Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	Docket No. 2005-4 CRB CD 2003
Distribution of the 2003 Cable Royalty Funds	)	

COMMENTS OF THE JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, the National Collegiate Athletic Association, the National Hockey League and the Women's National Basketball Association (collectively the "Joints Sports Claimants" or "JSC") submit the following Comments in response to the Copyright Royalty Board Notice published at 72 Fed. Reg. 46516 (August 20, 2007) ("Notice"). The Copyright Royalty Judges ("Judges") published the Notice in response to the Notice of Partial Phase I Settlement and Motion for Further Distribution (filed June 8, 2007) ("2007 Motion"), in which the settling Phase I Parties ("Settling Parties") requested a further distribution of 2003 royalties in light of their near global settlement of Phase I controversies over the 2003 cable royalty fund.

SUMMARY

The Judges seek comment on the proposed further distribution of 2003 cable royalties as well as several issues related to outstanding royalty distribution proceedings -- including those proceedings that the Copyright Office recently terminated pursuant to Section 6(b)(1) of the Copyright Royalty and Distribution Reform Act of 2004. *See* Notice of Termination, 72 Fed.

Reg. 54071 (August 10, 2007). JSC respectfully requests that the Judges take the following actions:

(1) Proceed with the further distribution of 2003 royalties as proposed by the Settling Parties in their 2007 Motion;

(2) Order the Independent Producers Group ("IPG") to identify the professional and collegiate sports teams whose telecasts are supposedly included in IPG's 1999-2003 Phase II claims so that the parties can determine whether there are any Phase II controversies in the Joint Sports category for those years and, if so, settle those controversies;

(3) Reject the creation of a Spanish-language programming Phase I category as unnecessary because existing Phase I categories already include Spanish-language programming;

(4) Commence a Phase I proceeding for all unresolved issues related to the 2000-2003 Cable Royalty Funds while providing interested parties with additional time to negotiate settlements of other years; and

(5) Ensure that all claimants receive adequate notice of filings that affect their interests, even where those filings are made prior to the formal commencement of a proceeding.

DISCUSSION

I. The Judges Should Order Further Distribution of 2003 Royalties as Requested by the Settling Parties.

The Settling Parties represent all parties who have demonstrated, in prior proceedings, an entitlement to cable royalty fees, and they have agreed to satisfy all the conditions specified by Section 801(b)(3)(C) of the Copyright Act, 17 U.S.C. § 801(b)(3)(C). *See* 2007 Motion at 3.

JSC believes that, under these circumstances, the Judges should promptly grant the 2007 Motion without imposing any further conditions. Several points should be emphasized.

First, as the Judges recognize, Section 801(b)(3)(C) requires that they determine whether "any claimant entitled to receive royalty fees from the 2003 Cable Fund has a reasonable objection to the proposed partial distribution." Notice at 46519. Only one party has expressed an objection to the 2007 Motion -- IPG. *See* IPG Opposition to "Phase I Claimants' Notice of Partial Phase I Settlement and Motion for Further Distribution" (filed June 14, 2007) ("IPG Opposition"); Notice at 46516-17. Unlike the Settling Parties who have spent a great deal of time, effort and resources over a period of nearly thirty years demonstrating that they are "entitled to receive" cable royalty fees, IPG has never made any such demonstration. *See* Notice at 46518-19 n.5 IPG has done no more than allege that it represents "literally hundreds of film and television producers" who claim royalties. IPG Opposition at 6. Nothing in IPG's Opposition or any other IPG submission provides a basis for concluding that, as required by Section 801(b)(3)(C), IPG is "entitled to receive" cable royalties. Until IPG demonstrates its entitlement to receive cable royalties, it would be inappropriate to consider IPG's objection to any motion for distribution of such royalties.[1]

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[1] JSC does not oppose the initiation of a summary proceeding to determine whether IPG is entitled to receive royalties -- and thus whether it has standing to object to any distributions. *See* 17 U.S.C. § 803(a)(2) (allowing the Judges to conduct "collateral and administrative proceedings"). But the distribution of 2003 cable royalties, as requested by the 2007 Motion filed three months ago, should not be delayed any further simply because IPG has made unverified and unsupported allegations that it should receive some portion of those royalties. To the extent that IPG has any valid claim to 2003 cable royalties, its interests are fully protected by holding a portion of the royalties in reserve and by the Settling Parties agreement to repay any amounts they receive in excess of their final awards.

