all allocations were performed as directed by the Judges consistent with their final determination and subsequent orders” *Order Regarding IPG’s Motion for Clarification of Order Re Final Distribution for the Program Suppliers’ Category*, No. 2008-2 CRB CD 2000-2003 (Phase II) (Dec. 23, 2016), at 5.

In at least five final distribution awards in the last five years since that time, the Judges have consistently ordered that earnings on funds following a partial distribution must be allocated based on the parties' relative shares remaining in the fund. *See Order Granting IPG's Motion for Final Distribution of 1999 Cable Royalties (Devotional Category)*, 2008-1 CRB CD 1998-1999 (Phase II) (June 12, 2017); *Final Distribution Determination*, Nos. 2012-6 CRB CD 2004-09, 2012-7 CRB SD 1999-2009 (Phase II), 84 Fed. Reg. 16,038, 16,039 (Apr. 17, 2019); *Order Granting SDC Motion for Final Distribution*, No. 2008-02 CD 2000-03 (Phase II) (Jan. 9, 2020), at 5; *Order Granting SDC's Motion for Final Distribution of 2010-13 Satellite Royalty Funds*, No. 14-CRB-0011-SD (2010-13) (Jan. 13, 2020), at 1-2; *Order Granting MPA's Motion for Final Distribution of 2010-13 Satellite Royalty Funds*, No. 14-CRB-0011-SD (2010-13) (Jan. 13, 2020), at 2.

The only arguable partial exception to this trend was in the final distribution order to JSC and CTV from the 2010-13 satellite fund, which was resolved by a non-precedential settlement. *Order Granting JSC and CTV Motion for Final Distribution of 2010-13 Satellite Royalty Funds*, 14-CRB-0011-SD (2010-13) (Feb. 24, 2020). But the only reason that an interest allocation was unnecessary there was because the parties agreed as part of their settlement that JSC and CTV would request a lump sum distribution instead of a percentage share. *Id.* at 4. Even in that lump sum distribution, the Judges ordered that the lump sum amount to JSC and CTV "shall be adjusted by the following proportion of any net increase or decrease (except for any decrease(s) caused by an intervening distribution of royalties to another party) in the respective amounts of the 2010-13 satellite royalty funds between November 30, 2019 and the date of the final distribution to JSC and CTV," setting forth percentage shares of interest based on amounts remaining in the fund at the time of the lump sum agreement. JSC and CTV were therefore

awarded earnings following the lump sum determination based on their proportionate share of the funds remaining in reserve at the time, rather than on their share of the funds in total.

Therefore, although it appears that a mix of inconsistent methodologies may have been applied to the apportionment of interest on 2010-13 satellite funds (due in part to the mixed nature of the final settlement, with some parties receiving a lump sum instead of a percentage share), the Judges' orders consistently provided for apportionment of interest to the parties whose principal earned it.

III. Interest Should Be Allocated Consistently Over Time and Across Categories.

Federal government agencies are required to apply accounting principles consistently: “Financial reports should be consistent over time; that is, once an accounting principle or reporting method is adopted, it should be used for all similar transactions and events unless there is good cause to change.” Federal Accounting Standards Advisory Board Handbook, Version 18 (June 30, 2019) at 37.¹ Even setting aside the issues of fairness, logic, and precedent discussed above, consistency itself is a principle that is upheld and advanced through the Licensing Division's calculation, which is applied consistently across years, funds, and categories.

In this matter, as in the 2000-2003 cable distribution matter, denying interest to a party to account for lost value for the period of time following distributions to other parties may “amount[] to a windfall to the claimants who had received their awards earlier.” *Order Directing Accounting of 2000-2003 Cable Royalties Distributed to the Program Suppliers Category*, 2008-2 CRB CD 2000-2003 (Phase II) (Nov. 25, 2015), at 3. As was the case in the 2000-2003 cable

