

**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF 2000-2003 CABLE  
ROYALTY FUNDS**

**DOCKET NO. 2008-02 CD 2000-03  
(Phase II) (Remand)**

**ORDER GRANTING SDC MOTION FOR FINAL DISTRIBUTION**

On July 25, 2019 the Settling Devotional Claimants (SDC) filed with the Copyright Royalty Judges (Judges) a Motion for Final Distribution under 17 U.S.C. § 801(b)(3)(A)<sup>1</sup> ([Motion](#)). Worldwide Subsidy Group LLC d/b/a Independent Producers Group (IPG) filed its response in opposition ([Opposition](#)) to the Motion on August 5, 2019, and the SDC filed its reply ([Reply](#)) on August 8, 2019.

On October 22, 2019, the Judges sought additional arguments and authorities from the participants. *See generally* [Order for Further Briefing](#), (Oct. 22, 2019).<sup>2</sup>

The parties filed their respective briefs on November 12, 2019 (the [SDC Brief](#) and the [IPG Brief](#)), and filed their respective response briefs on November 14 ([IPG Response Brief](#)) and November 15 ([SDC Response Brief](#)).

For the reasons discussed below, the Judges **GRANT** the Motion.

**Background and Arguments**

On July 17, 2019, the participants filed with the Judges a Joint Notice of Settlement and Motion for Stay ([Settlement Notice](#)). In it the participants represented to the Judges that “they have settled all controversies as to distribution of cable royalty fees collected for royalty years 2000 through 2003 that have been allocated to the Devotional category, and that such fees are no longer subject to controversy.” Settlement Notice at 1. The participants also stated that they

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<sup>1</sup> Section 801(b)(3)(A) empowers the Judges to “authorize the distribution ... of royalty fees ... to the extent that the ... Judges shall determine that the distribution of such fees is not subject to controversy.”

<sup>2</sup> The Judges directed the participants to address three questions:

- (1) Does the filing with a court or other adjudicatory tribunal of a notice of settlement bind the parties to the settlement according to the contents of that notice, or would the settlement as noticed be considered conditional, subject to agreement on additional terms, before it is adopted by the court or other adjudicatory tribunal?
- (2) Does the phrase “distribution of such fees is not subject to controversy” in Section 801(b)(3)(A) of the Copyright Act apply only to the amount of royalties paid by users of copyrighted works or does the phrase apply more broadly to include issues such as the allocation and distribution of accrued interest on such royalties and the appointment of a common agent to facilitate such distributions?
- (3) To the extent that resolution of issues presented by the SDC Motion requires the Judges to interpret the phrase “the distribution of such fees is not subject to controversy” in Section 801(b)(3)(A) of the Copyright Act, have the Judges or their predecessors interpreted such phrase in the past or does the issue present a novel material question of substantive law on which the Judges must request a decision of the Register of Copyrights pursuant to Section 802(f)(1)(B) of the Copyright Act?

*Order for Further Briefing* at 1.

were preparing a joint motion for final distribution, and sought a stay of the proceedings pending the filing of the joint motion. *Id.* The Judges **granted** the requested stay the following day.

Instead of the expected joint motion for final distribution, the Judges received the instant Motion by the SDC alone. In it the SDC explain that the parties failed to reach agreement on a joint motion for final distribution, and ascribe that failure to IPG's insistence on "further material terms that were not terms of the parties' original settlement." Motion at 4. Specifically, "IPG now demands confidentiality, appointment of a common agent for distribution, release of unidentified 'claims,' and indemnification." *Id.* The SDC argue that IPG accepted a settlement offer and that neither the offer nor the acceptance contained any terms other than the percentage division of royalties (31.25% to IPG and 68.75% to the SDC). *Id.* at 1-2. According to the SDC "[t]he offer and acceptance were complete and definite in their terms, and neither the offer nor the acceptance were [sic] conditioned on preparation of any further writing. The offer and acceptance therefore constitute a complete and enforceable written settlement agreement." *Id.* at 2.

In support of their conclusions, the SDC append to their Motion the emails exchanged among counsel in the course of negotiating the settlement. *See id.* at Ex. 1. Two of the emails from the SDC to IPG were labelled "**CONFIDENTIAL SETTLEMENT COMMUNICATION**" in bold capital letters. *See id.* at Ex 1, at 4, 6.

The SDC take the position that "[t]he Judges have the statutory jurisdiction and duty to 'authorize the distribution ... of ... royalty fees ... to the extent that the Copyright Royalty Judges have found that the distribution of such fees is not subject to controversy.'" 17 U.S.C. § 801(b)(3)(A). *Id.* at 5. The SDC conclude "there is nothing more for the Judges to do in this case but to order the final distribution to which the parties have agreed." *Id.*

In its Opposition, IPG takes the position that "a settlement agreement has been reached with the SDC, and it was subject to the same terms of confidentiality as to which the settlement negotiations were expressly subject." *Id.* at 13. Accordingly, IPG asserts that, if the Judges agree that "there [is] an effective settlement agreement," they must (a) require the licensing division of the Copyright Office to "engage in an analysis to determine the amount allocable to the devotional programming category, taking into consideration the amounts previously advanced to the SDC and the growth of the remaining capital," *id.* at 7; (b) adjust IPG's share upward if the amount of devotional funds held by the Copyright Office is less than IPG is expecting, *see id.* at 8; and (c) impose monetary sanctions on the SDC for disclosing confidential settlement discussions. *See id.* at 8-10.

