Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

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

SETTLING DEVOTIONAL CLAIMANTS' BRIEF IN RESPONSE TO ORDER FOR FURTHER BRIEFING REGARDING SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR FINAL DISTRIBUTION

In response to the Judges' inquiries set forth in their Order for Further Briefing, dated October 22, 2019, the Settling Devotional Claimants respond as follows:

1) Does the filing with a court or other adjudicatory tribunal of a notice of settlement bind the parties to the settlement according to the contents of that notice, or would the settlement as noticed be considered conditional, subject to agreement on additional terms, before it is adopted by the court or other adjudicatory tribunal?

The answer to both parts of the Judges' first question is "no." The filing of a notice of settlement is not inherently "binding" on the parties, in the absence of other factors (such as waiver or judicial estoppel), although it may be strong evidence of the parties' intent. *See T Street Development, LLC v. Dereje and Dereje*, 586 F.3d 6, 11 (D.C. Cir. 2009) (affirming finding that, despite notice of settlement, parties had not reached a meeting of the minds on a material term of the settlement); *see also Hall v. City of Williamsburg*, 768 Fed. App'x 366, 378-79 (6th Cir. Apr. 1, 2019) (affirming enforcement of settlement offer and acceptance by email, and finding based in part on notice of settlement that the parties intended to settle). Similarly, a notice of settlement does not imply that the settlement is conditional, subject to agreement on additional terms. To the contrary, even an expressed intent to negotiate a more formal written instrument in the future will not defeat a settlement that is definite in material respects, and the courts will enforce such a settlement. *See Foretich v. Am. Broadcasting Companies, Inc.*, 198 F.3d 270, 275 (D.C. Cir. 1999) (affirming enforcement of settlement offer and acceptance by correspondence, despite parties' failure to agree to scope of mutual release in a final document); *Hall*, 768 Fed. App'x at 378-79. In both circumstances, it is the underlying settlement, and not the notice, that is either fully binding or subject to agreement on further material terms. It is the role of the court or other adjudicatory tribunal to determine, in the event of a dispute, whether the underlying agreement was "definite in material respects," even if it "contains some terms which are subject to further negotiation …." *See T Street Development*, 586 F.3d at 11 (quoting *Tauber v. Quan*, 938 A.2d 724, 730-31 (D.C. 2007) (internal quotations omitted)). If the settlement was "definite in material respects," then the tribunal should give effect to the parties' agreement. *See Foretich*, 198 F.3d at 275.

The case *Foretich v. Am. Broadcasting Companies, Inc.* is instructive. In *Foretich*, the parties engaged in an exchange of correspondence regarding settlement, culminating in a letter by the defendant offering a settlement contingent on execution of "a full, general release …." 198 F.3d at 274. The plaintiff responded by letter, confirming acceptance of the offer. *Id.* The parties subsequently exchanged drafts of a formal settlement agreement, but failed to agree on the scope of the "full, general release." *Id.* The defendant filed a motion to enforce the settlement on the basis of the parties' exchange of correspondence, which the district court granted. *Id.* at 273.

In affirming the district court's enforcement of the offer and acceptance, the D.C. Circuit explained that "[p]arties may enter into a binding agreement that later is memorialized in a written instrument." *Id.* at 274 (citing *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 363 (D.C. Cir. 1983)). Although the offer and acceptance were themselves ambiguous as to an aspect of the scope of the release, they followed an extended series of communications in which the defendant had clearly insisted on the scope that it sought, and the plaintiff had not objected. *Id.* at 275. Therefore, the D.C. Circuit was able to conclude based on this parol evidence that the plaintiff's more restrictive reading of the release language in the accepted offer was not reasonable. *Id.*

In this case, as in *Foretich*, both parties believe they reached a binding agreement on July 16, 2019, when IPG accepted the SDC's offer by email for "31.25% to IPG, and 68.75% to SDC across all four cable royalty years, 2000-03." *See* SDC Motion for Final Distribution at Ex. 1, email exchange between A. Lutzker, B. Boydston, and M. MacLean (July 12-16, 2019). The parties' understanding that the offer and acceptance embodied a binding agreement that was "definite in material respects" is strongly evidenced by their Joint Notice of Settlement and Motion for Stay (July 17, 2019), in which they reported to the Judges that the parties had "settled all controversies as to distribution of cable royalty fees collected for royalty years 2000 through 2003 that have been allocated to the Devotional category, and that such fees are no longer subject to controversy."

