

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

**In the Matter of**

**Copyright Royalty Board Regulations  
Regarding Filing of Claims to Royalty  
Fees Collected Under Compulsory  
License**

**Docket No. 17-CRB-0012-RM**

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**COMMENTS OF THE ALLOCATION PHASE PARTIES**

The undersigned representatives of all 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. 14,167 (Mar. 17, 2017), concerning amendment of the regulations governing the filing of claims to compulsory license royalty fees. The Allocation Phase Parties generally support many of the Notice’s proposed amendments, most of which are related to an improved online claims filing system.

One newly proposed rule, however, would require each joint claim to identify at least one secondary transmission for *each* copyright owner that is the subject of that joint claim. Such a rule would impose substantial, costly, and unnecessary burdens on copyright holders, and is therefore opposed by the Allocation Phase Parties. The Copyright Office rightly rejected an identical proposal in 1994. There is no reason for the Judges to break with that decision.

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<sup>1</sup> The Allocation Phase Parties are Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Public Broadcasting Service, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., SESAC, Inc., Settling Devotional Claimants, Canadian Claimants Group, and National Public Radio.

The Allocation Phase Parties also believe that the proposed rules should not require a “motion showing good cause and lack of prejudice” in order to amend claims after the statutory filing period.

Finally, the Allocation Phase Parties suggest certain other clarifying or technical amendments to the Notice’s proposed regulations.

**I. The Judges Should Not Require Each Joint Claim to Identify a Secondary Transmission for Every Copyright Owner.**

The Allocation Phase Parties oppose the proposed new rule to be codified at 37 C.F.R. § 360.4(b)(2)(iii) because it would unnecessarily impose significant burdens on copyright owners by requiring joint claims to include “identification of at least one secondary transmission of one work by *each identified copyright owner* that has been secondarily transmitted by a cable system or satellite carrier.” 82 Fed. Reg. 14,169 (emphasis added). The current rule, by contrast, states that a joint claim must include “identification of at least one secondary transmission of *one of the copyright owners’ works* by a cable system.” 37 C.F.R. § 360.3(b)(2)(iii) (emphasis added).

The Allocation Phase Parties believe that the current one-example-per-claim requirement strikes the appropriate balance at the claim-filing stage between avoiding undue burden and cost for copyright owners while ensuring that each joint claimant meets the minimum statutory eligibility requirements to seek a distribution of cable royalties.

Indeed, that is precisely the conclusion that the Copyright Office reached in 1994 when it addressed the same issue. The subject arose after Congress eliminated the Copyright Royalty Tribunal (“CRT”) and replaced it with Copyright Arbitration Royalty Panels (“CARP”). In response, the Copyright Office adopted interim regulations and proposed permanent rules intended to reflect the CRT’s rules. However, the Copyright Office mistakenly “belie[ved] that

the [CRT]’s regulations required that a joint claim identify at least one secondary transmission for *each* joint claimant,” and its interim and proposed rules reflected this misunderstanding. Final Regulations, Copyright Arbitration Royalty Panels, 59 Fed. Reg. 63,025, 63,027 (Dec. 7, 1994). The immediate and unanimous opposition of copyright owners led the Copyright Office promptly to waive the requirement in its interim regulations and ultimately to remove that requirement from the final rule. *See* 59 Fed. Reg. at 63,028. The Copyright Office concluded that: “It is apparent from the unanimous opinion of the commentators that requiring identification of a secondary transmission for each joint claimant would add in some cases a substantial burden and cost to joint claimants without yielding an appreciable return in administrative efficiency.” *Id.*

The Copyright Office’s 1994 judicious analysis holds true today. Requiring identification of a secondary transmission for *each* copyright owner would incur hundreds of man-hours each year. For example, the last time one of the Allocation Phase Parties—PBS—undertook such a task, it expended approximately 300 hours annually to identify secondary transmissions simply for its member stations. 59 Fed. Reg. at 63,027. Similarly, the Canadian Broadcasting Corporation estimates that it would require approximately 275 hours to identify secondary retransmissions for each claimant listed on its annual joint claim today. The process would be extremely time-consuming because for many copyright owners’ claims, it would require merging commercially available and expensive broadcast programming databases with cable carriage data—something that most of the Allocation Phase Parties currently do not undertake on an *annual* basis for the *immediate preceding year*, as would be required by the proposed rule.

