Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of **Distribution of the 2010, 2011, and 2012 Cable Royalty Funds**	)	**Docket No. 14-CRB-007-CD (2010-12)**
In the Matter of **Distribution of the 2010, 2011, and 2012 Satellite Royalty Funds**	)	**Docket No. 14-CRB-008-SD (2010-12)**

MPAA REPLY IN SUPPORT OF MOTION TO CONSOLIDATE PROCEEDINGS

The Motion Picture Association of America, Inc. ("MPAA"), its member companies and other producers and distributors of network and syndicated series, movies, specials, and non-team sports broadcast by television stations and retransmitted by cable and satellite systems who have agreed to representation by MPAA ("MPAA-represented Program Suppliers"), hereby submit the instant Reply in support of the Motion to Consolidate Proceedings it filed on February 19, 2015 ("Motion").

INTRODUCTION

In the Motion, MPAA urges the Judges to administratively consolidate the captioned proceedings principally because such consolidation promotes judicial efficiency and would ease

the backlog of undistributed royalties.[1] Opponents of the Motion ("Opponents")[2] profess to support these important principles. Yet, they continue to advocate the *status quo* practice of deferring resolution of satellite Phase I and Phase II disputes for years while the cable proceedings for those years are litigated. *See e.g.*, JSC Opposition at 1-2, 7; NAB Opposition at 2, Devotional Claimants Opposition at 2; Cable-Only Claimants Opposition at 3. This deferment has disadvantaged satellite-only claimants and has, in significant part, been responsible for the backlog of undistributed royalties.

Unlike Opponents' approach, MPAA's approach accords paramount importance to the interests of copyright owners. As explained in this Reply, MPAA's approach is consistent with the Copyright Act, the Judges' regulations, and precedent. It is also the best approach to address the backlog issue, allowing the Judges to move all of the royalties on deposit to a prompt and full resolution. By contrast, Opponents' abeyance approach is inconsistent with the statute and regulations, and has for many years significantly prejudiced satellite-only claimants and parties, like MPAA, who have Phase II controversies.

Opponents gloss over the fact that the instant proceedings are far more similar to the ongoing consolidated Phase II Proceedings than prior Phase I Proceedings, in that Worldwide Subsidy Group LLC d/b/a Independent Producers Group ("IPG") has submitted multiple Phase I

[1] MPAA seeks an order similar to the Judges' Order Of Consolidation And Amended Case Schedule, issued in Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 1 (August 29, 2014) ("August 29 Order"), in which the Judges decided to "consolidate administratively" the pending cable and satellite Phase II proceedings "for all purposes."

[2] Opponents are the Joint Sports Claimants ("JSC"), National Association of Broadcasters ("NAB"), Broadcaster Claimants Group ("BCG"), Music Claimants, Devotional Claimants, and the Cable-Only Claimants (which are comprised of Public Broadcasting Service ("PBS"), the Canadian Claimants Group ("CCG"), and National Public Radio ("NPR"). The remaining entities who filed petitions to participate in these proceedings did not file Oppositions.

Petitions to Participate in both proceedings, albeit under the guise of aliases.[3] IPG's presence in these proceedings, if permitted by the Judges,[4] presents significant challenges to the possibility of a global Phase I settlement—making these proceedings unlike any Phase I proceedings previously addressed. Under these circumstances, consolidation is even more desirable, as determinations made in a cable Phase I proceeding regarding issues related to IPG would not need to be re-litigated in a subsequent satellite proceeding.

Some Opponents, such as JSC and NAB, argue that the Judges could adequately address MPAA's concerns regarding the enormous backlog of royalties on deposit with the Copyright Office through additional partial distributions of royalties under Section 801(b)(3)(C). JSC Opposition at 4-5, NAB Opposition at 6-8. That argument rings hollow for many reasons, including (1) partial distributions of royalties under any circumstances are not a substitute for complete resolution of royalty disputes; (2) even with additional partial distributions of royalties under Section 801(b)(3)(C), the amount of undistributed royalties will remain significant; and (3) the distributed royalties remain subject to a refund obligation that continues until all Phase II disputes are finally resolved, and all appeals are exhausted. Thus, parties like MPAA and others, who historically have faced (and expect to face) Phase II disputes that will likely need to be litigated through appeal, will continue to be prejudiced. Although MPAA supports additional

