

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

DISTRIBUTION OF CABLE ROYALTY FUNDS

**CONSOLIDATED
Docket No. 19-CRB-0010-CD (2018-21)**

**JOINT COMMENTS OF THE ALLOCATION PHASE PARTIES IN RESPONSE TO
ORDER 9 REGARDING FURTHER PROCEEDINGS**

On January 5, 2026, the Copyright Royalty Judges (“Judges”) issued *Order 9 Regarding Further Proceedings* (“Order 9”), which informed the parties of the Judges’ intent to convert the 2018-21 Cable Allocation Phase Proceeding to a paper proceeding under 17 U.S.C. § 803(b)(5). Order 9 required the participants in this proceeding to submit comments “on a decision to proceed on a paper record” by January 26, 2026. Order 9 at 1. Order 9 also included a list of topics to be addressed in the comments, including proposed dates, times, and page lengths for future filings, any additional details that the parties believe to be appropriate for such filings, and a proposed schedule for the remainder of the proceeding. Order 9 at 1-2. The Canadian Claimants Group (“CCG”), Commercial Television Claimants (“CTV”), Joint Sports Claimants (“JSC”), Program Suppliers, Public Television Claimants (“PTV”), and Settling Devotional Claimants (“SDC”) (collectively the “Allocation Phase Parties”) have met and conferred, and present these Joint Comments to address the issues raised in Order 9.¹

As explained in detail in Section I below, the Allocation Phase Parties submit that the 2018-21 Cable Allocation Proceeding is not an appropriate case for the paper proceedings

¹ While the Allocation Phase Parties are submitting these Joint Comments collectively, they are not aligned on every issue. When one Allocation Phase Party has a different position on an issue than what is reflected in the body of the Joint Comments their objection is explained in footnotes herein.

framework set forth in 17 U.S.C. § 803(b)(5). The Allocation Phase Parties therefore request that the Judges permit a full hearing, starting in April 2026, similar in duration to the 2014-17 Cable Allocation proceeding.

If the Judges are unable to hold such a hearing due to “other proceedings and circumstances” that are referenced in Order 9, *see* Order 9 at 1, the Allocation Phase Parties (excluding the CCG, for the reasons addressed below) request that the Judges exercise their authority under 17 U.S.C. § 801(c)² to adopt the hybrid proposal outlined in Section II below, which would include a significantly streamlined and time-limited hearing. The Allocation Phase Parties submit that, as compared to a paper-only proceeding, this proposed hybrid proceeding will provide a more fitting vehicle for the Judges to fairly assess the evidence presented in this proceeding.

If the Judges do not adopt the request for a full hearing or their hybrid proposal, the parties propose that the Judges adopt a modified paper proceeding consistent with the proposal set forth in Section III below.

I. The 2018-21 Cable Allocation Proceeding Should Not Be Resolved Solely on the Papers

The 2018-21 Cable Allocation Proceeding is not an appropriate case for a paper proceeding as it does not meet the criteria for such a proceeding set forth in either 17 U.S.C. § 803(b)(5)(A) or (B). Subsection (A) of the statute contemplates paper proceedings “in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure.”³ These conditions are not met

² The Judges have authority under 17 U.S.C. § 801(c) to “make any necessary procedural or evidentiary rulings in any proceeding under this chapter[.]”

³ 17 U.S.C. § 803(b)(5)(A). The Judges’ regulation regarding paper proceedings contains similar language. *See* 37 C.F.R. § 351.3(c)(1)-(2).

here, as multiple genuine issues of material fact remain in dispute among the Allocation Phase Parties, a hearing is necessary to resolve those disputes, and the Allocation Phase Parties have not agreed in writing to submit to the paper proceeding procedure. Indeed, the Judges appear to acknowledge in Order 9 that genuine issues of material fact remain in dispute in this proceeding among the Allocation Phase Parties, as they request comments on what “additional proceedings may be desired” to address “the issues in dispute.” Order 9 at 1.

Subsection (B) of 17 U.S.C. § 803(b)(5) provides that the procedures for paper proceedings “may be applied under such other circumstances as the Copyright Royalty Judges consider appropriate.” While the statute is silent as to what “circumstances” render a particular case “appropriate,” the legislative history of 17 U.S.C. § 803(b)(5) strongly suggests that Congress did not intend for the “paper proceedings” framework to apply in large, complex distribution proceedings like the 2018-21 Cable Allocation Proceeding.