Second, even if IPG had standing to object to the 2007 Motion (which it does not), IPG has failed to provide a "reasonable" objection to that Motion. The only basis IPG offers for objecting is that the Settling Parties did not negotiate with IPG before filing the 2007 Motion. *See* IPG Opposition at 4-7. But Section 801(b)(3)(C), by its very terms, contemplates that some claimants may not be parties to the negotiations that result in a distribution motion. Section 801(b)(3)(C) permits such parties to file an "objection" to the motion, which would be granted only if "reasonable." The requirement of having such a "reasonable" objection would be read out of the statute if, as IPG suggests, others could successfully object simply because they were not parties to the distribution motion. Nothing in the statute requires claimants who have established their entitlement to royalties to negotiate with other claimants who have failed to do the same.

Third, the Settling Parties have not requested distribution of 100% of the 2003 cable royalties. They acknowledged that a portion of the fund should be held in reserve pending resolution of all existing Phase I and Phase II controversies, including controversies raised by IPG. *See* 2007 Motion at 4-5; Notice at 46518. It is, of course, difficult to estimate the amount in controversy where a claimant, such as IPG, has never demonstrated entitlement to royalties let alone established the value of its claim. *See* IPG Opposition at 7 (noting that it has not had the opportunity to make a "prima facie showing of such value"); *infra* pages 9-10 (discussing IPG's refusal to provide even the most basic information that would allow JSC to determine whether IPG has any claim within the Joint Sports category). But that does not mean that no further distribution is warranted or that the amount of distribution should be based solely upon inflated and self-serving estimates provided by IPG or any other party. Otherwise, any claimant could hold up a distribution simply by asserting a claim to 100% of the remaining royalties -- precisely the situation against which the Court of Appeals warned in *National Ass'n of Broadcasters v.*

Copyright Royalty Tribunal, 772 F.2d 922, 939 (D.C. Cir. 1985) (rejecting attempt by one party who had not established entitlement to any cable royalties to block a distribution of royalties to parties who had established such entitlement).

Finally, JSC believes the situation here is comparable to the situation that the Copyright Office confronted when the Settling Parties' filed their motion for further distribution of 2000-2002 cable royalties following the near global settlement of those years. There, the Copyright Office set aside reserves of $10 million for each of the 2000 and 2001 cable royalty funds and $15 million for the 2002 cable royalty fund to cover all Phase I and II controversies (and administrative costs). *See* Distribution Order of April 3, 2007 in Docket Nos. 2002-8 CARP CD 2000, 2003-2 CARP CD 2001, and 2004-5 CARP CD 2002 at 2-3 ("2007 Distribution Order"). In JSC's view, the size of the 2000-2002 reserves was excessive given the minor nature of the unresolved Phase I and II controversies as well as the Settling Parties' agreement "to return any excess amounts to the extent necessary to comply with the final determination on the distribution of the fees," as required by 17 U.S.C. § 801(b)(3)(C)(ii) & (iii). Nevertheless, it appears that essentially the same controversies that exist for 2000-2002 exist for 2003. Thus, the 2007 Distribution Order, which no party challenged, does provide some precedent for determining the amount of 2003 cable royalties that should be held in reserve.

II. Multiple Controversies Exist and Should Be Addressed in the Order Most Likely to Lead to Settlement.

The Judges "seek comment on any potential Phase I and Phase II controversies" and the specific "categories of claimants to which the controversy applies." Notice at 46519. They also ask for an "estimate of the percentage of funds subject to controversy." *Id.* In addition, the Judges specify that when "commenters [ ] contend that a controversy exists" they should

"comment on whether a proceeding should be commenced at this time or whether such commencement should be delayed to permit negotiation among the claimants." *Id.*

As an initial matter, JSC does not believe that any controversy, including the controversies identified below, precludes the further partial distribution of 2003 cable royalties requested by the 2007 Motion. JSC understands the Judges' inquiry as a request to identify any controversies in unresolved distribution proceedings that could affect the decision about whether to commence a 2003 cable distribution proceeding at this time (*see* Notice at n.6). JSC provides information about Phase I controversies and Phase II controversies involving JSC, and where possible assesses the amounts that might be at issue in those controversies. JSC also suggests the order in which the remaining proceedings should be approached in order to maximize settlement possibilities.