There is no justification for the rule that would outweigh the burden it would impose. Requiring separate identifications of secondary transmissions at the claim-filing stage would not serve any substantive purpose because it is a jurisdictional requirement that does not determine the distribution of royalties to each joint claimant. *See id.* Moreover, it would be a waste of the Judges’ resources to screen the hundreds of annual filings to determine eligibility with respect to each secondary transmission—particularly in light of the fact that even if one claimant was determined to be ineligible, the joint claim would still remain a valid claim. *See id.* It is, in fact, impossible to determine at the claim-filing stage whether or to what extent the share awarded to the joint claimants might be affected by the ineligibility of one member of the group. Such questions are appropriately addressed through motions or other proceedings before the Judges on the basis of record evidence. *See id.*

For these reasons, the Allocation Phase Parties urge the Judges to amend the proposed rule to be codified at 37 C.F.R. § 360.4(b)(2)(iii) so that it requires only: “A general statement of the nature of the copyright owners’ works, and identification of at least one secondary transmission of one of the copyright owners’ works by a cable system or satellite carrier establishing a basis for the joint claim.”<sup>2</sup>

## **II. Amendments to Claims After the Statutory Period Should Not Require a Motion Showing Good Cause and Lack of Prejudice.**

The Notice proposes to add a new section, 37 C.F.R. § 360.30, that would permit the amendment of claims as of right up until the deadline for filing the claims, but would permit later amendments only by order of the Copyright Royalty Judges upon motion showing both good cause and a lack of prejudice to other claimants. The Allocation Phase Parties believe such

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<sup>2</sup> Note that, as proposed, the rule to be codified at 37 C.F.R. § 360.4(b)(2)(iii) also appears to be missing the word “and” before the word “identification.”

a rule would increase the administrative burden on the Judges and the claimants without producing any meaningful benefits.

The only elements of a claim subject to being amended<sup>3</sup> are those relating to the “general statement of the nature of the works” being claimed and to the example of a secondary transmission of one of the copyright owner’s works establishing the basis of the claim (37 C.F.R. §§ 360.4(b)(1)(ii), (b)(2)(ii)). The Allocation Phase Parties believe that amendments of those portions of a claim should be allowed as of right at any time.

The Judges have previously been called upon to consider evidence and argument on, and resolve disputes about, the accuracy of these portions of otherwise valid claims. The Judges rejected motions to strike claims based on allegations that the “examples” had (1) identified a station on which the program did not air at all, (2) used a different name for the selected program, (3) identified a station that was not carried as a distant signal, (4) identified a cable system that carried the station but mistakenly reported it as a distant signal, and (5) identified the wrong date as the one on which the program aired. Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims, Docket No. 2008-2 CRB CD 2000-2003 (Phase II), Mar. 21, 2013, at 15-17. Ten years after the claims had been filed, at the point at which their validity finally became relevant to the actual distribution of royalties, the Judges accepted evidence showing that, notwithstanding errors in the examples of retransmission that had initially been provided, the claimed programs had actually been retransmitted on some distant signal during the relevant period, and the claims were thus held valid.

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<sup>3</sup> Amendments to the elements of a claim providing the name and address of the copyright owner and of the filer and providing contact information would be not only permitted but required. 37 C.F.R. § 360.4(c). Amendments to a claim to add additional claimants after the jurisdictional period for filing the claim has expired would be absolutely prohibited. 37 C.F.R. § 360.30.

Allowing corrective amendments to these elements of claims as of right will allow at least some of these years-later disputes to be avoided entirely. Requiring motions to seek permission to make such amendments would disincentivize useful corrective actions and unnecessarily add to the administrative burdens of the Copyright Royalty Board and the Judges. Moreover, even if corrective amendments were freely permitted, any amended claim, along with the original, would still remain available for challenge and dismissal by the Judges if it were shown in a future claims issue proceeding to be invalid for any reason.

The Allocation Phase Parties also have a concern about how appropriate procedures could be developed for a motion requirement. In advance of the commencement of a docketed proceeding regarding the distribution of the royalties as to which the claim pertains, it is not clear how interested parties would receive notice of such a motion or the opportunity to oppose it. It is similarly unclear how the Judges could confidently determine that the requested amendment would not prejudice other claimants if they were not heard from and if their potential competing interests could not yet have been defined.

