In the Matter of	}	
	}	
Distribution of the 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds	}	**Docket No. 2000-2 CARP CD 93-97**
	}	

ORDER

This Order addresses two motions filed by the parties in this Phase II cable royalty distribution proceeding. The first, a motion filed by MPAA-represented Program Suppliers' ("PS"), seeks dismissal of the claim filed by Independent Producer's Group ("IPG"). The second is IPG's motion to dismiss certain portions of Program Suppliers' written direct case.

I. Program Suppliers' Motion to Dismiss

Program Suppliers move to dismiss the Phase II claim filed by IPG against the syndicated program category. Program Suppliers allege that IPG's claim (marked as No. 176 by the Copyright Office) does not satisfy the Office's rules and regulations, that none of the entities claimed by IPG are listed in claim No. 176 or filed their own individual claims, and that the documents authorizing IPG to represent the claimants it has listed in its direct case are signed after the deadline for filing 1997 claims and thus convey no rights to seek 1997 royalties. In addition, Program Suppliers allege that many of the program titles listed by IPG as belonging to its claimants actually belong to Program Suppliers' claimants.

IPG filed an opposition to Program Suppliers' motion, and Program Suppliers replied. Because Program Suppliers' motion, if granted in all respects, would obviate the need for this proceeding, the Library is addressing it first and will resolve pending discovery motions at a later date.

Discussion

Background

Program Suppliers' motion invites the Library to wade into the turbid waters of representation and ownership of copyrighted syndicated programs and toss out the red herrings prior to the convening of the CARP. In this instance, Program Suppliers allege that the entire ocean, or at least IPG's portion of it, is full of nothing but red herrings. Before even contemplating such a task, the Library examines the law regarding the filing of claims to cable royalties, and the regulation it has promulgated.

The Copyright Act identifies who is eligible for collecting section 111 compulsory license fees, and generally what they must do to claim royalties. Section 111(d)(3) of the Copyright Act provides that section 111 royalty fees shall "be distributed to those among

the following **copyright owners** who claim their works were the subject of secondary transmissions by cable systems during the relevant semiannual period." 17 U.S.C. 111(d)(3) (emphasis added). The copyright owners specified in the subsection are the owners of nonnetwork programs contained on distant signals retransmitted by cable systems.

Section 111(d)(4)(A) describes what must be done to claim royalties under section 111:

> During the month of July in each year, every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Librarian of Congress, in accordance with requirements that the Librarian of Congress shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

17 U.S.C. 111(d)(4)(A). This is all the Copyright Act has to say about the filing of cable claims. The Copyright Royalty Tribunal ("CRT"), where cable claims were filed and resolved prior to the Library assuming the task in 1993, adopted regulations governing the filing of cable claims. Section 302.7(a) of the Tribunal's regulations provided:

> During the month of July of each year, every person claiming to be entitled to compulsory license fees for secondary transmissions during the preceding calendar year shall file a claim to such fees in the office of the Copyright Royalty Tribunal. No royalty fees shall be distributed to copyright owners for secondary transmissions during the specified period unless such owner has filed a claim to such fees during the following calendar month of July. For purposes of this clause claimants may file claims jointly or as a single claim. Such filing shall include such information as the Copyright Royalty Tribunal may require. A joint claim shall include a concise statement of the authorization for the filing of the joint claim. A performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard agreements, for purposes of this filing and fee distribution.

37 C.F.R. 302.7(a) (1993). Subsection (b) of that regulation required the full name and address of the "person or entity claiming compulsory license fees," along with identification of at least one secondary transmission of that person's or entity's program by a cable system.

The purpose of the Tribunal's regulations governing the filing of cable claims is evident: identify who the claimants are to the royalty pool, and assure that they have asserted a prima facie claim for section 111 royalties. While the regulation states that "every person claiming to be entitled to compulsory license fees" may file a claim, the regulation further states that "[n]o royalty fees shall be distributed to copyright owners for secondary transmissions during the specified period unless such owner has filed a claim to such fees during the following calendar month of July." 37 C.F.R. 302.7(a) (1993).

When the Tribunal's responsibilities were assumed by the Library, the Library proposed changes to the regulations for filing cable claims. Proposed new section 252.2 read:

> During the month of July each year, any party claiming to be entitled to cable compulsory license royalty fees for secondary transmissions of one or more of its works during the preceding calendar year shall file a claim to such fees with the Copyright Office. No royalty fees shall be distributed to a party for secondary transmissions during the specified period unless such party has timely filed a claim to such fees. Claimants may file claims jointly or as a single claim.

59 FR 2550, 2564 (January 18, 1994). The Library did not state why it changed slightly the wording of the former Tribunal's regulation, but did propose a new section 252.3 which incorporated some of the same principles. Section 252.3(a)(3) stated that "[i]f the claim is a joint claim, a concise statement of the authorization for the filing of the joint claim [is required]. For this purpose a performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard agreements." 59 FR at 2565. The Library also proposed section 252.3(e) which stated that "[a]ll claimants filing a joint claim shall make available to the Copyright Office, other claimants, and, where applicable, a Copyright Arbitration Royalty Panel, a list of all individual claimants covered by the joint claim." 59 FR at 2565.

One commentator to the Notice of Proposed Rulemaking ("NPRM"), the Public Broadcasting Service ("PBS"), raised concerns about section 252.3(e), wondering if, in the case of a joint claim, each claimant was required to identify at least one secondary transmission. The Library responded:

> We acknowledge that § 252.3 as proposed in the NPRM muddies the waters for the filing of cable royalty claims, and of satellite royalty claims as well. We are troubled, however, by changing what had been a longstanding requirement at the Tribunal for obliging *all* claimants to identify at least one secondary transmission of their copyrighted works. While such requirement does undoubtably add to the time and expense burdens of joint claimants such as PBS, it is not without purpose. The law states plainly that cable compulsory license royalties are only to be distributed to "copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period." 17 U.S.C. 111(d)(3). To support such a claim, each claimant may reasonably be asked to identify at least one secondary transmission of his or her work, thus permitting the Copyright Office to screen the claims and dismiss any claimants who are clearly not eligible for royalty fees. The requirement will also help to reduce time spent by a CARP determining which claimants have a valid claim: if only one secondary transmission is identified for one of the joint claimants, then it could not readily be determined if the other claimants were even eligible for cable royalties.
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> In an effort to end this confusion we are deleting subsection (e) with its requirement that joint claimants submit a list identifying all the claimants. Instead, we are amending subsection (a)(4) to require that each claimant to a joint claim, other than a joint claim filed by a performing rights society on behalf of its members or affiliates, must identify at least one secondary transmission of his or her works.

59 FR 23964, 23979 (May 9, 1994).

A hail of protest followed the Library's change of the joint claims rule. Several copyright owner groups, including Program Suppliers, argued that a requirement that each joint claimant submit evidence of a secondary transmission was unnecessary and expensive and was not a practice observed by the CRT. Program Suppliers went further and argued that the Copyright Office should refrain from any examination or screening of claims as a regular practice, and leave such activities and eligibility issues to the claimants to raise through motions either to the Librarian or the CARPs. 59 FR 63025, 63027 (December 7, 1994).

On reconsideration, the Library dropped the requirement that each joint claimant identify a secondary transmission. We went on to note that "[t]he amended rule, however, does require each joint claim to identify all claimants participating in the joint claim. Those who are not identified in the joint claim may not be added to it after the filing period." Id. at 63028.[1] The amended section 252.3(a)(3) of the rules, which is the current rule and was in force in 1997, reads in pertinent part: "If the claim is a joint claim, a concise statement of the authorization for the filing of the joint claim, and the name of each claimant to the joint claim [is required]." Id. at 63042.

Analysis

As the above discussion reveals, the requirements of section 252 of the rules for the filing of cable claims are critical to the process of distributing royalties collected under the cable compulsory license. When a joint claim is filed, it must identify each of the claimants that are a part of the claim at the time the claim is filed. Parties may not be added to the joint claim after the fact because no royalty fees will be distributed to a party that has not filed a timely claim.