Phase I Controversies: There are Phase I cable royalty distribution controversies from 2000 onward. For 2000-2003, JSC is aware of two controversies. The first involves the Canadian Claimants' share of the funds. The amount that JSC and the other parties who filed the 2007 Motion, including the Canadian Claimants, believe is in controversy in that dispute is no more than 5.5% of the royalty funds for each year (after distribution of 0.18% to NPR). This is the amount that the Settling Parties asked the Office (for 2000-2002) and the Judges (for 2003) to hold in reserve to address the pending Phase I controversies with the Canadian Claimants. *See* Phase I Claimants' Notice of Partial Settlement and Motion for Further Distribution in Docket Nos. 2002-8 CARP CD 2000, 2003-2 CARP CD 2001, and 2004-5 CARP CD 2002 at 2 (filed December 6, 2005); 2007 Motion at 2. As described above, for 2000-2002, the Office decided to reserve $10 million, $10 million and $15 million, respectively, to cover "the value of the outstanding controversies at both Phase I and Phase II and any administrative costs needed to resolve them." 2007 Distribution Order at 2-3.

The second dispute, raised by IPG, involves the issue of whether there should be a Spanish-language Phase I claimant category. JSC's understanding is that IPG has raised this issue for all years beginning with the year 2000. JSC believes that no additional funds should be set aside pending resolution of this controversy because, as explained below, Spanish-language programming is encompassed within the existing claimant categories. Thus, no new Phase I category is needed. Even if one were created, various Phase I and Phase II claimant group representatives would simply claim royalties for the same programming in a different category, so all royalty funds would ultimately be paid to the same groups of copyright owners.

With respect to the 2004-2006 Cable Royalty Funds, at this time there are controversies among all Phase I categories. Currently, there are also controversies among the Phase I categories regarding distribution of the 1999-2006 Satellite Royalty Funds, although JSC is optimistic that controversies for several of these years will be resolved through settlement in the relatively near future.

Phase II Joint Sports Controversies: JSC is not aware of any Phase II controversies over the Joint Sports cable and satellite royalties except those raised by IPG. The individual JSC members have agreements among themselves for cable and satellite royalties through the year 2007. Two additional leagues (Major League Soccer and the Arena Football League) have filed satellite-only claims for Joint Sports royalties for some years. JSC has been in discussion with

these leagues and is optimistic that it will resolve any controversies with them without the need for a litigated proceeding.[2]

IPG Claim for Sports Royalties. During the 1990-92 cable distribution proceeding, the litigating Phase I parties entered into a joint stipulation defining their respective program categories. The Copyright Arbitration Royalty Panel ("CARP") adopted those mutually exclusive definitions in its final Report. Copyright Arbitration Royalty Panel Report in Docket No. 94-3 CARP CD-90-92 (May 31, 1996) at 11-13. And they have been used ever since to determine the Phase I category into which a particular program falls. The Joint Sports category was defined as:

> Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.

The Canadian Claimants category was defined as: "All programs broadcast on Canadian television stations except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports; and (2) other programs owned by U.S. copyright owners." *Id.*

As these definitions make clear, Joint Sports royalties are awarded for *live telecasts of professional and college team sports.* Thus the constant sum survey that JSC has employed and that has been used (since the 1978 proceedings) to determine relative value of the Joint Sports and other Phase I categories refers solely to "live telecasts of professional and college team sports" in its definition of the Joint Sports category. *See* Copyright Arbitration Royalty Panel

[2] During the past thirty years, JSC has been involved in only one Phase II controversy over Joint Sports royalties. The Copyright Royalty Tribunal allocated 0.02% of the 1982 Joint Sports cable royalties to the Spanish International Network for their telecasts of World Cup Soccer matches. 1982 Cable Royalty Distribution Determination, 49 Fed. Reg. 37653, 37657 (September 25, 1984).

