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In re	
DISTRIBUTION OF CABLE ROYALTY FUNDS	**DOCKET NO. 16-CRB-0009 CD (2014-17)**
DISTRIBUTION OF SATELLITE ROYALTY FUNDS	**DOCKET NO. 16-CRB-0010 SD (2014-17)**

ORDER LIFTING STAY AND ADOPTING CLAIMANT CATEGORIES

On December 20, 2019, the Copyright Royalty Judges (Judges) stayed the captioned proceedings pending a rulemaking process to define the Allocation Phase categories and to determine the issue of "unclaimed funds"—*i.e.*, the proper treatment in the allocation phase of a royalty distribution proceeding of claims that are not valid or not validly represented. *See Order Staying Proceedings Pending Rulemaking*, Docket No. 16-CRB-0009 CD (2014-17) (Dec. 20, 2019) (*Cable Stay Order*); *Order Staying Proceedings Pending Rulemaking*, Docket No. 19-CRB-0010 SD (2014-17) (Dec. 20, 2019) (*Satellite Stay Order*; collectively, the *Stay Orders*).

The Judges commenced the rulemaking[1] by publishing a Notice of Inquiry (NOI) in the Federal Register at 84 Fed. Reg. 71852 (Dec. 30, 2019). The Judges received ten sets of comments on March 15th and 16th, 2020.[2]

On May 12, 2020, the Judges received a Joint Notice of Settlement and Motion to Lift Stay (Motion to Lift Stay) in Docket No. 16-CRB-0009 SD from the Allocation Phase parties.[3] The Allocation Phase parties informed the Judges that they had "reached a confidential settlement of all Allocation Phase issues related to the 2014 and 2015 satellite royalty funds," and requested that the Judges lift the stay as to those two funds to permit the Allocation Phase parties to file motions for final distribution of royalties no longer in controversy. Motion to Lift Stay at 1. The Allocation Phase parties also asked the Judges to "affirm that the Allocation Phase Category Definitions originally set forth in the *Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order*, [Docket] No. 14-CRB-0011-SD (2010-13), at Ex. A (Nov. 25, 2015), apply to the 2014-15 Satellite Funds …." *Id*. The Allocation Phase parties renewed that request twice. *See* Supplemental Memorandum Regarding the Allocation Phase Parties' Motion to Lift Stay, Docket No. 16-CRB-

[1] *See* Docket No. 19-CRB-0014-RM.

[2] The Judges received comments from Multigroup Claimants, the Settling Devotional Claimants, Music Claimants (ASCAP, Broadcast Music, Inc. (BMI), and SESAC Performing Rights, LLC), Program Suppliers, Major League Soccer, LLC, the National Association of Broadcasters, National Public Radio, Inc., the Joint Sports Claimants, the Canadian Claimants Group, and the Public Broadcasting Service. Subsequently, on April 15, 2020, the Joint Sports Claimants filed a motion for leave to file reply comments. The Judges address that motion in a separate Order in the rulemaking proceeding. *See Order Denying JSC Motion for Leave to Reply*, Docket No. 19-CRB-0014-RM (Apr. 5, 2021).

[3] The Motion to Lift Stay was filed by Program Suppliers, Commercial Television Claimants, Joint Sports Claimants, Settling Devotional Claimants, ASCAP, SESAC, and BMI.

0009 SD (2014-17) (Oct. 5, 2020); Second Supplemental Memorandum Regarding Motion to Lift Stay, Docket No. 16-CRB-0009 SD (2014-17) (Mar. 18, 2021).

Based on the evidence and arguments presented to the Judges in the captioned proceedings and in the comments responding to the NOI, and for the reasons described below, the Judges, *sua sponte*, **LIFT** their stay as to both of the captioned proceedings. The Judges also **ADOPT** for each proceeding the claimant category definitions employed in the corresponding 2010-13 cable and satellite royalty distribution proceedings. The definitions applicable to the cable proceeding are attached as Exhibit A and the definitions applicable to the satellite proceeding are attached as Exhibit B.

In light of the Judges' decision to lift the stay fully as to both proceedings, the Judges **DENY AS MOOT** the Motion to Lift Stay in the satellite proceeding.

Discussion

Stay Pending Rulemaking

The Judges stayed the captioned proceedings intending to adopt claimant category definitions by regulation and then resume the proceedings using those definitions. Several of the NOI comments argued that category definitions adopted by regulation should apply prospectively only, and not affect proceedings that are already underway. For example, the Canadian Claimants Group (CCG) noted

> 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.

Comments of the Canadian Claimants Group Regarding Categorization of Claims for Cable and Satellite Royalty Funds and Treatment of Ineligible Claims, Docket No. 19-CRB-0014-RM, at 13 (Mar. 16, 2020) (CCG NOI Comments).[4]

Similarly, the Joint Sports Claimants (JSC) argued that changing the claimant category definitions for the ongoing 2014-17 proceedings would reduce the usefulness of studies already prepared in reliance on the traditional category definitions. JSC submitted a declaration from Mr. James Trautman, a media expert, that he had already conducted constant sum surveys for the 2014-17 proceedings "in reliance on more than forty years of stipulations." Comments of the Joint Sports Claimants, Docket No. 19-CRB-0014-RM, at 5 (Mar. 16, 2020) (JSC NOI Comments); Declaration of James Trautman, Ex. D to JSC NOI Comments, at ¶ 4 (Trautman Declaration). "These surveys cannot be redone years later—more than five years after the first royalties at issue were paid—in order to use revised claimant category definitions or somehow to account for unclaimed programming or invalid claims." Trautman Declaration ¶ 4; *see id*. ¶¶ 9-

[4] The CCG also contended that the Judges have no legal authority to adopt claimant category definitions by regulation. *See* CCG NOI Comments at 12-13. Since that argument does not bear on the current Order, the Judges will not address it here.

10. JSC contended that changing the claimant categories for the captioned proceedings would be "fundamentally unfair to the parties that have relied on the four decade-long historical convention." *Id*. at 5. If the Judges were to change the categories, "the change would need to be made many years in advance to avoid adverse impacts on the studies used to determine relative value and undue prejudice to the parties." *Id*.

The SDC raised the same issue in their comments, advising against unsettling the parties' expectations retrospectively in the context of the captioned proceedings.

> Even though the presentation of evidence has been delayed, the gathering of evidence has been underway for years. Surveys of cable operators, who are asked to assess the relative value of claimant categories in their decisions to retransmit signals, concluded years ago.… A change in category definitions at this stage could impact the reliability of survey evidence in unpredictable ways. At the very least, survey experts would have to interpret survey results in light of changed definitions, which would present new evidentiary challenges, increasing costs and engendering delays.

Comments of Settling Devotional Claimants, Docket No. 19-CRB-0014-RM, at 4 (Mar. 16, 2020) (SDC NOI Comments).

The Judges find that addressing the claimant category definitions for the captioned proceedings by means of a rulemaking would work a hardship on parties that have acted in reliance on the status quo. As a result of a series of stipulations of the Allocation Phase parties, the claimant category definitions in Phase I/Allocation Phase distribution proceedings have been largely unchanged for decades. Parties have come to rely upon those definitions to gather evidence while it is still fresh, and to prepare their cases in anticipation of an allocation phase proceeding that generally will not commence until years after the cable operators have deposited the royalties.[5]

The Judges are persuaded by the foregoing arguments that the better course of action is to determine the claimant category definitions for purposes of the captioned proceedings outside the rulemaking process. Once uncoupled from the rulemaking, there is no reason not to allow these proceedings to move forward. The Judges, therefore, **LIFT** their stay on the captioned proceedings.

Claimant Category Definitions for the Instant Proceedings

In staying the captioned proceedings, the Judges noted that they "require evidence and analysis from the participants regarding the tradeoffs, if any, between the purported greater efficiencies and/or cost-savings of a claimant-centric categorization and the asserted greater fairness and accuracy of a content-centric categorization." *Stay Orders* at 5 (footnote omitted). The parties endeavored to do so through their NOI comments, and the Judges will avail themselves of the administrative record thus developed in determining the category definitions for purposes of the captioned proceedings.[6]

[5] The Judges focus on allocation phase proceedings involving cable royalties since no allocation phase proceeding in a satellite case has proceeded all the way to a determination.

[6] All of the parties to the captioned proceedings had the opportunity to, and did in fact, provide comments on the appropriate claimant category definitions. Moreover, the Judges made clear through the *Stay Orders* and the NOI

Of the parties that submitted comments responding to the NOI, only Multigroup Claimants (MGC) and Program Suppliers, represented by the Motion Picture Association (MPA), supported changes to the claimant category definitions by means of a rulemaking.[7] All other commenters opposed changes to the claimant category definitions.

