

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

**INDEPENDENT PRODUCERS GROUP'S**  
**OPPOSITION TO THE SETTLING DEVOTIONAL CLAIMANTS'**  
**MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Worldwide Subsidy Group LLC (a Texas limited liability company)  
dba Independent Producers Group ("IPG") hereby submits its opposition to  
the "Motion to Compel Production of Documents" filed by the Settling  
Devotional Claimants ("SDC").

**INTRODUCTION**

According to 37 C.F.R. Section 351.6, "parties may request of an  
opposing party nonprivileged underlying documents *related to the written  
exhibits and testimony*". Although no reference exists in the regulations,  
following an initial production of documents, parties have historically been  
allowed to issue "follow-up" document requests, seeking documents  
underlying documents *already* produced in the initial round of discovery.  
Ergo, the reference to "follow-up".

During the “follow-up” portion of discovery, the SDC requested “All documents produced by MPAA to IPG in Docket No. 2008-2 CRB CD 2000- 2003 (Phase II)” (collectively, the “MPAA Documents”). No comparable request was made in the “initial” portion of discovery. Notably, however:

- (i) the MPAA Documents were produced *by the MPAA* to IPG in response to IPG’s request for documents relating to *the MPAA’s written exhibits and testimony* in the initial round of 2000-2003 cable distribution proceedings, i.e., *the MPAA Documents were not IPG-generated documents nor related to IPG’s written exhibits and testimony*;
- (ii) no mention of the MPAA Documents appears in IPG’s current written exhibits and testimony. Contrary to the fabrication of the SDC, at no time did IPG expert witness Dr. Charles Cowan rely on the MPAA Documents, nor does he so assert in his testimony;<sup>1</sup>
- (iii) the MPAA Documents do not underlie any documents produced by

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<sup>1</sup> As noted in the SDC motion, Dr. Cowan stated in his Report that he “considered the computations that IPG has performed in the past” and employed a methodology that “remove[d] the Time Period Weight Factor...which was the subject of significant criticism by the Judges.” Report at ¶ 31. IPG’s Time Period Weight Factor in the 2000-2003 cable proceedings was based on certain Nielsen data that was produced by the MPAA to IPG *in the 1997 cable proceedings*, and is mutually exclusive from the MPAA Documents, which are 2000-2003 data that the MPAA relied on. Moreover, and as noted above, IPG’s written direct statement makes clear that *the already-unrelated 1997 data is expressly not being relied on in this proceeding because of the Judges’ prior criticism thereof.*

IPG in this proceeding; and

- (iv) the standing protective order (which was subject to the prior *agreement* of the SDC) precludes IPG from producing the MPAA documents to the SDC.

Consequently, literally no basis exists for IPG to produce the MPAA Documents, and IPG is affirmatively precluded from producing the MPAA Documents pursuant to the terms of the referenced Protective Order.

In fact, the purpose for the SDC request is much more nefarious, and revealed within the SDC's own written direct statement. Therein, SDC witness John Sanders asserts that he has utilized data acquired from the MPAA in prior proceedings (presumably data that is part of the MPAA Documents) and applied it to the devotional programming category for 2000-2003, but states that:

“Although MPAA produced certain underlying data in the 1999-2009 satellite and 2004- 2009 cable cases, the SDC's use of that data in this case would be problematic, as consent to use the data may have to be obtained from Nielsen, the Tribune and the MPAA, and substantial data analytics services would have to be procured. Therefore, I determined in consultation with the SDC that the likely cost of gaining the right to use this data and then seeking to replicate Mr. Whitt's work was not justified by whatever additional benefit to the reliability of my valuation it would add.”

Consistent with such assertion, in response to IPG's request for all documents underlying Mr. Sanders' assertions regarding use of the MPAA's

data and its application to the devotional programming category, the SDC *failed to produce any documents*. Although IPG requested all information and data underlying the SDC calculations that were ostensibly based on the MPAA Documents, the SDC indicated that:

“Responsive documents are not in the SDC’s possession and control, except to the extent produced by MPAA to the SDC and IPG in the 1999-2009 satellite and 2004-2009 cable cases.”

See **Exhibit A**, attached hereto, at para. 34.

