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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

INDEPENDENT PRODUCERS GROUP'S RESPONSE TO ORDER FOR FURTHER BRIEFING

On October 22, 2019, the Judges issued an *Order for Further Briefing*. Specifically, the Judges requested briefing on three issues, to which Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") responds as follows:

> **Issue No. 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?

IPG Response: In the context of these proceedings, IPG is confused by the purpose of the Judges' question. On July 17, 2019, IPG and the SDC jointly provided notice to the Judges that they had settled their claims, and

no party has since notified the Judges that such notice was submitted in error. See *Joint Notice of Settlement and Motion for Stay* (July 17, 2019). The jointly submitted notice gave absolutely no details as to the content of such settlement, only that a settlement had occurred. By such notice, the parties were not seeking to have the Judges issue an order imposing the terms of the settlement, only to stay all proceedings pending the parties' private memorialization of their settlement agreement. Such process is, in fact, identical to that currently being followed by the Allocation parties in the 2010-2013 satellite proceedings.

While issues remain regarding the SDC's almost simultaneous breach of the settlement agreement, and the consequence thereof, neither party disagrees that a settlement occurred. See *SDC Motion for Final Distribution Under 17 U.S.C. § 801(b)(3)(A)*, filed July 25, 2019, and briefing related thereto. In fact, the parties' briefing reflects no disagreement as to the most material issue, the agreed-upon percentages of royalty distribution, only the confidentiality of the settlement agreement. As such, resolution of the Judges' question, while thought-provoking, has no apparent applicability to the instant proceedings.

Nevertheless, in response to the question, IPG contends that a "notice" of settlement does no more than inform the Judges that a settlement has occurred. It does not constitute the terms of settlement, and such is not the purpose of such a pleading. In fact, the notice of settlement submitted by IPG and the SDC on July 17, 2019 failed to identify *any* of the terms of settlement. As such, the Judges' question as to whether "notice of settlement [binds] the parties to the settlement according to the contents of that notice" seems misplaced. The sole reason identified for the joint notice submitted by IPG and the SDC was to notify the Judges of the existence of an agreement in order to stay proceedings that were quickly approaching.

Notwithstanding, it would be naive to suggest that once a notice of settlement had been provided, it could not be withdrawn under any circumstances. Circumstances sometimes arise where contracting parties believe an agreement exists, only to learn that some fundamental understanding was not shared by both parties. Provided that the parties giving notice of settlement did so in good faith, and not for some ulterior motive, the fact remains that the parties may not have had a sufficient "meeting of the minds". In such circumstance it would be wholly reasonable for one or more parties to inform the Judges that the prior representation to

the Judges was made in error, and that a settlement had not been reached. In such circumstance, the Judges would presumably proceed thereafter as though no settlement agreement had been reached. Of course, if an adverse party believed the contrary, i.e., that a settlement *had* been reached, such adverse party would be free to bring an action before the courts to enforce the terms thereof, during such time the Judges may or may not stay the proceedings before them.

Regardless, whether or not a meeting of the minds has occurred sufficient to result in contract formation is a matter of contract law, and not within the purview of the CRB Judges' consideration.[1]

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[1] Long-standing precedent in CRB proceedings explicitly prohibits review of such issues in distribution proceedings by the distributing tribunal, and holds that determinations relating to contractual interpretation between parties is retained by the state and federal courts applying state law. *National Broadcasting Company v. Copyright Royalty Tribunal*, 848 F.2d 1289 (1988). Therein, the court stated:

> "[W]e emphasize that the CRT has no authority to provide a legally significant interpretation of contracts conveying copyrights, and that parties to such contracts have full recourse to normal contractual remedies notwithstanding any distribution by the CRT."

848 F.2d 1289, 1290 (D.C. Cir., 1988). To be clear, the opinion was broader than a mere prohibition of interpreting contracts "conveying copyrights", as the opinion cited and discussed cases for the proposition that "Congress may

In sum, a "notice of settlement" merely reflects the existence of a settlement. Suggesting the converse, i.e., determining whether a settlement exists or the scope thereof *because* of the existence of a notice of settlement, is the proverbial "tail wagging the dog".

> **Issue No. 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?

IPG Response: Section 111(d)(2) of the Copyright Act holds the following:

> "**Handling of Fees** -- The Register of Copyrights shall receive all fees … deposited under this section[2] and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the

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not vest in a non-Article III court the power to adjudicate, render final judgment and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review", citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986); see also *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 584, 105 S.Ct. 3325, 3334-35, 87 L.Ed.2d 409 (1985).

[2] Section 111 of the Copyright Act addresses *inter alia*, the compulsory license for cable retransmitted programming, and the fees collected in connection therewith.

> United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution *with interest* by the Librarian of Congress upon authorization by the Copyright Royalty Judges."

