United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1063 **September Term, 2019**

FILED ON: APRIL 14, 2020

PROGRAM SUPPLIERS,
APPELLANT

v.

COPYRIGHT ROYALTY BOARD AND LIBRARIAN OF CONGRESS,
APPELLEES

CANADIAN CLAIMANTS GROUP, ET AL.,
INTERVENORS

On Petition for Review of a Decision of
the Copyright Royalty Board

Before: MILLETT, KATSAS and RAO, *Circuit Judges*.

J U D G M E N T

This petition for review of a decision of the Copyright Royalty Board was presented to the court and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

ORDERED AND ADJUDGED that the petition for review and motion for remand be **DENIED**.

The Copyright Act tasks the Copyright Royalty Board with distributing royalty fees owed to copyright holders whose content is retransmitted through mediums such as cable television. *See* 17 U.S.C. § 111(d). To determine the royalties due to each copyright holder, the Board holds a two-phased proceeding. In the allocation phase ("Phase I"), the Board establishes categories of programming based on content and determines the percentage of overall statutory royalties to which each category is entitled. *See Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132, 135 (D.C. Cir. 2015). In the distribution phase ("Phase II"), the Board determines the royalties due to individual copyright holders within each category. *See id.* Program Suppliers, a group of

copyright holders, petitions this court for review of the Board's Phase I final determination allocating royalties for retransmitted cable programming from 2010 to 2013. *See* 84 Fed. Reg. 3,552 (Feb. 12, 2019) (hereinafter "Final Determination"). Program Suppliers challenges two of the Board's procedural rulings as well as several substantive aspects of the Final Determination as arbitrary and capricious. Additionally, during the pendency of this appeal, Program Suppliers moved for a remand to the Board to reopen the Phase I proceeding in light of purportedly newly discovered evidence. We consider each issue in turn under the Administrative Procedure Act. *See* 17 U.S.C. § 803(d)(3) ("Section 706 of [the APA] shall apply with respect to review by the court of appeals under this subsection.").

Program Suppliers first challenges the Board's denial of one of its discovery requests. This court reviews the Board's discovery determinations with "'extreme deference' because the 'conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance.'" *Indep. Producers Grp.*, 792 F.3d at 138–39, 142 (quoting *Hi–Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000)). In the Phase I discovery period, Program Suppliers sought information regarding the validity of every royalty claim within every category. The Board quashed this request for inter-category discovery for two independent reasons: Program Suppliers was estopped from seeking such discovery because it had stipulated to the existing program categories, *see* J.A. 361–63, and Program Suppliers' discovery request was untimely, *see id.* at 363. Although Program Suppliers specifically challenges the Board's estoppel rationale, it does not contest the timeliness rationale on appeal. The Board noted that it had always considered challenges to claim validity in Phase II rather than Phase I and that Program Suppliers' request, if granted, would upend the Board's long-standing practice. *See id.* The Board thus held that Program Suppliers' "attempt to alter the historic Phase I/allocation process comes far too late in this proceeding," particularly considering the "substantial reliance on the process by other parties." *Id.* The untimeliness of the discovery request provides an independent and sufficient ground for denying Program Suppliers' discovery request. Because Program Suppliers fails to contest this rationale on appeal, its challenge is forfeited, and we decline to disturb the Board's discovery ruling.

Next, Program Suppliers challenges the Board's denial of its motion, filed after the Phase I discovery deadline, to supplement an expert report. Program Suppliers' proposed "Third Errata" to its expert report consisted of significant revisions and additions based on a new data set. The Board rejected Program Suppliers' attempt to file the Third Errata because "[t]he filing was not an erratum; it was a significant modification of [] expert testimony" that could not be "sprung" on the other parties "two weeks before the scheduled start of a major hearing projected to last five- to six-weeks." *Id.* at 3,868–869. Program Suppliers now argues that the Board arbitrarily excluded the Third Errata because the Board accepted other parties' post-deadline submissions. Even without the deference afforded to Board discovery decisions, we can find no error in the Board's denial of Program Suppliers' tardy submission. The Board consistently allowed several parties, including Program Suppliers, to file minor corrections to their expert reports after the discovery deadline. *See, e.g.*, *id*. at 1,150 (Settling Devotional Claimants); *id.* at 710 (Program Suppliers). Further, the Board consistently rejected the attempts of parties to file substantive revisions to their expert reports after the discovery deadline. *See, e.g.*, *id.* at 2,816–817 (Settling Devotional Claimants); *id.* at 3,454 (Program Suppliers). Because the record demonstrates the Board reasonably assessed

post-deadline revisions based on the content of the filing rather than the identity of the moving party, we reject Program Suppliers' argument that the exclusion of the Third Errata was arbitrary and capricious.

