

Before the  
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Copyright Royalty Board

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In the Matter of ) )  
Distribution of the 2010-2012 ) Docket No. 14-CRB-0007-CD (2010-12)  
Cable Royalty Funds ) )  
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In the Matter of ) )  
Distribution of the 2010-2012 ) Docket No. 14-CRB-0008-SD (2010-12)  
Satellite Royalty Funds ) )  
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**OPPOSITION**  
**OF THE NATIONAL ASSOCIATION OF BROADCASTERS**  
**TO MPAA'S MOTION TO CONSOLIDATE**  
**CABLE AND SATELLITE ROYALTY DISTRIBUTION PROCEEDINGS**

The National Association of Broadcasters (“NAB”), as the representative of the Phase I Commercial Television Category in the Cable Royalty Distribution Proceedings, hereby opposes the Motion to Consolidate Proceedings filed by the Motion Picture Association of America (“MPAA”) on February 19, 2015 (“Motion”).

NAB strongly supports efforts to make the cable royalty distributions more timely and efficient. As representative of the claimant category historically receiving the third-largest Phase I royalty share, NAB has a substantial interest in collecting and redistributing royalties to its many hundreds of broadcast station claimants as promptly and efficiently as possible. For the

reasons outlined below, however, NAB believes that consolidating the 2010-2012 satellite royalty distribution proceeding with the 2010-2012 cable royalty distribution proceeding would hamper this objective rather than promoting it.

MPAA argues that consolidating the two types of cases into one proceeding would be more efficient, Motion at 3-4, and that it would reduce the delay in final distribution of the subject royalty funds, Motion at 6-7. It further argues that the consolidation of the satellite and cable Phase II proceedings for the Program Suppliers and Devotional categories for 1999-2009 demonstrates that consolidating the satellite and cable Phase I proceedings for 2010-2012 would promote efficiency. Motion at 3-5.

MPAA's Motion presents a false dichotomy, between having two simultaneous Phase I distribution proceedings, on the one hand, or a single consolidated proceeding covering both, on the other. The far more likely scenario, driven by the powerful incentives of the Phase I parties themselves to promote efficiency and expedite the distribution of royalties to their claimants, and borne out by 25 years of consistent experience, is a single cable distribution proceeding followed by a negotiated settlement of the satellite distribution. Consolidating the 2010-2012 Phase I cable and satellite proceedings would, rather than promoting efficiency, instead impose on the parties and the Judges the huge costs of litigating an additional and heretofore unnecessary satellite proceeding, and guarantee a radically less efficient and more judicial-resource-intensive distribution proceeding. And contrary to MPAA's assertions, the Judges' entirely sensible decision to consolidate the limited Phase II cable and satellite controversies for 1999-2009 does not support Phase I consolidation at all.

## BACKGROUND

After fully litigating each of the first three cable distribution proceedings (1978, 1979, and 1980), the Phase I category representatives began to find ways to reduce the cost and delay of the proceedings, principally by settling multiple royalty years among themselves and thus receiving final distributions for those years more promptly and at a lower cost. Even in years for which litigation was necessary, the parties sought and received early partial distributions of substantial portions of the royalty fund at issue to mitigate the delay in final resolution of the cases. And they began to litigate cases covering several years at a time (1990-1992, 1998-1999, 2000-2003, 2004-2005), as well as entering partial settlements and other arrangements that reduced the issues to be resolved in various cases.

Most significantly, after the Satellite compulsory license was enacted, the representatives of Phase I categories involved in those proceedings entered settlements among themselves to avoid litigation altogether. As MPAA points out, Motion at 6, they did so as a matter of course, and every single Phase I satellite royalty proceeding in the 25-year history of the license has been resolved without litigation. The process has operated both efficiently and expeditiously. For example, after the 2004-2005 Phase I Cable Final Determination was published in the Federal Register in September 2010,<sup>1</sup> the Satellite parties announced a Phase I settlement of all years from 2004 through 2009 in November 2011.<sup>2</sup> The cable proceeding took about two years of intensive litigation to resolve two years of royalty allocations, and the satellite proceeding then took about a year of negotiations to resolve six years of royalty allocations.

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<sup>1</sup> 75 Fed. Reg. 57063 (Sept. 17, 2010).