[3] *See* Multigroup Claimants Petition To Participate In Distribution Proceedings, Docket No. 14-CRB-007-CD (2010-2012) at Exhibit A (dated January 20, 2015); Multigroup Claimants Petition To Participate In Distribution Proceedings, Docket No. 14-CRB-008-SD (2010-2012) at Exhibit A (dated January 20, 2015); Spanish Language Producers Petition To Participate In Distribution Proceedings, Docket No. 14-CRB-007-CD (2010-2012) at Exhibit A (dated January 20, 2015); Spanish Language Producers Petition To Participate In Distribution Proceedings, Docket No. 14-CRB-008-SD (2010-2012) at Exhibit A (dated January 20, 2015).

[4] MPAA notes that the Judges have already determined that IPG is not a Phase I Participant, and have previously rejected IPG's attempts to have the Judges recognize a "Spanish Language" Phase I program category. *See* Order On Motions For Distribution, Docket Nos. 2007-3 CRB CD 2004-2005 *et al.*, at 4 (February 17, 2012) ("IPG is not a representative of a Phase I program category."); Order Granting Partial Distribution Of The 2003 Cable Royalty Fund, Docket No. 2005-4 CRB CD 2003 at 3 (January 23, 2008) ("IPG, the only commenter that supported creation of an additional Phase I program category—that for Spanish language programming—fails to make a persuasive argument why such programming is not fairly represented by the current claimant categories.").

partial distributions of royalties under 801(b)(3)(C), it is very clear that such additional partial distributions will do little to eradicate the significant delay in resolving cable and satellite royalty distribution proceedings identified by MPAA, or to remedy the concerns raised by the Judges regarding the litigation of Phase II disputes using decades-old evidence many years after the fact. *See* Motion at 7-8 (quoting Chief Judge Barnett).

Simply put, Opponents have not made a cogent argument against consolidation. Accordingly, the Judges should grant MPAA's Motion, and administratively consolidate the instant proceedings.

ARGUMENT

I. The Judges Have The Authority and The Discretion To Consolidate The Captioned Proceedings.

Opponents do not question the Judges' broad authority to administratively consolidate the 2010-12 cable and 2010-12 satellite Phase I Proceedings (collectively, "2010-12 Proceedings"). *See* MPAA Motion at 3-5; *see also* 17 U.S.C. § 801(c) ("The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter[.]"); August 29 Order at 1. Opponents instead urge the Judges to evaluate the Motion under Federal Rule of Civil Procedure 42(a), which authorizes a federal district court to consolidate actions involving common issues of law or fact, arguing that MPAA has not "met its burden" under that rule. *See, e.g.*, NAB Opposition at 6; JSC Opposition at 6-7; Cable-Only Claimants Opposition at 2-3. Initially, the Judges have not previously relied on Rule 42 in deciding whether to consolidate distribution proceedings, and nothing in the Copyright Act or the Judges' regulations requires them to do so.[5] However, even if Rule 42 were applicable here, MPAA should prevail

[5] *See* August 29 Order at 1 (ordering consolidation "in the interest of efficiency of case management (as well as environmental preservation)" where the cases involved similar participants, issues, and case schedules); Order On Motion To Consolidate Proceedings, Docket Nos. 2008-2 CRB CD 2000-2003 and 2007-3 CRB CD 2004-2005 at 1

on the Motion. *First*, MPAA has clearly met its burden under that rule. *See* Fed R. Civ. P. 42(a) ("If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay."). As MPAA's Motion explains, Motion at 3-5, common issues of law and fact are present in the 2010-2012 Proceedings that support consolidation under a Rule 42(a) standard, should the Judges decide to employ that standard here.

Second, Rule 42 affords the Judges broad discretion to order consolidation. *See Prudential Ins. Co. v. Saxe*, 134 F.2d 16, 34 (D.C. Cir. 1943) ("Rule 42 confers on the District Court broad discretionary powers for consolidation of actions."); *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 286 (D.D.C. 2011) ("Consolidation pursuant to Rule 42(a) is permissive and vests a purely discretionary power in the district court."); *Am. Postal Workers Union v. United States Postal Serv.*, 422 F. Supp. 2d 240, 245 (D.D.C. 2006) ("The decision whether to consolidate cases under Rule 42(a) is within the broad discretion of the trial court."). Clearly, the Judges have broad discretion to consolidate the instant proceedings, and should do so here.