Program Suppliers' primary substantive challenge to the Final Determination centers on the Board's use of a regression analysis as the starting point for calculating the royalty allocation due to each category. We may set aside the Board's Final Determination "only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the agency have no basis in the record." *Indep. Producers Grp.*, 792 F.3d at 136 (quoting *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1223 (D.C. Cir. 2009)). Since 2004, the Board and its predecessor agencies have relied primarily upon survey data, supplemented by regression analysis. *See Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 399–400, 402 (D.C. Cir. 2005); 84 Fed. Reg. at 3,557–558. In this proceeding, the Board determined that the regression-based Crawford Analysis remedied flaws with past regression analyses and was the methodology that most accurately calculated the market value of programming. *See* 84 Fed. Reg. at 3,569, 3591. Based on this finding, the Board employed the Crawford Analysis "as the starting point" for its allocation calculation. *Id.* at 3,610. Program Suppliers argues that the Board's shift to emphasizing regression analysis was arbitrary and capricious because it represents an unexplained departure from past practice. The record, however, demonstrates that the Board provided a reasonable explanation for changing its methodological emphasis.

To begin with, the Board recognized that its past reliance on cable survey data was a "methodological precedent," *id.* at 3,590–591, and explicitly acknowledged that it was shifting from surveys to regression analysis as the primary methodology for calculating royalty allocation, *id.* at 3,591. The Board then provided good reasons for employing the Crawford Analysis, including its superior precision relative to alternative methodologies, which Professor Crawford achieved through his use of a broad data set. *Id.* at 3,569 ("[T]he confidence intervals for his proposed shares were relatively narrow at the 95% confidence level (*i.e.*, at a .05 significance level)."). This explanation substantiates the Board's conclusion that the Crawford Analysis was "the most persuasive methodology overall on this record." *Id.* at 3,610. Finally, the Board adequately described how the Crawford Analysis reflected "relevant market factors" by estimating the marginal value of each minute of programming in a category. *Id.* at 3,556–558. The Board thus reasonably explained how the Crawford Analysis was the best available method to determine the "relative market value of the programming types at issue" in accordance with the agency's traditional market-based standard. *Id.* at 3,556–569. We reject Program Suppliers' challenge because the Board acknowledged it was shifting to primary reliance on regression-based analysis, provided good reasons for the change, and demonstrated that the analysis conforms to the Board's market-based standard. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

We also reject Program Suppliers' remaining arbitrary and capricious challenges to the Board's Final Determination. First, Program Suppliers argues that the Crawford Analysis was not replicable and therefore the Board should not have relied upon it. The record demonstrates, however, that opposing experts were "able to 'reproduce' Professor Crawford's original estimates," J.A. 3,862, and the Board explained that "there is no credible record evidence that [an opposing expert's] claimed attempts to replicate Professor Crawford's algorithm revealed anything beyond a *de minimis* difference, let alone a difference sufficient to call into question the

reasonableness of Professor Crawford's findings," *id.* at 3,863. Second, contrary to Program Suppliers' assertion, the record demonstrates that only two categories—Devotional and Canadian—contained a significant amount of "niche" programming that was not captured by the Crawford Analysis and thus required an upward adjustment in royalty percentage. 84 Fed. Reg. at 3,610–611. Program Suppliers points to nothing in the record supporting its claim that it was similarly situated to the much smaller Devotional and Canadian categories and thus entitled to a similar upward adjustment. Third, even if Program Suppliers is correct that the Board's initial "ranges of reasonable[]" allocations were unsupported by the record, such error is harmless because the agency exhaustively explained how it allocated the final royalty share calculations. *See, e.g.*, *id.* at 3,610. Fourth, we can find nothing arbitrary in the Board's rejection of Program Suppliers' proposed "other sports" category and reallocation of the projected royalties from that category to the other established categories. *Id.* at 3,591 (finding the "other sports" category "created a value where none, or next to none, existed").

Finally, we consider Program Suppliers' motion to remand the case in light of newly discovered evidence. To obtain such a remand, Program Suppliers must demonstrate that the "basic information on which the [agency] relied has changed." *Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 907 (D.C. Cir. 1980). The supposed "newly discovered evidence" that forms the basis of Program Suppliers' motion consists of hundreds of preliminary regression analyses conducted by Professor Crawford. These preliminary regressions were in existence when Program Suppliers filed its initial discovery requests and it had an opportunity to obtain the regressions through greater diligence in the discovery period. Because the evidence existed at the time of the initial discovery period, and Program Suppliers had a fair opportunity to obtain it through discovery, there has been no "change in 'core' circumstances … that goes to the very heart of the case." *Id.* (quoting *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971)). Accordingly, we deny Program Suppliers' remand motion.

For the foregoing reasons, the petition for review and motion for remand are denied in full.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk