

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

_____)	
In the Matter of)	
)	
Distribution of)	Docket No. 2008-2 CRB CD
2000-2003)	2000-2003 (Phase 2)
Cable Royalty Funds)	(REMAND)
_____)	

**INDEPENDENT PRODUCERS GROUP’S OPPOSITION TO
SETTLING DEVOTIONAL CLAIMANTS’
MOTION TO STRIKE IPG’S WRITTEN DIRECT STATEMENT**

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its “Opposition to Settling Devotional Claimants Motion to Strike IPG’s Written Direct Statement”.

**A. THE SDC HAVE PURPOSELY MISREPRESENTED IPG’S
METHODOLOGY, AND SUCH MISREPRESENTATION
FATALLY FLAWS THE SDC ARGUMENT.**

One year following IPG’s submission of its Written Direct Statement in these remand proceedings, the Settling Devotional Claimants (“SDC”) seek to strike the entirety of IPG’s Written Direct Statement. As the predicate to its argument, the SDC purposely mischaracterize IPG’s

presented methodology as the *same* methodology previously rejected by the Judges in this proceeding. It is not. Rather, IPG modified its methodology in order to address the criticisms *specifically* articulated by the Judges in their prior distribution ruling, and have produced additional evidence *specifically* articulated by the Judges as lacking. See *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984 (Oct. 30, 2013).

A simple comparison of IPG's previously submitted methodology (filed May 25, 2012; the "Initial Direct Statement") with its current methodology (filed April 16, 2016; the "Remand Direct Statement) reveals these differences, including IPG's express comment in its Remand Direct Statement that it was excluding a previously included weighting factor *because* of the Judges' criticism thereof,^{1 2} and IPG's designation of the

¹ IPG'S Remand Direct Statement references the Judges' prior criticism of a particular weighting factor and IPG's removal of such factor, i.e., a methodological change:

"Notwithstanding, while IPG believed that implementation of a Time Period Weight Factor was reasonable, the CRB has since criticized IPG's use of such factors. . . . Consequently, *IPG's Time Period Weight Factor that was introduced in the initial round of these proceedings has now been excised from any IPG analysis.*"

Remand Direct Statement at pp. 23-24 (emphasis added).

testimony of several witnesses from prior proceedings whose testimony had never been previously offered in these proceedings.³ See Remand Direct Statement at pp. 23-24. Further, in response to the Judges' criticism that the methodology was being presented by Raul Galaz, "an individual with no relevant training or experience in economics or econometrics, a financial stake in the outcome, and a prior history of fraud", IPG engaged Dr. Charles Cowan to review, verify, and critique IPG's methodology. As set forth in Dr. Cowan's report, which was submitted as part of IPG's Remand Direct Statement, Dr. Cowan engaged in such analysis, came to the identical

² The Judges also criticized that IPG's Time Period Weight Factor, while being applied to 2000-2003 data, was derived from time period viewership from 1997. See 78 Fed. Reg. 64999, at 65001 (Oct. 30, 2013). Although IPG had additionally submitted Nielsen data reflecting that time period viewership had not changed over *decades*, thereby establishing that 1997 data could be applied to 2000-2003 for such limited purpose, the Judges' criticism is mooted by IPG excising the Time Period Weight Factor from IPG's revised analysis appearing in the Remand Direct Statement.

³ The Judges criticized "[IPG's contention that] a CSO may prefer a program with a smaller level of viewership if that viewership represents *new* subscribers, instead of a show with a large audience that consists only of *existing* subscribers. IPG has not, however, proffered any evidence applying such a marginal analysis." See *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64999 (Oct. 30, 2013). IPG's Remand Direct Statement responded by designating the unrefuted testimony of six witnesses from prior proceedings, who unanimously maintain that CSOs do not consider ratings data, *ever*. Remand Direct Statement, at Designation of Prior Records.

results, and ultimately endorsed IPG's *revised* methodology,⁴ thereby disposing of most of the express criticisms of the Judges.^{5 6} See Remand

⁴ Inexplicably, the SDC assert that Dr. Cowan “does not present the results of any methodology other than Mr. Galaz's methodology, about which Dr. Cowan expresses no opinion.” Motion at p. 2. On the contrary, after indicating the impossibility of performing a Shapley analysis with data available for 2000-2003, Dr. Cowan states “As a *viable alternative*, I present in this report a set of estimates that relies on a calculation that the Judges have previously accepted.” Remand Direct Statement, Cowan Report at p. 2 (emphasis added). Notably, Dr. Cowan submits the results as were submitted as part of IPG's revised analysis, making clear that the “viable alternative” that is being submitted is IPG's revised analysis.