Unlike in *Foretich*, there is no ambiguity as to whether the offer or acceptance contained a term of confidentiality or appointment of a common agent for distribution. Neither confidentiality nor appointment of a common agent for distribution was a part of the settlement negotiation at all. But if there had been any ambiguity, *Foretich* establishes that the ambiguity can be resolved by looking at settlement communications preceding the offer and acceptance. 198 F.3d at 275. Similar to the case in *Foretich*, the negotiation history shows that the SDC had proposed that the Licensing Division of the Copyright Office would calculate interest, and that IPG never objected to the SDC's proposal. *See* SDC's Motion for Final Distribution at Ex. 1 (email of Apr. 29, 2019) ("IPG's share of the interest accruing on remaining balances would be in excess of the 30% share, *as the Office will calculate*." (Emphasis added)). Because such a proposal would render confidentiality impossible and appointment of a common agent unnecessary, the parol evidence further supports the conclusion that confidentiality and appointment of a common agent were not intended as terms of the settlement at the time of the offer and acceptance.

The Judges' Order for Further Briefing seems to suggest that the parties may have been mistaken in their belief, reported to the Judges, that the parties had "settled all controversies," because the parties evidently have a dispute as to whether the settlement's terms were intended to include confidentiality and appointment of a common agent for distribution. *See* Order for Further Briefing at 1 ("The participants have now informed the Judges of a dispute as to whether they had in effect entered into a full and final settlement."). However, neither party has contended that their settlement was not full and final. Rather, the SDC understand IPG's argument to be that there is a full and final settlement agreement, but that the SDC breached an implied (or "presumed") term of that agreement. IPG recently confirmed the SDC's understanding of its position. *See* IPG's Renewed Motion for Partial Distribution (Oct. 25, 2019) at 3 ("As of July 17, 2019, IPG believed that IPG's motion, first filed over two years prior, was moot. … [N]either party disagrees that a settlement had occurred.").

But even if IPG were to contend that the parties' agreement was not definite in a purportedly material respect, this case is not similar to cases in which courts have allowed parties out of settlement agreements for failure to agree on a material term. In *T Street Development*, the parties reported to the district court that they had reached an oral settlement following a settlement conference, but it subsequently emerged, as shown in the transcript of the settlement conference, that the parties had tabled discussion of two material terms of the agreement as to which they had not reached a resolution. 586 F.3d at 8-9. The D.C. Circuit reiterated that the parties' oral settlement agreement would be enforceable if it were "definite in material respects," even if it "contains some terms which are subject to further negotiation …." *Id.* at 11 (internal quotations omitted). But the D.C. Circuit affirmed the district court's finding that the terms on which the parties failed to agree were material, pointing to the parties' extensive and inconclusive discussions of the terms *before* the alleged settlement was reached. *Id.* at 12 ("When the issue arose at the settlement conference before the magistrate judge, the parties sparred about it at length. … [T]he parties then requested an additional week to 'work out' the dispute. … Given this, we can easily understand why the district court found that the parties had failed to reach agreement on a material element.").

In this case, unlike in *T Street Development*, the parties did not discuss confidentiality or appointment of a common agent for distribution prior to the SDC's offer and IPG's acceptance, and did not agree to "work out" any terms later. Nor is there any evidence that the parties would have considered such terms to be material. To the contrary, the parties' Joint Notice of Settlement and Motion for Stay, filed even after IPG requested confidentiality and the SDC responded that "[c]onfidentiality was not a term of [the SDC's] offer or of IPG's acceptance," demonstrates conclusively that the parties did not consider confidentiality or appointment of a common agent for distribution to be a material term of their settlement. "[T]he parties to a contract are free to decide for themselves what is material and what is not. … [M]ateriality is not, as the buyer asserts, preordained, but is instead a factual question that depends on what the parties deem to be the material elements of their agreement." *Id.* at 12 (internal quotations omitted).

Accordingly, although the parties' Joint Notice of Settlement and Motion for Stay is not itself inherently "binding" on the parties, it demonstrates the parties' intent to be bound by their settlement offer and acceptance, and that neither confidentiality nor appointment of a common agent for distribution were terms of that settlement. It is the parties' settlement, which is "definite in material respects," that is binding on the parties.

