

**Before the  
COPYRIGHT ROYALTY JUDGES  
The Library of Congress**

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

**SETTLING DEVOTIONAL CLAIMANTS’ BRIEF IN RESPONSE TO INDEPENDENT  
PRODUCERS GROUP’S RESPONSE TO ORDER FOR FURTHER BRIEFING**

As to the first and third questions posed in the Judges’ Order, IPG and the SDC are broadly in agreement. Both parties agree that they have an enforceable settlement agreement, that there is no controversy relating to the distribution of fees, and that there is no novel material question of law presented. Although the parties disagree as to what the Judges should do if a party were to contest the enforceability of a settlement agreement, neither party has raised such a dispute here.

The parties substantially disagree as to the answer to the Judges’ second question, particularly as it relates to allocation of interest and appointment of a common agent for distribution. But the parties’ disagreement is largely academic, since there is no dispute over the proper allocation of interest and neither party has requested the Judges to appoint a common agent for distribution.

The Judges should authorize the distribution to which the parties have agreed. Any other disputes between the parties can be resolved in court, if necessary.

**I. The SDC and IPG Are Broadly in Agreement in Response to the Judges' First and Third Question, and Any Dispute Is Academic.**

As to the Judges' first question, of whether the parties are bound by their notice of settlement, and the Judges' third question, of whether there is a novel material question of law that should be referred to the Register of Copyrights, the parties are broadly in agreement:

- Both parties agree that the parties settled on July 16, 2019, and both parties stand by their notice to the Judges on July 17, 2019, reporting that they had “settled all controversies as to distribution of cable royalty fees” at issue in this matter, and that “such fees are no longer subject to controversy.” *See* SDC Brief at 3 (“[B]oth parties believe they reached a binding agreement on July 16, 2019 ....”); IPG Brief at 2 (“[N]either party disagrees that a settlement occurred.”).
- Although IPG claims that the SDC breached the settlement agreement, neither confidentiality nor appointment of a common agent for distribution was raised in the parties' discussion prior to the offer and acceptance, which both parties concede was a completed settlement agreement. As noted in the SDC's pleadings, 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 prior to accepting the SDC's offer. *See* SDC's Motion for Final Distribution at Ex. 1 (e-mail 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)). Although the parties discussed the possibility of confidentiality *after* IPG accepted the settlement offer, the SDC's counsel made clear during that discussion that confidentiality was not a term of the settlement. *Id.* (email of July 17, 2019) (“Confidentiality was not a term of Arnie's offer or of IPG's acceptance ....”). In response, IPG's counsel expressed the hope that the parties could

proceed confidentially, but he did not dispute the statement that confidentiality was not a term of the agreement when he agreed to the notice of settlement. *Id.*

- Both parties agree as to the amount of the agreed-upon distribution. *See* SDC Brief at 3 (“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.’”); IPG Brief at 2 (“[T]he parties’ briefing reflects no disagreement as to the most material issue, the agreed-upon royalty distribution, only the confidentiality of the settlement agreement.”).
- Both parties agree that it is the settlement agreement, and not the notice of settlement, that is binding on the parties. SDC Brief at 2 (“[I]t is the underlying settlement, and not the notice, that is either fully binding or subject to agreement on further material terms.”); IPG Brief at 3 (“[A] ‘notice’ of settlement does no more than inform the Judges that a settlement has occurred. It does not constitute the terms of the settlement, and such is not the purpose of such a pleading.”).
- Both parties agree that there is no novel material question of law presented by this matter requiring the Judges to request a decision of the Register of Copyrights. SDC Brief at 10 (“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.”); IPG Brief at 10 (“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.”).

The only material conflict between the SDC’s position and IPG’s position in response to the Judges’ first question relates to the hypothetical question as to what *would* happen *if* a party

were to inform the Judges that a notice of settlement had been filed in error, and that a settlement had not been reached.

It is the SDC's position that in such a circumstance, the Judges should exercise their express statutory duty under 17 U.S.C. § 801(b)(3)(A) to determine if "the distribution of such fees is not subject to controversy," and, if they so find, to authorize the distribution. The SDC's position is supported by case law in the D.C. Circuit establishing that a tribunal will give effect to a settlement agreement that is "definite in material respects," even if it "contains some terms which are subject to further negotiation ...." See *T Street Development, LLC v. Dereje and Dereje*, 586 F.3d 6, 11 (D.C. Cir. 2009) (quoting *Tauber v. Quan*, 938 A.2d 724, 730-31 (D.C. 2007)); see also *Foretich v. Am. Broadcasting Companies, Inc.*, 198 F.3d 270, 275 (D.C. Cir. 1999). It is also supported by the Judges' determination in the 2010-13 cable and satellite distribution case, where the parties reached agreement on the amount of the distribution but failed to reach agreement on the terms of a proposed order. 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.").