⁵ Notably, although Dr. Cowan was not the designer of the IPG methodology, in significant manner his endorsement thereof stands no different than the endorsement by Mr. John Sanders in the 1998-1999 cable proceedings (Phase II) of a methodology that was not designed by Mr. Sanders.

In the 1998-1999 cable proceedings, the SDC presented the results of a study that was not presented by its designer (who remains *unknown*), but was endorsed by the SDC expert (Mr. John Sanders) a decade after its making, without any opportunity for revision or manipulation, and only after the study results (not the complete analysis) were taken from an inoperable hard drive found in a basement of a computer programmer previously employed by the MPAA. See generally, *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014).

Nonetheless, Dr. Cowan's endorsement is distinctive to the extent that Dr. Cowan was able to communicate with the methodology designer, and was able to manipulate the methodology as he saw fit, unlike Mr. Sanders' endorsement. *Id.*

⁶ Additional criticisms to the prior IPG methodology were also made, such as that IPG did not engage in a random sampling of stations when acquiring its station data. However, IPG's response is that such non-random selection was intended and is superior because IPG's methodology is looking at the

Direct Statement, Exh. IPG-7. That the SDC's motion did not direct the Judges to these revisions, and characterized IPG's two methodologies as identical reflects a purposeful misleading of the Judges.⁷

Indeed, why the SDC would submit a motion based on such evidently false representations boggles the mind, other than a far flung hope that the Judges would simply disregard all facts, throw all responsibilities to the wind, and summarily accept the SDC's mischaracterization of IPG's revised methodology. Regardless, it moots the SDC's argument regarding "the law

exposure of programs to the CSOs that are generating the retransmission fees. Because the top 200 stations account for the vast amount of fees generated, a random sample that includes the 500-600 stations with *de minimus* retransmission would reduce the value of the sample.

In fact, IPG's analysis is a census of over 90% of the stations generating the fees, and no evidence has been presented or exists to suggest that the last 10% of generated fees would affect IPG or SDC disproportionately. Moreover, the Judges have since adopted this rationale pursuant to which they accepted an MPAA sampling as valid, which sample was a random sample derived from only the top 120 stations, resulting in the inclusion of only 71 stations in the MPAA analysis. That is, the Judges found it reasonable for the MPAA analysis to utilize a random sample of a non-random sample – still a non-random sample -- just smaller and less reliable than a non-random sample of the top 200 stations selected by IPG.

⁷ This conclusion appears evident to IPG, as the SDC even attach a declaration of Mr. John Sanders, who indicates that he has reviewed the electronic data underlying IPG's Remand Direct Statement. Even if IPG had not already indicated the changes from its previously-submitted methodology, such changes would have been evident from the electronic data underlying the figures presented in IPG's Remand Direct Statement.

of the case”, to which IPG need not respond, as IPG has presented a methodology different than was previously presented, with different numeric results, coupled with new evidence that the Judges previously criticized was missing but necessary in order to support the concepts appearing in both IPG’s Initial Direct Statement and Remand Direct Statement. To reiterate, IPG modified its previously submitted methodology in order to address the express criticisms set forth in the Judges’ previous distribution order and, having addressed those criticisms, it cannot now be asserted that such modifications do not result in a different methodology.