Alternatively, if the Judges find there is no effective settlement agreement, IPG "demand[s]" that the entire panel of Judges recuse themselves and cause the proceeding to be heard by "an entirely different panel of Judges" that has not seen the SDC Motion and the attached emails. *Id.* at 11.

In reply, the SDC observe that both parties agree that there is a binding settlement agreement. *See Reply* at 1. However, the SDC disagree that the agreement includes any obligation of confidentiality. *See id.* at 2-6. Moreover, even if confidentiality were part of the settlement agreement, the SDC argue that "alleged breach of a confidentiality agreement would be a civil matter outside of the Judges' statutory purview." *Id.* at 7. The SDC conclude that the existence of a settlement agreement renders the funds at issue in this proceeding no longer in controversy and, therefore, subject to distribution. *See id.* at 1.

The foregoing turn of events raised questions as to whether the participants had in fact entered into a full and final settlement. The Judges sought to resolve these questions through their *Order for Further Briefing*.

The parties' responses to the *Order for Further Briefing*, as well as their earlier pleadings, reflect agreement on a central point: IPG and the SDC entered into a final settlement concerning royalties previously allocated to the Devotional category, agreeing that IPG will receive 31.25% of those royalties and the SDC will receive 68.75% for each of the years at issue.<sup>3</sup> See SDC Brief at 4; IPG Brief at 2.

Both parties also agree (in response to the third question posed in the *Order for Further Briefing*) that there is no novel question concerning the interpretation of 17 U.S.C. § 801(b)(3)(A) because their settlement renders "the distribution of such fees ... not subject to controversy."

The parties disagree over the correct response to the Judges' second question concerning the phrase "distribution of such fees is not subject to controversy" in Section 801(b)(3)(A) of the Copyright Act. The SDC argue that the phrase applies only to the funds paid in by cable systems, not to costs or interest, or to the appointment of a common agent. See SDC Brief at 6. IPG argues that the cable fees *and interest* both are subject to the Judges' "fee" distribution authority set forth in Section 801(b)(3)(A) of the Copyright Act. See IPG Brief at 6. IPG further argues that it would also be "within the purview of the Judge's [sic] authority to" appoint a common agent, and that it would be necessary for the Judges to do so in the current case. *Id.* IPG infers the Judges' authority to appoint a common agent from language in section 801(d) requiring the Librarian to provide the Judges with "necessary administrative services related to proceedings under" chapter 8 of title 17. *Id.* at 8.

The Judges agree with the SDC that the parties' disagreement over this question 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." SDC Response Brief at 1. The parties' disagreement on these points is not an impediment to a determination that "the distribution of such fees is not subject to controversy."

## **Discussion**

### *Royalties are not in Controversy*

Stripped to its essentials, the Judges' task in a distribution proceeding is to determine how to divide up – on a percentage basis – royalties that are in controversy. If, at any point, the Judges determine that those royalties are no longer in controversy, their role is simply to authorize the distribution of those funds. See 17 U.S.C. § 801(b)(3)(A). To the extent that participants have disputes concerning the existence and possible breach of other elements of an agreement between them, those matters are outside the Judges' purview.

The Judges find—and the participants do not dispute—that the 2000-2003 cable royalty funds allocated to the Devotional category are no longer in controversy. The Judges' duty now is to give effect to the parties' agreed allocation and distribute the subject royalties. If an

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<sup>3</sup> Both parties agree that it is the offer and acceptance of settlement terms that binds the parties, and not the Settlement Notice. Consequently, both parties found the first question posed in the *Order for Further Briefing* to be beside the point.

aggrieved party wishes to enforce other alleged terms of the agreement between them, that party must seek redress in another forum.

The Judges have apprised the licensing division of the agreed distribution percentages (31.25% to IPG and 68.75% to the SDC for each royalty year) and have requested that the licensing division compute the apportionment of interest using the same methodology that it employed for apportioning the funds allocated to the Program Suppliers' category in this proceeding between MPAA and IPG. *See Order Regarding IPG's Motion for Clarification of Order re Final Distribution for the Program Suppliers' Category* (Dec. 23, 2016). When those computations are complete, the Judges will issue an Order of Final Distribution.

