Keys, LaKeshia

From: Barnett, Suzanne
Sent: Thursday, July 03, 2014 9:45 AM
To: crb
Cc: Strickler, David; "David Strickler' (demknicks24@aol.com)'; Feder, Jesse; Strasser, Richard; Keys, LaKeshia
Subject: 2008-1 CRB CD 98-99
Attachments: 7-3-14 Order Denying SDC Mot for Reconsideration final draft order denying SDC motion for reconsideration.pdf

Attached please find the Judges' Order in the '98-'99 Cable Royalty Distribution proceeding.

Please reply to crb@loc.gov as confirmation that you received this email.

Thank you,

Copyright Royalty Board

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
Distribution of 1998 and 1999 Cable Royalty Funds	**Docket No. 2008-1 CRB CD 98-99 (Phase II)**

ORDER DENYING SETTLING DEVOTIONAL CLAIMANTS'S MOTION FOR RECONSIDERATION

On June 18, 2014, the Copyright Royalty Judges (Judges) issued a Ruling and Order Regarding Claims (Claims Ruling) in the present proceeding. The Settling Devotional Claimants (SDC) filed a motion (Motion) requesting reconsideration of one aspect of the Claims Ruling. IPG filed a timely opposition to the Motion. The Judges now **DENY** that Motion.

BACKGROUND

The Copyright Act and the Judges' procedural regulations do not explicitly permit a party to file a motion for reconsideration. Indeed, the SDC do not state the statutory or legal authority that they assert governs their Motion. However, the Judges clearly have authority under 17 U.S.C. § 802(f)(1)(A) to consider and rule on a motion for reconsideration of an interlocutory ruling after a preliminary claims hearing. *See, e.g., Order Denying IPG Motion to Reconsider Preliminary Hearing Order Relating to Claims Challenged by SDC*, Docket No. 2008-2 CRB CD 2000-20003, 1 (May 14, 2013).

Given this implied statutory authority, the Judges have previously set forth the following standard of review applicable to motions for reconsideration:

> Motions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered.... Such motions should be granted only where:
>
> (1) there has been an intervening change in controlling law;
> (2) new evidence is available; or
> (3) there is a need to correct a clear error or prevent manifest injustice.

Order Denying SoundExchange 's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns, Docket No. 2005-1, 1 CRB DTRA (May 3, 2006) (henceforth "*Order*, Docket No. 2005-1") (*citing Regency Commun. Inc.* v. *Cleartel Commun., Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)). *See also Order Denying Motions for Rehearing,* Docket No. 2011-1, CRB PSS/Satellite II

(January 30, 2013). Satisfaction of one or more of these standards is necessary as reconsideration motions are not "intended to afford the opportunity to re-litigate previously decided matters." *Order*, Docket No. 2005-1, *supra*.

The SDC do not assert the existence of any intervening change in the law. The Motion must, therefore, necessarily rest on the existence of new evidence (the second category) or the need to correct a clear error or prevent manifest injustice (the third category). The Judges do not find, and the SDC do not overtly argue, either of these factors. The SDC are simply and improperly attempting to re-litigate an issue that the Judges have decided.

DISCUSSION.

The SDC's Motion asks for reconsideration of the Judges' decision to admit into evidence—over the SDC's objection—the perpetuated testimony of Ms. Jan Harbour. Ms. Harbour is the chief financial officer of Kenneth Copeland Ministries, one of the claimants that IPG purports to represent in this Phase II distribution proceeding. The SDC objected to the admission of this testimony because Ms. Harbour's attorney (with the passive acquiescence of IPG's attorney) instructed her not to answer certain questions posed by the SDC's counsel. *See* Declaration of Matthew MacLean, Esq., Ex. D at 8 (MacLean Declaration).

The SDC obtained Ms. Harbour's perpetuated and transcribed testimony pursuant to a prior order of the Judges. That order granted the SDC's motion seeking to issue *"requests"* for information and documents to Ms. Harbour (and others), *provided* the SDC clearly mark each written request "on the first page in bold and capital letters" that it was a request and not a subpoena. *Order Granting in Part SDC Motion for Request for Additional Evidence, etc.*, Docket No. 2008-1 CRB CD 98-99 (Phase II) (*April 25th Order*).

The *April 25th Order* directed that the parties should examine each witness on the record, under oath or on penalty of perjury, in the presence of counsel. *Id.* The Order allowed counsel to examine and cross-examine the witness and required all counsel to preserve evidentiary objections on the record. The Judges reserved ruling on any evidentiary objection until a party offered the perpetuated testimony of the witness.

