

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC**

| | | |
|--|---|--|
| In the Matter of |) | |
| |) | |
| Phase II Distribution of the 2000-2003, Cable Royalty Funds |) | Docket No. 2008-02 CD 2000-03 (Phase II) REMAND |
| |) | |
| |) | |

**REPLY IN SUPPORT OF SETTling DEVOTIONAL CLAIMANTS' MOTION TO
COMPEL INDEPENDENT PRODUCERS GROUP TO PRODUCE DOCUMENTS**

The Settling Devotional Claimants (“SDC”) hereby submit this reply in support of the SDC’s Motion to Compel Independent Producers Group (“IPG”) To Produce Documents (the “SDC Motion”) in response to the SDC’s follow-up document request for “All documents produced by MPAA to IPG in *Docket No. 2008-2 CRB CD 2000-2003 (Phase II)*” (the “MPAA Documents”). In its Opposition, IPG essentially argues that the MPAA Documents were not part of any initial discovery request and are unrelated to IPG’s written exhibits and testimony. Opposition at 2. These arguments are simply incorrect.

I. The SDC Requested the MPAA Documents in Their Initial Requests

In their initial document requests, the SDC sought from IPG, in connection with the Testimony of Raul Galaz (“Galaz Testimony”), the following:

Request No. 2 - Provide all documents, data, and source material that Mr. Galaz considered that underlie, relate to, support or form the basis of, or in the alternative undermine or dispute all facts, conclusions, and/or opinions contained in the Testimony and exhibits.

Request No. 4 - Provide all data IPG has that supports the number of broadcasts for IPG and SDC programs (Galaz Testimony at 11.)

Request No. 5 - Provide all data IPG has that “reflects the compulsory license fees that have been generated by retransmitted stations, the number of distant households that received the retransmitted broadcasts, programming data reflecting the length of the

broadcast, and data that reflects the viewership within particular time periods calculated.” (Galaz Testimony at 15.)

In response to each of these requests, IPG stated that except for unspecified general objections, it does not object to the request. There is no dispute that the MPAA Documents are highly relevant to the case and directly responsive to each of these requests. Indeed, the MPAA Documents in IPG’s possession: (a) undermine conclusions and opinions in the Galaz Testimony (which purports to question the validity of using viewing data, including distant viewing data); (b) support the number of broadcasts for IPG and SDC programs by providing program and station specific information regarding telecasts of the parties; and (c) enable viewership calculations over particular time periods by permitting the merger of Nielsen and Tribune data files. In short, because the MPAA Documents were expressly requested in the SDC’s initial requests and are “related to” IPG’s written testimony and exhibits, they are proper under 37 C.F.R. Section 351.6.

II. Dr. Cowan Knew or Should Have Known About the MPAA Documents

Furthermore, in connection with the testimony of IPG’s expert, Dr. Charles D. Cowan, the SDC made the following requests:

Request No. 18 - Provide all documents, data, and source material that Dr. Cowan considered that underlie, relate to, support or form the basis of, or in the alternative undermine or dispute all facts, conclusions, and/or opinions contained in the Expert Report.

Request No. 20 – Provide all documents showing the source of the data that Dr. Cowan was provided (Expert Report ¶ 2), including who provided him with the data.

Request No. 21 - Provide all documents underlying the statement: “I developed a methodology that is may be [sic] responsive to what is my understanding of valuation.” (Expert Report ¶ 3.)

Request No. 25 - Provide all documents underlying the statement, “Again, if such data is made available in the future, I can implement this procedure.” (Cowan Report at ¶ 8.)

Request No. 26 - Provide all documents underlying the statement, “I present in this report a set of estimates that relies on a calculation that the Judges have previously accepted.” (Cowan Report at ¶ 8.)

Request No. 34 - Provide all documents underlying the statements: “In my computations, I use broadcast hours for shows as a measure of volume, but broadcast hours is in some respects a measure of value as the CSO that is paying to rebroadcast a station surely recognizes before paying the fee that some titles are broadcast more frequently than others. To remain competitive in its offerings, the CSO would not choose a channel that is "Friends" 24 hours a day. However, this only captures one minor aspect of value, as noted by the Judges. I do not use Time of Day, since Time of Day might explain some variability in the value by explaining some of the variability in the number of viewers, but this would not relate to value measurement, only the reliability of the measurement.” (Cowan Report at ¶ 32.)

As with Requests Nos. 2, 4 and 5, the MPAA Documents are properly subsumed with these additional requests, because the MPAA Documents were in IPG’s possession and relate to what IPG and its expert, Dr. Cowan knew, or should have known, as Dr. Cowan was preparing his testimony. To the extent IPG, or Mr. Galaz, intentionally withheld the MPAA Documents from Dr. Cowan and selectively turned over material to him, the expert testimony has been hamstrung to the detriment of the SDC, which interferes with the Judges’ goal of reaching a fair and final result in this remanded proceeding.