For example, the House Judiciary Report regarding H.R. 1417 (ultimately enacted into law as 17 U.S.C. § 803(b)(5)) states “[i]t is anticipated that CRJs will choose to exercise their discretion to order paper proceedings in circumstances where, for instance, the cost of the proceeding would exceed the royalties likely to be collected, or where a class of participants may otherwise find it impossible to participate.” H.R. REP. 108-408, at *30-31. The bill’s sponsor, Rep. Berman, also stated during a House debate that “H.R. 1417 allows CRJs to conduct an all-paper, rate-setting proceeding, which in many circumstances, should substantially reduce the barriers to participation for small copyright owners and users. H.R. 1417 also creates an expedited small-claims process to facilitate the distribution of royalties to small claimants.” 150 Cong. Rec. H762-01, H764, 2004 WL 392977 (Mar. 4, 2004 House Debate).

Certainly, the 2018-21 Cable Allocation Phase Proceeding is neither the type of small proceeding contemplated in these legislative discussions, nor are its parties the “small copyright owners and users” whose interests – e.g., participation in Copyright Royalty Board proceedings – Congress was attempting to protect. The costs of the 2018-21 Cable Allocation Phase Proceeding will not exceed the royalties at stake in the proceeding, which amount to almost \$1 billion in royalties collected by the Copyright Office.⁴ Moreover, the Allocation Phase Parties do not expect that their royalty claims will be dwarfed by the costs associated with litigating this proceeding. Rather, each of the six Allocation Phase Parties represents a group of copyright owner claimants, each of whom expects to collect a substantial amount of royalties for their claimant group far exceeding the litigation costs expected to be borne by the Allocation Phase Parties in connection with this proceeding.

In addition to financial considerations, applying the paper proceeding framework in this complex proceeding would be inconsistent with the Judges’ prior interpretation of 17 U.S.C. § 803(b)(5)(B). In their Federal Register Notice promulgating the initial Copyright Royalty Board regulations, the Judges observed that paper proceedings under 17 U.S.C. § 803(b)(5)(B) should be utilized in situations “where live hearings would not aid the Judges in their deliberations and any legal requirements could be met with paper hearings.” 70 Fed. Reg. 30901, 30903 (May 31, 2005). The record before the Judges in the 2018-21 Cable Allocation Proceeding does not satisfy these conditions.

⁴ According to the Licensing Section of the Copyright Office, as of September 30, 2024, the 2018-21 cable royalty funds at issue in this proceeding amounted to \$967,175,958.65. *See Year-Over-Year Growth In The Copyright Royalty Funds, as of September 30, 2024, available at <https://www.copyright.gov/licensing/copyright-royalty-funds.pdf>.*

Notably, the number of witnesses in this proceeding exceeds those in the 2014-17 Cable Allocation proceeding, which culminated in a 100-hour, 5-week hearing.⁵ Forty-two witnesses have submitted written testimonies in the 2018-21 Cable Allocation Phase Proceeding (including both direct and rebuttal testimony), many of whom have never before testified in CRB proceedings.⁶ Many of these witnesses are presenting new analyses that have not previously been submitted to the Judges, vetted by other witnesses in prior proceedings, or subject to cross-examination. Even where witnesses and studies have been presented in prior proceedings, the record in this proceeding includes calculations, analyses, critiques, and criticisms of those methodologies that have not been fully vetted in past proceedings.

Fairness and due process concerns also render a paper proceeding inappropriate for the 2018-21 Cable Allocation Phase Proceeding. A Cable Allocation Phase paper proceeding is unprecedented. The Parties therefore did not anticipate that this proceeding might potentially be resolved on the papers alone when submitting their direct and rebuttal statements, and reasonably anticipated that witnesses who presented direct testimony would be permitted an opportunity to explain their opinions at a hearing and respond to rebuttal criticisms during their hearing testimony, as has been the practice of the Judges in prior proceedings. The Parties are also

⁵ See *Order 26 On Hearing Schedule And Related Prehearing Matters*, Docket No. 16-CRB-0009-CD (2014-17) at 2 (February 14, 2023); *Order 28 Revising Hearing Schedule And Related Matters*, Docket No. 16-CRB-0009-CD (2014-17) at 2 (February 24, 2023).