The Library has examined claim No. 176, received by the Copyright Office on July 20, 1998. The claim states that Artists Collections Group, Ltd. filed the claim on behalf of itself and Worldwide Subsidy Group, although the claim is signed by the President of Worldwide Subsidy Group. The claim identifies the nature of the copyrighted works as motion pictures and identifies two programs, "Unsolved Mysteries" and "Garfield and Friends," as being subject to secondary transmissions by cable systems during 1997. IPG states in its written direct case that Artists Collection Group has withdrawn its claim because it did not represent any copyright owners whose programs were retransmitted by cable systems during 1997. IPG Direct Case at 3, n.2. This leaves Worldwide Subsidy Group as the sole identified claimant.

It is clear from IPG's pleadings that Worldwide Subsidy Group is not a copyright owner, but is "either the transferee or agent of copyright owners for purposes of this proceeding." IPG Opposition at 4. The question arises whether, under the Library's rules, a noncopyright owner party can file a claim to cable royalties. The Tribunal's old rules could be read as permitting only copyright owners and performing rights societies to file royalty claims. See 37 C.F.R. 302.7(a) (1993) ("No royalties shall be distributed to copyright owners ... unless such owner has filed a claim to such fees during the following calendar month of July," but performing rights societies are not required to obtain separate authorizations from members or affiliates). The Library's rules, however, state that "any party claiming to be entitled to cable compulsory license royalty fees" may file a

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[1] An exception to this requirement was made for performing rights societies, such as ASCAP and BMI. That exception, however, has no application in this proceeding.

claim. 37 C.F.R. 252.2. The rule is broad enough to allow noncopyright holders, who are acting as agents or representatives of copyright owners of nonnetwork programming retransmitted by cable systems, to file a claim. It was permissible, therefore, for Worldwide Subsidy Group to file a claim. However, that does not answer the question whether Worldwide Subsidy Group had to identify the copyright owners on whose behalf it was filing the claim.

Section 252.3(a)(3) requires that all claimants to a joint claim must be identified. As discussed above, this is required to assure that royalties are not distributed to copyright owners that have not filed a timely claim. With the dismissal of Artists Collections Group, the only named claimant on claim No. 176 is Worldwide Subsidy Group. However, in exhibit D of its written direct case, IPG, the representative of Worldwide Subsidy Group, lists the programs and copyright owners or distributors which it alleges comprise its claim. These owners and distributors are: Abrams Gentile Entertainment; Beacon Communications; Cosgrove-Meurer Productions; Flying Tomato Films; Funimation; Golden Films; Jay Ward Productions; Lacey Entertainment; Litton Syndications; Mainframe Entertainment; Paws, Inc.; Raycom Sports; Sandra Carter Productions; Scholastic Productions; Tide Group d/b/a Psychic Reader's Network; and the United Negro College Fund. None of these parties are listed on claim No. 176. Furthermore, only one of these, Lacey Entertainment, filed a claim with the Copyright Office.

IPG asserts that it was not required to list these copyright owners and distributors because it did not file a joint claim. Rather, IPG submits that claim No. 176 is a single claim with Worldwide Subsidy Group acting as agent or transferee[2] for all the copyright owners and distributors identified in exhibit D. IPG argues that filing a claim in this fashion is permissible. We do not agree. The law is clear that only those parties whose works were the subject of secondary transmissions are entitled to a distribution of royalties, and it is only those parties on whose behalf a claim may be filed. 17 U.S.C. 111(d)(3), (d)(4)(A). The Library rules permit the filing of joint claims, provided that the individual claimants are identified to assure that they have indeed filed timely claims. But the rules do not permit the filing of a single claim by a party that purports to represent a list of unidentified copyright owners. If IPG's position were accepted, the requirement of a timely-filed claim would be flouted. In that instance, a single party claiming to represent a myriad of unidentified copyright holders and distributors could file a single claim and then, at a future date, claim that the filing covered these unidentified parties. A copyright owner would never have to worry about submitting a cable claim so long as the

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[2] IPG asserts that it is the transferee of the right to collect cable royalties in certain instances, but does not assert that it is the transferee of one or more of the 17 U.S.C. 106 exclusive rights granted by copyright. If IPG were the transferee of the relevant exclusive rights, it would have standing to submit a claim on its own behalf.

owner aligned itself with one of the representative parties (such as Worldwide Subsidy Group) prior to the filing of the written direct cases. As we said in the preamble to our final rules on the filing of joint cable claims, a joint claim cannot be amended after the July filing period to add new parties, because those parties have not filed a timely claim. 59 FR at 63028. IPG's interpretation would render this language, and the law, meaningless because it would never be possible to determine whether a copyright owner or distributor filed a timely cable claim.

