Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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| In the Matter of | ) | |
| | ) | |
| Distribution of 2000, 2001, 2002 | ) | Docket No. 2008-2 CRB CD 2000-2003 |
| And 2003 Cable Royalty Funds | ) | (Phase II) |
| | ) | |

**INDEPENDENT PRODUCERS GROUP'S RESPONSE TO JUDGES' ORDER OF OCTOBER 6, 2015**

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its "Response to Judges' Order of October 6, 2015".

**PROCEDURAL BACKGROUND**

On October 6, 2015, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) issued a mandate making final its decision in *Settling Devotional Claimants v. Copyright Royalty Board,* No. 13-1276 (August 14, 2015). The DC Circuit vacated the portion of the Copyright Royalty Judges' (Judges) Determination in the captioned matter apportioning royalties in the devotional programming category and remanded the matter to the Judges.

In accordance with 37 C.F.R. § 351.15, on October 6, 2015 the Judges ordered the parties to file written proposals for the conduct and schedule of the resolution of the remand by November 20, 2015. Therein, the Judges directed each party to include in its submission an analysis of how its proposal fulfills the DC Circuit's injunction to "balance [the Judges'] legitimate interest in preventing parties before them from engaging in trial

by ambush with the need to have a sufficient factual basis to make a reasoned decision." *Settling Devotional Claimants,* slip op. at 27.

## PROPOSAL FOR RESOLUTION OF REMAND

### A. THE SDC FAILED TO PROPOSE ANY DISTRIBUTION METHODOLOGY, WHILE IPG SUBMITTED A PREVIOUSLY ADOPTED METHODOLOGY.

As set forth in the Judges' final determination in the 2000-2003 cable proceedings, the SDC engaged in "trial by ambush". Specifically, despite a May 30, 2012 direct statement filing deadline, the SDC presented no stated methodology for the distribution of devotional programming royalties. Consequently, the SDC's actions denied IPG any opportunity to engage in discovery, no data was produced by the SDC in discovery to support any stated methodology, and IPG was incapable of securing rebuttal witnesses or developing any other rebuttal evidence toward any distribution methodology because, quite simply, no distribution methodology had been presented by the SDC. While IPG responded to multiple motions filed by the SDC relating to IPG's direct statement and IPG's response to discovery thereon, the SDC was obliged to respond to nothing relating to a distribution methodology because, again, no distribution methodology had been presented by the SDC.[1]

[1] Upon the filing of its rebuttal statement in May 2013, i.e., a year later and only weeks before the scheduled final distribution hearing, the SDC attempted to present a distribution methodology, couching it as "rebuttal" testimony. However, the processes for discovery relating to rebuttal statements are significantly more limited, more expedited, and preclude a party from presenting witnesses to rebut the then-presented rebuttal evidence. As was noted by the Judges, at no juncture during the year between the SDC's filing of its direct statement and its rebuttal statement did the SDC attempt to introduce its newfound distribution methodology.

By contrast, IPG complied with the May 2012 deadline ordered by the Judges for presentation of a distribution methodology. Although the Judges ultimately disfavored IPG's proposed methodology, IPG cannot be accused of failing to develop a methodology. In fact, IPG's methodology drew off of a previously presented methodology that had initially been found reasonable by a prior sitting CARP. See *Distribution of 1993-1997 Cable Royalty Funds*, 66 Fed. Reg. 66433 (Dec. 26, 2001). However, that prior methodology was subsequently deemed deficient by the reviewing Librarian due to specific imperfections that IPG expressly remedied in the methodology presented to the Judges in the 2000-2003 cable proceedings.[2] Id. Nonetheless, the Judges found IPG's proposed methodology devoid of merit, and despite IPG's efforts to address all prior criticisms.

Predictably, the SDC will seek an entirely new proceeding, with an opportunity to present its delinquent methodology as its proposed direct statement methodology, or perhaps some other methodology. However, affording the SDC any opportunity to do so will flout the multiple CRB regulations and Judges' orders setting forth deadlines with which all other involved parties timely complied - - IPG, MPAA, and the JSC - - and flout the obvious concept that a party may not rely on evidence requested and not produced in discovery. *See, e.g.*, 37 C.F.R. § 351.4 (requiring compliance with direct statement filing deadlines, and *substantive* limitations on the amended direct statements); § 351.10 (precluding introduction of analyses absent the presentation of specified

[2] As was also noted within evidence recently presented in the 1999-2009 satellite and 2004-2009 cable proceedings (Phase II), the criteria utilized by IPG as part of its methodology are the same criteria utilized by all other foreign collection entities that distribute royalties for entertainment programming (inclusive of devotional programming), i.e., the organizations Screenrights (aka Audio-Visual Collection Society of Australia), the Copyright Collective of Canada, and AGICOA.

criteria). In fact, allowing the presentation of distribution methodologies that were not timely articulated in the underlying proceedings would necessarily require the commencement of *all* proceedings anew in order to afford IPG the entitlements of discovery, rebuttal preparation, etc., that were already afforded to the SDC more than three years ago. Since the 2000-2003 cable proceedings, two other Phase II proceedings have transpired, and a wealth of issues have been addressed regarding comparable matters, all of which would likely be revisited in the context of the 2000-2003 devotional programming pools. As a simple matter of public policy, the SDC should not be rewarded the proverbial "second bite at the apple" after altogether ignoring the several clear CRB regulations and orders that dictated the presentation of proposed methodologies.

Further, IPG notes that the Judges have previously issued claims rulings in these proceedings wherein IPG was found to have been deficient in its presentation of documents adequately supporting the assertion of claims on behalf of Jack Van Impe Ministries and Salem Baptist Church. Anticipating identical issue in the 1999-2009 satellite proceeding, IPG presented additional documentation that would have been relevant to the 2000-2003 cable proceeding, and the claims of Jack Van Impe Ministries and Salem Baptist Church were thereafter either not challenged by the SDC or sustained. Cf. *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, at pp. 8-9, Dkt. #2008-2 CRB CD 2000-2003 (Phase II) (March 21, 2013) and *Order on IPG's Motions for Modification*, at pp. 5, 39, Dkt. #2012-6 CRB CD 2004-2009 (Phase II), Dkt. #2012-7 CRB SD 1999-2009 (April 9, 2015.

No logical distinction exists between the failure of the SDC to articulate a distribution methodology and produce supporting documentation, and the prior failure of IPG to produce supporting documentation of the dismissed claims. IPG respectfully points out that if the SDC were allowed to advocate a distribution methodology that was not timely articulated and now provides supporting documentation, such commencement of proceedings anew would equally warrant IPG's ability to present documentation not submitted in the 2000-2003 cable proceeding that is now available (and was addressed in the 1999-2009 satellite proceeding to sustain such claims).

### B. ONLY A LIMITED PROCEEDING THAT ALLOWS PARTIES TO SUBMIT EVIDENCE FURTHER SUPPORTING THEIR PROPOSED METHODOLOGY, AND ADDRESSING SPECIFIC CRITICISMS OF THE JUDGES, IS WARRANTED.

In any comparable circumstance in a court of law where adverse parties are arguing about a valuation of sorts, the failure of one party to present *any* evidence regarding a valuation would be comparable to a default as to the other party's position. As such, the fact that the SDC failed to propose *any* distribution methodology as part of its direct case should have reasonably allowed the Judges to adopt IPG's proposed methodology (for purposes of devotional programming distribution) subject only to addressing claims issues. Likely, the only reason that such result did not occur was the language appearing in the Judges' final distribution order, criticizing IPG's proposed methodology as having no merit despite, as noted, being modeled after a methodology previously found to have merit, and utilizing the identical criteria as are used by foreign collectives charged with the same task as the CRB (in some cases, in the identical manner employed by IPG).

