

**Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

**In the Matter of**

**Proceedings Of The Copyright Royalty  
Board; Violation Of Standards Of  
Conduct**

**Docket No. 17-CRB-0013-RM**

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**COMMENTS OF THE ALLOCATION PHASE PARTIES**

The undersigned representatives of certain of the Allocation Phase (formerly “Phase I”) claimant categories to which Section 111 cable royalties have been allocated in prior cable royalty allocation proceedings (“Allocation Phase Parties”)<sup>1</sup> submit the following comments in response to the Notice of Proposed Rulemaking (“Notice”), 82 Fed. Reg. 18601 (April 20, 2017), concerning the adoption of a new regulation that would authorize the Copyright Royalty Judges (“Judges”) to bar, temporarily or permanently, certain individuals and entities from participating in proceedings before the Judges.

The Allocation Phase Parties agree with the Judges’ stated goal of preserving the integrity of Copyright Royalty Board (“CRB”) proceedings, and support the Judges’ effort to adopt a regulation clarifying the standards of conduct expected of individuals and entities appearing before the Judges. The Judges have broad authority under the Copyright Act to “make any necessary procedural and evidentiary rulings in any proceeding under this chapter,” 17 U.S.C. § 801(c), and the D.C. Circuit has interpreted this statutory language as encompassing

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<sup>1</sup> The Allocation Phase Parties joining these comments are Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Public Broadcasting Service, Settling Devotional Claimants, Canadian Claimants Group, and National Public Radio.

inherent authority to impose sanctions.<sup>2</sup> The Judges also have statutory authority to “issue regulations to carry out their functions under [the Copyright Act.]” 17 U.S.C. § 803(b)(6)(A). Thus, the Allocation Phase Parties agree with the Judges that the new regulation proposed in the Notice should be understood as a non-exclusive supplement to, rather than replacement for, the case-specific evidentiary rulings and other sanctions that the Judges have utilized to address objectionable behavior in past and ongoing proceedings. *See* Notice at 18602. Because the Judges have proposed the new regulation in the Notice as a tool to assist in preserving the integrity of Copyright Royalty Board proceedings, and stated that they intend it to provide “a mechanism that is less prone to evasion than the *ad hoc* approaches the Judges have employed in the past,” *see id.*, the Allocation Phase Parties respectfully request that the Judges make the new regulation, once adopted, effective immediately.

To assist the Judges, the Allocation Phase Parties offer the following comments on the proposed regulation in the Notice, and also address some of the questions raised by the Judges in the Notice. *See* Notice at 18603.

## **I. Comments On The Proposed Regulation**

### **A. Proposed Section 350.9(b):**

Proposed Section 350.9(b) should clarify how a suspension or debarment would come before the Judges. While the proposed regulation states that suspension or debarment would only occur “after notice and opportunity for hearing,” it is silent on whether the Judges would expect a party (or parties) to submit a motion to the Judges to initiate such a proceeding, or if the

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<sup>2</sup> *Indep. Producers Gp. v. Librarian of Congress*, 792 F.3d 132, 138-139 (D.C. Cir. 2015) (citing 17 U.S.C. §§ 801(c)). In addition, the Register of Copyrights has previously recognized the Judges’ inherent authority to dismiss a party from a royalty distribution proceeding as a sanction for procedural violations. *See* Order, Docket Nos. 2001-8 CARP CD 98-99, *et al.*, at 6 (June 26, 2006).

Judges would instigate such a proceeding *sua sponte* based on particular conduct, or both. The Allocation Phase Parties propose that the Judges clarify that a suspension or debarment action could be brought either via a motion from interested parties, or by the Judges *sua sponte*.