In fact, while IPG acquired from the MPAA certain 2000-2003 data as part of the consolidated 1999-2009 satellite and 2004-2009 cable proceeding, IPG did not receive *any* documents applying such data to the 2000-2003 devotional programming category (as the SDC asserts in its discovery response), nor would the MPAA have had any reason to generate such data.

As such, while the SDC falsely asserts that IPG has all of the data to support one aspect of the SDC’s methodology (which it doesn’t), the SDC also seeks to falsely characterize the MPAA Documents as the basis for some unidentified portion of IPG’s written direct statement in order to bring certain underlying data within the realm of discoverability.

**A. The SDC Request is not related to any assertions made in IPG’s written direct statement, nor is related to any documents produced by IPG, nor is it related to any documents considered by Dr. Cowan. The SDC Request is therefore not within the scope of “initial” or “follow-up” discovery.**

The SDC first assert that IPG expert witness Dr. Charles Cowan relied on the MPAA Documents, which is a contrived falsity. See fn. 1, supra. Dr. Cowan neither relied on the MPAA Documents, nor indicated that he relied on the documents produced by the MPAA in the initial round of 2000-2003 proceedings. *Id.* In fact, Dr. Cowan did not even assert that he has *seen* any of the MPAA Documents (which he has not).

Next, the SDC conflictingly assert that Dr. Cowan has *not* relied on the MPAA Documents, and argue that the SDC is therefore allowed to see all documents *not* relied on by Dr. Cowan.<sup>2</sup> No authority remotely suggests that a party must produce the potentially infinite number of documents and data *not* relied on. Moreover, the latter argument is in direct contravention

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<sup>2</sup> One would expect that the SDC at least limit its assertion to documents actually reviewed or considered by an expert witness, but not relied on to form any opinions. Regardless, application of the SDC’s argument creates the absurd result that a party must at least present to any future expert witness all data presented in any prior proceeding, by any party and by any witness, relating to any year, and relating to any program category. As a general matter, such practice would violate each and every protective order issued by the Judges in distribution proceedings since 2012.

of 37 C.F.R. Section 351.6, which only requires the production of documents “*related to the written exhibits and testimony*”. If data was not relied on to prepare a methodology espoused in the written exhibits and testimony, then as a logical matter it is difficult to accept that such data or documents are “related to” a methodology espoused in the written exhibits and testimony.

**B. The SDC is not entitled to receive the MPAA Documents because it is not part of the “universe of data” from which Dr. Cowan formed the statements in his report.**

IPG wholeheartedly agrees that *if* Dr. Cowan had relied on the MPAA Documents to form the statements in his report, it would be discoverable. As noted, however, Dr. Cowan did *not* rely on the MPAA Documents, nor does Dr. Cowan so assert in his testimony. Moreover, and contrary to the SDC’s initial sentence in part II of its argument, the electronic file produced by IPG in the initial round of discovery was not a document produced by the MPAA in the 2000-2003 cable proceedings, i.e., part of the MPAA Documents.<sup>3</sup> Rather, the only document produced by IPG in these

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<sup>3</sup> In fact, the only reason that IPG produced the electronic file in discovery was because it was part of the files previously produced by IPG in these proceedings. Such electronic file was produced to the SDC under the heading “Documents previously produced to SDC” and, as noted within IPG’s written direct statement, was expressly *not* relied on because of

proceedings that is referenced by the SDC was an electronic file previously produced by the MPAA in the 1997 cable proceedings, a fact that was even addressed in the Judges' final distribution order for the 2000-2003 cable proceedings.<sup>4</sup> See *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds* at fn. 57, 78 Fed. Reg. 64984, 64998 (Oct. 30, 2013).

Consequently, even accepting a watered-down version of the SDC's assertion that a party must produce all documents reviewed, but not relied on, to propose a methodology or in the drafting of written exhibits and testimony, the MPAA Documents *still* do not qualify as discoverable.

**C. IPG and the SDC are bound by the Protective Order which was agreed upon by the parties, and which precludes IPG's dissemination to the SDC of information produced by the MPAA.**

Although the primary basis of IPG's objection is that the MPAA

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criticisms of its use that were levied by the Judges in their final determination in the initial round of the 2000-2003 cable proceedings.