¹ The Federal Accounting Standards Advisory Board is the designated advisory board for setting federal government accounting standards. See Memorandum of Understanding Among the Government Accountability Office, the Department of the Treasury, and the Office of Management and Budget on Federal Accounting Standards and a Federal Accounting Standards Advisory Board (rev. Oct. 2009) (available at http://files.fasab.gov/pdf/OUR_MEMORANDUM_OF_UNDERSTANDING_03_2011-1.pdf).

proceeding in which the Judges recognized the need to allocate earnings on funds based on relative shares remaining after partial distributions, each of the parties that has received partial distributions in this case was required to agree to “repay to the Copyright Office any overpayment that results from the distribution of these funds, together with interest according to the amount that would have accrued if the principal had remained in the fund.” *Order Granting Motion of Phase I Claimants for Partial Distribution of 2011 Cable Royalty Funds*, No. 2012-9 CRB CD 2011 (Mar. 13, 2013), at 2; *Order Granting Motion of Phase I Claimants for Partial Distribution*, No. 14-CRB-0007 CD (2010-12) (Dec. 23, 2014), at 4; *Order Granting Motion of Phase I Claimants for Partial Distribution*, No. 14-CRB-0010 CD (2013) (May 28, 2015), at 2.

Indeed, the allocation phase parties have continued to agree to payback agreements as a condition for receiving partial distributions, even after the Judges explained that the purpose of the requirement of interest repayment was to ensure that earnings are awarded to the parties whose principal earned them. *See, e.g., Order Granting Moving Parties’ Motion for Partial Distribution of 2018 Cable Royalties*, No. 19-CRB-0010 CD (2018) (Aug. 20, 2020), at 4. Especially given that the Judges’ decision in the 2000-03 cable distribution case was directly in response to a joint filing by all of the same allocation phase parties who are now parties to this case, all parties were on notice of the payback agreements’ purpose “to ensure that the interest will be paid to the claimant(s) whose principal earned it, or would have earned it, had that principal remained in the fund.” *Order Directing Accounting of 2000-2003 Cable Royalties Distributed to the Program Suppliers Category*, 2008-2 CRB CD 2000-2003 (Phase II) (Nov. 25, 2015), at 3. Therefore, as in the 2000-2003 cable distribution case, all parties to this case have agreed that interest on copyright royalty funds will be paid to the claimants whose principal earned it, and not to the claimants who took their principal out of the funds early.

The principle of consistency is especially important when dealing with allocation of funds of fixed amounts, because any allocation to one party necessarily reduces the amount available to other parties. As the SDC have explained in the 2000-2003 cable royalty proceeding, in which shortfalls and excess amounts in the 2000-2003 cable royalty funds remaining for final distribution are currently under consideration, the discrepancies at issue in that proceeding appear to be an artifact of inconsistent treatment of interest allocations in partial and final distributions over the course of twenty years. *Order Directing Recalculation of Royalty Allocations in the Devotional Category and Seeking Additional Guidance*, No. 2008-2 CD 2000-03 (Phase II) (Aug. 28, 2020) (“The SDC assert that ‘[e]ven small variations over time in the methodologies used to apportion interest could easily generate the net surplus and shortfalls in the amounts remaining. ... In essence, the aggregate sums of the effects of all variations in interest allocations over all of the distributions made in all categories have wound up in the amounts remaining in the one small category that has not received a final distribution.’”).

Just as small variations in interest treatment over time can lead to significant discrepancies, small variations across different funds and categories can lead to the same significant discrepancies. All shares, whether characterized as distribution phase shares or allocation phase shares, come from the same funds. It is simply not possible, using a consistent methodology, to allocate interest *within* a category without also allocating interest *to* a category.

IV. The Licensing Division’s Rounding of Distribution Shares Within the Devotional and Program Suppliers Categories Result in Windfall to MGC.

