

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
) **Docket No. 16-CRB-0009-CD (2014-17)**
Distribution of the 2014-17)
Cable Royalty Funds)
)

MPA NOTICE OF CONTROVERSIES

Pursuant to the Copyright Royalty Judges’ (“Judges”) *Scheduling Order And Notice Of Voluntary Negotiation Period*, dated April 5, 2021 (“April 5 Order”), which announced the Voluntary Negotiation Period and set the initial case schedule in the captioned proceeding, the Motion Picture Association, Inc. (“MPA”), on behalf of its member companies and other producers and distributors of syndicated series, movies, specials, and non-team sports broadcast by television stations and retransmitted by cable operators who have agreed to representation by MPA (“MPA-represented Program Suppliers”), hereby submits its Notice of Controversies (“Notice”) regarding distribution of the 2014, 2015, 2016, and 2017 cable royalty funds (“2014-17 Cable Funds”).

I. Statement Of The Nature Of Controversies

The April 5 Order required all participants to “participate in good faith settlement negotiations aimed at resolving controversies regarding the ultimate distribution of the royalty funds for the years at issue in this proceeding” during the Voluntary Negotiation Period established by the Judges. *See* April 5 Order at 1. As explained below, controversies remain outstanding as to the 2014-17 Cable Funds in both the Allocation and Distribution Phases of the proceedings.

A. Allocation Phase Controversies

As explained in MPA's Petition to Participate filed in this proceeding, MPA has historically served as the representative of the Program Suppliers category in Allocation Phase proceedings, and MPA will serve as the representative for the Program Suppliers Cable Claimant Category (as defined by the Judges) in the Allocation Phase of this proceeding. *See Amended Joint Petition To Participate Of The MPAA-Represented Program Suppliers* at 2 (June 27, 2019). On June 24, 2021, MPA participated in a settlement video conference on behalf of the Program Suppliers category with representatives of each of the other Cable Claimant Categories: the Joint Sports Claimants ("JSC"), the Commercial Television Claimants ("CTV"), the Music Claimants,¹ the Canadian Claimants Group ("CCG"), Settling Devotional Claimants ("SDC"), National Public Radio ("NPR"), and the Public Television Claimants ("PTV"). Despite all parties' good faith efforts, they were unable to reach a settlement, and Allocation Phase controversies remain outstanding among all the Cable Claimant Categories in this proceeding.

B. Distribution Phase Controversies With The Program Suppliers Category

During the Voluntary Negotiation Period, MPA initiated settlement discussions with National Association of Broadcasters ("NAB") and Multigroup Claimants ("MC"), the two parties which have unresolved Distribution Phase controversies with MPA in the Program Suppliers category. MPA participated in one settlement telephone conference with NAB, and separately participated in two settlement telephone conferences with MC. Despite good faith efforts by MPA, NAB, and MC, the parties were unable to reach any settlements, and Distribution Phase controversies remain outstanding in the Program Suppliers category between MPA and NAB as to the 2014-17 cable royalty years, and between MPA and MC as to the 2015-

¹ The Music Claimants include Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors, and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC").

17 cable royalty years.² As explained below, it appears that further proceedings before the Judges will be required to resolve these controversies.

II. Legal And Factual Issues To Be Presented To The Judges

Each participant in the referenced proceeding must establish that its claims are valid, eligible to be allocated royalties, and that each claimed program is properly categorized within one of the Cable Claimant Categories adopted by the Judges for this proceeding (“Eligibility Issues”). Eligibility Issues are threshold issues before the Judges can resolve royalty allocation or distribution issues. As the Judges have made clear, before any royalty distribution can be made, the Judges “must first determine whether the copyright owner is eligible to receive royalties.” *Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64987 (Oct. 30, 2013) (citing *Universal City Studios LLLP v. Peters*, 402 F.3d at 1235, 1244 (D.C. Cir. 2005); *Order Denying Motions To Strike Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2 (Sept. 14, 2012)). This is because Section 111 authorizes royalty distributions only to copyright owners or their authorized representatives who have filed valid claims for such royalties, demonstrated that they are copyright owners of works entitled to receive such royalties, and presented evidence establishing their share of the royalties in a proceeding before the Judges. *See* 17 U.S.C. §§ 111(d)(3) and (4)(A); § 803. Indeed, resolution of Eligibility Issues is inextricably linked to resolution of allocation issues, especially when certain allocation methodologies (such as regression analyses) rely on measures of programming volume.³

