

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

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

**SETTLING DEVOTIONAL CLAIMANTS' MOTION TO STRIKE
IPG'S WRITTEN DIRECT STATEMENT**

The Settling Devotional Claimants ("SDC") hereby move to strike IPG's Written Direct Statement on the following grounds:

1. The Testimony of Raul C. Galaz presents a methodology that the Judges already rejected on the merits. The Judges' ruling rejecting Mr. Galaz's methodology was not appealed in the Devotional category, and is now law of the case. As the Judges recognized in their Order for Proceedings on Remand and Scheduling Order (Jan. 14, 2016) ("Order for Remand Proceedings"):

With regard to the SDC appeal, IPG did not challenge the Judges' evaluation of the methodology IPG presented at trial. The Judges' conclusion regarding IPG's methodology is not an issue on remand.

Order for Remand Proceedings at 2, n. 1.

2. Moreover, the results of Mr. Galaz's methodology improperly include IPG claimants Jack Van Impe and Salem Baptist Church, which the Judges disqualified in their Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims (Mar. 21, 2013) ("Claims Order"). The ruling disqualifying these claimants was not appealed, and is now law of the case. The results of Mr. Galaz's methodology therefore violate the Claims Order:

[T]he Judges will not ... consider any portions of the parties' respective Written Direct Statements relating to any claims that are denied in this Order. Further, the

Judges will not hear any testimony or review any further exhibits relating to the denied claims.

Claims Order at 18. IPG's Written Direct Statement also violates the Judges' Order for Remand Proceedings, which ordered the parties "to file Written Direct Statements ... solely on the issue of allocation methodologies." Order for Remand Proceedings at 3. The Judges' Claims Ruling was expressly not at issue and was not to be revisited. Resolution of this issue on a motion to strike would be consistent with the Judges' ruling from the bench in the 2004-2009 cable and 1999-2009 satellite case refusing the admission into evidence of IPG exhibits that improperly incorporated the programming of disqualified claimants into the results. Transcript Vol. II, Apr. 14, 2015, 215:9-228:2.

3. Finally, the Expert Report of Charles D. Cowan, Ph.D., does not present the results of any methodology other than Mr. Galaz's methodology, about which Dr. Cowan expresses no opinion. Although Dr. Cowan describes in very general terms a methodology that he claims would provide an "estimation of values that are an approximation to Shapley values," he confesses his inability to implement this methodology unless further "data is made available in the future." Cowan Report at ¶ 8.¹ IPG did not file any amended Written Direct Testimony following discovery and the production of potentially relevant data, and its time to do so has expired. Expert

¹ In Dr. Cowan's Expert Report filed a few months later in the reopened 1999-2009 cable and satellite proceeding (Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket No. 2012-7 CRB SD 1999-2009 (Phase II)), he conceded that no Shapley valuation was even feasible:

I note that in another ruling, the Judges advocated use of Shapley values. The utility of Shapley Values for this situation would be the construction of relative marginal values; these would be used in making a decision as to how to allocate a fixed pot of money. In response to this suggestions [sic], another expert, Dr. Erdem, indicated this couldn't be done because "[s]uch an approach was not possible ... because of the non-existence, unavailability or, from the parties' perspective, prohibitive development cost of the necessary evidence upon which such a comparison could be made." *Dr. Erdem understates the difficulty of using Shapley values, because no amount of expenditure would make it possible to derive the relative marginal values.* Expert Report of Dr. Charles Cowan at 2. (Emphasis supplied.)

testimony that is not related to a usable methodology does nothing to assist the trier of fact, and should therefore be stricken.

A. IPG's Written Direct Testimony Should Be Stricken Because it Presents a Methodology That the Judges Have Already Rejected, and That Ruling is Law of the Case.

The Judges previously concluded that the methodology presented by Mr. Galaz was “so flawed that the Judges cannot credit the percentage allocations as proposed.” *Final Distribution Order*, 78 FR 64984, 65005 (CRB Oct. 30, 2013). In the Program Suppliers category, IPG appealed the Judges’ acceptance of the MPAA’s methodology, but did not appeal the rejection of IPG’s own methodology. *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 141-44 (D.C. Cir. 2015). The D.C. Circuit affirmed the Judges’ ruling in the Program Suppliers category. *Id.* In the Devotional category, IPG did not appeal the Judges’ rejection of its methodology at all. As the Court of Appeals for the D.C. Circuit noted, “the Royalty Judges dismissed the validity of IPG’s model for the devotional category, finding that ‘IPG’s formula produced absurd results in the Devotional category, as it did in the Program Suppliers category.’” *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106, 1113 (D.C. Cir. 2015).