Although the SDC confirm that the calculations of the Licensing Division correctly allocate final distributions to the allocation phase categories, the calculations result in a shortfall to the SDC and MPA-Represented Program Suppliers and a windfall to MGC in the amount of \$47,308.05 by rounding the distribution shares within the Devotional and Program Suppliers

categories to two decimal places. For example, in the Devotional and Program Suppliers categories for 2010, the correct calculations as awarded by the Judges for these parties, by multiplying the allocation phase award by the distribution phase award, are as follows:

	2010 Distribution phase award	Basic Fund	3.75% Fund	Syndex Fund
<i>2010 Devotional allocation phase award</i>		4.0%	4.7%	0%
SDC	77.1%	3.08400%	3.62370%	0.00000%
MGC	22.9%	0.91600%	1.07630%	0.00000%
<i>2010 Program Suppliers allocation phase award</i>		26.5%	31.1%	100%
MPA	99.37%	26.33305%	30.90407%	99.37000%
MGC	0.63%	0.16695%	0.19593%	0.63000%

The Licensing Division performed this calculation, but rounded the results to only two decimal places leaving SDC and MPA with a shortfall and gave MGC an unearned windfall:

	2010 Distribution phase award	Basic Fund	3.75% Fund	Syndex Fund
<i>2010 Devotional allocation phase award</i>		4.0%	4.7%	0%
SDC	77.1%	3.08%	3.62%	0.00%
<i>Shortfall</i>		<i>(0.00400)%</i>	<i>(0.00370)%</i>	<i>0%</i>
MGC	22.9%	0.92%	1.08%	0.00%
<i>Windfall</i>		<i>0.00400%</i>	<i>0.00370%</i>	<i>0%</i>
<i>2010 Program Suppliers allocation phase award</i>		26.5%	31.1%	100%
MPA	99.37%	26.33%	30.90%	99.37%
<i>Shortfall</i>		<i>(0.00305)%</i>	<i>(0.00407)%</i>	<i>0.00%</i>
MGC	0.63%	0.17%	0.20%	0.63%
<i>Windfall</i>		<i>0.00305%</i>	<i>0.00407%</i>	<i>0.00%</i>

Although the rounding changes appear to be small when expressed as percentages, they add up over time given the millions of dollars at stake. Using a replication of the Licensing Division's spreadsheet, the SDC found that the rounding leads to shortfalls and windfalls in the respective parties' final distributions over all four years in the following amounts:

	2010	2011	2012	2013	Total
SDC	\$ (8,024.15)	\$ (4,751.09)	\$ (8,206.93)	\$ (3,269.18)	\$ (24,251.35)
MPA	\$ (6,432.78)	\$ (7,296.57)	\$ (2,224.90)	\$ (7,102.44)	\$ (23,056.70)
MGC	\$ 14,456.93	\$ 12,047.66	\$ 10,431.83	\$ 10,371.62	\$ 47,308.05

By simply using the computations for shares as awarded by the Judges without rounding, the inequity would be eliminated.

V. Conclusion

For the foregoing reasons, the SDC acknowledge that the Licensing Division's calculations for the allocation shares are correct, and request that the Licensing Division not round the distribution award percentages for claimant groups within the Devotional and Program Supplier categories.

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Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, October 26, 2020, I provided a true and correct copy of the Settling Devotional Claimants' Notice in Response to Order Directing Parties to Review Calculation of Final Distribution to the following:

Commercial Television Claimants (CTC), represented by John Stewart, served via ESERVICE at jstewart@crowell.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis, served via ESERVICE at smosenkis@ascap.com

SESAC Performing Rights, LLC, represented by John C. Beiter, served via ESERVICE at john@beiterlaw.com

Public Television Claimants (PTC), represented by Ronald G. Dove Jr., served via ESERVICE at rdove@cov.com

MPA-Represented Program Suppliers, represented by Gregory O Olaniran, served via ESERVICE at goo@msk.com

Broadcast Music, Inc. (BMI), represented by Brian A Coleman, served via ESERVICE at Brian.Coleman@dbr.com

Canadian Claimants Group, represented by Lawrence K Satterfield, served via ESERVICE at lksatterfield@satterfield-pllc.com

Joint Sports Claimants, represented by Michael E Kientzle, served via ESERVICE at michael.kientzle@apks.com

Signed: /s/ Matthew J MacLean