A. The Claims Ruling Correctly Held that the SDC Did Not Comply with the Judges' April 25th Order.

The SDC failed to include on their request the conspicuous notation required by the *April 25th Order*. The SDC acknowledge in the Motion papers that they indeed "failed to comprehend" the instruction in the Order regarding the language needed to carefully distinguish a "request" from a "subpoena." MacLean Declaration, ¶ 6. The SDC acknowledge further that this failure was an "oversight" on the part of counsel. MacLean Declaration, ¶14. They also acknowledge that the *April 25th Order*, like all orders, was "to be obeyed, and that careful attention to detail is required." Declaration of Clifford M. Harrington, ¶4.

Although the SDC acknowledge that they should have obeyed the *April 25th Order,* they nonetheless assert that their conduct may be excused because they deemed the issuance of the requests permitted by the *April 25th Order* as "*merely pro forma.*" *SDC Motion,* at 2. The SDC's prior actions, however, belie the characterization of the requests as "merely pro forma" in nature. The SDC *twice* previously moved for the issuance of "subpoenas" (rather than "requests"), raising arguments that the Judges denied.[1] Only thereafter did the SDC move—for a third time—seeking additional information, this time requesting the issuance of "requests" instead of "subpoenas." Thus, the SDC were well aware of the distinction between a document identified as a "subpoena" and one identified as a "request." The requests the Judges allowed to issue were not in any sense "merely pro forma."

The Judges further find no basis to reconsider their ruling based upon any *post hoc* rationale proffered by the SDC in the present Motion. On the first day of the two-day hearing, the Judges asked SDC's counsel why they had failed to comply with the requirement in the Order to include the wording needed to distinguish the requests from subpoenas. In response, the SDC's counsel replied: "[I]f we were supposed to include that as a bold statement then it's not there. If it was required by the order then I apologize, it was an oversight." 5/5 Tr. at 186.[2] At no time during the remainder of the two days of hearings did the SDC provide a further or alternative explanation for its failure to include the required language in the requests. Only now, after considering the Judges' reaction to that failure, does the SDC advance a different and more particular argument.

The SDC's new argument is that they did not think the words "not a subpoena" had to be included in the capitalized and bold-faced letters, or even that they had to be included at all. MacLean Declaration, ¶6. Rather, they state that they understood that only the word "request" had to be capitalized and in bold. *Id.* The Judges find this argument unavailing, in significant part because it has been proffered for the first time on this Motion for reconsideration.

Further, the SDC's claimed misunderstanding of the language does not follow reasonably from the language itself. Again, the pertinent language of the Order states:

> [T]he Judges authorize the SDC to deliver to a person or entity receiving the request a document in the like form to a subpoena but clearly marked on the first page in bold and capital letters that it is a request and not a subpoena. ... The SDC shall also provide a copy of this Order to any person or entity receiving a request.

April 25th Order at 5. The SDC claims that it interpreted this language to mean that only the word "request" needed to be set forth in bold and capital letters—rather than the words "not a

[1] On November 21, 2013, the SDC filed an initial motion for the issuance of subpoenas that it subsequently withdrew on December 5, 2013, before the Judges had ruled on that motion. The SDC's second motion for the issuance of subpoenas was denied by the Judges in an order dated April 3, 2014 Motion, because the Judges found that no statutory power permits the issuance of subpoenas in distribution proceedings.

[2] SDC's counsel also stated that they had modified their prior draft subpoenas "by removing the word 'subpoena' wherever it appeared and replacing it with 'request' ...." *Motion* at 3. However, the final page of the document prepared by the SDC requesting Ms. Harbour's testimony characterizes the document as a "subpoena." *See* MacLean Declaration, Ex. D.

subpoena." The SDC's interpretation is unreasonable because it renders the phrase "and not a subpoena" mere surplusage. In effect, the SDC wrongly interprets this quoted language as though it were in parentheses. Additionally, if the SDC were subjectively uncertain as to the language required within the Request, counsel could have asked the Judges for clarification, especially since the SDC describes this procedure as a "first-of-its-kind." *Motion* at 2.