For these reasons, the Allocation Phase Parties urge the Judges to amend the proposed rule to be codified at 37 C.F.R. § 360.30 so that it provides only: “Any claimant may amend a filed claim as of right by filing a Notice of Amendment with the Copyright Royalty Board. No filer may amend a filed claim to add additional claimants after the expiration of the time for filing claims.”

### **III. Clarifications or Technical Amendments to the Proposed Rules.**

The Allocation Phase Parties also suggest the following clarifying or technical amendments to the rules proposed in the Notice.

*First*, the proposed rule to be codified at 37 C.F.R. § 360.4(b)(2)(ii) would require a joint claim to include “[a] concise statement of the authorization by each named claimant for

the person or entity to file the joint claim.” Although this language differs slightly from the language that currently appears in 37 C.F.R. § 360.3(b)(2)(ii),<sup>4</sup> the Allocation Phase Parties do not interpret the proposed language to impose any new requirements beyond the single concise statement by the filer of a joint claim, which must address the filer’s authorization by all of the claimants named in the joint claim. The Allocation Phase Parties are concerned, however, that the proposed language might be misread to require *separate* concise statements from each claimant identified within a joint claim. The Allocation Phase Parties believe that the proposed language is sufficient and do not object to that proposed language insofar as it does not impose a new requirement of separate statements with respect to each claimant. However, we suggest that the following language may be clearer: “A concise statement by the person or entity filing the joint claim stating its authority to file the joint claim on behalf of all of the named claimants.”

*Second*, the proposed rule to be codified at 37 C.F.R. § 360.4(a)(2)(ii) would refer to <http://www.loc.gov/cable> for cable claims and <http://www.crb.gov/satellite> for satellite claims. If both sites will be located at the <http://www.crb.gov> domain, the Allocation Phase Parties suggest correcting the URL for cable claims stated in Section 360.4(a)(2)(ii).

*Third*, the proposed rule to be codified at 37 C.F.R. § 360.23 refers to “cable or satellite compulsory license royalty fees,” but that provision would be located within Subpart B, which relates to DART royalty payments. The Allocation Phase Parties suggest correcting the quoted language to refer instead to “DART royalty payments.”

#### **IV. Conclusion.**

For the reasons set forth above, the Allocation Phase Parties respectfully request that the Judges: (a) change the proposed rule to be codified at 37 C.F.R. § 360.4(b)(2)(iii) so that

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<sup>4</sup> Section 360.3(b)(2)(ii) currently states a joint claim must include “[a] concise statement of the authorization for the person or entity filing the joint claim.”

it requires identification of only one secondary transmission of *one* of the copyright owners' works by a cable system; (b) change the proposed rule to be codified at 37 C.F.R. § 360.30 so that it does not mandate a motion showing good cause and lack of prejudice for all amendments of claims; and (c) adopt the clarifications and technical amendments suggested above.

April 17, 2017

Respectfully submitted,

**PROGRAM SUPPLIERS**



Gregory O. Olaniran (DC Bar No. 455784)  
Lucy Holmes Plovnick (DC Bar No. 488752)  
Alesha M. Dominique (DC Bar No. 990311)  
MITCHELL SILBERBERG & KNUPP  
LLP  
1818 N Street NW, 8th Floor  
Washington, DC 20036  
Phone: (202) 355-7917  
Fax: (202) 355-7887  
goo@msk.com  
lhp@msk.com  
amd@msk.com

**JOINT SPORTS CLAIMANTS**



Robert Alan Garrett (DC Bar No. 239681)  
M. Sean Laane (DC Bar No. 422267)  
Michael Kientzle (DC Bar No. 1008361)  
Bryan L. Adkins (DC Bar No. 988408)  
ARNOLD & PORTER KAYE SCHOLER  
LLP  
601 Massachusetts Avenue, N.W.  
Washington, DC 20001  
Phone: (202) 942-5000  
Fax: (202) 942-5999  
robert.garrett@apks.com  
sean.laane@apks.com  
michael.kientzle@apks.com  
bryan.adkins@apks.com