**B. Proposed Section 350.9(b)(1):**

Proposed Section 350.9(b)(1) states, in part, that the Judges may deny the privilege of participating in CRB proceedings to any “person who has been convicted of a felony or a misdemeanor involving moral turpitude.” The Allocation Phase Parties propose that the Judges clarify the regulation to also permit the Judges to suspend or debar any person who has been convicted of a crime the elements of which required proving, or required an admission regarding, a dishonest act or false statement. This language is consistent with Federal Rule of Evidence 609(a)(2), which governs impeachment by evidence of a criminal conviction. In addition, the Allocation Phase Parties propose that the Judges add the word “of” before the phrase “a misdemeanor” in order to eliminate ambiguity, and that the Judges add the words “agency or tribunal” to the first sentence of the regulation, to clarify that any attorney who has been suspended or disbarred by an agency or tribunal (such as the CRB) would also fall within the scope of the proposed regulation.

The Allocation Phase Parties therefore propose the following revised language for Proposed Section 350.9(b)(1) (with their proposed additional language shown in bold):

Any attorney who has been suspended or disbarred by a court of the United States, or of any State, **or by an agency or tribunal**; any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or **of a misdemeanor involving moral turpitude, or otherwise convicted of a crime the elements of which required proving, or required an admission regarding, a dishonest act or false statement.** A disbarment, suspension, revocation, or conviction within the meaning of this section shall be deemed to have occurred when the disbarring, suspending, revoking, or convicting agency or tribunal

enters its judgment or order, including a judgment or order on a plea of nolo contendere, regardless of whether the person has taken or could take an appeal of the judgment or order.

**C. Proposed Section 350.9(b)(3):**

Proposed Section 350.9(b)(3) includes language that appears similar to statutory provisions governing conduct of persons appearing before the U.S. Patent and Trademark Office (“PTO”). *See* 35 U.S.C. § 32 (permitting the suspension or exclusion of “any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with [PTO] regulations...”). The Allocation Phase Parties propose that the Judges clarify the language of the new regulation to include the phrase “guilty of gross misconduct” to cover a comparable scope of sanctionable activity. The Allocation Phase Parties therefore propose the following revised language for Proposed Section 350.9(b)(3) (with their proposed additional language shown in bold):

Any person, agent, or attorney shown to be incompetent or disreputable, or **guilty of gross misconduct**.

**D. Proposed Section 350.9(b)(5):**

Proposed Section 350.9(b)(5) states that “any person who has violated any Copyright Royalty Board rules or regulations” could be subject to suspension or debarment. This language appears to be overly broad, in that it would appear to invite suspension or debarment for any regulatory infraction, even if the infraction is minor and inadvertent, and even if it is an isolated procedural misstep rather than misconduct of a type that implicates the integrity of the proceedings. While a repeated pattern of disregard for procedural rules may warrant suspension or debarment, ordinarily a procedural misstep (*e.g.*, an isolated incident of late filing) is not the type of conduct that would warrant such action. On the other hand, even a single infraction may warrant suspension or debarment if it involved conduct that threatens the integrity of the

proceedings (*e.g.*, knowingly subscribing to a material false statement). Therefore, the Allocation Phase Parties propose that the regulation be revised to impose suspension or debarment only when the Judges determine that a regulatory violation involves misconduct that implicates the integrity of the proceedings, or when repeated violations of the rules by a particular person, attorney, or party representative demonstrate a pattern of persistent failure to abide by the Judges' rules. The Allocation Phase Parties therefore propose the following revised language for Proposed Section 350.9(b)(5) (with their proposed additional language shown in bold):

Any person who has ~~violated any~~ **demonstrated a pattern of persistent failure to abide by** Copyright Royalty Board rules or regulations, **or who has committed a violation of Copyright Royalty Board rules or regulations that threatens the integrity of the proceedings.**

**E. Proposed Section 350.9(c):**

Proposed Section 350.9(c) states that a person denied the ability to participate in proceedings before the Judges “may apply for reinstatement at any time.” The Allocation Phase Parties propose that the Judges consider modifying the text of the proposed regulation to require a “cooling off” period of no less than twelve months before a debarred person or entity may apply for reinstatement. The cooling off period should start running on the date that a debarment order is issued by the Judges. In the event a debarred individual files a motion seeking reconsideration of a debarment order, the cooling off period should start running on the date that the Judges issue an order ruling on the motion for reconsideration.