IPG, on the other hand, speculates that the Judges would duck their statutory duty to decide the issue before them, and that the Judges "would presumably proceed thereafter as though no settlement agreement had been reached." IPG Brief at 4. IPG proposes that a party seeking a distribution in accordance with a settlement agreement must "bring an action before the courts to enforce the terms thereof ....," although IPG does not identify any court that would

have the authority to order the Judges to authorize a distribution of royalty fees in the Copyright Office's possession. *Id.*

The Judges need not reach this issue here. Neither party has asserted that the notice of settlement was in error or that a settlement has not been reached, so the Judges need not decide what they would do if such a circumstance were to arise in another case. Even IPG acknowledges that the question is academic. IPG Brief at 2 (“[N]either party disagrees that a settlement occurred. ... As such, resolution of the Judges’ question, while thought-provoking, has no apparent applicability to the instant proceedings.”).

But if the Judges were to reach out to decide this issue (or if they may find it useful to refer back to this brief if they ever encounter the issue in the future), they should find that they have the authority and the duty to determine whether controversies over the distribution of fees have been resolved by a settlement agreement.

IPG seems to argue that the Judges cannot decide a dispute as to whether a settlement agreement resolves all controversies as to distribution, because it would be a matter of “contractual interpretation.” IPG Brief at 4 n. 1. IPG misunderstands the applicable case law. In *National Broadcasting Company v. Copyright Royalty Tribunal*, 848 F.2d 1289 (1988), in a dispute as to whether a distribution should be made to the producer or to the syndicator of a television program, the D.C. Circuit affirmed the Copyright Royalty Tribunal’s determination that a distribution should be made to the syndicator. 848 F.2d at 1297. In so holding, the D.C. Circuit took pains to explain that the Copyright Royalty Tribunal’s decision should not be viewed as a dispositive determination as to the ownership of the copyright based on the parties’ contractual relationship, which was a matter that could be litigated between the parties in a more appropriate forum. *Id.* at 1296 (“We therefore conclude the CRT's ruling should not be seen at

all as adjudicating the contractual entitlement rights of NBC and Worldvision, but rather as setting forth a general rule for the distribution of cable royalties in these cases. This disposition leaves the parties free to litigate their contractual claims in an appropriate forum.”). In short, the Copyright Royalty Tribunal’s decision should not be construed “to determine ownership rather than distribution.” *Id.* at 1295.

But the decision in *NBC* does not mean that the Judges cannot consider a contract in determining the issues of distribution that are properly before them. As the D.C. Circuit later explained, “That holding [in *NBC*] does not preclude the Royalty Judges from looking at a contract in resolving the first question or other antecedent questions concerning whether to allocate royalties to a particular program in the first place.” *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106, 1116 (D.C. Cir. 2015).

In performing their statutory role to determine distribution of royalty fees, the Judges routinely look at contracts to determine, among other things, who is entitled to a distribution and who is authorized to act on behalf of claimants. *Id.* The D.C. Circuit has affirmed the Judges’ limited use of contracts for the purpose of deciding the issues before them – *i.e.*, whether and to whom to authorize a distribution. *Id.* If the parties have contractual claims against each other, such as who is entitled to ownership of the copyright, who is entitled to the distributed funds, or whether either party is liable for breach of any contractual obligations, those disputes are not within the Judges’ purview, and must be resolved in another forum. *Id.* But in determining a claim for a distribution by the Judges, the Judges are free to consider whatever contracts are relevant to the determination.

Applying *NBC* in this case, the Judges have the authority to consider the parties’ settlement agreement for the purpose of determining whether to authorize a final distribution of

royalties, as requested in the SDC's Motion for Final Distribution Under 17 U.S.C. § 801(b)(3)(A). The Judges are authorized by statute to determine controversies over distribution of royalty fees, and are expressly required to order a distribution if no controversy exists. On the other hand, the Judges would lack authority to decide any claim for breach of contract between the parties, any such claim being within the purview of the courts.

The parties here agree that no controversy exists over the distribution of royalty fees. The Judges have all they need to order a distribution in accordance with the parties' agreement. If either party believes it is entitled to anything further from the other, a complaint for breach of contract can be brought in an appropriate court with jurisdiction.

**II. The Judges Lack Authority to Allocate Interest or to Appoint a Common Agent Without the Consent of the Parties.**

As to the Judges' second question, the parties reach opposite conclusions. The SDC disagree with IPG's contention that the Judges have the authority to determine disputes regarding the allocation of interest. As explained in the SDC's brief, the Judges' statutory authority is to determine the distribution of "royalty fees" deposited by the cable systems. 17 U.S.C. § 111(d). Allocation of costs and interest falls by statute within the purview of the Register of Copyrights and the Librarian of Congress, not the Judges. As set forth in 17 U.S.C. § 111(d)(2):

The Register of Copyrights shall receive all fees (including the filing fee specified in paragraph (1)(G)) deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the 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.

Therefore, while the Judges authorize the distribution of royalty fees, it is the responsibility of the Register of Copyrights to deduct reasonable costs, and it is the responsibility of the Librarian of Congress to make the authorized distribution “with interest.”