Because Worldwide Subsidy Group appears not to be a claimant in its own right and purports to have filed a claim on behalf of many other claimants, claim No. 176 must be considered a joint claim in this proceeding to have validity. However, Worldwide Subsidy Group did not comply with the rules for the filing of joint claims. Because of this failure, IPG's case could be dismissed. Nevertheless, the Library cannot say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. It is sometimes the case that the Copyright Office will receive a single claim filed by a production company that does not identify any joint claimants. Whether this production company owns all or some of the copyrights represented by the claim, or is just a representative of unidentified copyright owners, is unknown to the Office. To the Library's knowledge, these claims have not been challenged in the past, and this is a case of first impression. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim. However, what is clear, and what the law requires, is a factual determination as to which of the owners and distributors identified by IPG in exhibit D of its written direct case were in fact represented by Worldwide Subsidy Group at the close of the filing period for 1997 cable claims. Any party listed in exhibit D (with the exception of Lacey Entertainment, which filed its own claim) that was not represented by Worldwide Subsidy Group before August 1998 cannot be said to have filed a timely claim, and therefore testimony contained in IPG's written direct case regarding such party must be stricken.

Both Program Suppliers and IPG have offered information and argument as to the status of representation of the exhibit D parties. The status of each of these parties is a factual inquiry and is best resolved by the CARP. In designating this matter to the CARP, we offer some decisional guidelines. First, because Worldwide Subsidy Group did not list any joint claimants, IPG has the burden of proving that it represented each of the exhibit D parties for distribution of 1997 cable royalties on or before July 31, 1998. Second, IPG must submit written proof of representation for each exhibit D party. Written proof is required because claim No. 176 does not identify any of the exhibit D parties, and because testimonial evidence alone will not preserve the integrity of the law and the regulations which prohibit adding parties to a joint claim after the fact. Proof must be in the form of written agreements of representation between IPG and each of the exhibit D parties executed on or before July 31, 1998. Finally, if the CARP determines that one or more of the exhibit D parties were not validly represented by Worldwide Subsidy Group for distribution of 1997 cable royalties on or before July 31, 1998, the

CARP must strike that portion of IPG's written direct case related to that party or parties.

II. IPG's Motion to Strike

IPG moves to strike reference to certain claimants and programs in Program Suppliers' written direct case. IPG submits that Program Suppliers "signed up" for representation Lacey Entertainment and General Mills, Inc. after the September 28, 1999, deadline for filing Notices of Intent to Participate and that because these parties did not file their own timely Notices, they are no longer parties to this proceeding. IPG also reserves the right to challenge other claimants represented by Program Suppliers if evidence reveals that they did not engage Program Suppliers to represent them until after the deadline.[3] Program Suppliers oppose IPG's motion.

Discussion

The cable royalty distribution process is a straightforward one. As described above in the discussion regarding Program Suppliers' motion, all parties claiming to be entitled to a distribution of cable royalties must submit a timely-filed claim. This is a statutory requirement. The statute says nothing more about how the proceeding is run after that point (other than describing the creation and operation of a CARP), and leaves these matters to the Library. 17 U.S.C. 111(d)(4)(B). We have established rules as to what must be done prior to the convocation of the CARP. Any claimant wishing to appear before the CARP and present evidence must file a Notice of Intent to Participate. 37 C.F.R. 251.45(a). As we have said on numerous occasions, failure to file a timely Notice may result in a dismissal of the claim. See, e.g. 64 FR 41473 (July 30, 1999)(this proceeding); 61 FR 49799 (September 23, 1996)(1993 and 1994 cable Phase I); 62 FR 48894 (September 17, 1997)(1995 cable Phase I). Certainly not all claimants appearing on the claims list must file their own Notice. These parties may be represented by a party that files a Notice on their behalf and represents them throughout the course of the proceeding. The question presented by IPG's motion is: what happens when a claimant is not represented by someone else at the time Notices of Intent to Participate are due, and then later seeks representation from one of the parties that has filed a timely Notice?