For the foregoing reason, IPG proposes a more limited proceeding, wherein the parties may present additional evidence supporting their timely-stated methodologies, and provides the Judges the opportunity to inquire whether certain data exists that could serve to validate the methodologies to an extent sufficient for the Judges to issue a final determination thereon. With such proposal, IPG realizes that this nonetheless precludes any further presentation of evidence by the SDC to support a methodology, for the obvious reason that the SDC did not present a methodology. Nonetheless, and as explicated above, allowing the SDC to propose any methodology that remained unarticulated while all other parties complied with the CRB regulations and the Judges' orders relating thereto, unduly rewards the party that flouted the regulations and orders, while prejudicing the party that complied in good faith in order to provide a genuinely acceptable distribution methodology.

### C. REVIEW SHOULD ONLY OCCUR IN CONNECTION WITH THE ROYALTY POOL YEARS IN DISAGREEMENT.

For purposes of clarification, IPG did not take issue with the Judges' approach for allocation of devotional programming royalties. The Judges noted that, even accepting the SDC's delinquently-proposed methodology, for two of the four years at issue there was no disagreement between the parties. Common sense dictates that if there is no disagreement, there is no need for a proceeding, no matter how unreasonable, outrageous, or devoid of merit as the methodologies proposed by IPG and the SDC might be. As such, it is unclear to IPG whether the DC Circuit actually intended to remand the proceedings to address the royalties for those years not significantly in dispute, i.e., whether there was actually any objection to the Judges' conclusion that "no significant dispute exists", or whether it was simply oversight by the DC Circuit that such royalty

years were included as part of the remand. Common sense dictates that the DC Circuit would not press the Judges to identify "the perfect distribution methodology", if the parties were not in significant dispute regarding the allocable percentages.

Working with the premise that there was no objection to the Judges assigning (within a "zone of reasonableness") the percentage allocations *agreed upon* by both IPG and the SDC, necessarily limits review to the two years in which disagreement existed. The Judges applied averages from the years of agreement to the years of disagreement, yet what the DC Circuit may have been unaware of is the data before the Judges that was not cited as part of the Judges' final determination, i.e., data reflecting the specific percentages that IPG and SDC programming comprised of the aggregate compensable devotional programming according to a multitude of criteria, and the similarity of percentages over each of the four years addressed by the proceedings. Whether such information was consciously considered by the Judges is unknown but, regardless, it was not articulated as the basis for considering the respective percentages for years in disagreement to be comparable to years in agreement, and presenting such data to the Judges in a form that would allow the Judges to further explain and justify their method of averaging would, in the opinion of IPG, be a reasonable endeavor. Therefore, another alternative is an even more limited proceeding that allows the parties to draw comparisons between the years in agreement with the years in disagreement according to evidence that was timely produced in discovery.

## CONCLUSION

For the foregoing reasons, IPG advocates either of two aforementioned proposals for the conduct and schedule of the resolution of the remand, both of which fulfills the

DC Circuit's injunction to "balance [the Judges'] legitimate interest in preventing parties before them from engaging in trial by ambush with the need to have a sufficient factual basis to make a reasoned decision." Specifically, (1) IPG may present additional evidence supporting its timely-stated methodology, or (2) IPG and SDC may draw comparisons between the years in agreement with the years in disagreement according to evidence that was timely produced in discovery, i.e., data reflecting the specific percentages that IPG and SDC programming comprised of the aggregate compensable devotional programming according to a multitude of criteria, and the similarity of percentages over each of the four years addressed by the proceedings.

Such additional proceedings could be handled solely on the submission of documentation. Absent such possibility, remand would require the commencement of proceedings anew in order to provide IPG with the information it was entitled to receive more than three years ago, and which has already been afforded to the SDC.

Respectfully submitted,

Dated: November 19, 2015

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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2015, a copy of the foregoing was sent by electronic mail and regular mail to the parties listed on the attached Service List.

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