⁶ For example, witnesses presenting testimony in this proceeding who have never previously appeared live before the Judges in past royalty distribution proceedings include CCG witnesses Marc Rysman, Ph.D., Brian Mills, Ph.D., Beverley Kirshenblatt, and Tom Cox; CTV witnesses Timothy Coles and Michael Newman; JSC witnesses Professor Katja Seim, Andrew Albert, and Katherine S. Payne; Program Suppliers' witnesses Patti Cohen, Michael D. Nilsson, and Michael Nissenblatt; PTV witnesses Karen Baile-Holloway, Dr. David Blackburn, Diana Epstein, Michael Kheyfets, Margaret Miller, Dr. Stanley Presser, Robert P. Smith, Jr., and Lonna Thompson; and SDC witnesses Professor Robert Miller, Professor Michael D. Smith, Jack Goodman, and Professor Tulin Erdem.

concerned that, without a hearing, the Judges will not have a reasonable opportunity to assess the credibility of the witnesses merely based on paper submissions. Witness credibility has historically been a significant underlying factor in assigning weight to different pieces of evidence in royalty allocation proceedings before the Judges.⁷ In fact, critical weighting decisions in prior cases would not have been possible without live testimony adduced during cross-examination and questioning by the Judges.⁸

In light of the foregoing, the Parties respectfully request that the Judges reconsider their intention to convert the 2018-21 Cable Allocation Phase proceeding to a paper proceeding as contemplated by 17 U.S.C. § 803(b)(5). Given the size and complexity of the record and the fact that there are more witnesses submitting testimony in this proceeding than testified in the 2014-17 Cable Allocation Phase Proceeding, the Parties request that the Judges allocate at least 120 hours of hearing time for this proceeding.⁹

II. If the Judges Are Unable to Hold a Full Hearing, they Should Exercise Their Authority Under 17 U.S.C. § 801(c) to Adopt a Hybrid Model with a Streamlined Hearing

As noted above, the Allocation Phase Parties' strong preference would be for the Judges to conduct a full hearing for this proceeding. However, if a hearing of this duration is not

⁷ See, e.g. 89 Fed. Reg. 54166 (June 28, 2024) (2014-17 Cable Final Determination); 84 Fed. Reg. 3552 (Feb. 12, 2019) (2010-13 Cable Final Determination); 75 Fed. Reg. 57063 (Sept. 17, 2010) (2004-05 Cable Final Determination).

⁸ See, e.g., 89 Fed. Reg. at 54234 (June 28, 2024) (“The Judges find Mr. Singer and Mr. Berlin to be particularly credible witnesses in relation to their testimony . . .”); 89 Fed. Reg. at 54233 (June 28, 2024) (“The Judges again find that Ms. Hamilton was a knowledgeable and credible witness . . .”).

⁹ This is the same amount of time that the participants initially requested in advance of the 2014-17 Cable Allocation hearing. See *[Proposed] Order On Hearing Schedule And Related Prehearing Matters*, Docket No. 16-CRB-0009-CD (2014-17) at 2 (filed December 9, 2022).

possible, the Allocation Phase Parties with the exception of the CCG¹⁰ request that the Judges adopt a hybrid model with a significantly shorter hearing to resolve the 2018-21 Cable Allocation Phase Proceeding, consistent with their authority under 17 U.S.C. § 801(c) to “make any necessary procedural or evidentiary rulings in any proceeding under this chapter[.]”

The Allocation Phase Parties submit that the following hybrid proposal promotes the interests of efficiency while still addressing some of the participants’ concerns regarding practicality, fairness, and due process:

- **Written Sur-rebuttals.** One additional filing for the submission of sur-rebuttal written testimony to allow witnesses who submitted written direct testimony to address criticisms of their testimony raised in another witness’s written rebuttal testimony. The sur-rebuttal testimony would have a maximum word count, be strictly limited to responding to criticisms made in rebuttal testimony, and would not include any new witnesses or analyses other than in direct response to criticisms made in written rebuttal testimony.

¹⁰ The Canadian Claimants Group does not join this part of the Joint Comments requesting a hybrid model. The CCG joins the other claimant parties in requesting that the Judges conduct a full evidentiary hearing as discussed in Section I. However, should the Judges decide against the full evidentiary hearing, the CCG requests the Judges proceed with a paper proceeding as described in Section III. Although the hybrid process would provide a limited amount of live testimony, allocating a few hours per party across forty-two witnesses—a fraction of what the parties believe is necessary for a full hearing—would produce a distorted and incomplete evidentiary record. Such an extremely truncated format would almost certainly result in fragmented, disjointed examinations, with insufficient time for witnesses to present coherent direct testimony on complex methodological issues, and even less time for focused cross- or redirect examination to clarify or test that evidence. In the CCG’s view, these distortions will unnecessarily complicate the record, rather than aid the Judges’ evaluation. By contrast, a well-organized paper proceeding consistent with the Judges’ notice of intent in Order 9, does not require the parties or the Judges to disentangle the confusion that would inevitably arise from such compressed live testimony and instead allows the parties to present more complete, coherent, and carefully organized arguments in support of their proposed royalty shares.