Report in Docket No. 2001-8 CARP CD 98-99 (October 21, 2003) at 31 (concluding that JSC constant sum survey should be used to determine relative awards for Joint Sports, Program Suppliers and Commercial Television categories); *see* Final Order in Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3612-16 (January 26, 2004) (Librarian's decision upholding CARP use of constant sum survey).

Ever since JSC learned that IPG was asserting a claim for Joint Sports royalties, JSC has sought to learn the identity of the "professional or collegiate sports teams" whose telecasts are supposedly included in the IPG claim. IPG, however, has steadfastly refused to provide JSC with even that basic information.[3] As a result, JSC is unable to determine whether IPG has any valid royalty claim for programming that comes within the Joint Sports category -- let alone what the value of that claim might be. Indeed, at this point, there is very real doubt as to whether any of the programming of claimants supposedly represented by IPG falls into the Phase I Joint Sports category and thus is the legitimate subject of Phase II Joint Sports claims. Certainly no evidence supporting IPG's claims has thus far been provided to JSC.

In an Order dated February 8, 2006, the Copyright Office required IPG to provide JSC with information on the identity of the claimants that had allegedly authorized it to claim royalties in the JSC category -- but chose not to require IPG to identify any of the professional or collegiate sports teams that were the subject of the claims. As a result, IPG gave JSC a list (that IPG reserved the right to update at a later time) containing a handful of corporate names that had

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[3] IPG is well aware of the professional and collegiate team sports within the JSC claim -- Major League Baseball, National Football League, National Basketball Association, National Hockey League, Women's National Basketball Association and The National Collegiate Athletic Association.

no obvious connection to any professional or collegiate teams sports, including Fishing University LLC, TearDrop Golf, Daniel Hernandez Productions and Timberwolf Productions.

Under these circumstances, JSC believes that setting aside funds for a 2003 cable Phase II controversy with IPG may well be unreasonable. However, JSC notes that IPG itself has said that setting aside 2% of the Joint Sports royalties would provide adequate funds to resolve its 2003 Phase II Joint Sports controversy. Independent Producers Group's Comments on the Existence of Controversies and Notice of Intent to Participate in Phase I and Phase II Hearings in Docket No. 2005-4 CRB CD 2003 at 2 (filed October 26, 2005) (quoted in Notice at 46517). This assertion, while unsubstantiated, certainly sets the outside boundary of the amount that should be reserved from the 2003 Cable Fund to resolve IPG's alleged controversy. Should the Judges decide to create a Phase II reserve for the IPG controversy in the Joint Sports category, setting aside 1% of the entire 2003 Cable Fund (which would be the equivalent of assuming JSC received a Phase I share of 50% of the cable royalties) would be more than reasonable to safeguard the full scope of IPG's asserted interests in the 2003 Joint Sports share of the cable royalties. *See* Final Order in Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3620 (January 26, 2004) (affirming award of 35.78076% (1998) and 37.62758% (1999) of the Basic Fund royalties and 38.42541% (1998) and 40.47418% (1999) of the 3.75 Fund royalties to JSC).

In order to expedite resolution of the Phase II claims in the JSC category, JSC requests that the Judges order IPG to provide the information that will answer the threshold question of what programming -- if any -- is the subject of IPG's Phase II claims in the Joint Sports category. If it is established that IPG represents program copyright owners with valid claims to Joint Sports royalties, then it would be possible for JSC to move forward and assess IPG's claims as a first step in resolving them. If this information on IPG's claims is not available outside a

proceeding, then it would be useful to commence a proceeding to identify the JSC/IPG claims, and possibly other IPG Phase II claims, as soon as possible. *See* note 1 *supra*.

III. All Asserted Claims Fit Within the Existing Phase I Claimant Categories.

The Judges ask in the Notice for commenters to specify "whether the categories into which the claimants have traditionally divided themselves in Phase I proceedings are adequate to fairly represent the interests of all claimants or [whether] additional categories of claimants [should] be recognized." Notice at 46519. JSC believes that the traditional Phase I categories of broadcast programming, as set forth in the CARP's Report in the 1990-92 cable royalty distribution proceeding, fairly and reasonably encompass all categories of programming that are the subject of claims from any claimant -- and should not be altered. *See* Distribution of 1990, 1991 and 1992 Cable Royalties, Docket No. 94-3 CARP CD-90-92, 61 Fed. Reg. 55653, 55655 (Oct. 28, 1996).

As noted above, IPG apparently wants a new category for "Spanish-language programming." However, there is no compelling reason to create such a category, since copyright owners of Spanish-language programming already have the ability to receive royalties as Phase II claimants, including Phase II claimants of Joint Sports royalties. *See, e.g.,* 1982 Cable Royalty Distribution Determination, 49 Fed. Reg. 37653, 37657 (September 25, 1984) (awarding Spanish International Network ("SIN") a share of the 1982 Joint Sports Royalties); *see also* 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9896-97 (March 8, 1982) (allocating SIN a share of Program Syndicators' 1979 royalties); 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9569 (March 7, 1983) (allocating SIN a share of Program Syndicators' 1980 royalties); 1981 Cable Royalty Distribution Determination, 49 Fed. Reg. 7845, 7848 (March 2, 1984) (allocating SIN stipulated share of Program Syndicators' 1981 royalties).

Furthermore, telecasts of JSC members themselves are often available in Spanish (for example, through the use of secondary audio programming channels activated by pressing a button on the remote control). It would be needlessly disruptive to now require JSC members to become Phase II claimants in an entirely new category. IPG has already asserted a Phase II cable royalty claim in the JSC category from 1999 onward, so if IPG has claimants who own the copyright on live Spanish language telecasts of professional and collegiate sports teams, those claimants can be compensated through the existing JSC category (as SIN was in the 1982 proceeding).

IV. Known Parties Should Be Notified of Filings that Affect Their Interests.

The final question posed in the Notice is whether the Judges should adopt some type of pre-proceeding service requirement that would allow "interested persons to become aware in a timely manner of motions and other filings that might impact their interests." Notice at 46519-20. In general, JSC favors a system that provides interested persons with notice of pleadings and proceedings that affect their interests. When the identity of other interested parties is known, JSC and most parties involved in royalty distribution proceedings try to follow this practice as a matter of courtesy. However, JSC has no objection to the adoption of some type of formal system of notification before the technical commencement of proceedings, such as earlier compilation and distribution of an official service list of interested parties or the posting of information about proceedings and filings that have response deadlines on the Copyright Royalty Board website. JSC would be concerned about additional requirements for the Judges to publish notices in the Federal Register, as that system would lead to additional expense and delays in the resolution of issues before the Judges.

JSC has no objection in principle to the IPG proposal that "overnight mail" service be clarified to mean next calendar day service rather than next business day service. *See* IPG 2007

Opposition at 8. However, this requirement could be problematic if service must be made through an overnight express mail delivery service, because Saturday delivery service is not available to all U.S. locations. The current rules of the Judges do not allow for electronic mail service without consent. If the concern about electronic mail service is the possibility that the electronic message would not be delivered, one possibility would be to require attempted same-day service by electronic mail in addition to the use of an overnight express mail delivery service. This system would at least reduce the likelihood of service taking more than a day.

CONCLUSION

JSC requests the Judges to promptly proceed with the further distribution of 2003 cable royalties and take the other action discussed above and summarized at page 2 *supra*.

Dated: September 19, 2007

Respectfully submitted,

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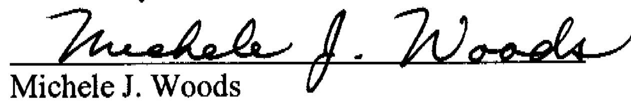
CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2007, a courtesy copy of the foregoing Comments of the Joint Sports Claimants was sent by electronic mail to the counsel and parties listed below.



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