Because the Judges’ rejection of IPG’s methodology was not challenged on appeal, it is now law of the case. “[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.” *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Palmer v. Kelly*, 17 F.3d 1490, 1494 (D.C. Cir. 1994). “[T]he same issue presented a second time in the same case in the same court should lead to the *same result*.”

United States v. Thomas, 572 F.3d 945, 949 (D.C. Cir. 2009) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (1996) (en banc)) (emphasis in original). As the Judges noted in their Order for Remand Proceedings, “The Judges’ conclusion regarding IPG’s methodology is not an issue on remand.” Order for Remand Proceedings at 2, n. 1.

Despite the Judges’ rejection of Mr. Galaz’s original methodology, IPG again proposes the same methodology (modified only to exclude the “Time Period Weight Factor,” one of several flawed factors that the Judges rejected). See Cowan Report at ¶ 31 (“The methodology employed is exactly that previously described by the Judges in their review of previous many IPG calculations, however modified to remove the Time Period Weight Factor that was employed”).

Perhaps IPG will argue that the removal of the “Time Period Weight Factor” allows it to escape the consequences of the law-of-the case doctrine. But this is not a new, changed, or different methodology. It is merely a truncated presentation of the already-rejected methodology. Crucially, it does nothing to address any of the “major defects” that the Judges found in the IPG methodology. Those defects were related to the underlying assumptions in the methodology, failures its construction, and the credibility of the witness who presented it. The reasons for the Judges’ rejection of IPG’s methodology are thoroughly set forth in the Judges’ Final Distribution Order, and are summarized here:

First, the Judges concluded that Mr. Galaz’s methodology based on “station weight factors” and time of day fails to account for viewership levels, fails to apply any other “more sophisticated model” to demonstrate how a cable system operator would maximize subscribership by attracting marginal viewers, and does not follow from any of Mr. Galaz’s critiques of a viewership-based analysis. *Final Distribution Order*, 78 FR 64984, 64999 (CRB

Oct. 30, 2013). IPG has done nothing to refine its model or to address the issue of viewership or to address the lack of supporting evidence. *Final Distribution Order*, 78 FR 64984, 65002 (CRB Oct. 30, 2013) (“In these two regards, (an undeveloped theory and the absence of factual support) the Judges cannot adopt the IPG Methodology.”). Instead, IPG insists on doing the same thing over and over and apparently expects that the Judges will reach a different result.

Second, the Judges concluded that “IPG made no effort to mitigate the problems with its non-random sample.” *Final Distribution Order*, 78 FR 64984, 65000 (CRB Oct. 30, 2013). Rather than adjust the sample or the analysis to account for this, Mr. Galaz uses the same sample on remand. *Compare* Direct Statement of IPG, at 19 *with Final Distribution Order*, 78 FR 64984, 64998, n.55 (CRB Oct. 30, 2013) (using identical station samples).

Third, IPG’s methodology is still set forth by Raul Galaz, who the Judges noted was an “imperfect messenger” because of his prior fraud in copyright royalty proceedings, clear self-interest in the outcome, and lack of relevant expertise or experience. *Final Distribution Order*, 78 FR 64984, 65000 (CRB Oct. 30, 2013).² Although IPG presented the results through the Cowan Report, Dr. Cowan does not present any expert opinion on Mr. Galaz’s methodology or its results. The methodology remains wholly the work product of Mr. Galaz.

These factors all remain unchanged on remand. As before, “[n]othing in Mr. Galaz’s testimony indicates that the Judges should give his testimony any weight.” *Final Distribution Order*, 78 FR 64984, 65000 (CRB Oct. 30, 2013).

Indeed, IPG’s removal of the “Time Period Weight Factor” may even have been counterproductive. Of all of the factors considered by the IPG methodology, the “Time Period

² Mr. Galaz was also found to have provided false testimony in the 1999-2009 cable and satellite proceeding. *See Memorandum Opinion and Ruling on Validity and Categorization of Claims, In re Distribution of Cable and Satellite Royalties* (Dkt. Nos. 2012-6 CRB CD 2004-09 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (March 13, 2015) at 7-8.