MGC and MPA both sought to replace the traditional Joint Sports Claimants category, which covers only live professional and collegiate team sports programming, with a broader Sports Claimants category that includes most sports-related programming.[8] MGC's comments largely repeated the arguments it made in the captioned proceedings—*i.e.*, that the historic definitions are not based on "inherent differences" in programming, and result in "absurd distinctions" and "counterintuitive results." *See generally* Multigroup Claimants' Comments on Claimant Category Definitions and Proposed Modification, Docket No. 16-CRB-0009-CD (2014-17) (Apr. 19, 2019) (MGC Category Comments); Multigroup Claimants' Response to Request for Comments on Categorization of Claims, Docket No. 19-CRB-0014-RM (Mar. 15, 2020) (MGC NOI Comments). MGC did not present any evidence to support its position.

MPA argued that cable system operators (and, presumably satellite providers as well) do not distinguish between live professional and collegiate team sports programming represented by JSC, and other sports programming that is represented by other claimant groups—including Program Suppliers. Program Suppliers Notice of Inquiry Comments, Docket No. 19-CRB-0014-RM, at 5-6 (Mar. 16, 2020) (MPA NOI Comments). MPA provided a declaration of Howard Horowitz, founder and CEO of Horowitz Research, a market research firm, in which Mr. Horowitz described interviews his firm conducted with ten cable programming executives. MPA NOI Comments, at Ex. C (Horowitz Declaration). Mr. Horowitz stated in his declaration that, in considering sports programs on distant signals, the cable executives "thought about the full breadth of available sports content carried by the stations." Horowitz Declaration ¶ 6 (emphasis omitted). He stated that, when making their distant signal programming decisions, the cable executives "did not distinguish between live team sports versus other sports, or network versus non-network sports …." *Id*. Mr. Horowitz also related that, after being read the definitions of the claimant categories used in past allocation phase proceedings, and confirming that they believed they understood the definitions, the cable executives were asked in which claimant category certain non-team sports programs such as tennis, golf, and NASCAR belong. Not one of the cable executives responded correctly. *Id*. ¶ 7.

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that they would use the submissions in the rulemaking to determine, *inter alia*, the claimant category definitions to be used in the captioned proceedings.

[7] The Music Claimants' comments seek a technical change to the definition of "Music Claimants" applicable to cable distribution proceedings that was proposed in the Joint Comments of the 2014-17 Cable Participants on Allocation Phase Claimant Category Definitions, Docket No. 16-CRB-0009 CD (2014-17) (Apr. 19, 2019) (Joint Category Comments). *See* Comments of Music Claimants BMI, ASCAP, and SESAC on Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, Docket No. 19-CRB-0014-RM at 14-15 (Mar. 16, 2020) (Music Claimants' NOI Comments). Music Claimants aver that the change is to correct an inadvertent omission, rather than to effect a substantive change. *See id*. at 5. The Judges agree that the change is both technical in nature and appropriate, and include it in the category definition of "Music Claimants" in Exhibit A.

[8] MGC made this proposal during the process the Judges conducted to determine claimant categories in the captioned proceedings prior to commencing the rulemaking. *See generally* MGC Category Comments. MPA opined that "[t]here is some merit" to MGC's proposal, but did not embrace it at the time. Program Suppliers' Responsive Brief, Docket No. 16-CRB-0010-SD (2014-17), at 5-6.

For its part, JSC presented declarations from a former cable programming executive and a former satellite programming executive, both of whom described the distinctive value of live professional and collegiate team sports programming as distinguished from other sports programming, including an explanation that loyalty to a team provides subscribers with an on-going emotional interest in the sport that generally does not exist for individual sports. *See* Comments of the Joint Sports Claimants, Docket No. 19-CRB-0014-RM, at 10-20 (Mar. 16, 2020) (JSC NOI Comments). Mr. Alan Singer, a former cable executive, stated in his declaration that "[t]he live professional and collegiate team sports currently within the definition of JSC have the power to drive and retain video customers. It is this distinctive characteristic of live professional and collegiate team sports that differentiates them and makes them much more valuable than the other types of programming, including the additional sports programming that MGC seeks to bolt onto the current JSC definition." *Id*. at Ex. A ¶ 12 (Singer Declaration). He also noted an important distinction between team sports and individual sports from the standpoint of a cable programming executive. Individual sports such as golf, swimming, and running "do not generate the depth of subscriber interest and passion that presents a risk of significant subscriber loss" if the cable company does not carry them, because "[t]he competitors in these sports also do not represent specific geographic markets, which decreases fan loyalty and interest." Singer Declaration ¶ 32.