<sup>2</sup> Phase I Parties' Notice of Phase I Settlement and Motion for Further Distribution, Docket Nos 2010-2 CRB SD 2004-2007, 2010-7 CRB SD 2008, 2011-8 CRB SD 2009, filed Nov. 4, 2011.

## ARGUMENT

The Judges have discretion to order the cable distribution proceedings in ways that further efficiency and conservation of judicial resources, and NAB supports such measures. MPAA's Motion, however, is misleading and incomplete in its argument in favor of consolidation here.

### **1. The Example of the 1999-2009 Phase II Case is Inapposite**

MPAA cites the Judges' Order of Consolidation and Amended Case Schedule, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), August 29, 2014 ("August 29 Order") as the only precedent for its Motion. But however appropriate the Judges' decision was in those 1999-2009 Phase II cases -- in which the Judges are being called upon to resolve an absolutely unprecedented multi-year backlog brought on by the equally unprecedented circumstances of ancillary state court litigation and claims involving the Independent Producers Group ("IPG") -- it does not support consolidation here.

The August 29 Order found that "The participants in the proceedings are the same. The issues for determination are the same." August 29 Order at 1. The Phase II disputes in both the cable and satellite cases involved only the same three participants: IPG, the Settling Devotional Claimants, and MPAA-represented Program Suppliers. That the issues were the same was evident, for example, from the fact that MPAA had submitted two separate thousand-page-plus direct case filings, with the same four witnesses offering essentially identical testimony in each, except for minor changes to mention satellite rather than cable. *Compare, e.g.*, Written Direct Statement of MPAA-Represented Program Suppliers in Docket No. 2012-6 CRB CD 2004-2009 (Phase II), filed May 9, 2014 ("Cable Written Direct Statement"), *with* Written Direct Statement

of MPAA-Represented Program Suppliers in Docket No. 2012-7 CRB SD 1999-2009 (Phase II), filed May 9, 2014 (“Satellite Written Direct Statement”).

In addition, as MPAA asserted in each of its cloned direct cases, it would be urging the Judges to adopt a methodological approach to the royalty allocations that features a viewing study, based in part on the premise that “programs within the Program Suppliers category are generally homogeneous.” Cable Written Direct Statement at 4; Satellite Written Direct Statement at 5. The two other parties to the Phase II proceedings are also expected to present approaches that refer to viewing measures.

In the Phase I proceedings, the same conditions do not exist. The programs represented by the various Phase I categories are not homogeneous, and the Phase I parties have historically presented and advocated for competing methodological approaches, the resolution of which has been a principal focus of the Judges’ and their predecessors’ determinations.<sup>3</sup> We already know that the Phase I parties making claims to satellite royalties are not identical to those who will participate in the cable proceedings,<sup>4</sup> thus failing to satisfy one of the premises of the Judges’ August 29 Order. But whether the issues for determination in the cable and satellite matters will be the same is unknowable at this point, given that there has never been a litigated Phase I satellite distribution proceeding. There are, however, differences between the satellite and cable license structures and marketplaces<sup>5</sup> that might well lead Phase I parties to propose different

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<sup>3</sup> See, e.g., Distribution of the 2004 and 2005 Cable Royalty Funds, 75 Fed. Reg. 57063, 57065-57070.

<sup>4</sup> See Motion at 4 n.2.

<sup>5</sup> For example, the cable and satellite compulsory licenses differ in terms of royalty fee structure (*compare* 17 USC §111(d)(1), *with id.* §119(b)(1)) and owners eligible to receive royalty distributions (*compare* 17 USC §111(d)(3), *with id.* §119(b)(4)).

approaches for the satellite Phase I allocations, even for parties that participate in both proceedings.

In the analogous context of Federal Rule of Civil Procedure 42(a), under which consolidation or other streamlining measures may be ordered by the court when separate actions “involve a common question of law or fact,” it has been held that

The burden is on the party seeking aggregation to show common issues of law or fact; the burden is not on the party opposing aggregation to show divergences. . . . A party may not use aggregation as a method of increasing the costs of its adversaries—whether plaintiffs or defendants—by forcing them to participate in discovery or other proceedings that are irrelevant to their case.