² Multigroup Claimants did not file a 2014 cable royalty claim, and is not seeking a share of 2014 cable royalties.

³ *See Order Lifting Stay And Adopting Claimant Categories* at 7 (April 5, 2021) (quoting Program Suppliers Notice of Inquiry Comments, Docket No. 19-CRB-0014- RM, at 11 (Mar. 16, 2020)). Vetting eligibility issues as a threshold issue is particularly important in this proceeding because there are no stipulations among the parties regarding eligibility issues. *See id.* at 7, n.9.

As the Judges know, MC is another name for Worldwide Subsidy Group, LLC d/b/a Independent Producers Group (“IPG”). MC and IPG have been denied a presumption of validity as to their cable and satellite royalty claims, repeatedly, in past Distribution Phase proceedings before the Judges.⁴ In this proceeding, MC appears as a Distribution Phase participant in several Cable Claimant Categories *and* separately as an Allocation Phase claimant in the Joint Petition to Participate filed by PTV.⁵ Moreover, MPA remains concerned that Eligibility Issues may exist in this proceeding beyond the claims and programs associated with MC, particularly due to the fact that several of the Allocation Phase Parties have avoided any scrutiny of their claims for Eligibility Issues in past proceedings simply because the Judges have deferred consideration of those issues to the Distribution Phase and have historically not permitted these issues to be addressed in the Allocation Phase. *See Order Lifting Stay And Adopting Claimant Categories* at 7 (April 5, 2021). Deferring examination of claims for Eligibility Issues to the Distribution Phase works against fair distribution of relative Allocation shares among Allocation Phase parties because it allows Allocation parties, whose claims are invalid and/or ineligible, to avoid scrutiny of their claims and yet receive overvalued Allocation shares which ultimately inure to their Distribution Phase claimants.

⁴ As the Judges are aware, MC was denied any presumption of validity as to its cable or satellite royalty claims for the 2010-13 cable and satellite royalty years, and a large number of its claims were dismissed as unauthorized. *See Ruling And Order Regarding Objections To Cable And Satellite Claims* at 5-10 and Appendices A-B (October 23, 2017). Similarly, IPG was also denied any presumption of validity as to its cable or satellite royalty claims filed for the 2004-2009 cable and 1999-2009 satellite royalty years, and the Judges dismissed a very large number of entities that IPG claimed to represent as unauthorized. *See Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 9-10; Exhibits A-1 and A-2 (March 13, 2015). The Judges also dismissed a significant number of IPG entities as unauthorized as to the 2000-2003 cable royalty years. *See Memorandum Opinion And Order Following Preliminary Hearing On Validity Of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 3-14; Exhibit B (March 21, 2013).

⁵ *See Joint Petition To Participate Of Public Broadcasting Service* at Attachments B-D (March 11, 2019) (identifying Multigroup Claimants as a claimant expected to be represented by PTV in this proceeding).

In light of these issues, MPA believes that preliminary discovery and a ruling from the Judges addressing Eligibility Issues will be necessary to resolve Eligibility Issues in both the Allocation and Distribution Phases of this proceeding, and that such proceedings should precede and inform the Judges' consideration of methodology and allocation issues. Moreover, consolidation of cable and satellite proceedings, particularly when addressing the Eligibility Issues, would promote judicial economy and substantially decrease the cost of litigation for the parties. MPA expects Eligibility Issues to be substantially similar, if not identical, in cable and satellite. When methodology issues are ultimately addressed, MPA intends to present evidence in the Allocation Phase as a representative of the Program Suppliers category regarding the appropriate allocation of royalties among the Cable Claimant Categories adopted for this proceeding, and also in the Distribution Phase regarding the appropriate allocation of royalties within the Program Suppliers category. MPA intends to participate fully in all parts of the proceeding.