**B. THE SDC SEEK STRIKING THE ENTIRETY OF IPG’S
REMAND DIRECT STATEMENT FOR 2000-2003
ROYALTIES FOR ALLEGED MISCALCULATIONS IT
ADMITS AFFECT ONLY 2001.**

According to the SDC, IPG’s analysis inappropriately includes the values for certain broadcasts attributable to Jack Van Impe Ministries and Salem Baptist Church Ministries. Notably, the SDC admits that IPG’s database includes Jack Van Impe Ministries broadcasts for calendar years 2000-2001, and Salem Baptist Church Ministries broadcasts for 2000, 2001, and 2003, but that IPG’s coding erringly attributes IPG with a value *only* for the 2001 broadcasts of those two claimants. For this obvious reason, the

SDC admit that only IPG's 2001 figures are overstated. See Exh. A to SDC motion (Sanders decl.), at paras. 15-19.

While clearly capable of doing so, the SDC conspicuously fail to identify the numeric consequence of including such 2001 broadcasts as part of IPG's claim. Moreover, the SDC also fail to explain why any alleged miscalculation for a single year warrants the dismissal of IPG's *entire* direct statement, particularly when the SDC has purposely avoided identifying the significance of such miscalculation. Such a remedy would appear to be the proverbial "throwing out the baby with the bathwater". That is, the SDC fail to explain why any error in coding would not simply be addressed in the rebuttal phase of proceedings, and require an adjustment of calculations, as typically occurs, as opposed to discarding the entirety of IPG's direct statement.

As best as IPG can surmise, the basis of the SDC's argument is to accuse IPG of malfeasance. But again, the SDC make an incendiary accusation by alleging IPG's "defiance" of a prior CRB order, when no evidence or suggestion thereof exists. The SDC's only argument related thereto is to raise a distant tangent, citing to a bench ruling in the 1999-2009 satellite, 2004-2009 cable consolidated proceedings (the "Consolidated Proceedings") that, while clarifying the intended order of the Judges

regarding Envoy Productions, conflicted with the written order issued by the Judges. Conveniently, the SDC fail to cite the transcript of those proceedings, which clearly established good faith ambiguity as to the intent of one aspect of the Judges claims ruling.⁸

Obviously, there is no relationship between the two matters, nor any evidence that IPG “defied” a CRB order in either the Consolidated

⁸ In the course of the final distribution proceeding in the Consolidated Proceedings, it was clarified that the broadcasts of programs claimed by Envoy Productions were attributed in IPG’s calculations to the devotional programming category, rather than the program suppliers category, based on the claims ruling issued by the Judges. The SDC objected, arguing that the Judges had directed that the Envoy Productions programming be placed in the program suppliers category. See generally, Transcript (April 14, 2014) at pp. 214-228.

IPG testified that both it and its expert witness had read the Judges’ claims ruling to only move eight (8) programs from the devotional to the program suppliers category, i.e., the seven programs specifically challenged by MPAA witness Jeff Rovin, and one other. *Id.* at pp. 217-218. See also, *Memorandum Opinion and Ruling on Validity and Categorization of Claims* at p. 44 (“For the foregoing reasons, the Judges GRANT the SDC request to disallow as Devotional Programming the [seven] claims disqualified by Mr. Rovin and the claim on behalf of Willie Wilson Productions. IPG may seek royalties for these claimants in the Program Suppliers category.”)

The Judges agreed that a ruling for movement of all Envoy Productions programming to the program suppliers category was intended by the order, but no suggestion was ever made that IPG had “defied” the Judges’ prior ruling, nor would doing so have necessarily benefitted IPG. The consequence of the revision was merely to move the aggregate of Envoy Productions programming to the program suppliers category and be compensated therein, not to deny the claims of Envoy Productions programming.

Proceedings or in these proceedings. In sum, the SDC simply fabricate a ruling of malfeasance where none exists, even as to matters for which IPG had no motivation to engage in malfeasance (e.g., a movement of programming from one compensable category to another compensable category), then accuse IPG of defying a specific portion of the prior claims ruling in this proceeding.