The other parties disagree with CCG’s assertions. Shorter, focused live testimony will allow the Judges to assess the credibility of the most critical witnesses on their key points, and will give the parties opportunity to cross-examine witnesses on the most important aspects of their testimony. The parties are fully capable of presenting coherent and carefully organized arguments in a week-long hearing.

- **Joint Motion for En Masse Admission of Hearing Exhibits.** In order to streamline the hearing, pre-filed written testimonies and designated past testimony and exhibits could be admitted into evidence *en masse*.
- **Shortened, Virtual Hearing.** A virtual hearing lasting approximately one week, with 40 hours of hearing time divided evenly among the Parties.
- **Post-Hearing Briefing.** Word-count limited post hearing briefing, as directed by the Judges.
- **Closing Arguments.** One day of closing arguments, to be held live (in-person or virtually) after all post-hearing briefing is completed.¹¹

As required by Order 9, a proposed schedule for a hybrid proceeding, including word limits for briefing, is attached as Exhibit A. If the Judges decide to utilize this hybrid framework, the Allocation Phase Parties will also prepare and jointly submit a proposed order with a detailed framework for the hybrid proceeding, including proposed virtual hearing procedures and protocols.

III. If the Judges Choose to Proceed Without a Hearing, they Should Permit Additional Submissions from the Parties to Supplement Those Contemplated by 17 U.S.C. § 803(b)(5)

As noted above, the Allocation Phase Parties respectfully submit that a full hearing is necessary. Absent a full hearing, a hybrid proceeding is the next best alternative, yet still insufficient. The parties object to proceeding without a hearing, but if the Judges intend to forego a hearing entirely, the Allocation Phase Parties respectfully request that the Judges utilize

¹¹ The Allocation Phase Parties would propose a framework for in-person closing statements similar to what the Judges recently ordered in Docket No. 23-CRB-0012-WR (2026-30). *See Public Order 59 Scheduling Supplemental Closing Arguments And Directing Participants To Jointly File Proposed Hearing Procedures*, Docket No. 23-CRB-0012-WR (2026-30), at 1-2 (January 13, 2026).

their authority under 17 U.S.C. § 801(c) to allow the parties to adopt a framework for a modified paper proceeding, to include the following:

- **Final Briefing.** Word-count limited final briefing and submission of additional exhibits, as directed by the Judges.
- **Closing Arguments.** One day of closing arguments, to be held live (in-person or virtually) after all post hearing briefing is completed.¹²

CTV, JSC, PS, and SDC also propose that a modified paper proceeding include **Written Sur-rebuttals**: one additional filing for the submission of sur-rebuttal written testimony to allow witnesses who submitted written direct testimony to address criticisms of their testimony raised in another witness's written rebuttal testimony. The sur-rebuttal testimony would have a maximum word count, be strictly limited to responding to criticisms made in rebuttal testimony, and would not include any new witnesses or analyses other than in direct response to criticisms made in written rebuttal testimony. CCG and PTV oppose an additional round of written sur-rebuttal testimony in a paper-only proceeding.¹³

¹² See note 11, *supra*.

¹³ PTV and CCG believe that an additional round of written sur-rebuttal testimony in a paper-only proceeding would exacerbate problems with assessing witness credibility. If sur-rebuttal testimony were allowed, witnesses could say anything they wanted knowing in advance that they would not face cross-examination or further rebuttal. That would contrast with witnesses who submitted direct and rebuttal testimony prior to Order 9, who were constrained by the knowledge that they would likely be subjected to cross-examination in a live hearing. Injecting a third round of potentially less credible testimony would thus do more harm than good, contravening the very purpose and efficiency objective of paper proceedings. The parties have already had two full rounds of written testimony – in the direct and rebuttal phases – resulting in over five thousand pages of written submissions. There is no need for another round, particularly given that the statute and regulations do not contemplate any such written sur-rebuttal testimony, and there is no precedent for it in allocation phase proceedings. See 17 U.S.C. § 803(b)(6)(C)(i); 37 C.F.R. §§ 351.4 & 351.11 (referring to only “direct” and “rebuttal” statements). Any concerns about particular rebuttal testimony could be addressed in the final rounds of briefing as set out in the parties’ proposed schedule. These briefs would serve as the “additional response by each such participant” contemplated by the paper proceedings provision of the statute. 17 U.S.C. § 803(b)(5).

As required by Order 9, a proposed schedule for a modified paper proceeding, including word limits for briefing, is attached as Exhibit B.