Similarly, Daniel Hartman, a former satellite executive, stated in his declaration that "[a]s [a multichannel video programming distributor (MVPD)] programming executive, I considered JSC programming to appeal more strongly to subscribers than any other category of content, including other types of sports-related content. Subscribers feel passionate about live professional and collegiate team sports programming, and there is a substantial risk of subscriber losses if an MVPD chooses not to carry this programming." JSC NOI Comments, Ex. B ¶ 9 (Hartman Declaration). According to Mr. Hartman, "[n]on-team sports programming simply does not play the same role in attracting and retaining subscribers, and therefore is viewed differently by MVPDs." Hartman Declaration ¶ 23. "Non-team sports generally rely on rare generational stars to generate the kind of excitement and passion that team sports generates among its fan base on a regular basis." *Id*. ¶ 24.

Multiple parties contended that changing the claimant category definitions would make allocation and distribution phase settlements less likely, and would make intra-category valuation of programming in distribution phase proceedings more difficult. *See*, *e.g*., SDC NOI Comments, at 3-4; Music Claimants NOI Comments, at 3-4, 7-8; Comments of the National Association of Broadcasters, Docket No. 19-CRB-0014-RM, at 12-15 (Mar 16, 2020) (NAB NOI Comments); JSC NOI Comments at 28-29; CCG NOI Comments at 14-18; Comments of Public Broadcasting Service, Docket No. 19-CRB-0014-RM, at 8-9 (Mar. 16, 2020) (PBS NOI Comments). Dr. Andrew Dick, an economist for JSC, stated in a declaration:

> A reconfiguration of claimant groups also would lead to an increase in the number of Distribution Phase disputes as well as increased challenges as to how to value disparate programming within a claimant group. Under the existing claimant group definitions, settlements between members of a given claimant group are frequent (with the notable exception of MGC). These settlements are facilitated by the fact that the programming within each claimant group shares common features, and thus members of a given claimant group can negotiate resolutions. That is not to say that the value of every program in the current categories is

> identical, but rather that the similarities are meaningful and thus allow for negotiated resolutions. However, if, as MGC proposes, claimant groups were redefined to include programming that plays very different functions in MVPD decision making and command very different relative values, then settlements would be much harder to achieve. Absent settlements, methodologies for estimating relative value among more heterogeneous programming within the same claimant group would need to be developed. All of this runs counter to the Copyright Act's public policy goal of reducing the transaction costs associated with compensating rights holders for retransmission of their programming on distant signals.

JSC NOI Comments at Ex. C ¶ 12 (Dick Declaration) (footnotes omitted).

The Judges find that there is sufficient evidence and arguments in the record, as supplemented by the NOI submissions, to support either maintenance of the status quo or adoption of the changes to the definition of the Joint Sports Claimants category proposed by MGC and MPA. However, the Judges do not find it necessary in the present context to weigh the relative merits of the two positions in isolation from the discussion, *supra*, of the effect of a definitional change on parties that have acted in reliance on the traditional category definitions. The parties' reliance on the traditional category definitions tilts the balance decisively and overwhelmingly in favor of retention of the traditional category definitions in the captioned proceedings.

Evidence from surveys of cable operators has played a central role in Phase I/Allocation Phase cable distribution proceedings for well over a decade. *See*, *e.g.*, *Final Allocation Determination*, Docket No. 14-CRB-0010-CD (2010–2013), 84 Fed. Reg. 3552, 3590-91 (Feb. 12, 2019) (*2010-13 Cable Allocation Determination*); *Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress*, Docket No. 2001-8 CARP CD 98-99, at 31 (Oct. 21, 2003) (*1998-99 CARP Report*). These surveys ask cable executives who are responsible for deciding which distant signals to carry to allocate value to the programming in each of the claimant categories. The Judges have found this survey evidence to be helpful and, in some cases, dispositive in determining relative market value of different categories of television programming. *See 2010-13 Cable Allocation Determination* at 3591.

The value of survey evidence diminishes with the passage of time between a cable operator's programming decisions and the collection of the survey data. As Mr. Trautman stated in his declaration, his firm "endeavors to conduct these surveys close in time to the year in question to maximize measurement accuracy." Trautman Declaration ¶ 3. In order to have survey participants allocate value among claimant categories, they must be presented with definitions of those categories as part of the survey process.

The Judges find that the application of new claimant category definitions to the ongoing 2014-17 cable and satellite distribution proceedings would unsettle the reasonable expectations of the parties that the Judges would continue to apply the definitions that the parties had employed for the better part of the past four decades. The Judges also find that adopting changed definitions for use in those proceedings would work a particular hardship on JSC, which has already completed a survey of cable system operators based on the existing categories, and on any other parties that expected to rely on survey evidence.

The Judges, therefore **ADOPT** the claimant category definitions used most recently in the 2010-13 cable and satellite distribution proceedings, as set forth in Exhibit A (cable) and Exhibit B (satellite).