2) Does the phrase "distribution of such fees is not subject to controversy" in Section 801(b)(3)(A) of the Copyright Act apply only to the amount of royalties paid by users of copyrighted works or does the phrase apply more broadly to include issues such as the allocation and distribution of accrued interest on such royalties and the appointment of a common agent to facilitate such distributions?

The phrase "distribution of such fees is not subject to controversy" applies only to controversies concerning distribution of the royalty fees paid by the cable systems, and not to costs or interest accrued for such royalties. Moreover, because a common agent for distribution is an agent appointed by the parties, and not by the Judges, a dispute related to appointment of a common agent is not a "controversy" that would fall within the Judges' purview. Of course, the Judges have authority to address issues of who is a proper claimant, who is a proper recipient of a distribution, and whether one or more proper claimants are duly representative by a designated agent. Those issues are within the purview of the Judges where controversies over royalty fees exist, because each relates directly to the issue of distribution of the royalty fees paid by cable systems. But the issues do not arise where such fees are not subject to controversy.

In the cable compulsory licensing statutory scheme established by Congress in Section 111 of the Copyright Act of 1976, as amended, 17 U.S.C. § 111, the basic "controversy" to be resolved by the Judges relates to the "royalty fees" deposited by the cable systems. First, pursuant to 17 U.S.C. § 111(d)(3), the *royalty fees* deposited are to be distributed to copyright owners (defined in Section 111(d)(3)) in accordance with procedures set forth in Section

111(d)(4). In Section 111(d)(4)(B), the "Copyright Royalty Judges shall determine whether there exists a controversy concerning the distribution of *royalty fees*." (Emphasis supplied.) The phrase "royalty fees" is repeated throughout Sections 111, 801 and 803 (and also referenced as "such fees") and must be given consistent readings. *See Adena Regional Medical Center v. Leavitt*, 527 F.3d 176, 180 (D.C. Cir. 2008) ("As the Supreme Court has instructed on countless occasions, we are to presume 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). Therefore, when the statute references "royalty fees," it means the money paid by cable systems. It does not mean the total funds available for distribution, which as noted below excludes "costs" of administration by the Copyright Office, and includes interest earned on funds deposited with the Treasury.

Second, if the Judges "find the existence of a controversy, the Copyright Royalty Judges shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of *royalty fees*." 47 U.S.C. § 111(d)(4)(B) (emphasis added). Section 801(b)(3)(A) authorizes the Judges to distribute "*those royalty fees collected under section[] 111…* to the extent that the Copyright Royalty Judges have found that the distribution of *such fees* is not subject to controversy." (Emphasis added.) In Section 801(b)(3)(A), the antecedent of "such fees" is "those *royalty fees collected under section[] 111*." (Emphasis added.) Again, the provision does not authorize the Judges to determine controversies relating to other funds.

Third, pursuant to 17 U.S.C. § 111(d)(2), it is the Register of Copyrights (not the Judges) that receives "all fees," i.e., royalties paid by the cable systems. After an accounting of costs, those royalty fees are deposited in U.S. treasury securities, as directed by the Secretary of the Treasury. These "funds," which constitute the balance of royalty fees, less costs plus interest, are distributed by the Librarian of Congress, upon authorization of the Judges. Any dispute regarding the amount or allocation of costs incurred by the Register of Copyrights in managing the royalty fees, or the amount or allocation of interest earned by the deposit of those as directed by the Secretary of the Treasury, is not addressed in Section 801(b)(3)(A). Therefore, any dispute about the management of the royalty fees by the Copyright Office is outside the scope of "controversy" set forth in Section 801(b)(3)(A).

Fourth, pursuant to Section 801(b)(3)(C), the Judges are authorized to make partial distribution of royalty fees on proper motion of one or more claimants, in the absence of a reasonable objection and upon signing by all claimants receiving a partial distribution to execute an agreement (a "payback agreement") obligating a claimant to return any excess amounts received based on a final determination. The payback agreement, which the Judges drafted and which the claimants sign with the Copyright Office, also obligates claimants to return "any excess amounts (including interest according to the amount that would have accrued if the principal had remained in the fund) to the extent necessary to comply with the final determination of fees …."