IPG has investigated the matter and determined that it inaccurately attributed value to 2001 broadcasts for programming owned by Jack Van Impe Ministries and Salem Baptist Church. Notwithstanding, after less than a half-hour of review, mostly involving refamiliarization of IPG's data, IPG was able to determine that IPG overstated its 2001 cable claim in the devotional category by 3.73%. See **Exh. A**, Decl. of R. Galaz. That is, the revised claim to be made by IPG for calendar year 2001 is 42.32% rather than the figure initially claimed, 46.05%,⁹ and it is on the basis of such

⁹ IPG shall forthwith amend its claim in order to clarify that it makes claim to 42.32% of the 2001 cable royalty pool in the devotional category. IPG has yet to determine why the 2001 broadcasts for programming owned by Jack Van Impe Ministries and Salem Baptist Church were attributed value in IPG's database. Notwithstanding, IPG's investigation has prompted IPG to file a motion for reconsideration of the dismissal of such 2001 claims, which motion will be filed imminently.

3.73% differential that the SDC contend that IPG's Remand Direct Statement be stricken in its entirety.

C. NO BASIS EXISTS TO DISREGARD ANY ASPECT OF DR. COWAN'S REPORT, AND DR. COWAN'S DISCUSSION REGARDING A SHAPLEY ANALYSIS WAS *REQUIRED*.

Finally, the SDC argue that Dr. Cowan's description of a Shapley analysis must be stricken because it exists "without any testimony applying it to data or setting forth results." Motion at p. 9. On the contrary, the dictate of the CRB regulations is clear on this matter:

"Introduction of studies and analyses. If studies or analyses are offered in evidence . . . [t]he facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. Summarized descriptions of input data, tabulations of input data and the input data themselves shall be retained."

37 C.F.R. §351.10(e) (emphasis added).

As is evident from Dr. Cowan's testimony, a Shapley analysis was an "alternative course of action considered", and was therefore *required* to be articulated in Dr. Cowan's testimony. Notwithstanding, Dr. Cowan concluded that such analysis was not possible with the data available for 2000-2003. Remand Direct Statement, Cowan Report at pp. 3-7. The gist of Dr. Cowan's testimony, therefore, was to address the Judges' prior statement

that they viewed a Shapley analysis as superior,¹⁰ but to explain why such analysis could not be performed with the available data, in order that the Judges not be left with the misimpression that the type of analysis expressly requested by the Judges had been summarily disregarded.

For the foregoing reasons, no basis exists to disregard any aspect of Dr. Cowan's discussion of the Shapley analysis in his report.

CONCLUSION

For the foregoing reasons, the SDC motion should be denied in its entirety.

Respectfully submitted,

Dated: April 20, 2017

_____/s/_____
Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers
Group

¹⁰ See 2008-1 CRB CD 98-99 (Phase II), *Final Distribution of Distributions of 1999 Cable Royalty Funds* at p. 14 et seq. (Jan. 14, 2015).

**DECLARATION
OF
RAUL GALAZ**

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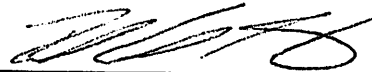
DECLARATION OF RAUL GALAZ

I am a consultant to Worldwide Subsidy Group, LLC dba Independent Producers Group (“IPG”). The following facts are within my personal knowledge, and if called upon I could and would testify competently thereto.

1. On April 14, 2017, I was provided a copy of the *Settling Devotional Claimants Motion to Strike IPG’s Written Direct Statement*, which asserted that calculations that I made relating to IPG’s claim to 2001 cable royalties for the devotional category had erringly attributed IPG a value for 2001 broadcasts of programming owned by Jack Van Impe Ministries and Salem Baptist Church. After less than a half-hour of review, mostly involving familiarization of IPG’s data, I was able to determine that the value for 2001 broadcasts of programming owned by Jack Van Impe Ministries and Salem Baptist Church had been attributed to IPG, and that the

value of such inclusion was 3.73% of the 2001 cable royalty pool. That is, the revised claim to be made by IPG for calendar year 2001 is 42.32% rather than the figure initially claimed, 46.05%.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of April, 2017.



Raul Galaz

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of April, 2017, a copy of the foregoing was sent by overnight mail and email to the parties listed on the attached Service List.

/s/

Brian D. Boydston, Esq.

DEVOTIONAL CLAIMANTS:

Clifford M. Harrington
Matthew J. MacLean
Victoria N. Lynch
Pillsbury, Winthrop, et al.
P.O. Box 57197
Washington, D.C. 20036-9997