*In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993). In its Motion, MPAA makes no attempt to demonstrate that the issues of law or fact would be the same in the cable and satellite Phase I proceedings. Instead, it simply points to the Judges’ August 29 Order, which appropriately consolidated cable and satellite Phase II matters that involve two groups of homogeneous programs and only three parties, all of whom propose related methodological approaches. *See* Motion at 3-5. The Phase I cable and satellite proceedings, by contrast, involve different parties and potentially different issues of law and fact.

Again, NAB fully supports measures that will fairly reduce the costs and judicial resources expended in resolving the Phase I cable royalty proceedings. But ordering the consolidation of the 2010-2012 cable and satellite cases will certainly (1) as a practical matter, force the full litigation of a Phase I satellite proceeding, which the parties have found unnecessary for all 25 years of the existence of the satellite license, and (2) radically increase the cost and complexity of the Phase I cable proceeding itself.

## **2. MPAA’s “Delay” Argument is a Red Herring.**

MPAA asserts that consolidation would be “sound policy” because it would purportedly expedite the distribution of royalties to claimants. Motion at 6-7. It cites the 2000-2003 cable

royalty proceedings as an example of a 15-year distribution delay. *Id.* But MPAA's featured example focuses on the tail rather than the dog, because it describes the fact that the final distributions of 2000-2003 royalties have not yet occurred. *Id.* As MPAA knows, substantial distributions of the 2000-2003 royalty funds occurred over many years, beginning in 2002. The parties received the usual 50% initial partial distributions within roughly two years after each particular royalty year. The parties then received most of the rest of their Phase I royalties (bringing the total distribution up to about 94%), in 2007 and 2008,<sup>6</sup> prior even to filing their petitions to participate in the Phase I case. And all parties who had no unresolved Phase II disputes then received the final portion of their 2000-2003 royalties in early 2011,<sup>7</sup> less than a year after final resolution of the Phase I case.<sup>8</sup> Although, as MPAA emphasizes, Program Suppliers and Devotional Claimants have yet to receive the final increment of their 2000-2003 cable royalties because their Phase II proceedings are not yet final, what remains undistributed after 15 years is a relatively small percentage of the royalties, and is limited to the two categories with unresolved disputes.

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<sup>6</sup> See Order, Docket Nos 2002-8 CARP CD 2000, 2003-2 CARP CD 2001, and 2004-5 CARP CD 2002 (Apr. 10, 2007); Order Granting Partial Distribution of 2003 Cable Royalty Fund, Docket No. 2005-4 CRB CD 2003 (Jan. 23, 2008).

<sup>7</sup> See Order Granting Phase I Claimants' Motion for Further Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-2003 (Feb. 3, 2011).

<sup>8</sup> While the IPG-induced Phase II logjam is unprecedented in the history of the compulsory licenses, the Judges' schedule for resolving the 2010-2012 Phase I cable proceeding is not outside the range of prior Phase I cases. For example, the 2000-2003 Phase I case was not resolved until ten years after the first covered royalty year, *see* 75 Fed. Reg. 26798 (May 12, 2010), while the 1998-1999 and 2004-2005 cases were resolved within about six years after the first covered royalty year. *See* 69 Fed. Reg. 3606 (Jan. 26, 2004); 75 Fed. Reg. 57063 (Sept. 17, 2010). The 2010-2012 case is on track to be within the same general range. NAB and the Phase I parties, of course, support efforts towards earlier resolution of Phase I proceedings, but NAB believes that the Judges' disposition of the pending Phase II matters should improve future Phase I distribution schedules. Consolidating the Phase I satellite and cable cases would not.

NAB, of course, strongly supports efforts to distribute more of the cable royalty funds earlier in the process. But the 2000-2003 example of undue delay cited by MPAA is anomalous, and even there the Phase I parties received about 94% of their royalties within about four years after the latest royalties were collected. The delay in distribution of royalties can and should be addressed directly, as it has been for decades, through the parties' requesting partial distributions as appropriate. But consolidating the 2010-2012 Phase I cable and satellite proceedings would in no way improve the timeliness of the distribution of those royalties to eligible claimants.

### CONCLUSION

For the reasons stated above, NAB respectfully requests that the Judges deny MPAA's Motion requesting consolidation of the 2010-2012 Phase I cable and satellite royalty distribution proceedings.

Respectfully submitted,

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Dated: February 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2015, a copy of the foregoing corrected version of the February 26, 2015, Opposition to MPAA's Motion to Consolidate Proceedings was sent by Federal Express overnight mail to the individuals listed below:

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