

COPYRIGHT ROYALTY JUDGES
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<i>In re</i> DISTRIBUTION OF CABLE ROYALTY FUNDS	DOCKET NO. 14-CRB-0007 CD (2010-12)
<i>In re</i> DISTRIBUTION OF SATELLITE ROYALTY FUNDS	DOCKET NO. 14-CRB-0008 SD (2010-12)

ORDER DENYING MPAA’S MOTION TO CONSOLIDATE PROCEEDINGS

On February 19, 2015, the Motion Picture Association of America, Inc. (MPAA), filed a Motion to Consolidate Proceedings (Motion), requesting that the Copyright Royalty Judges (Judges) administratively consolidate the above-captioned cable and satellite distribution proceedings. MPAA is a trade organization that represents its member companies and other producers and distributors claiming royalties for network and syndicated series, movies, specials, and non-team sports. In past retransmission proceedings, the MPAA claims have been consolidated within a category referred to as the “Program Suppliers.”¹ MPAA is claiming royalties *in both of the above-captioned proceedings*.

On February 26, 2015, the Judges received Oppositions from six participants in one or both of the above captioned proceedings:

- (1) the “Broadcast Claimants Group” (comprised of an “ad hoc” group of commercial television broadcast station owners), claiming royalties only in the above-captioned *satellite* proceeding;

¹ The definition of the “Program Suppliers” category in previous proceedings has been: “Syndicated series, specials and movies, other than Devotional Claimants programs as defined below. 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 video shows, cartoon shows, ‘PM Magazine,’ and locally hosted movie shows.” *See, e.g., Memorandum Opinion and Ruling on Validity and Categorization of Claims* at 41, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (March 13, 2015).

- (2) the “Cable-Only Claimants” (comprised of the Public Broadcasting Service, the Canadian Claimants and National Public Radio), claiming royalties only in the above-captioned *cable* proceeding);
- (3) the “Devotional Claimants,” claiming royalties in *both* of the above-captioned proceedings for religiously-themed programs that have been categorized in other retransmission royalty distribution proceedings as “[s]yndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions”;
- (4) the “Joint Sports Claimants” (comprised of the Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, the National Hockey League, the Women’s National Basketball Association and the National Collegiate Athletic Association), claiming royalties in *both* of the above-captioned proceedings for the retransmission of their respective team sports programs;
- (5) the “Music Claimants” (comprised of three collection societies, Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, and SESAC, Inc.), claiming royalties in *both* of the above-captioned proceedings; and
- (6) the National Association of Broadcasters (NAB), a trade association of broadcasters claiming royalties for commercial television programs, on behalf of its members, only in the above-captioned *cable* proceeding.

On March 6, 2015, MPAA filed a Reply.

For the reasons set forth below, the Judges **DENY** the Motion **WITHOUT PREJUDICE** .

Historically, the Judges and their predecessors have conducted the cable and satellite retransmission royalty distribution proceedings separately. More recently, though, the Judges have exercised their discretionary authority by ordering, *sua sponte*, the administrative consolidation of partially overlapping Phase II cable and satellite proceedings under sections 111 and 119 of the Copyright Act. *See Order of Consolidation and Amended Case Schedule*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 1 (August 29, 2014).

In the Motion, MPAA urges that consolidation of the cable and satellite proceedings captioned above would be “judicially efficient.” Motion at 1. Additionally, MPAA asserts that consolidation would avoid “the practice of holding resolution of satellite disputes in abeyance [that] has ... left millions in undistributed royalties languishing in Copyright Office investments, for years on end.” *Id.* at 7. MPAA is apparently seeking consolidation of the above-captioned proceedings *at both the Phase I and the Phase II* stages of the proceedings.²

² Neither Phase I nor Phase II of a distribution proceeding is mandated by statute or regulation. However, the regulations refer parenthetically to a Phase I proceeding as “the initial part of a distribution proceeding where royalties are divided among the categories or groups of copyright owners,” and to a Phase II proceeding “where the money allotted to each category is subdivided among the various copyright owners within that category.” 37 CFR § 351.1(b)(2)(i)(B) and (ii)(C).

In its Opposition, the NAB urges the Judges to distinguish between consolidation of cable and satellite Phase I proceedings, on the one hand, and consolidation of Phase II cable and satellite proceedings, on the other hand. NAB Opposition at 2. According to the NAB, the consolidation of Phase II proceedings can be “entirely sensible,” whereas any such consolidation of Phase I proceedings would inject inefficiencies into the process. Specifically, the NAB asserts that a more efficient procedure for the Phase I proceedings would be a continuation of the historical process, “a single cable distribution proceeding followed by a negotiated settlement of the satellite distribution.” *Id.* at 2. As the NAB points out, its recommended process is “driven by the powerful incentives of the Phase I parties ... to promote efficiency and expedite the distribution of royalties to their claimants, and borne out by 25 years of consistent experience.” *Id.* More specifically, the NAB notes that “every single Phase I satellite royalty proceeding in the 25-year history of the license has been resolved without litigation.” *Id.* at 3.

The Devotional Claimants make essentially the same argument, noting “that the Phase I satellite parties have a very long record of successfully resolving satellite claims without need for a separate hearing.” Devotional Claimants Opposition at 1-2.