IV. Conclusion

For all the reasons set forth herein, the Allocation Phase Parties respectfully request that the Judges reconsider their intention to resolve the 2018-21 Cable Allocation Phase Proceeding solely on a paper record under 17 U.S.C. § 803(b)(5). If the Judges are unable to conduct a full hearing in this matter, the Allocation Phase Parties (excluding the CCG) request that they instead adopt a hybrid proceeding with a streamlined hearing, as outlined in Exhibit A. If the Judges decide to proceed without any hearing at all, the Allocation Phase Parties, while objecting to this format, request a modified paper proceeding, as outlined in Exhibit B, with all parties reserving their rights.

The parties supporting written sur-rebuttal testimony disagree with these positions. While a live hearing certainly is preferable and would allow for important cross-examination, the importance of establishing a full written record in a paper-only proceeding outweighs concerns about a lack of constraint on witnesses. In addition, counsel's responsive argument to rebuttal testimony in a brief would not carry evidentiary weight as would a witness' sur-rebuttal testimony.

Dated: January 26, 2026

Respectfully submitted,

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Exhibit A: Proposal For Hybrid Proceeding

Document	Description	Document Filing Status	Proposed Deadline	Word Limit
Judges' Order Adopting A Hybrid Proceeding	Order setting schedule and parameters for a hybrid proceeding	Public	Monday, February 9, 2026	N/A
Witness Written Responses Clarifying and/or Commenting on Written Rebuttal Statements Submitted	Responses to WRT only by witnesses who submitted direct testimony; no new witnesses.	Public and/or Restricted	Thursday, March 19, 2026	35,000 Words / party
Joint Motion for En Masse Admission of Pre-Filed Hearing Exhibits; Deadline for filing any motions in limine	Parties to file joint motion for en masse admission of undisputed hearing exhibits: i) 2018-21 witness testimony, ii) designated testimony from past proceedings, iii) exhibits from past proceedings. Any party objecting to admission of a pre-filed exhibit or witness must file a motion in limine by this date.	Public and/or Restricted	Friday, March 30, 2026	37 CFR § 303.3 (c) (1)
Streamlined Virtual Hearing	Virtual hearing consisting of 40 hours of hearing time, divided equally among the parties. Parties may use their allotted time as desired for opening statements, direct examination, and cross examination of witnesses. Any witnesses not called during the hearing will be considered solely on the papers.	Public and/or Restricted	Start date Monday April 13, 2026	
Post-Hearing Brief	Standard argumentative brief filed with references to eCRB docketed testimony and exhibits; additional demonstrative exhibits and exhibits based on materials produced in discovery may also be attached to briefs	Public and/or Restricted	Monday, May 18, 2026	40,000 words

Post-Hearing Reply Brief	Standard argumentative brief filed with references to eCRB docketed testimony and exhibits	Public and/or Restricted	Monday, June 15, 2026	25,000 words
Closing Arguments	Live, in-person or virtual. Slide decks exchanged on the morning of the hearing (each party gets 60 minutes excluding Judges' questions)		Wednesday, July 1, 2026	N/A
Hyperlinked Briefs (opening and reply) + Errata + Appendix of Authorities		Public and Restricted	Tuesday, July 7, 2026	same as original document

Exhibit B: Proposal For Modified Paper Proceeding

Document	Description	Document Filing Status	Proposed Deadline	Word Limit
Judges' Order Adopting A Paper Proceeding	Order setting schedule and parameters for a paper proceeding	Public	Monday, February 9, 2026	N/A
Witness Written Responses Clarifying and/or Commenting on Written Rebuttal Statements Submitted¹⁴	Responses to WRT only by witnesses who submitted direct testimony; no new witnesses.	Public and/or Restricted	Thursday, March 19, 2026	35,000 Words / Party
Opening Brief	Standard argumentative brief filed with references to eCRB docketed testimony and exhibits; additional demonstrative exhibits and exhibits based on materials produced in discovery may also be attached to briefs	Public and/or Restricted	Monday, May 18, 2026	40,000 words
Reply Brief	Standard argumentative brief filed with references to eCRB docketed testimony and exhibits	Public and/or Restricted	Monday, June 15, 2026	25,000 words
Closing Arguments	Live, in-person or virtual. Slide decks exchanged on the morning of the hearing (each party gets 60 minutes excluding Judges' questions)		Wednesday July 1, 2026	N/A
Hyperlinked Briefs (opening and reply) + Errata + Appendix of Authorities		Public and Restricted	Monday, July 7, 2026	same as original document

¹⁴ For the reasons explained in note 13, PTV and CCG oppose this additional round of sur-rebuttal testimony in a paper-only proceeding.