IPG submits that Lacey Entertainment's and General Mills' failure to file a timely Notice of Intent to Participate has the same effect as failing to timely file a claim. We disagree. Timely submission of a claim is a statutory requirement—we lack the authority to waive the requirement. A timely Notice of Intent to Participate is a regulatory requirement, and it is a well-established practice that a party wishing to file an untimely Notice may move for leave to do so. Such motions are evaluated under a two-part test:

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[3] Production of documents relating to Program Suppliers' representation of its claimants is the subject of a pending discovery motion.

1) the disruption to the proceeding caused by allowing the moving party to participate; and 2) good cause for accepting the late-filed Notice. Order in Docket No. 99-6 CARP

DTRA (November 30, 1999)(accepting late-filed Notices of Intent to Participate from seven different parties); Order in Docket No. 99-6 CARP DTRA (December 22, 1999); Order in Docket No. 99-3 CARP DD 95-98 (August 5, 1999). Program Suppliers recognize this and assert that representation of a claimant after the date for Notices of Intent to Participate is not a problem, particularly where "Program Suppliers have a good faith belief as to the composition of their group and the potential controversies at the filing date for Notices of Intent, regardless of whether all potential claimants to their group have actually signed representation agreements with MPAA by that time." Program Suppliers' Opposition at 3.

Although the importance of the Notice of Intent to Participate requirement is not on par with the filing of claims requirement, the question remains as to what happens when a party that submits a Notice on behalf of a claimant does not in fact represent the claimant at the time the Notice is filed, but does represent the claimant prior to the filing of the written direct cases. We note that the rule requires that "parties wishing to participate in the proceeding" must file a Notice. 37 C.F.R. 251.45(a). Unlike the filing requirements for joint claims, the rule does not require that the Notice identify all claimants on whose behalf the Notice is filed. Some parties, in both royalty distribution and rate adjustment proceedings, do as a matter of practice identify the entities on whose behalf the Notice is filed. Others do not. The current regulation is not a model of clarity, and the Library is reluctant to decide the fate of the claims of Lacey Entertainment and General Mills (or other claims Program Suppliers seeks to represent) based on a ruling, in a case of first impression, on the meaning of an imprecise regulation.

Fortunately, this motion can be resolved without answering that difficult question. As already noted, on several occasions the Library has received late-filed Notices of Intent to Participate from parties that did not file their own separate Notices and were not identified as being encompassed by a timely-filed Notice. We have traditionally accepted these late-filed Notices, provided that they satisfy the two-part test referred to above.

Because the Library has authority to grant late-filed Notices of Intent to Participate--authority it does not have with respect to late-filed cable royalty claims--the appropriate resolution to this dispute is to permit General Mills and Lacey Entertainment the opportunity to submit motions to accept late-filed Notices. In addition, any other claimants that were not represented by Program Suppliers on the date that Notices of Intent to Participate were due in this proceeding should also be given the opportunity to file motions to accept their late-filed Notices. All such motions must be submitted to the Library on or before June 30, 2000. The Library will consider these motions consistent with the two-part test for sufficiency most recently articulated in the above-described Orders in Docket No. 99-6 CARP DTRA.

Wherefore, **IT IS ORDERED** that Program Suppliers' motion to dismiss IPG's case is designated to the CARP for resolution consistent with the terms of this Order. **IT IS FURTHER ORDERED** that IPG's motion to strike Lacey Entertainment's and General Mills' claims from Program Suppliers' written direct case **IS DENIED** without prejudice, and that Lacy Entertainment, General Mills and any other claimant not represented by Program Suppliers at the time Notices of Intent to Participate were due in this proceeding may file motions to accept late-filed Notices no later than June 30, 2000. Following the disposition of those motions, IPG may renew its motion if and to the extent that it is not encompassed in or precluded by the rulings on those motions.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: _____
William J. Roberts, Jr.
Senior Attorney

DATED: June 22, 2000