Similarly, the Broadcast Claimants Group (BCG) notes that “every Phase I royalty distribution proceeding since the initiation of the satellite compulsory license ... has settled ... through 2009.” BCG Opposition at 2. Accordingly, BCG argues that MPAA’s proposed consolidation “would force the parties to prepare for and engage in full-fledged litigation of the 2010-2012 Phase I satellite proceeding, which would impose huge but unnecessary costs on the Phase I parties and on the Judges.” *Id.*

The Cable-Only Claimants—as their name foreshadows—object to a Phase I consolidation of their “cable only” claims with the satellite claims of other claimants and participants. Cable-Only Claimants Opposition at 1. Additionally, the Cable-Only Claimants distinguish the Judges’ consolidation in the August 29, 2014 Order because the Judges had relied in that Phase II proceeding on the fact that “the participants are the same” in both the cable and satellite proceedings. *Id.*

The Joint Sports Claimants (JSC) assert that consolidation at Phase I would be inefficient given the parties’ present negotiating positions and the history of Phase I satellite disputes settling after the resolution of Phase I cable disputes. Specifically, the JSC assert:

Based upon the negotiations to date, there is no reasonable likelihood of resolving Phase I cable controversies However, it is equally clear that every Phase I satellite claimant (with the possible exception of MPAA) believes it can resolve the Phase I controversies concerning the 2010-2012 satellite royalty funds once the Judges issue a final determination concerning the 2010-2012 cable royalty funds.”

JSC Opposition at 2.³

Additionally, the JSC take issue with MPAA’s assertion that consolidation is necessary to expedite the distribution of backlogged royalties now invested in (low risk) securities with a low rate of return. The JSC assert that they are the participants with a significant share of backlogged

³ Indeed, no other opposing party contradicts this assertion.

royalties, owed for the retransmission of “the crown jewels of televised sports events,” yet they do not believe that the “unnecessary litigation” arising from joinder at Phase I would be an appropriate cost to incur to obtain the benefit of expedited royalty payments. *Id.* at 5-6.

Finally, the Music Claimants, while echoing the positions of the other participants’ Oppositions, also note that sequential (as opposed to consolidated) cable and satellite proceedings, have led to “significant cost reductions in connection with subsequent satellite royalty proceedings ... an efficiency enjoyed ... by all Phase I claimants.” Music Claimants Opposition at 2. More particularly, the Music Claimants note that sequential proceedings (that have led to the settlement of the satellite proceedings) have saved the Music Claimants alone “millions of dollar in attorneys’ fees.” *Id.* at 2-3.

In its Reply, MPAA noted, *inter alia*, that the Phase I proceedings in the above-captioned proceedings would be more similar to a Phase II proceeding in an important way: MPAA made this argument based on the fact that one participant that has asserted only Phase II controversies in the past, Worldwide Subsidy Group LLC d/b/a Independent Producers Group (IPG), has submitted petitions to participate in the 2010-2012 cable and satellite proceedings. Thus, MPAA argues that consolidation at the Phase I level is necessary to avoid re-litigation of the same or similar issues likely to be raised by IPG in both Phase I proceedings. MPAA Reply at 2-3.

Discussion.

The Judges agree with MPAA that procedural steps designed to expedite the distribution of retransmission royalties to copyright owners and other lawful claimants is a salutary purpose. However, like all benefits, the expediting of distributions in the manner proposed by MPAA would come at a cost. That cost, as the opposing parties all note, would be in the form of additional Phase I litigation of satellite proceedings when history strongly suggests that such proceedings would be settled if held in abeyance until the companion Phase I cable proceedings were concluded. Moreover, since some parties have no interest in both proceedings, they would incur substantial and unnecessary litigation costs by being compelled to participate in joined Phase I proceedings. The Judges recognize that these Phase I proceedings *might* be somewhat different because of the involvement of a new participant (IPG) in Phase I. However, that fact does not necessarily mean that any party, including IPG, would find it beneficial to litigate Phase I issues in a satellite proceeding when those same issues had been resolved in the companion Phase I cable proceeding.

Because the Judges are mindful of MPAA’s well-taken position that the procedures utilized under sections 111 and 119 of the Act should be designed to expedite the distribution of royalties, the Judges have decided, as noted *supra*, to deny the Motion without prejudice. If subsequent events suggest that a consolidation has become, on balance, an appropriate procedural tool, the Judges would entertain a renewed motion to consolidate filed by any party. Unless and until the Judges makes such determination, however, the parties should file papers with a single docket number.

Additionally, the Judges note that the Phase I and Phase II proceedings have evolved as a matter of convention and have not been enshrined by statute or explicit rule. Thus, there is no statutory or regulatory reason why the Judges could not consider proposals by the parties to alter the sequencing of these proceedings in some other manner in order to expedite the distribution of royalties at a reasonable cost. Accordingly, the Judges invite the parties to consider alternative sequences of the proceedings now known as Phase I and Phase II respectively, particularly when,

as here, companion cable and satellite years are at issue. If any such alternative sequences seem worthwhile, a party may petition for a change in the procedure.

SO ORDERED.



Suzanne M. Barnett
Chief Copyright Royalty Judge

Dated: March 19, 2015