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Copyright Royalty Board

37 CFR Part 387

[Docket No. 15-CRB-0010-CA-S (Sports Rule Proceeding)]

Adjustment of Royalty Rates for Statutory Cable Retransmission License

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Request for comments.

SUMMARY: The Copyright Royalty Judges solicit reply comments on the legal issue of the purported reach of the proposed rules relating to a cable system license royalty surcharge for retransmission of broadcasts of certain professional sports events.

DATES: Reply comments are due on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Surreplies from original commenters are due on or before [INSERT DATE 40 DAYS FROM DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: You may make replies and surreplies, identified by docket number 15-CRB-0010-CA-S (Sports Rule Proceeding), by any of the following methods:

CRB's electronic filing application: Submit comments online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE,

Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Unless submitting online, commenters must submit an original, five paper copies, and an electronic version on a CD. All submissions must include the CRB's name and docket number. All submissions received will be posted without change to eCRB on <https://app.crb.gov> including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 15-CRB-0010-CA-S (Sports Rule Proceeding). For documents not yet uploaded to eCRB (because it is a new system), go to the agency website at <http://www.crb.gov/> or contact the CRB Program Specialist.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

In May 2017, the Copyright Royalty Judges (Judges) published notice of an agreed settlement and proposed rules to adjust royalties payable by certain cable system operators for a license to retransmit broadcast sports programming (the Sports Surcharge Rules). *See* 82 Fed. Reg. 24611 (May 30, 2017). Specifically, the rules as proposed

would be applicable to “Form 3” cable systems¹ retransmitting “eligible professional sports events.” The proposed rules define “eligible professional sports event” as a game involving member teams of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, and the Women’s National Basketball Association.²

The Copyright Act (Act) directs that the Judges provide 1) an opportunity to comment to nonparticipants who would be bound and 2) an opportunity to comment *and object to participants* who would be bound. *See* 11 U.S.C. 801(b)(7)(A)(i). The Judges may decline to adopt an agreement as a basis for statutory terms and rates for “participants that are not parties to the [settlement] agreement,” if a *participant* objects to the agreement and the Judges conclude that the settlement “does not provide a reasonable basis for setting” rates or terms. *Id.* at § 801(b)(7)(A)(ii).

The statutory language does not prohibit the Judges from considering whether the proposed provisions are contrary to statutory law. *See [Register of Copyrights] Review of Copyright Royalty Judges Determination*, Docket no. 2009-1, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009) (Register’s Opinion).³ In the cited opinion, the Register concluded that “nothing in the statute limits the [Judges] from considering comments filed by non-participants if those nonparticipant commenters argue that the proposed provisions are

¹ “Form 3” cable systems are those with semi-annual gross receipts, as defined by statute, greater than \$527,600. *See* 17 U.S.C. 111 (d)(1)(B), (E), & (F).

² The proposed sports programming surcharge would also apply to an “eligible collegiate sports event” as that term is defined in the proposed regulations. Eligible collegiate sports events are limited to games that involve certain Division I football or men’s basketball teams. Proposed Rule 387.2(e)(5).

³ The Act permits the Register of Copyrights (Register) to review for legal error the Judges’ resolution of a material question of substantive law under the Act “that underlies or is contained in a final determination” by the Judges. *See* 17 U.S.C. 802(f)(1)(D). Decisions of the Register are binding as precedent upon the Judges in proceedings subsequent to the Register’s opinion. *Id.*

contrary to statutory law.” *Id.* According to the Register’s Opinion, which is binding precedent for the Judges, the Judges may decline to adopt portions of the agreed regulations that would be “contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.” *Id.*

The Judges received two comments on the proposed rules before the June deadline. Joint Sports Claimants (JSC)⁴, participants and the proponents of the settlement, supported adoption of the final rule and offered a correction of a misstated cross reference within the rule.

Major League Soccer, L.L.C. (MLS) also commented. In the present proceeding, MLS did not file a Petition to Participate; thus MLS is not a participant.⁵ Nonetheless, MLS states that it would be “[a]ffected by these proposed rules and their terms.” MLS Comment at 2. MLS contends that, even though it is not a participant in this proceeding, it clearly meets the [Judges’] description of ‘Joint Sports Claimants’⁶ in that MLS owns copyrights in “live telecasts of professional teams’ sports broadcasts by U.S. and Canadian television stations” *Id.* As MLS asserted in its comment, the definition of “eligible professional sports event” “unfairly excludes MLS, and any other [unnamed] eligible, professional league that broadcasts live team sports.” *Id.* at 3. In its comment, MLS contends that its omission results in unfair treatment. *Id.* at 2, 4.

⁴ The Joint Sports Claimants (JSC) consists of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, and the Women’s National Basketball Association.

⁵ MLS asserted without evidence that it made “attempts to join the JSC “on a formal basis,” but that it had “not yet been recognized as a JSC member.” MLS Comment at 2.

⁶ See Notice of Participant Groups . . . and Scheduling Order, Consolidated Proceeding No. 14-CRB-0010-CD (2010-13) (Nov. 25, 2015), Ex. A. By its terms, this order limited application of the agreed participant groups to the proceeding in which it was adopted. The Judges nonetheless consider the categories informative for purposes of determining distribution in the present proceeding.

According to MLS, “[s]ince JSC are representatives for, and custodians of the funds of, all programs falling within that agreed [Joint Sports Claimants] category, [JSC] should represent the interests of the entire category, not only those it deems *members*. The benefits of the regulation should apply to a [sic] who fall into the Joint Sports Claimants category.” *Id.* at 3.

Although MLS generally states that adoption of the proposal would be unfair or inequitable to MLS and certain other omitted professional leagues that broadcast live team sports, MLS does not expressly contend that the proposal is “contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law,” which, under the Register’s Opinion, would permit the Judges to decline to adopt portions of the agreed regulations. In the interests of developing a more complete record to support the Judges’ decision, however, the Judges seek further comment specifically addressing the issue of whether they must adopt the rules as contained in the settlement agreement and published for comment in May 2017, consistent with Section 801(b)(7)(A) of the Copyright Act, or whether any provision in the proposed rules is contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law.

The Judges hereby solicit Reply Comments limited to legal analysis of the issue as the Judges express it. Any party in interest may file Reply Comments addressing the issue the Judges present in this Notice. Commenters that believe any provision of the proposed rules is contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law should specify the provision or provisions in question, explain why the provision(s) is contrary to the applicable license or applicable statutory law, and

provide supporting legal analysis. Reply commenters should focus particular attention on whether any entities not expressly addressed in the proposal would nonetheless be bound by the rates and terms of the proposal or otherwise affected by the proposed rules and how, if at all, the affect should dictate action by the Judges. If any entities other than those expressly included in the proposed provisions are bound by the proposal, are the Judges effectively adopting a zero sports surcharge rate with respect to those entities? If so, what factors justify the different rates for the entities that would have a zero rate from those that would receive the proposed sports surcharge rate?

Any commenter may thereafter file Surreply Comments addressing specifically the legal analysis of a party or parties filing Reply Comments.

Dated: September 18, 2017

Suzanne M. Barnett,
Chief U.S. Copyright Royalty Judge.
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