17 U.S.C. Section 111(d)(2) (emphasis added).

Clearly, the "fees" addressed by Section 801(b)(3)(A) are the same "fees" addressed by Section 111(d)(2). Accordingly, there should be little debate on the matter that the cable retransmission "fees" collected by the Copyright Office, *and* the interest derived therefrom, are subject to distribution by the Judges.[3]

As to the appointment of a common agent to facilitate distributions that are "not subject to controversy", IPG contends that it would logically be within the purview of the Judge's authority to do so and, under current

[3] The royalties collected by the Copyright Office are derived from the exploitation of copyrighted works that are owned by those parties seeking distribution of the collected royalties. To the extent that such royalties are retained by the Copyright Office, and interest accrues on the principal, it is interest derived from principal monies owing to the owners of those copyrighted works. To the extent that any argument were made that copyright owners are not entitled to the accrued interest, and that such monies are retained by the Copyright Office for its own use, such result would result in a warped motivation for the Copyright Office to delay proceedings, and delay distributions (advanced distributions and final distributions alike).

circumstances, *required*. As IPG anticipates, the purpose of a common agent could be two-fold, either to keep confidential the terms of a settlement, or to provide a neutral determination as to what monies should be distributed to two or more parties when advance distributions have occurred or interest has accrued on the collected fees.

Although appointment of a common agent may not be *necessary* in all circumstances,[4] it is *always* necessary when the parties agree that a settlement will be kept confidential or, as here, information detailing the interest accruing on the "fees" collected by the Copyright Office has not been made available to the public or the participants. In the absence of the Copyright Office providing information detailing the interest accruing on collected "fees", the parties have no alternative other than to enlist the assistance of Copyright Office personnel to calculate the monies owing pursuant to any settlement based on percentages.

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[4] For example, appointment of a common agent would not be *necessary* if the aggregate of royalties for either an entire royalty pool or a particular category, were being distributed, no advance distributions had taken place for such pool or category, and the parties agreed that the terms of a settlement were not to be deemed confidential.

In fact, the Judges' appointment of a common agent to render such calculations appears to have been contemplated by the Copyright Act. Specifically, section 801(d) of the Act holds:

> **Administrative Support --** The Librarian of Congress shall provide the Copyright Royalty Judges with the necessary administrative services related to proceedings under this chapter.

17 U.S.C. Section 801(d).

Section 801(d) does not delineate exactly what administrative services must be rendered by the Librarian, however since one purpose for the appointment of a common agent would be for rendering a calculation that can only be performed with the information withheld by the Copyright Office from the public and participants, the Librarian is clearly *required* to render such services, and the Judges are *ipso facto required* to appoint a common agent for such purpose.

To be clear, were information relating to the accrued interest made available to the public or participants, no need would exist to enlist administrative support from the Copyright Office for such purpose, or appointing a common agent, as such calculations could as easily be performed by the parties. Such fact has been previously recognized by IPG and, consequently, was the basis for IPG's its *Motion Requesting Order to*

Compel Release of Information by Licensing Division (Oct. 1, 2019). Were the Copyright Office to make public the accrued interest figures, then appointment of a common agent would only be necessary for the purpose of keeping the terms of any settlement confidential.

Historically, parties entering into settlements in these proceedings have held them confidential from the Judges and the public, for the obvious reason that the parties do not want the settled percentages to influence the percentages awarded in future proceedings. Nevertheless, even if settling parties deviated from this norm, and did not require confidentiality, unless and until the Judges issue an order requiring the Licensing Division of the Copyright Office to cooperate and disclose information relating to the "fees" collected *and* the interest accrued thereon, which *should* be a matter of public record anyway, the Judges will *always* be required to appoint a common agent.

> **Issue No. 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?

In light of the position of *both* parties, i.e., that a settlement agreement was achieved, no interpretation of the Section 801(b)(3)(A) phrase is required. Nor need the Judges consider the issue of whether such phrase impliedly includes the interest accrued on such fees, as statutory language expressly makes clear that accrued interest is included. See supra.

IPG is unaware of any prior determination of the CRB, the CARP, the CRT, or courts, addressing such matters. Nonetheless, unless and until such matters are required to be addressed by circumstances before the Judges, and absent a circumstance already addressed by statutory authority, could such matters qualify for submission to the Register of Copyrights pursuant to Section 802(f)(1)(B) of the Copyright Act.

# # #

Respectfully submitted,

Dated: November 12, 2019

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this November 12, 2019, a copy of the foregoing was electronically filed and served on the following parties via the eCRB system.

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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 Independent Producers Group's Response to Order for Further Briefing to the following:

Settling Devotional Claimants (SDC), represented by Michael A Warley, served via Electronic Service at michael.warley@pillsburylaw.com

Signed: /s/ Brian D Boydston