As Dr. Cowan explains in his testimony, “I derived a set of estimates based on my analysis of data *I was provided.*” Cowan at ¶ 2 (emphasis supplied). “I will implement this methodology *if there is new data presented in the future that could be used to perform these calculations.*” Cowan at ¶ 3 (emphasis supplied). In short, Dr. Cowan relied on IPG, and presumably Mr. Galaz, to provide all the data that Dr. Cowan needed to consider forming his expert opinion. Therefore, the SDC are entitled to use the MPAA Documents to cross examine Dr. Cowan and test whether he believed that there was no other available data that might have influenced his calculations.

Further, Dr. Cowan states that he “considered the computations that IPG... performed in the past” and employed a methodology that “removed the Time Period Weight Factor.” Cowan Report at ¶¶ 30-31. The SDC Request No. 33 expressly addressed this statement:

Request No. 33 - Provide all documents underlying the statement: “As part of my assignment, I was asked to consider the computations that IPG has performed in the past and provide the results of these computations for this case. (Cowan Report at ¶ 30.)

Once again, save for its general objections, IPG did not object to producing underlying documents. Dr. Cowan either used the MPAA Documents in his computations to create a revised methodology, or he did so without reviewing the underlying data because IPG refused to provide it, despite its potential relevance to Dr. Cowan’s analysis. Either way, Dr. Cowan’s testimony relates to the MPAA Documents, and the SDC are entitled to receive the MPAA Documents in discovery and to test the veracity of Dr. Cowan’s testimony with these documents in hand.

III. The Judges’ Prior Orders Support the SDC Motion

IPG or Dr. Cowan’s decision to remove the time period weight factor and its underlying MPAA-produced Nielsen data from Dr. Cowan’s analysis does not render the MPAA Documents undiscoverable. The Judges have interpreted “underlying documents” as used in 37 C.F.R. Section 351.6 “to include any document that a party has considered in formulating its Written Direct Statement, whether or not the party has chosen to rely on it.” *Amended Joint Order on Discovery Motions*, Docket No. 2012-6 CRB CD 2004-2009 and Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (July 30, 2014) at 1 (citing *Order Granting in Part and Denying in Part Settling Devotional Claimants’ Motion to Compel the Production of Documents*, Docket No. 2008-1 CRB CD 98-99 (Phase II) at 4 n.3). While a party is not obligated to “produce the potentially infinite number of documents and data not relied on,” (Opposition at 5), a party is

obligated under the Judges' regulations to produce information concerning "all variables considered in the [party's] analysis," and "any alternative courses of action considered." 37 C.F.R. Section 351.10(e). The Judges know from recent proceedings that IPG has not been reluctant to withhold documents in discovery that may be damaging to its case. *See In the Matter of Distribution of the 2000-2003 Cable Royalty Funds*, Dkt. No. 2008-2 (Phase II), Transcript, Vol III at 583-584 (Galaz) (Dec. 5, 2012) (During questioning by MPAA, Mr. Galaz acknowledged that IPG would *not have* produced termination letters it received from its claimants that it purported to represent).

Here, IPG claims that one electronic file it produced to the SDC was produced by MPAA in the 1997 cable proceeding and is "mutually exclusive" from the MPAA Documents produced in the 2000-2003 proceeding. Opposition at 2, 7. This may – or may not – be true. Either way, under the Judges' rules, the SDC are allowed to test that bald assertion. Under any circumstances, the SDC are still entitled to view all of the data MPAA produced to IPG in the 2000-2003 proceeding. As the Judges have acknowledged:

Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). That is why Congress included provisions for discovery in Chapter 8 of Title 17. Enabling parties to obtain all of the relevant facts is not only mutually beneficial to the parties, but beneficial to the Judges as well. Ultimately a fair and effective discovery process promotes the public interest in an efficient proceeding and a just outcome.

Order Granting IPG's Motion to Compel Production of Electronic Files, Docket No. 2008-1 CRB CD 98-99 (Phase II) (Jan. 31, 2014) at 3; *Amended Joint Order on Discovery Motions*, Docket No. 2012-6 CRB CD 2004-2009 and Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (July 30, 2014) at 2. The MPAA Documents are relevant to the presentation of the complete data available to all parties for the 2000-2003 time period.

Further, IPG's methodology in this proceeding is just a variation of its original methodology, which relied on the MPAA data. Dr. Cowan acknowledged that he considered the computations IPG used for its original methodology in order to calculate "the results of th[ose] computation for this case." Cowan Report at ¶ 30. Therefore, even if Dr. Cowan did not actually use the MPAA Documents, the SDC are still entitled to review all documents relating to IPG's original computations.

