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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
OPPOSITION TO SDC RESPONSE
TO ORDER FOR FURTHER BRIEFING

Although the conclusions reached by Independent Producers Group and the Settling Devotional Claimants in response to the Judges' *Order for Further Briefing*, issued on October 22, 2019, do not vary significantly, certain discrepancies do warrant noting.

As to Issue no. 1, the SDC set off on a tangent not requested for briefing, addressing whether there was any "ambiguity as to whether the offer or acceptance contained a term of confidentiality or appointment of a common agent for distribution." SDC Response at 3. To this point, the SDC again misstate the sequence of correspondence between IPG and the SDC, in order to falsely represent that IPG had somehow conceded that a

non-confidential settlement agreement had been entered into, which did not require the selection of a common agent in order to effectuate it.

According to the SDC, "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." SDC Response, at 3, citing SDC's *Motion for Final Distribution* at Ex. 1. This is a false statement.

Such fiction has twice been made by the SDC in prior briefing, and twice addressed by IPG. As IPG previously set forth in its *Opposition to Settling Devotional Claimants' Motion for Final Distribution under 17 U.S.C. § 801(b)(3)(A)* and *Motion for Sanctions*, filed August 5, 2019, as well as in its *Reply In Support of Motion for Sanctions*, filed August 13, 2019, the SDC contention ignores that the confidentiality of the settlement, and therefore the need for a common agent (in order to preserve such confidentiality), were expressly communicated to the SDC both prior to the filing of *Joint Notice of Settlement and Motion for Stay*, and prior to the SDC filing its current *Motion for Final Distribution*.

Specifically, the SDC's own cited correspondence makes clear that the SDC's concern with confidentiality was ostensibly premised on:

> "[T]he practical obstacles [of designating a common agent and with calculating interest from figures only the Licensing Division retains that] will be difficult or impossible to overcome".

SDC Exh. 1 (July 16 and 17 emails from SDC to IPG). To this statement, IPG *immediately* informed the SDC (within an hour) that IPG:

> "was waiting to hear back from the Licensing Division regarding information *that should allow us to move forward confidentially*."

SDC's *Motion for Final Distribution* at Exh. 1 (July 17 email from IPG to SDC)(emphasis added). Such was the ***last*** communication from IPG before the SDC proposed notifying the Judges that a settlement had been entered into – leaving IPG with the distinct understanding that IPG's suggestions to address any SDC concerns were sufficient and that the settlement agreement remained confidential.

Remarkably, and despite the foregoing written record, the SDC continue to maintain that IPG never objected to the SDC's proposal of non-confidentiality. On the contrary, the SDC *made no objection* to IPG's representation that it understood that the parties were moving forward confidentially, and the SDC understood this fact (reflected in IPG's last

correspondence) when it proposed to IPG that the parties prepare and submit to the Judges their *Joint Notice of Settlement and Motion for Stay*.

While such tactic of maintaining a verifiable falsity may work on social media (even for our President), it should not work in the context of these proceedings. Asserting a falsity over and over does not make it truthful.

As to Issue no. 2, the SDC conclude that any determination whether the fees "not subject to controversy" referenced in Section 801(b)(3)(A) does not impute any determination as to the accrued interest on the "fees" paid by the users of copyrighted works. This is incorrect. While the SDC spend a fair amount of effort identifying where there is no corresponding mention of "fees" and "accrued interest" in Sections 111, 801, and 803 of the Copyright Act, the SDC altogether fail to address the statutory authority that *expressly* does mention "accrued interest", and squarely places it in the purview of the Judges to authorize distribution. See 17 U.S.C. Section 111(d)(2). While the SDC specifically cite Section 111(d)(2) in their response, they conspicuously omit reference to the most relevant portion of its text:

> "The Register of Copyrights shall receive all fees … and, after deducting the reasonable costs incurred by the Copyright Office … shall deposit the balance …. All funds … shall be invested … for later distribution ***with interest*** … upon authorization by the Copyright Royalty Judges."

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

As set forth in IPG's *Response to Order for Further Briefing*, the "fees" addressed by Section 801(b)(3)(A) are clearly 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.

Respectfully submitted,

Dated: November 14, 2019

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this November 14, 2019, a copy of the foregoing was electronically filed and served on the following parties via the eCRB system.

_____/s/_____
Brian D. Boydston

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Proof of Delivery

I hereby certify that on Thursday, November 14, 2019, I provided a true and correct copy of the Independent Producers Group's Opposition to SDC Response to Order for Further Briefing to the following:

Settling Devotional Claimants (SDC), represented by Matthew J MacLean, served via Electronic Service at matthew.maclean@pillsburylaw.com

Signed: /s/ Brian D Boydston