Treatment of Claims that are not Valid or not Validly Represented

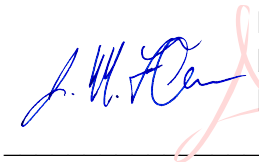
The Judges' NOI also sought input on the so-called "unclaimed funds" ruling. Under this decision of the Copyright Royalty Tribunal (CRT), the Judges determine the allocation of royalties among claimant categories as if all programs comprising each category are validly claimed and represented.

The sole proponent of abandoning this long-held practice was MPA. MPA argued that "[t]he Judges must ensure that the Claimant Group Definitions adopted in their regulations are consistent with the eligibility requirements for claiming and receiving statutory license royalties set forth in the Copyright Act." MPA NOI Comments at 8-9; *see also* Program Suppliers' Brief Regarding Proposed Claimant Group Definitions, Docket No. 16-CRB-0009-CD (2014-17), at 3 (Apr. 19, 2019) (MPA Category Comments). MPA contended that, because sections 111 and 119 limit distribution of funds deposited with the Copyright Office to those copyright owners of distantly retransmitted programs that have filed valid claims, "volume estimates utilized in Allocation and Distribution Phase methodologies must be based solely on eligible works, *i.e.*, works associated with valid cable or satellite royalty claims." MPA NOI Comments at 11.

MPA treats the issue as definitional—*i.e.*, defining claimant categories to exclude ineligible works. The Judges and parties recognize, however, that MPA raises a broader question about the bifurcated structure of distribution proceedings. In every past distribution proceeding, the Judges have addressed claims validity in the distribution phase. MPA seeks to have the parties and the Judges address that issue in the allocation phase.

The Judges find that the issue raised by MPA need not be resolved within the definitions of claimant categories. If the issue arises at a later stage of the proceeding (*e.g.*, during discovery)[9] the Judges will address it at that time and in that context.[10]

SO ORDERED.



Jesse M. Feder
Chief Copyright Royalty Judge

DATED: April 5, 2021

[9] In the 2010-13 cable distribution proceeding MPA sought to address claims validity in the allocation phase by seeking discovery of documents relating to claims from the other Allocation Phase parties. The Judges denied MPA's request based on the language of the parties' stipulation concerning claimant category definitions. *See generally Order Regarding Discovery*, Docket No. 14-CRB-0010-CD (2010-13) (Jul. 21, 2016). MPA now raises the issue in a proceeding with no such stipulation. *See* MPA Category Comments at 6-7 & n.7.

[10] The Judges may also address the "unclaimed funds" issue in the pending rulemaking.

EXHIBIT A

Definitions of Cable Claimant Categories

Following are non-exhaustive descriptions of the types of programs or other creative works that fall within each of the adopted categories of claimants (Adopted Categories) to which categories the Judges may approve an allocation of cable retransmission royalties.

"Canadian Claimants." All programs broadcast on Canadian television stations, except: (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) programs owned by U.S. copyright owners.

"Commercial Television Claimants." Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those listed in subpart (3) of the Program Suppliers category.

"Devotional Claimants." Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.

"Joint Sports Claimants." Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except programs in the Canadian Claimants category.

"Music Claimants." Musical works performed during programs that are in the following categories: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Public Television Claimants, Devotional Claimants, Canadian Claimants, National Public Radio.

"National Public Radio." All non-music programs that are broadcast on NPR Member Stations.

"Program Suppliers." Syndicated series, specials, and movies, except those included in the Devotional Claimants category. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, "PM Magazine," and locally-hosted movies.

"Public Television Claimants." All programs broadcast on U.S. noncommercial educational television stations.

The Judges intend that these category descriptions define mutually exclusive claimant groups. The Judges will not approve a retransmission royalty distribution from more than one Approved Category for any one claimed program.

EXHIBIT B

Definitions of Satellite Claimant Categories

Following are non-exhaustive descriptions of the types of programs or other creative works that fall within each of the adopted categories of claimants (Adopted Categories) to which categories the Judges may approve an allocation of satellite retransmission royalties.

"Commercial Television Claimants." Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those listed in subpart (3) of the Program Suppliers category.

"Devotional Claimants." Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.

"Music Claimants." Musical works performed during programs that are in the following categories: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, and Devotional Claimants.

"Joint Sports Claimants." Live telecasts of professional and college team sports broadcast by U.S. television stations.

"Program Suppliers." Syndicated series, specials and movies, except those included in the Devotional Claimants category. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, "PM Magazine," and locally-hosted movies.

The Judges intend that these category descriptions define mutually exclusive claimant groups. The Judges will not approve a retransmission royalty distribution from more than one Adopted Category for any one claimed program.