IV. The Protective Order in this Case Does Not Preclude the SDC from Receiving the MPAA Documents

As for IPG's specious argument that the Protective Order prohibits it from producing the MPAA Documents, IPG's paraphrase of the Protective Order is inaccurate. Paragraph 4 of the Protective Order says that "[N]o recipient of Protected Materials shall disseminate such Protected Materials, or any information derived therefrom, to any counsel, party or person associated with such counsel or party, who is a Phase II participant in a Phase II category other than that in which such *recipient* is a participant." (Emphasis added). IPG is the "recipient." IPG is a participant in the Devotional category, as are the SDC. Therefore, this provision is not a barrier to IPG's producing information to the SDC.¹

To support its Opposition, IPG attaches an email exchange with MPAA counsel Greg Olaniran, in which Mr. Olaniran opines that IPG has standing to object to the production of

¹ IPG's Opposition also ignores the SDC's position that that it is highly likely, if not inevitable, that IPG will have to produce the rest of the protected MPAA information in connection with IPG's anticipated rebuttal position that it lacks sufficient information to replicate the Reports of Household Viewing Hours from MPAA Copyright Royalty Database Showing Cable Viewing Data for 2000 through 2003 ("HHVH reports"), which were utilized by SDC witness John Sanders in his methodology. As previously stated, it is the SDC's understanding that the HHVH reports can be replicated from the information produced by MPAA; therefore, the SDC are entitled to review the MPAA Documents to inquire into the accuracy of any such contention.

MPAA Documents pursuant to the protective order. Opposition at Exhibit C. Obviously, it is not for MPAA to grant standing to another party that does not have a proprietary interest in the protected material. Under CRB procedure, because MPAA is the only party in privity with Nielsen concerning the MPAA Documents, only MPAA has standing to object. As the Judges have clearly ruled, “[O]nly an entity ... that has a proprietary interest in, or contractually limited right to, the ... material at issue may attempt [to] seek relief regarding the use of such material.” See *Order on Motion of SDC for Appropriate Relief*, Docket No. 2008-1 CRB CD-98-99 (Phase II) (July 15, 2014) at 2.

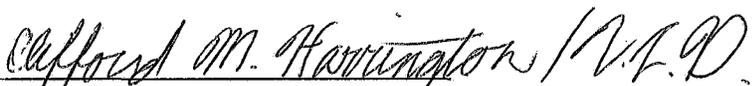
In other words, it was for MPAA, not IPG, to file an objection to release of the protected material based on a claim of privilege. MPAA utterly failed to do so, and its objection cannot be formalized through an email sent *ex parte* to IPG. To be clear, not only did the SDC serve MPAA with the SDC Motion, but also the SDC advised MPAA in advance of the filing that the SDC would seek this material. This explains why the Protective Order issue was brought to IPG’s attention “even prior to the SDC motion being filed.” Opposition at 9. The MPAA had a complete, informed and early opportunity to object formally to the production of the MPAA Documents. But MPAA chose not to exercise its right to object. Accordingly, MPAA’s concern, if any, is not properly before the Judges.

Conclusion

For the foregoing reasons and the reasons stated in its original Motion, the SDC respectfully request the Judges to compel IPG to produce in response to the SDC’s follow-up discovery request all documents produced by MPAA to IPG in this proceeding.

Dated: July 5, 2016

Respectfully submitted,


Clifford M. Harrington (D.C. Bar No. 218107)

Matthew J. MacLean (D.C. Bar No. 479257)

Victoria N. Lynch-Draper (D.C. Bar No. 1001445)

PILLSBURY WINTHROP SHAW PITTMAN LLP

P.O. Box 57197

Washington, D.C. 20036-9997

Telephone: 202-663-8525

Facsimile: 202-663-8007

E-Mail: Clifford.Harrington@PillsburyLaw.com

Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

I, Victoria N. Lynch-Draper, hereby certify that a copy of the foregoing was sent via Federal Express, and sent electronically, this July 5, 2016 to the following:

| INDEPENDENT PRODUCERS GROUP | MPAA-REPRESENTED PROGRAM SUPPLIERS |
|---|--|
| Brian D. Boydston Pick & Boydston, LLP 10786 Le Conte Avenue Los Angeles, CA 90024 brianb@ix.netcom.com | Gregory O. Olaniran Lucy Holmes Plovnick MITCHELL, SILERBERG & KNUPP LLP 1818 N Street, NW, 8 th Floor Washington, DC 20036 202-355-7917 202-355-7887 goo@msk.com lh@msk.com |


Victoria N. Lynch-Draper