The Judges have recognized this division of responsibility. “Section 111 of the Copyright Act authorizes the Judges to direct the distribution of deposited cable royalties. That section also authorizes the Register of Copyrights to administer the royalty fees on deposit pursuant to that section, including by allocating interest and deducting reasonable costs incurred by the Copyright Office.” *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).<sup>1</sup>

The SDC also disagree with IPG’s surprising contention that the Judges would have authority to appoint a common agent for distribution. IPG cites to 17 U.S.C. § 801(d), requiring the Librarian of Congress to provide the Judges with “administrative services,” to support IPG’s claim that “the Judges’ appointment of a common agent to render such calculations [of interest] appears to have been contemplated by the Copyright Act.” IPG Brief at 8. As discussed above, the Librarian of Congress and the Register of Copyright are responsible for the apportionment of

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<sup>1</sup> In the Judges’ *Restricted Order Directing Accounting*, the Judges also stated, “[T]he Copyright Office will allocate accrued interest applied to each year’s fund from the date funds were deposited until the date any portion of these funds was disbursed (or from which Copyright Office expenses were deducted). Interest ceases to accrue on funds when they are disbursed. In this regard, in completing the final distribution of Program Suppliers funds, the Copyright Office will review the dates and amounts of any partial distribution in determining an appropriate *pro rata* allocation of accrued interest.”

In a different context, the Judges’ statement might be interpreted as an order directing the Copyright Office as to how to allocate interest. But consistent with the Judges’ recognition that allocation of interest is the responsibility of the Copyright Office, rather than the Judges, the SDC understand the Judges’ statement as to what the Copyright Office “will” do to be descriptive rather than prescriptive. That is, the SDC interpret the Judges’ statement as a description of the Copyright Office’s process, rather than as an order directing the Copyright Office to follow the process described. *See, e.g., Tin Cup, LLC v. U.S. Army Corps of Engineers*, 904 F.3d 1068, 1074 (9th Cir. 2018) (“The Supreme Court has distinguished descriptive ‘will’ statements from mandatory ‘shall’ statements.”) (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004)).



interest and costs. But the statutory provision for “administrative services” under 17 U.S.C. § 801(d) has nothing to do with appointment of a common agent.

Contrary to IPG’s apparent misconception, a common agent for distribution is an agent serving the parties, not the Judges. *See, e.g., Order Granting Allocation Phase Parties’ Motion for Partial Distribution of 2015 Satellite Royalties*, No. 17-CRB-0011-SD (2015) (Nov. 7, 2018), at 6 (explaining the role of the Office of the Commissioner of Baseball, “which has *agreed* to act as a common agent *for all of the Allocation Phase Parties ...*”) (emphasis added); *see also* SDC’s Reply in Support of Motion for Final Distribution Under 17 U.S.C. § 801(b)(3)(A) and Opposition to IPG’s Motion for Sanctions (Aug. 8, 2019), at Ex. 4, Devotional Claimants 1998 Cable Royalty Agreement (designating escrow account for receipt and further distribution of royalty funds). The Copyright Office can calculate interest and make the distribution authorized by the Judges, but neither the Copyright Office nor the Librarian serves as an agent to the parties. Rather, the common agent *receives* the distribution *on behalf* of the parties it serves. *See id.* Parties to prior settlement agreements often have chosen to utilize a common agent for the receipt of distributed funds, in part for the purpose of protecting confidentiality. *See id.* But the use of a common agent has always been by the voluntary agreement of the parties and the agent, not by any mandate from the Judges. *See id.*

The Judges may have inherent or implied authority to disqualify or debar an agent from practicing in copyright royalty proceedings. *See, e.g., Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 572-73 (2d Cir. 1979) (affirming agency’s authority to debar a service provider from participating on behalf of a party to proceedings). But the Judges have no authority, express or implied, to force an agent’s fiduciary duties upon an unwilling agent, or to force an agent upon an unwilling principal.

But at any rate, although the parties are not in agreement as to the correct answer to the Judges' second question, the disagreement again is academic. There is no dispute between the parties as to how interest will be calculated. Both parties agree that they currently lack the information necessary to calculate interest themselves, but both parties agree that the Copyright Office is able to calculate interest in the manner previously described by the Judges, and neither party objects to the method described. Whether the Copyright Office performs this allocation on its own authority or as directed by the Judges is immaterial in this case. Moreover, it is undisputed that the SDC have not agreed to appointment of a common agent for distribution, and neither party has requested the Judges to appoint a common agent for distribution over the SDC's objection. Where, as here, the parties have not agreed to appointment of a common agent for distribution, the distribution can be authorized to the parties separately. This is what the SDC request. And in light of the fact that these cable funds have been held for final distribution for up to 19 years, the SDC respectfully ask that this proceeding be expeditiously and finally concluded.

### **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.

November 15, 2019

Respectfully submitted,

**SETTLING DEVOTIONAL CLAIMANTS**

*/s/ Matthew J. MacLean*

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**Certificate of Service**

I certify that on November 15, 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 Friday, November 15, 2019, I provided a true and correct copy of the Brief in Response to Independent Producers Group's Response to Order for Further Briefing to the following:

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

Signed: /s/ Matthew J MacLean