Weight Factor” was the only one that the Judges described as “*not irrational*, even though IPG’s emphasis on that factor, and its failure to acknowledge the much greater importance of per-program viewership, is *unreasonable*.” *Final Distribution Order*, 78 FR 64984, 65002 (CRB Oct. 30, 2013) (emphasis in original). Thus, IPG’s methodology on remand removes the one factor that drew limited approval, although the Judges noted a failure to properly use that factor.

At any rate, IPG has offered the Judges no reason to revisit their earlier rejection of Mr. Galaz’s methodology, and has now waived its right to do so by not raising its challenges to the Judges’ ruling on appeal.

B. The Results of IPG’s Written Direct Testimony Also Must be Stricken Because They Incorporate Programming of IPG Claimants That the Judges Disqualified.

Even if the Judges were inclined to disregard their prior rejection of Mr. Galaz’s methodology and the law of the case, Mr. Galaz’s methodology also runs afoul of the Judges’ Claims Ruling, which is also law of the case. The Claims Ruling was affirmed by the D.C. Circuit on appeal, and remains in effect today. *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106, 1109-10 (D.C. Cir. 2015). The Claims Ruling provided:

[T]he Judges will not ... consider any portions of the parties’ respective Written Direct Statements relating to any claims that are denied in this Order. Further, the Judges will not hear any testimony or review any further exhibits relating to the denied claims.

Claims Order at 18. Similarly, the Judges’ Order on Remand Proceedings required the parties “to file Written Direct Statements ... solely on the issue of allocation methodologies” Order on Remand Proceedings at 3. In fact, the Judges recognized that “IPG supported the Judges’ claims rulings in the devotional category; those rulings are not an issue on remand,” and declined to revisit any claims rulings in these proceedings. *Id.* at 2 n. 2.

Disregarding the clear ruling precluding IPG from pursuing claims on behalf of certain copyright owners, IPG has failed to remove those claims from its submissions, thereby intentionally and improperly attempting to inflate its shares. Despite having only five of its original eight Devotional claimants remaining, IPG now claims it “represents seven (7) producers and distributors in the Devotional Programming Category,” apparently only honoring the Judges’ decision to dismiss the claimant W.R. Portee. Direct Statement of IPG at 11.

With respect to Jack Van Impe, the Judges have already concluded that IPG was unable to show that it was authorized to file claims for the years 2001-2003. Claims Ruling at 9 (“That evidence alone is insufficient to show that IPG was duly authorized to file claims on Jack Van Impe’s behalf from 2001-2003. Therefore, SDC’s request to dismiss those claims is **GRANTED.**”). With respect to Salem Baptist Church, the Judges concluded that IPG failed to show that it was authorized to file claims for the years 2001-2003. *Id.* (“the Judges find insufficient evidence to show that IPG was authorized to file claims on Salem Baptist’s behalf for 2001-2003. Therefore, SDC’s request to dismiss those claims is **GRANTED.**”).

IPG’s underlying calculations still improperly include programming claimed by Jack Van Impe and Salem Baptist Church, both of which the Judges have disqualified. *See* Declaration of John Sanders ¶ 4. Specifically, Raul Galaz appears to have manually taken steps to remove W.R. Portee from his calculations, but did not remove Jack Van Impe or Salem Baptist. Sanders Declaration ¶¶ 11-14. Purely by happenstance, the inclusion of Jack Van Impe and Salem Baptist Church only affected Mr. Galaz’s results in 2001. Sanders Declaration ¶¶ 15-19. But of course this does little to mitigate IPG’s defiance of the Judges’ order, yet again.

IPG engaged in substantially the same conduct in the 2004-2009 cable and 1999-2009 satellite case, in which it doggedly refused to exclude programs claimed by Envoy Productions

in the Devotional category, even in the face of the Judges' ruling disqualifying all of Envoy's programs from the Devotional category, either because they were not shown to be Devotional or because they were cross-claimed by other IPG claimants. The SDC filed a motion for exclusion of all IPG exhibits that included Envoy programming in the Devotional category, and then objected to the admission of those exhibits at the hearing. The Judges sustained the SDC's objections from the bench. Docket No. 2016-6 CRB CD 2004-09 (Phase II), Docket No. 2012-7 CRB SD 1999-2009 (Phase II), Transcript Vol. II, Apr. 14, 2015, 215:9-228:2; *see also* Docket No. 2016-6 CRB CD 2004-09 (Phase II), Docket No. 2012-7 CRB SD 1999-2009 (Phase II), Order Denying Motions to Strike IPG Testimony and Exhibits (July 20, 2015) (denying the SDC's motion to strike IPG's exhibits as moot, because the SDC's objection had been sustained from the bench). A motion to strike IPG's Written Direct Statement on the same ground is therefore very appropriate here.

