

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC**

In the Matter of)	
)	Docket No. 2008-02 CD 2000-03
)	(Phase II)
Distribution of 2000-2003)	
Cable Royalty Funds)	

**SETTLING DEVOTIONAL CLAIMANTS’
PROPOSAL FOR PROCEEDINGS ON REMAND**

In response to the Judges’ Order dated October 6, 2015, which directed the parties to file written proposals for the conduct and schedule of the resolution of the remand, the Settling Devotional Claimants (“SDC”) submit these comments.

In this case, the Judges refused to admit into evidence on procedural grounds the SDC’s methodology based on distant household viewing hours (“HHVH”). *Distribution of 2000-03 Cable Royalty Funds*, 78 Fed. Reg. 64984, 65003-04 (Oct. 30, 2013). The Judges rejected on substantive grounds IPG’s methodology, which was based on a combination of broadcast hours, time of day, subscribership, and fees generated. *Id.* at 65003. Despite these rulings, the Judges employed the results of both the SDC’s and IPG’s methodologies in reaching their final determination.

On appeal, the D.C. Circuit affirmed the Judges’ rejection of both methodologies, but reversed and remanded the case, making clear that the Judges were nevertheless required “to make reasoned decisions supported by the written record before them,” not “a discredited methodology ... a methodology that the Royalty Judges had refused to consider ... [or] a blank slate of an evidentiary record.” *Settling Devotional Claimants v. Copyright Royalty Board*, 797

F.3d 1106, 1120-1121 (D.C. Cir. 2015) (“*SDC v. CRB*”). Moreover, the D.C. Circuit criticized the Judges for ultimately relying on a methodology “first presented in the Judges’ determination and not advanced by any participant.” *Id.* at 1121 (quoting *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 571 F.3d 69, 87 (D.C. Cir. 2009)).

In the 1999 cable case, the Judges similarly rejected the SDC’s HHVH methodology and rejected IPG’s methodology based on a combination of broadcast hours, time of day, subscribership, and fees generated. *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. 13423, 13442-43. As in the 2000-2003 cable case, the Judges therefore lacked a methodology presented by a party that they found to be acceptable. But instead of adopting a split-the-baby approach based on the parties’ competing requests, the Judges adopted a methodology based entirely on local ratings reported in Nielsen’s Report on Devotional Programming for February, 1999, which the SDC had offered into evidence for the purpose of establishing a correlation coefficient between local ratings and distant HHVH data. *Id.*

In this case on remand, the SDC propose that the Judges adopt the same approach that they adopted in the 1999 cable case when they rejected both parties’ methodologies. The Nielsen Reports on Devotional Programming for February of each year at issue in this proceeding are already in evidence, having been presented as part of the SDC’s rebuttal of IPG’s case. *See* Exhibit 180 at Rebuttal Exhibit 14 (admitted at Trans., 1373:6-1382:5 (Brown)), and the Judges have already relied upon these reports in concluding that IPG’s methodology yielded “absurd results.” *Distribution of 2000-03 Cable Royalty Funds*, 78 Fed. Reg. at 65003 (“IPG’s formula produced absurd results” based on Dr. William Brown’s comparison between IPG’s valuation and a program’s national rating). An allocation based on local ratings reported in the Nielsen Reports on Devotional Programming can easily be calculated by hand, without the need

for further expert testimony or other evidence. This approach would allow the Judges to make an allocation with a substantial basis in evidence that they have already determined is not arbitrary and capricious. *See Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13433 (“The Judges are confident that this Determination satisfies those standards”). It is an approach already adopted by the Judges’ own precedents, which the Judges are required by statute to apply. *See* 17 U.S.C. § 803(a). And because it would not require the Judges to adopt a methodology that requires any reliance on the excluded testimony of Mr. Alan Whitt, the Judges’ interest in avoiding “trial by ambush” would be preserved.

Moreover, while the D.C. Circuit recognizes that “rough justice in dividing up the royalty pie seems to be the inevitable result of the process that Congress ordained,” it nevertheless requires that the “administrative body [rely] on some relevant and creditable methodological evidence.” *SDC v. CRB*, 797 F.3d at 1121 [citation omitted]. Therefore, the SDC submit that the Judges can adopt a distribution methodology that employs the equivalent local ratings data that they relied on in the 1999 cable case.

To avoid any possibility of trial by ambush, and because the D.C. Circuit has repeatedly exhorted the Judges not to adopt a methodology of their own without first giving the parties an opportunity to respond (*see SDC v. CRB*, 797 F.3d at 1121; *Intercollegiate Broadcast System, Inc.*, 571 F.3d at 87), the SDC also propose that the parties should be given a reasonable opportunity to submit written and rebuttal comments on the application of this local ratings methodology. The SDC believe there is no need for a further hearing or live testimony.

Accordingly, the SDC propose the following schedule:

Event

Date

Each party files a written statement addressing calculation of allocation using local ratings as reported in SDC Ex. 180, at Rebuttal Exhibit 14.

14 days after scheduling order

Each party files a rebuttal statement responding to opposing party's written statement.

14 days after filing of written statement

November 20, 2015

Respectfully submitted,


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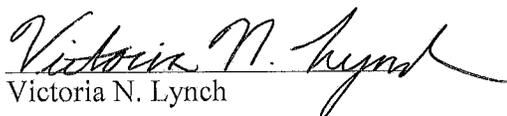
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CERTIFICATE OF SERVICE

I, Victoria N. Lynch, hereby certify that a copy of the foregoing was sent electronically and via overnight mail this November 20, 2015 to the following:

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