II. Administrative Consolidation Supports The Legislative Goal of Timely Resolution of Royalty Disputes.

Consolidating these cases makes sense because it is a more expeditious path to satisfying the tight statutory timelines Congress envisioned for these proceedings. *See* 17 U.S.C. § 803. Holding resolution of satellite royalty disputes in abeyance, while consistent with the approach taken under the Copyright Arbitration Royalty Panel ("CARP") system, ignores the substantial

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(October 31, 2008) (denying the Canadian Claimants Group's motion to consolidate because, in that case, it (1) would not result in judicial economy, and (2) would delay the issuance of a Final Determination regarding 2000-2003 cable royalties).

change in the statutory standards governing cable and satellite distribution proceedings that occurred with the enactment of the Copyright Royalty Distribution Reform Act of 2004 ("CRDRA"). Section 803(b)(3) of the Copyright Act, which was enacted as a part of the CRDRA, requires the Judges to "promptly" provide the parties with a list of participants and instigate the voluntary negotiation period once petitions to participate have been collected. *See* 17 U.S.C. § 803(b)(3). The legislative history surrounding the CRDRA suggests that Congress did not intend for proceedings to languish in abeyance after the Judges solicit petitions to participate. As explained in the House Committee Report:

> (3) Voluntary Negotiation Period. This section requires that promptly after petitions to participate have been filed, the CRJs must make available to all participants in the proceeding a list of all other participants. ***Upon making available these names, the CRJs are to initiate a voluntary negotiation among the participants which is to last for three months.*** At the close of the voluntary negotiation proceedings, the CRJs are to determine whether and to what extent paragraphs (4) (small claims procedure in distribution proceedings) and (5) (paper proceedings in ratemaking proceedings).

H.R. Rep. 108-408 at 30 (January 30, 2004) (emphasis added). Opponents argue that 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." NAB Opposition at 2. But given the statutory provisions at issue, simultaneous distribution proceedings is exactly what must happen here if consolidation does not occur.[6] MPAA's

[6] MPAA notes that in every other cable and satellite royalty distribution proceeding to date, the Judges have commenced the voluntary negotiation period within one to six months of collecting petitions to participate. Moreover, in all but one instance, the voluntary negotiation period was commenced within two months of the deadline for established for collection of petitions to participate. *See* Order Accepting Petitions to Participate And Announcing Negotiation Period, Docket No. 2008-1 CRB CD 98-99 (Phase II) (March 24, 2008); Order Announcing Negotiation Period, Docket No. 2008-2 CRB CD 2000-2003 (June 30, 2008); Order Announcing Negotiation Period, Docket No. 2007-3 CRB CD 2004-2005 (October 31, 2008); Order Announcing Negotiation Period, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) (September 22, 2011); Notice Of Participants, Commencement of Voluntary Negotiation Period, And Case Scheduling Order, Docket No. 2012-6 CRB CD 2004-

suggested approach provides both the parties and the Judges with an efficient means of approaching these proceedings within the framework Congress intended while minimizing the expense and administrative inefficiency of maintaining two open dockets on the same procedural track.

Certain Opponents, such as the Cable-Only Claimants, have argued that consolidated cable and satellite proceedings could unduly prejudice them by requiring them to "wade or sit through additional arguments, pleadings, discovery, and testimony that would be of little or no relevance to their interests." Cable-Only Claimants' Opposition at 2. But these concerns could be easily addressed through the Judges' scheduling orders and the cooperation of the parties, and should not bar consolidation here.[7] Moreover, Opponents have not explained why the Judges should perpetuate an "abeyance" practice that has no basis in law, and that has benefitted certain parties, such as cable-only claimants, and claimants with no Phase II controversies, at the expense of other participants, like MPAA, for decades.[8]

III. The Mere Possibility of Settlement Is Not A Bar To Administrative Consolidation.

Several Opponents suggest that the Judges should hold the 2010-12 satellite proceedings in abeyance until the full resolution of cable Phase I proceedings for the same years as a means of encouraging settlement, making reference to the fact that previous satellite Phase I

2009 (Phase II) (September 23, 2013); Notice Of Participants, Commencement of Voluntary Negotiation Period, And Case Scheduling Order, Docket No. 2012-7 CRB SD 2004-2009 (Phase II) (September 23, 2013).