**II. Comments On Questions Raised In The Notice**

**A. Term Of Suspension Or Debarment**

The Judges have requested comments regarding what criteria the Judges should apply in deciding whether a denial of participation should be temporary or permanent. *See* Notice at

18603. The Allocation Phase Parties recommend that the Judges make determinations on whether a suspension or debarment is temporary or permanent on a case-by-case basis, based on the severity of the conduct at issue and the degree to which it has become a pattern, or is a continuing issue. The Judges should also consider the type and pendency of any ongoing proceedings implicated by the suspension or debarment order. To clarify that the Judges will weigh such considerations when determining whether and to what extent suspension or debarment should be imposed, the Allocation Phase Parties propose the following revised language for Section 350.9(b) (with their proposed additional language shown in bold):

After notice and opportunity for hearing, the Copyright Royalty Judges may, **as appropriate and based on all of the relevant facts and circumstances**, deny, temporarily or permanently, the privilege of participating as a representative, agent, attorney, or witness in a proceeding before the Copyright Royalty Board....

**B. Treatment Of Claimants Where A Party Representative Is Suspended Or Debarred**

The Judges have requested comments on how the claims (and claimants) associated with a particular claims representative should be handled in the event that a claims representative is barred from participation in proceedings before the Judges. *See* Notice at 18603. If the Judges suspend or debar a claims representative or agent, Allocation Phase Parties recommend that the Judges issue a Federal Register notice announcing their decision and providing any claimant represented by the suspended or debarred claims representative an opportunity to file a notice with the Judges indicating that they will represent themselves, or informing the Judges that they have designated a new agent as their claims representative. The Federal Register notice should provide a deadline for submitting such a notice to the Judges and indicate that any claimant who does not file a notice by the deadline will forfeit their entitlement to royalties for any affected proceedings. The Judges should require the claims representative to submit a current list

providing the names and contact information of *all* of its claimants to the Judges at the commencement of the disciplinary proceeding. In addition to publishing the Federal Register notice, the Judges should mail a copy of the Federal Register notice to the represented claimants. In the alternative, the Judges may order the suspended or debarred representative to mail a copy of the Federal Register notice to each of its represented claimants within a specified time after publication. Noncompliance with this order would be a material negative consideration in any subsequent reinstatement proceeding. After the deadline set forth in the Federal Register notice, any claimants who did not file the required notice with the Judges would be dismissed.

The procedure described above is consistent with the Judges' rulings in cable and satellite distribution proceedings that royalty claims belong to copyright owners, and that only a duly authorized agent or representative may participate in a CRB Distribution Phase proceeding on behalf of a copyright owner. *See, e.g., Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (Consolidated) at 6-7 (March 13, 2015); *Memorandum Opinion And Order Following Preliminary Hearing On Validity Of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 7-8 (March 21, 2013). The Judges should not re-assign claims to other party representatives *sua sponte*, because they would be doing so without consent or authorization of the copyright owner and the party representative who would receive the re-assigned claims. In addition, the Judges should not permit a suspended or debarred claims representative to submit notices or other filings on behalf of any copyright owners, either in its own name or through any other agent or alias.

### **C. Other Questions Raised In The Notice.**

As to all other questions for which the Judges sought comment in the Notice, the Allocation Phase Parties believe such matters would be best left to the Judges' discretion and

determined on a case-by-case basis, taking into consideration all relevant facts and circumstances.

### III. Conclusion

The Allocation Phase Parties welcome this opportunity to provide comments to the Judges in response to the Notice. For the reasons set forth above, the Allocation Phase Parties respectfully request that the Judges adopt the clarifications and technical amendments suggested above.

Respectfully submitted,

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