Although the Judges gave IPG the opportunity in the 2004-2009 cable and 1999-2009 satellite case to submit multiple sets of revised and recalculated exhibits excluding disqualified claimants that should have been excluded in the first place, the Judges warned IPG sternly that it is "grossly unfair" and "inappropriate" to require seriatim corrections to bring those exhibits into compliance with the Judges' orders. Transcript Vol. IV, Apr. 16, 2015, 83:13-85:11. IPG is now well aware of the Judges' expectation that exhibits be prepared and calculated in compliance with orders the first time around. There is no reason to give IPG such leeway again. The results contained in IPG's Written Direct Statement, which are calculated to include the programming of IPG claimants that the Judges have disqualified, should be stricken in their entirety.

C. Dr. Cowan's Potential Methodology Was Not Applied and Cannot Be Considered

Dr. Cowan's report failed to put forth any sufficient methodology of its own. As the D.C. Circuit held in remanding this very case, the Written Direct Statement necessarily must include:

testimony applying [the party's] proposed methodology to the case at hand. Indeed, linking the proposed methodology to the facts of the case is the testimonial heart of the matter. Abstract discussion of potential methodologies, without any application, would do nothing to support the party's desired outcome.

S.D.C., 797 F.3d at 1118.

These requirements, applicable to the SDC in the original proceeding, must apply equally to Dr. Cowan's report on remand. Although Dr. Cowan claimed to describe a potential methodology for estimating Shapley values, he suggested that he would implement his methodology only "if there is new data presented in the future that could be used to perform these calculations." Cowan Report at ¶ 3. In his conclusion, Dr. Cowan stated "I reserve the right to implement this methodology if new data is presented in these proceedings." Cowan Report at ¶ 29. He never did so.

At this stage of the proceedings, the time for amending the methodology in response to new data has passed. The deadline for Amended Written Direct Statements was January 18, 2017. Order Establishing Modified Remand Schedule, Apr. 25, 2016 (setting deadline "2 weeks after Judges' Order(s) on Discovery Motions"); Order Denying SDC's Motion to Compel IPG, Jan. 3, 2017. IPG chose not to implement an alternative methodology using the data at its disposal. Without any evidence supporting Dr. Cowan's hypothetical model and without any testimony applying it to data or setting forth results, it does not meet the standard required of a proposed methodology in these proceedings and must be stricken.

CONCLUSION

For the foregoing reasons, the SDC's Motion to Strike IPG's Written Direct Statement should be granted and IPG's Written Direct Statement must be stricken in its entirety.

Date: April 14, 2017

Respectfully submitted,



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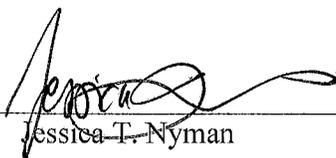
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Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

I, Jessica T. Nyman, hereby certify that a copy of the foregoing Motion to Strike was served electronically and via overnight delivery through Federal Express on April 14, 2017, to the following:

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Jessica T. Nyman

EXHIBIT A

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

In the Matter of)	
Phase II Distribution of the 2000,)	
2001, 2002, and 2003 Cable)	
Royalty Funds)	
)	

Docket No. 2008-2
CRB CD 2000-2003 (Phase II)

DECLARATION OF JOHN S. SANDERS

I, John Sanders, hereby state and declare as follows:

1. I have been a Principal at the Washington, DC-based firm Bond & Pecaro, Inc. since 1986. Bond & Pecaro, Inc. specializes in the appraisal of communications and media assets. Prior to that, I was a manager with Frazier, Gross & Kadlec, Inc., where I worked from 1983 to 1986. Frazier, Gross & Kadlec, Inc. also specialized in the valuation of media and communications assets.

2. I have examined the exhibits to and document production in support of the Direct Statement of Independent Producers Group (“IPG”) in the Phase II Remand of this proceeding filed on April 15, 2016.