[7] For example, the Judges could limit discovery requests to clarify that cable-only claimants are not subject to satellite-related discovery, and structure the hearings to facilitate attendance of cable-only claimants on certain days.

[8] MPAA represents numerous satellite-only claimants in the 2010-12 Proceedings. MPAA is also aware that it has unresolved Phase II controversies with IPG and NAB as to these royalty years.

controversies have settled without the need for a hearing.[9] *See* JSC Opposition at 2-3; NAB Opposition at 3; Music Claimants Opposition at 3; Devotional Claimants' Opposition at 1-2. However, those Opponents have not shown that consolidation discourages settlement or that failure to consolidate encourages settlement. Moreover, Opponents suggested approach is fraught with other problems.

First, neither the Copyright Act, nor the Judges' regulations require satellite proceedings to be held only after cable proceedings for the same royalty years have been resolved. Instead, these provisions require the Judges to "promptly" commence a voluntary negotiation period once they have identified a controversy and solicited petitions to participate. *See* 17 U.S.C. § 803(b)(3)(A)(ii); 37 C.F.R. § 351.2. The legislative history of the development of the voluntary negotiation period signifies Congress' clear intention for settlement negotiations to occur within this specified period in order to move proceedings forward toward resolution:

> In granting CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in rate-setting or distribution proceedings, the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates and the distribution of royalties throughout the Chapter 8 process. ***The Committee believes that by creating a formalized time period for encouraging settlement under the direction of the CRJs, parties will necessarily have to focus their attentions upon the Committee's goal of achieving settlements.*** The Committee intends that the CRJs during this time period act in a capacity similar to that of Federal judges during their scheduling conferences. The Committee expects the CRJs to act in a manner which ensures that the timetable for proceedings are adhered to, while helping to facilitate the ultimate goal of conflict resolution between participants. The Committee does not expect the CRJs to be present with parties during all discussions during this time period.

[9] Although Opponents fail to mention it, there was one prior satellite Phase I proceeding in which the parties initiated litigation, including filing Written Direct Cases on January 8, 1999. *See* Docket No. 97-1 CARP SD 92-95. In that case, the parties reached a settlement the day before the satellite distribution hearing commenced.

H.R. Rep. 108-408 at 30 (January 30, 2004) (emphasis added). Plainly, the voluntary negotiation period was created within the procedural framework to encourage settlements or accelerate resolution of royalty distribution proceedings. If no settlement is achieved during the voluntary negotiation period, then the Judges are required to move forward and schedule further proceedings. *See* 17 U.S.C. § 803(b)(3)(C); *see also* 37 C.F.R. § 351.3 ("If a settlement has not been reached within the voluntary negotiation period, the Copyright Royalty Judges will issue an order declaring that further proceedings are necessary. The procedures set forth at §§351.5, et seq., for formal hearings will apply, unless the abbreviated procedures set forth in paragraphs (b) and (c) of this section are invoked by the Copyright Royalty Judges."). MPAA's request for consolidation will do nothing to chill settlement discussions during the voluntary negotiation period. If anything, it will facilitate settlement discussions.

Second, Opponents overstate the possibility of a global settlement of satellite disputes. Once again, IPG has filed petitions to participate in this case in both cable and satellite and Phase I and Phase II proceedings. Absent consolidation, any determinations made by the Judges in a cable Phase I proceeding on issues involving IPG will almost certainly need to be re-litigated in satellite.[10] If the proceedings are consolidated now, all of those common issues can be litigated together. Further, IPG has indicated that it intends to participate in the Phase II proceedings in the Program Suppliers, Sports, Devotional, and Canadian program categories. *See* note 3, *supra*. Because given IPG's history, Phase II litigation involving IPG is almost certain, the Judges

[10] As the Judges are aware, IPG has forced the Phase II Parties and the Judges to revisit numerous issues related to representation in the 2004-2009 cable and 1999-2009 satellite Phase II Proceedings that were already addressed conclusively in the 2000-2003 cable Phase II Proceeding—simply because the proceeding involved different royalty years and/or satellite funds rather than cable funds. Had the 2000-2003 cable Phase II Proceeding been consolidated with satellite proceedings for the same royalty years, this duplicative litigation could have been avoided.

should adopt a procedure that allows the parties to commence that litigation as soon as reasonably possible.

IV. Increased Partial Distributions Of Royalties Under Section 801(b)(3)(C) Do Not Remedy The Backlog Issue Identified By MPAA.

MPAA agrees that increased (and prompt) partial distributions of cable and satellite royalties are helpful, especially given the lengthy delay that persists in reaching full resolution of controversies over the royalties on the merits. However, while partial distributions are important, the royalties distributed under Section 801(b)(3)(C) remain subject to a refund obligation that continues until all Phase I and Phase II controversies are resolved entirely as to the royalties, including exhaustion of all appeals.[11] Thus, while receiving prompt additional partial distribution of royalties may be extremely beneficial to parties with no Phase II controversies, or who, like JSC, have thus far been able to limit their Phase II controversies to paper proceedings, partial distribution of royalties subject to a possible refund obligation inures a lesser benefit to parties like the copyright owners represented by MPAA who have Phase II disputes.

Further, increased partial distributions under Section 801(b)(3)(C) does nothing to address the backlog of pending proceedings, as it leaves the ultimate resolution of the merits of the disputes unresolved until they are litigated, possibly decades later in the case of Phase II proceedings. In contrast, MPAA's consolidation approach moves all the 2010-12 Proceedings forward simultaneously to a full resolution. What's more, Opponents' argument diminishes the value of undistributed royalties that remain on deposit following a partial distribution as if it were mere chump change. Undistributed royalties today stand at approximately $40 million for

[11] This includes any appeals in the D.C. Circuit and, potentially, separate actions brought under the Administrative Procedure Act in D.C. District Court. *See Independent Producers Group v. Library of Congress*, 759 F.3d 100 (D.C. Cir. 2014).

2000 through 2009 cable and $25 million for 1999 through 2009 satellite. These amounts are by no means insignificant.[12] Therefore, Opponents' attempt to assuage prejudiced parties by proposing increased partial distribution is just putting a band aid on the problem.

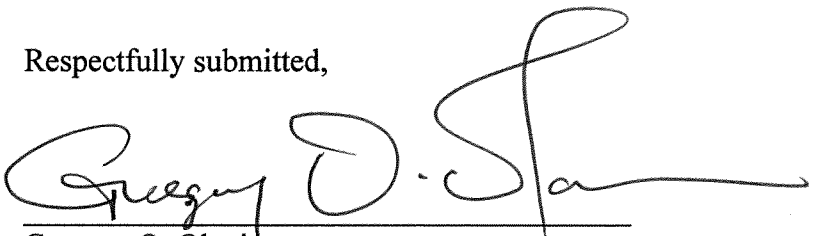
With the participation of IPG, the example MPAA provided of the 2000-2003 cable proceedings is not an anomaly as NAB argues, *see* NAB Opposition at 6-8, but in fact the *new normal* for both the Judges and the participants. MPAA reiterates that administrative consolidation of the 2010-2012 Proceedings is the best way to address this problem, as it moves both cases forward to a resolution on the merits efficiently, and within the framework intended by Congress. However, if the Judges do not wish to consolidate the proceedings, they could mitigate the decades of prejudice that MPAA has endured due to the historical prioritization cable proceedings over satellite proceedings by holding the cable and satellite proceedings simultaneously.

CONCLUSION

For the foregoing reasons, the Judges should grant MPAA's Motion and administratively consolidate the 2010-12 Proceedings.

[12] Moreover, a much larger balance of undistributed royalties remains for the 2010-2012 cable and satellite royalty years. Even after the recently ordered 60% partial distribution of the 2012 satellite fund takes place, *see* Order Granting Motion Of Phase I Claimants For Partial Distribution Of 2012 Satellite Royalties, Docket No. 14-CRB-0008-SD (2010-2012) (March 3, 2015), the total amount of undistributed 2010-2012 cable and satellite royalties held on deposit at the Copyright Office will still be more than $420 million. These amounts, even if cut in half by further partial distributions, will remain significant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2015, a copy of the foregoing pleading was sent by Federal Express overnight mail to the parties listed on the attached service list.

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