In *Restricted Order Directing Accounting of 2000-2003 Cable Royalties Disbursed to the Program Suppliers Category*, No. 2008-02 CRB CD 2000-03 (Phase II) (Nov. 25, 2015), the Judges stated that there was no dispute regarding the percentage allocation in the Program Suppliers category, but noted that there was a dispute concerning "the handling of certain expenses, the accrual of interest, and how to account for previously distributed funds in the final distribution." *Id*. at 3. Acknowledging that the Copyright Act authorizes the Register of Copyrights to administer the royalty fees on deposit, the Judges ordered an allocation of interest by the Copyright Office but left it to the Copyright Office to make "an appropriate *pro rata* allocation of accrued interest." *Id*. at 4.

Therefore, the apportionment of costs and interests on royalty fees held by the Copyright Office is determined by the Register of Copyrights, and within the Register's Office by the Licensing Division. Under the statutory scheme set forth in the Copyright Act, Congress did not contemplate that a party to a contested proceeding before the Judges would have a right to appeal that allocation of costs and interest. Indeed, 17 U.S.C. § 803(d)(1) authorizes an appeal of a final determination of the Judges after publication in the Federal Register. There is no appeal under the statute of a final distribution of the funds previously awarded in the final determination.[1]

As to the final question whether the appointment of a common agent to facilitate the distribution is contemplated as a matter of potential controversy, there is nothing in the Copyright Act that requires a common agent be appointed to receive funds not in controversy, nor that suggests the designation of a common agent is a matter of controversy which can delay an order for final distribution. While the Judges have authority to determine in the case of a controversy who is entitled receive funds, *see* Sections 111(d)(3) and 111(d)(4)(B), nothing suggests that the Judges have the authority to appoint a common agent.

In the current context, there is no controversy regarding the allocation of royalty fees between the SDC and IPG. Therefore, all the Judges have to do is to authorize the Register of Copyrights to make distribution of the funds available to the Devotional category pursuant to the shares awarded by the Judges. The allocation of costs and interest remains within the purview of the Register of Copyrights, subject to the payback agreements the SDC previously executed. In

[1] Whether a party asserting a dispute over allocation of interest would have a cause of action against the Librarian of Congress or the Register of Copyrights under the Administrative Procedure Act is a separate issue, but one that needs not be answered in response to the Judges' order for further briefing.

light of the settlement as agreed to by IPG and SDC, there is no issue of whether an agent is needed to receive the funds as an initial matter. The parties, who were previously determined by the Judges to be qualified copyright owners (in the case of the SDC) or a proper designated agent of copyright owner (in the case of IPG), should each directly receive the funds as reasonably determined by the Register of Copyrights.

> 3) To the extent that resolution of issues presented by the SDC Motion requires the Judges to interpret the phrase "the distribution of such fees is not subject to controversy" in Section 801(b)(3)(A) of the Copyright Act, have the Judges or their predecessors interpreted such phrase in the past or does the issue present a novel material question of substantive law on which the Judges must request a decision of the Register of Copyrights pursuant to Section 802(f)(1)(B) of the Copyright Act?

The SDC are not aware of any "novel material question of substantive law" presented by this matter requiring the Judges to request a decision of the Register of Copyrights under Section 802(f)(1)(B) of the Copyright Act. The legislative history of Section 802(f)(1)(B) of the Copyright Act suggests that the purpose of the provision was to preserve the Register of Copyright's role in setting copyright policy, while assigning to the Judges the role of deciding the factual and legal issues in matters before them. *See* Report from the Committee on the Judiciary, 108 H. Rpt. 408 (Bill Summary, § 802(f)(1)), Jan. 30, 2004 (the intent of the provision was to "balance the concerns of preserving independence in the role and decisionmaking of the CRJs against the benefit of having the ability to consult the expertise of the Copyright Office … This section will help to effectuate the Committee's goal that the Copyright Office retain responsibility for creating and implementing copyright policy, while the CRJs will retain sole responsibility for making factual and legal determinations regarding matters before them in a proceeding."). It would not advance the purpose of the Copyright Act to refer a question to the Register of Copyrights relating to whether the parties have resolved all controversies in a settlement agreement – a question that is principally factual in nature, that is committed to the Judges for a determination, and that has no bearing on any policy set by the Copyright Office.