#### *IPG's Request to Adjust Royalty Shares*

In a July 16, 2019 email to counsel for the SDC, IPG's counsel accepted the SDC's settlement offer on behalf of IPG, stating:

IPG accepts the SDC's offer of 31.25% of the 2000-2003 cable royalty pool attributable to the devotional programming category in order to settle the 2000-2003 cable proceeding. We have reached out to the Licensing Division of the Copyright Office in order to determine the exact value of such pool, but suffice it to say that as long as the figures provided to IPG by the SDC previously were accurate when made (figures IPG has been relying on for several years), there will be no issue.

Declaration of Mathew J. MacLean in Support of Settling Devotional Claimants' Motion for Final Distribution under 17 U.S.C. § 801(b)(2)(A) (MacLean Decl.) at Ex. 1 at 3 (attached to Motion). IPG argues that the phrase "as long as the figures provided to IPG by the SDC previously were accurate when made ... there will be no issue" was an explicit caveat of IPG's acceptance. "[I]f the monetary figures previously reported by the SDC to IPG as allocable to the devotional programming category was inaccurate ..., IPG's share of the devotional programming category monies must be adjusted upward to account for such discrepancy." Opposition at 8.

Apart from the email cited above, IPG has not presented any evidence that would establish any basis for adjusting the parties' agreed royalty shares. Assuming, without deciding, that the quoted phrase was an explicit condition on IPG's acceptance of the settlement percentages, the Judges have no statutory basis for adjusting the parties' agreed royalty shares if the purported condition has not been met. Further, as a factual issue, the Judges have no basis for determining whether that condition has been met (nor do they have the statutory authority to consider a factual issue regarding the pool of money available for distribution by the Licensing Division) The Judges, therefore, will make no adjustment to the percentage royalty shares offered by the SDC and accepted by IPG.

#### *IPG's Request for Sanctions*

Regarding IPG's request for sanctions, the Judges note at the outset that they have stated on multiple prior occasions that a request for relief that first appears in a responsive pleading is not properly before the Judges. *See, e.g., Order Granting Settling Devotional Claimants' Motion for Relief from Protective Order*, at 6 n.9 (Jul. 9, 2019); *Order Denying IPG Third Motion for Modification of March 13, 2015 Order*, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II) & 2012-7 CRB SD 1999-2009 (Phase II), at 3 n.5 (Jun. 1, 2016). Nevertheless, since the SDC

made a substantive response to IPG's request in its Reply, the Judges find that the issue is joined and exercise their discretion to consider it on the merits.

The communications between IPG and the SDC were not designated "restricted" under the Protective Order in force in this proceeding,<sup>4</sup> nor were they subject to any other order of the Judges. To the extent the legend that the SDC placed at the top of two of their emails created any obligation of confidentiality between the parties, enforcement of that obligation is outside the Judges' purview. Simply put, there is no factual or legal basis on which the Judges may impose a sanction for the SDC's conduct in this case. To be clear, the Judges neither condone nor condemn the SDC's actions. IPG's request for sanctions is **DENIED**.

#### *Other Pending Motions*

IPG filed a Motion for Partial Distribution of 2000-2003 Cable Royalties on April 19, 2017 ([Motion for Partial Distribution](#)), which the Judges published for public comment at [84 Fed. Reg. 12295](#) (Apr. 1, 2019). IPG filed a Renewed Motion for Partial Distribution of 2000-2003 Cable Royalties on October 25, 2019 ([Renewed Motion for Partial Distribution](#)). In view of the Judges' decision to make a final distribution of all remaining cable royalties for 2000-2003, the Motion for Partial Distribution and the Renewed Motion for Partial Distribution are **DENIED** as moot.

On October 1, 2019, IPG filed its Motion Requesting Order to Compel Release of Information by Licensing Division ([Motion to Compel LD](#)). IPG sought an order compelling the Licensing Division to provide IPG with information that would enable IPG to compute an apportionment of interest and expenses attributable to the 2000-2003 cable royalty pools. In view of the Judges' decision to make a final distribution of all remaining cable royalties for 2000-2003, the Motion to Compel LD is **DENIED** as moot.

#### **Conclusion**

For the foregoing reasons the Motion is **GRANTED**.

Pursuant to section 801(b)(3)(A), the Judges, having found "that the distribution of ... fees is not subject to controversy," hereby authorize the distribution of those royalty fees to the SDC and IPG in amounts to be calculated by the Licensing Division allocating interest as if the agreed distribution allocation of 68.75% to the SDC and 31.25% to IPG had been applied to each year's fund from the date funds were deposited until the date any portion of those funds was disbursed (or from which Copyright Office expenses were deducted), with interest ceasing to accrue on funds when they were disbursed. The Judges will issue an order of final distribution of 2000-2003 cable royalties in due course once the Licensing Division has completed its computations apportioning interest and expenses between the SDC and IPG.

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<sup>4</sup> See *Order Adopting Protective Order and Amending Discovery Schedule* (July 10, 2012).

Further, the Judges **DENY** as moot IPG's Motion for Partial Distribution, Renewed Motion for Partial Distribution, and Motion to Compel LD.

**SO ORDERED.**

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Jesse M. Feder  
Chief Copyright Royalty Judge

DATED: January 9, 2020.