<sup>4</sup> The SDC make reference to the fact that in the consolidated 1999-2009 satellite and 2004-2009 cable proceedings, the SDC successfully obtained an order from the Judges requiring that the MPAA turn over all of its data to the SDC, despite the MPAA having no claim adverse to the SDC in those proceedings. Such fact is inapposite for two reasons. First, in the initial round of the 2000-2003 proceedings, the MPAA took no issue with IPG's use of the MPAA's previously produced 1997 data. Second, the protective order issued during the initial round of the 2000-2003 proceedings was subject to SDC agreement, including stipulation that the SDC would not be entitled to see any documents relating to non-devotional program categories. See *infra*.

Documents were not relied on by Dr. Cowan, nor part of any group of documents relied on by Dr. Cowan, nor part of any group of documents *ever seen* by Dr. Cowan, IPG also objected on the grounds that the MPAA Documents are subject to the clear dictate of a protective order precluding the production of information to parties in program categories other than the party producing the documents. See **Exhibit B** at p. 4. The MPAA Documents were produced by the MPAA in the initial round of the 2000-2003 cable proceedings in support of its claim in the program suppliers category. This remanded proceeding only involves a dispute between IPG and the SDC in the devotional programming category. By its letter, therefore, IPG's objection is warranted.

The SDC conveniently fail to address that the SDC *agreed* to the limitation on discovery, whereby participants in one category were not entitled the data and documents of parties in other Phase II categories. See **Exhibit B** at p. 4. Literally no response to this fact is forthcoming from the SDC, who now encourage the Judges to disregard a provision to which all parties stipulated as part of a negotiation of the applicable protective order. Such negotiation is confirmed by the pleadings attendant to the Judges' issue of the protective order, including briefing by the SDC, wherein only a handful of unrelated issues were found to be unresolved and were submitted



to the Judges for review. See *SDC Reply to IPG Comments on and Partial Opposition to Entry of Protective Order ...*”, filed June 29, 2014, Docket No. 2008-2 CRB CD 2000-03 (Phase II).

The SDC defend that the Judges’ prior order in the 1998-1999 cable proceeding limits standing to object to the producing party. However, unlike the protective order applicable to the 1997 proceedings, which was being reviewed in the 1998-1999 cable proceeding, the provision prohibiting dissemination to parties in other Phase II categories did not exist (nor was necessary). Such negotiated provision was not intended just to protect a producing party from dissemination of its data to other parties in unrelated categories, but to protect from the confusion that would result from the injection of new issues midway into a proceeding. Regardless, to IPG’s knowledge the SDC have sought no exemption from the MPAA from the protective order dictate. In fact, it was the MPAA that brought the provision of the protective order to IPG’s attention even prior to the SDC motion being filed. Under no circumstances does IPG intend to violate the standing protective order as the Judges have sternly chastised IPG for any use of confidential materials from prior proceedings.

On this issue, the MPAA is in agreement with IPG. Specifically, counsel for the MPAA has stated that (1) IPG has standing to object to this

request of the SDC's, and (2) that the referenced Protective Order precludes IPG from producing these documents, and (3) that the MPAA does not consent to exempting the SDC from the terms of the Protective Order. See the June 24, 2016 email of Greg O. Olaniran, Esq., attached hereto as **Exhibit C**.

Moreover, the contradiction of the SDC's previous and current position cannot be ignored. While the SDC has previously been extraordinarily vocal to challenge IPG's very limited use of a single electronic file produced by the MPAA in a prior proceeding (1997)<sup>5</sup>, wherein the protective order had not actually been violated and where the MPAA had previously waived any objection to IPG's subsequent use of such limited data (see *Opposition of IPG to MPAA Motion to Compel Compliance with Protective Order, and Seeking Sanctions*, filed July 22, 2014; Docket No. 2008-1 CRB CD 1998-99 (Phase II)), the SDC now seek *all* data produced by the MPAA in the initial round of 2000-2003 cable proceedings, without qualification or limitation, and even despite its irrelevance to IPG's written exhibits and testimony. Such data includes literally scores of electronic files.

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<sup>5</sup> IPG's use of previously produced MPAA data was to aggregate into 48 half-hour time periods the Nielsen ratings recorded across millions of broadcasts, thereby revealing none of the specific information found in the MPAA-produced data, in order to create a "Time Period Weight Factor".

## CONCLUSION

For the reasons set forth herein, the SDC's motion should be denied in its entirety.

Respectfully submitted,

Dated: June 27, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2016, a copy of the foregoing was sent by overnight mail to the parties listed on the attached Service List.

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