**COMMERCIAL TELEVISION  
CLAIMANTS**



John I. Stewart, Jr. (DC Bar No. 913905)  
David Ervin (DC Bar No. 445013)  
Ann Mace (DC Bar No. 980845)  
Brendan Sepulveda (DC Bar No. 1025074)  
CROWELL & MORING LLP  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2595  
Phone: (202) 624-2685  
Fax: (202) 628-5116  
jstewart@crowell.com  
dervin@crowell.com  
amace@crowell.com  
bsepulveda@crowell.com

**PUBLIC BROADCASTING SERVICE**



Ronald G. Dove, Jr. (DC Bar No. 430533)  
Lindsey L. Tonsager (DC Bar No. 983925)  
Dustin Cho (DC Bar No. 1017751)  
Robert N. Hunziker, Jr. (DC Bar No. 1018458)  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
Phone: (202) 662-5685  
Fax: (202) 778-5685  
rdove@cov.com  
ltonsager@cov.com  
dcho@cov.com  
rhunziker@cov.com

## MUSIC CLAIMANTS

### AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Samuel Mosenkis/vce  
Samuel Mosenkis (NY Bar No. 2628915)  
ASCAP  
One Lincoln Plaza  
New York, NY 10023  
Phone: (212) 621-6450  
Fax: (212) 787-1381  
smosenkis@ascap.com

### SESAC, INC.

John C. Beiter/vce  
John C. Beiter (TN Bar No. 12564)  
LEAVENS, STRAND & GLOVER, LLC  
1102 17th Avenue South, Suite 306  
Nashville, TN 37212  
Phone: (615) 341-3457  
jbeiter@lsglegal.com

Christos P. Badavas (NY Bar No. 2673838)  
SESAC  
152 West 57th Street, 57th Floor  
New York, NY 10019  
Phone: (212) 586-3450  
cbadavas@sesac.com

### BROADCAST MUSIC, INC.

Joseph J. DiMona/vce  
Joseph J. DiMona (DC Bar No. 413159)  
BROADCAST MUSIC, INC.  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007-0030  
Phone: (212) 220-3149  
Fax: (212) 220-4447  
jdimona@bmi.com

Brian A. Coleman/vce  
Brian A. Coleman (DC Bar No. 459201)  
Jennifer T. Criss (DC Bar No. 981982)  
DRINKER BIDDLE & REATH LLP  
1500 K Street, NW, Suite 1100  
Washington, DC 20005  
Phone: (202) 842-8800  
Fax: (202) 842-8465  
brian.coleman@dbr.com  
jennifer.criss@dbr.com

**CANADIAN CLAIMANTS GROUP**

L. Kendall Satterfield / DGC  
L. Kendall Satterfield (DC Bar No. 393953)  
SATTEFIELD PLLC  
1629 K Street, Suite 300  
Washington, DC 20006  
Phone: (202) 355-6432  
lksatterfield@satterfield-llc.com

**NATIONAL PUBLIC RADIO**

Gregory A. Lewis / DGC  
Gregory A. Lewis (DC Bar No. 420907)  
NATIONAL PUBLIC RADIO, INC.  
1111 North Capitol Street, NE  
Washington, DC 20002  
Phone: (202) 513-2050  
Fax: (202) 513-3021  
glewis@npr.org

**SETTLING DEVOTIONAL  
CLAIMANTS**

Arnold P. Lutzker / DGC  
Arnold P. Lutzker (DC Bar No. 101816)  
Benjamin Sternberg (DC Bar No. 1016576)  
Jeannette M. Carmadella (DC Bar No.  
500586)  
LUTZKER & LUTZKER LLP  
1233 20th Street, NW, Suite 703  
Washington, DC 20036  
Phone: (202) 408-7600  
Fax: (202) 408-7677  
arnie@lutzker.com

Clifford M. Harrington / DGC  
Clifford M. Harrington (DC Bar No.  
218107)  
Matthew J. MacLean (DC Bar No. 479257)  
Michael A. Warley (DC Bar No. 1028686)  
Jessica T. Nyman (DC Bar No. 1030613)  
PILLSBURY WINTHROP SHAW  
PITTMAN LLP  
2300 N Street, NW  
Washington, DC 20037  
Phone: (202) 663-8525  
Fax: (202) 663-8007  
clifford.harrington@pillsburylaw.com