The SDC deny any intent to deceive witnesses into thinking that the requests constituted commands issued by the Judges.[3] However, the failure of the SDC to include the ordered language within the requests created more than a concern that witnesses might be misled.[4] The Judges are obliged to follow scrupulously the strictures of the statute. An important purpose of the required language was to differentiate between a "subpoena" and a "request" because they are *statutorily* distinct approaches for the acquisition of information. *See* 17 U.S.C. § 803(b)(6)(C)(viii) and (ix); *April 25th Order* at 2-3.

B. The Claims Ruling Properly Weighed the Facts and Circumstances Relating to the Harbour Deposition.

The Judges disagree with the SDC's characterization of their ruling regarding the admission of Ms. Harbour's deposition testimony as a "sanction." The perpetuated testimony that was admitted related to Ms. Harbour's alleged knowledge of the identity of the owner of the program for which IPG seeks royalties in this proceeding. MacLean Certification, Exhibit D at 40-44. The questions Ms. Harbour's counsel instructed her not to answer related to a different issue, *viz.*, whether IPG had the authority to represent the purported copyright owner (Kenneth Copeland Ministries) in this proceeding. *Id.* at 10-40.[5]

As explained in the June 18th Claims Ruling, the Judges faced a dilemma: either *i)* accept Ms. Harbour's testimony as to the copyright ownership issue, despite her counsel's interference regarding questions relating to IPG's representation of the copyright owner, or *ii)* reject her

[3] In that regard, the SDC assert that their conduct while arranging for witnesses to provide material or testimony demonstrates the absence of any intent on their part to deceive. Nonetheless, there is no dispute but that the SDC failed to include within all of the requests the bold faced and capitalized language required by the *April 25th Order*, the absence of which had the capacity to mislead witnesses. A purpose of the *April 25th Order* in requiring such a conspicuous notice was to avoid such a misleading effect. The SDC speculates that its *other* actions and comments caused the witnesses to appreciate the voluntary nature of the requests, but such speculation cannot excuse the SDC's failure to abide by the language required by the *April 25th Order*, that was designed to avoid any such possible misleading effect.

[4] The SDC did not indicate that it provided the witnesses who received the requests a copy of the *April 25th Order*, as also required by the *April 25th Order*. Although the SDC may have assumed that IPG would provide a copy to the witnesses, that assumption would not excuse the SDC's "careful attention" to that requirement of the *April 25th Order* as well

[5] The Judges note that, although the SDC's counsel acknowledged that "one of the reasons" the SDC requested Ms. Harbour's testimony was to answer "questions about the ownership of television programs broadcast by cable and satellite ... with respect to Kenneth Copeland Ministries," MacLean Declaration, Exhibit D at.17 , he unilaterally declined to ask questions on that topic after Ms. Harbor was instructed not to answer questions concerning IPG's right to represent that claimant. It is not uncommon, though, in discovery or perpetuation depositions for counsel to make the full record—notwithstanding stated objections—for a later ruling or, if *in extremis,* to contact the judicial officer (or officers in this case), for a contemporaneous instruction or ruling regarding the conduct of the deposition.

entire testimony regarding copyright ownership because of that interference—without regard for the SDC's failure to abide by the terms of the *April 25th Order*.

By choosing to admit her testimony, the Judges were engaged in a weighing process, not a process of imposing sanctions. The Judges acted well within their discretion, given the factors discussed in the Claims Ruling and in this decision, in deciding to admit Ms. Harbour's testimony into evidence.[6]

CONCLUSION

None of the SDC's arguments, discussed *supra*, are based upon new evidence that was not available to the SDC during the hearing. Further, as explained *supra*, the Judges had good and sufficient reasons to admit Ms. Harbour's perpetuated testimony, and it was therefore not erroneous—and certainly not "clear error" or "manifestly unjust"—to admit her testimony. Rather, the SDC is attempting to re-litigate an issue that has previously been decided. Accordingly, there is no basis to grant the SDC's Motion seeking reconsideration.

For the foregoing reasons, the Judges **DENY** the SDC's Motion for Reconsideration.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: July 3, 2014.

[6] The Judges also note, by way of analogy, that, pursuant to *Fed.R.Civ.P.* 37(b)(2), a party that fails to comply with an order can be subject not only to sanctions, but also to "further just orders," that include (but are not limited to) "prohibiting the disobedient party from ... opposing designated claims or defenses, or from introducing designated matters in evidence." In the present case, the Judges' refusal to grant the SDC's motion at the claims hearing objecting to the admission of Ms. Harbour's testimony certainly falls within the scope of such "just orders," and hardly constitutes a "sanction."