III. Proposal For Further Proceedings

As separately reported today in the 2014-17 satellite proceeding, Docket No. 16-CRB-0010-SD (2014-17), the satellite Allocation Phase Parties have reached a settlement in principle regarding all Allocation Phase issues associated with the 2014-17 satellite royalty funds. *See Joint Notice Of Partial Settlement* at 1, Docket No. 16-CRB-0010-SD (2014-17) (filed July 19, 2021). Once all 2014-17 satellite Allocation Phase issues are settled, MPA proposes that the Judges consolidate the Distribution Phase controversies remaining in the 2014-17 satellite proceeding, which are smaller in scope, with the 2014-17 cable proceeding in order to promote

efficiency and judicial economy.⁶ MPA proposes that the Judges follow that consolidation by establishing a procedural schedule for the Allocation and Distribution Phases of the consolidated proceeding that provides the parties with an opportunity to conduct preliminary discovery related to Eligibility Issues and an opportunity for related disputes to be addressed and resolved by the Judges before any proceedings related to Allocation or Distribution phase methodologies are presented.

CONCLUSION

MPA will continue its good faith efforts to reach a settlement with all participants regarding the 2014-17 Cable Funds. However, given the participation of parties that are clearly not entitled to a presumption of validity, MPA remains skeptical that a global cable settlement can be achieved in this proceeding until all Eligibility Issues are fully resolved by the Judges. MPA urges the Judges to adopt a procedural schedule that allows for a comprehensive resolution of all outstanding controversies related to the 2014-17 Cable Funds in as expedient a manner as possible under the statute and regulations.

⁶ Consolidation of outstanding cable and satellite Distribution Phase issues in the interest of judicial economy is consistent with precedent. *See Order Consolidating Proceedings And Reinstating Case Schedule* at 1-2, Docket No. 14-CRB-0010-CD/SD (2010-13) (December 22, 2017).

Respectfully submitted,

/s/ Gregory O. Olaniran

Gregory O. Olaniran

D.C. Bar No. 455784

Lucy Holmes Plovnick

D.C. Bar No. 488752

MITCHELL SILBERBERG & KNUPP LLP

1818 N Street, N.W., 8th Floor

Washington, D.C. 20036

Telephone: (202) 355-7917

Fax: (202) 355-7887

goo@msk.com

lhp@msk.com

Dated: July 19, 2021

CERTIFICATE OF SERVICE

I certify that on July 19, 2021, I caused a copy of the foregoing to be served on all parties registered to receive notice by eCRB by filing through the eCRB filing system.

/s/ Lucy Holmes Plovnick _____
Lucy Holmes Plovnick

Proof of Delivery

I hereby certify that on Monday, July 19, 2021, I provided a true and correct copy of the MPA Notice of Controversies to the following:

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

Devotional Claimants, represented by Matthew J MacLean, served via ESERVICE at matthew.maclean@pillsburylaw.com

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

National Public Radio, represented by Gregory A Lewis, served via ESERVICE at glewis@npr.org

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via ESERVICE at jennifer.criss@dbr.com

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

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via ESERVICE at ted@copyrighroyalties.com

Multigroup Claimants, represented by Brian D Boydston, served via ESERVICE at brianb@ix.netcom.com

Global Music Rights, LLC, represented by Scott A Zebrak, served via ESERVICE at scott@oandzlaw.com

Commercial Television Claimants / National Association of Broadcasters, represented by John Stewart, served via ESERVICE at jstewart@crowell.com

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

ASCAP, represented by Sam Mosenkis, served via ESERVICE at smosenkis@ascap.com

Signed: /s/ Lucy H Plovnick