The question as to whether the distribution of fees is subject to controversy is principally a question of fact, and does not involve a material question of law. *See T Street Development*, 586 F.3d at 12 (whether settlement omits material terms is a "factual question"). Moreover, because the answer to this question of fact goes directly to "the ultimate distribution of copyright royalties," it is expressly excepted from the authority of the Register of Copyrights under Section 802(f)(1)(A) of the Copyright Act, which provides that

> The authority under this clause shall not be construed to authorize the Register of Copyrights to provide an interpretation of questions of procedure before the Copyright Royalty Judges, the ultimate adjustments and determinations of copyright royalty rates and terms, the ultimate distribution of copyright royalties, or the acceptance or rejection of royalty claims, rate adjustment petitions, or petitions to participate in a proceeding.

At any rate, even if there were a material question of law at issue, it is not a "novel" question. The Judges and their predecessors have interpreted and applied the meaning of the word "controversy" in the phrase "distribution of such fees is not subject to controversy" in Section 801(b)(3)(A) of the Copyright Act, and there is sufficient case law for the Judges to reach a decision without the need to request a decision from the Register of Copyrights. In the analogous context of a federal court's certification of a question of state law to the highest court of a state, the D.C. Circuit has held that certification is not appropriate unless the law is "genuinely uncertain," meaning that there is not "a discernible path for the court to follow." *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 20 (D.C. Cir. 2014). The Judges' precedents establish a discernible path to follow in this case.

The Judges' decision with regard to the Devotional category in the distribution phase of the 2010-13 cable and satellite proceedings is on point. In that case, the SDC and Multigroup Claimants agreed upon the final distribution percentages, but could not reach agreement as to another term of the proposed order, based on the SDC's request that the order reflect Multigroup Claimants "acceptance" of the SDC's distribution methodology in that case. *See* SDC's Response to Multigroup Claimants' Notice of Consent and Motion for Entry of Distribution Order, No. 14-CRB-0010-CD/SD (2010-13) (July 12, 2018). The Judges found it unnecessary to resolve the dispute raised by the SDC, finding instead that because there was no remaining dispute over the distribution of the subject funds, there was no remaining controversy to be decided by the Judges. *Final Distribution Determination*, No. 14-CRB-0010-CD/SD (2010-13), 83 Fed. Reg. 38,326 (Aug. 6, 2018) ("The Judges find that the parties' agreement regarding the final percentage distribution ends any remaining controversy with regard to the subject funds over which the Judges have jurisdiction and that neither party retains a significant interest related to this proceeding.").

So too, here. The parties' agreement regarding the final percentage distribution ends any remaining controversy with regard to the subject funds over which the Judges have jurisdiction. The Judges can determine, as a matter of fact, that the parties have no remaining controversies that would prevent the Judges from authorizing the distribution of royalties to which the parties have agreed. If the Judges determine that there are no remaining controversies that would prevent them from authorizing the distribution, then it is the Judges' statutory duty to authorize the distribution. 17 U.S.C. § 801(b)(3)(A) ("[T]he functions of the Copyright Royalty Judges shall be as follows … To authorize the distribution, under sections 111, 119, and 1007, of those royalty fees collected under sections 111, 119, and 1005, as the case may be, to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy."). It is a core responsibility of the Judges to make factual findings, including a finding as to the existence of any controversy. There is no "novel material question of substantive law."

Conclusion

For the foregoing reasons, the SDC's motion for final distribution under 17 U.S.C. § 801(b)(3)(A) should be granted, and IPG's motion for sanctions should be denied.

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Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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Certificate of Service

I certify that on November 12, 2019, I caused a copy of the foregoing to be served on all parties registered to receive notice by eCRB by filing through the eCRB filing system.

/s/ Matthew J. MacLean
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Proof of Delivery

I hereby certify that on Tuesday, November 12, 2019, I provided a true and correct copy of the Brief in Response to Order for Further Briefing Regarding Settling Devotional Claimants' Motion for Final Distribution to the following:

Independent Producers Group (IPG), represented by Brian D Boydston, served via Electronic Service at brianb@ix.netcom.com

Signed: /s/ Matthew J MacLean