3. The SDC have asked me, among other things, to review the calculations used by IPG to reach its proposed distribution values and determine whether IPG included disallowed claimants in those calculations.

4. I have observed that IPG’s calculations include claimants Jack Van Impe and Salem Baptist Church, which I understand the Judges have dismissed from IPG’s claims in this proceeding.

IPG's Written Direct Testimony

5. I first reviewed IPG's Written Direct Testimony in the original proceedings.

From these I understand that IPG originally sought to claim the following:

- a. Jack Van Impe, for the years 2001, 2002, and 2003;
- b. Salem Baptist, for the years 2001 and 2002;
- c. W.R. Portee for the year 2003.

6. I also understand that the Judges excluded all claims from IPG for all three of these claimants.

7. Based on IPG's Written Direct Testimony in the remand proceedings, I understand that IPG now claims the following years for those three claimants:

- a. Jack Van Impe, for the years 2001, 2002, and 2003;
- b. Salem Baptist, for the years 2001 and 2002;
- c. W.R. Portee, for no years.

8. In order to determine whether IPG's calculations matched the claims for these programs as stated in its Written Direct Testimony, I reviewed IPG's document production.

IPG's Calculations

9. IPG's calculations were performed using a spreadsheet named "Item 36 - - IPG database - Devotional ProgrammingAFTERCORRECTIONSWITHGROUPEID." This spreadsheet contained a list of programs from IPG's data sources along with columns indicating the claim year (column E), whether IPG claimed the program (column AE), and a column indicating "restrictions" on the years claimed for certain copyright owners (column AF).

10. The "restrictions" column purports to guide the user in determining whether certain programs should be claimed for IPG. Relevant to the three claimants above, it contains

entries stating “JVI 2001-2003,” “Salem 2001-2002 only,” and “W.R. 2003 only.” These restrictions match the original claim periods IPG made for each claimant.

Raul Galaz’s Stated Changes

11. I reviewed a Microsoft Word document detailing Raul Galaz’s manual adjustments to the datasets named “Creating the Excel Spreadsheet used in Calculations.”

12. According to the Microsoft Word file, Raul Galaz did not make any adjustments to remove the Jack Van Impe or Salem Baptist claimants. Instead, it stated that he chose to “Delete all broadcasts wherein the WSG-represented claimant is ‘W.R. Portee Word Healing Ministry,’ reflected in the column entitled ‘WSG claimant per claimant.’ [column AD]”

13. Consistent with those stated changes, IPG’s spreadsheet contains no programs for which W.R. Portee is claimed by IPG. Instead of listing the claimant as “IPG” in order to trigger the calculation formula to include the program, W.R. Portee programs had empty entries in the column indicating the claimant.

14. IPG’s spreadsheet does include programs which IPG claims for Jack Van Impe and Salem Baptist, however. It appears that these entries were not deleted as they were for W.R. Portee.

Effect of Incorrect Claims

15. IPG’s data sample only presented broadcasts from Jack Van Impe for the years 2000 and 2001. In its spreadsheet, programs from 2000 had a blank entry in the claimant column, while programs from 2001 contained “IPG” (consistent with the “JVI 2001-2003” restriction).

16. Thus, between not claiming 2000 and lacking data in 2002-2003, the erroneous inclusion of Jack Van Impe's programs only affected IPG's final distribution calculation for the year 2001.

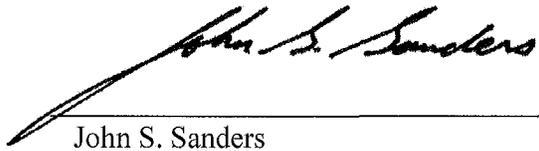
17. IPG's data sample only presented broadcasts from Salem Baptist for the years 2000, 2001, and 2003 (and not for 2002). In its spreadsheet, programs from 2000 and 2003 had a blank entry in the claimant column, while programs from 2001 contained "IPG" (consistent with the "Salem 2001-2002 only" restriction).

18. Thus, between not claiming 2000 and 2003 and lacking data in 2002, the erroneous inclusion of Salem's programs only affected IPG's final distribution calculation for the year 2001.

19. Combined, IPG's erroneous inclusion of Jack Van Impe and Salem Baptist increased its proposed distribution in the year 2001 only.

I hereby declare under penalty of perjury that the foregoing is true and correct.

April 14, 2017



John S. Sanders