

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

<i>In re</i> DISTRIBUTION OF 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds	DOCKET NO. 2012-6 CRB CD 2004-09 (Phase II)
<i>In re</i> DISTRIBUTION OF 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Satellite Royalty Funds	DOCKET NO. 2012-7 CRB SD 1999-2009 (Phase II)

ORDER DENYING MPAA AND SDC MOTIONS FOR SANCTIONS

On March 10, 2017, the Motion Picture Association of America (MPAA) and the Settling Devotional Claimants (SDC) filed motions (the [MPAA Motion](#) and the [SDC Motion, respectively](#)) asking the Copyright Royalty Judges (Judges) to impose sanctions against Worldwide Subsidy Group d/b/a/ Independent Producers Group (IPG) for violations of the Judges’ procedural rules. IPG filed a timely response in opposition to the motions on April 10, 2017 ([Opposition](#)), and MPAA and the SDC filed timely replies on April 14, 2017 (the [MPAA Reply](#) and the [SDC Reply](#)).

The Judges **DENY** both motions for the reasons stated below.

I. Background

The participants filed Written Direct Statements (WDSs) in this reopened proceeding¹ on August 22, 2016. Four days later the SDC filed a notice consenting to distribution of satellite royalties in the Devotional category in accordance with IPG’s proposed royalty shares, which were, on the whole, more advantageous to the SDC than the SDC’s own proposed shares. *See Notice of Consent to 1999-2009 Satellite Shares Proposed By Independent Producers Group and Motion for Entry of Distribution Order* (Aug. 26, 2016) (Notice and Motion). IPG then filed an Amended WDS (AWDS) in which its economic expert, Dr. Charles Cowan, revised his written report and changed his proposed royalty shares, largely to IPG’s benefit. In response to motions by the SDC and MPAA, the Judges struck IPG’s AWDS because IPG failed to comply with the Judges’ procedural rules. *See Order Granting MPAA and SDC Motions to Strike IPG Amended Written Direct Statement and Denying SDC Motion for Entry of Distribution Order* (Oct. 7, 2016) (*October 7 Order*). IPG subsequently sought, and the Judges granted, leave to file an AWDS. *See Order on IPG Motion for Leave to File Amended Written Direct Statement* (Jan. 10, 2017) (*January 10 Order*).

¹ After the initial hearing in this matter in April 2015, the Judges determined that no party had “presented a methodology and data that, together, [were] sufficient to support a final distribution” *Order Reopening Record and Scheduling Further Proceedings* at 1 (May 4, 2016) (*Order Reopening Record*). The Judges reopened the record and directed the participants to present additional evidence and expert opinion.

In the filings concerning IPG's AWDS, IPG's counsel stated that he "did not review or consider" his expert's report prior to submitting it to the Judges purportedly to avoid allegations that IPG had "straightjacketed" its witness. IPG Opposition to MPAA Motion to Strike IPG's Amended Direct Statement, at 3 n.4. (Sept. 12, 2016); see *October 7 Order*, at 4 & n.5. According to Dr. Cowan, "after preparation of the August 22nd report, IPG's counsel immediately inquired about the produced results, and during the course of the next week [Dr. Cowan] discovered errors in the earlier processing of the data." IPG Opposition to MPAA Motion to Strike IPG's Amended Direct Statement, at Ex. A ¶ 9 (Sept. 12, 2016).

Based on IPG's conduct in relation to Dr. Cowan's report, including IPG's counsel's admission in two filings with the Judges that he filed Dr. Cowan's written testimony without reviewing it, the Judges invited the SDC and MPAA to file

individual motions or a joint motion with authoritative legal analysis addressing the Judges' authority, if any, to impose financial or other sanctions in this circumstance in which a party has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification.

January 10 Order at 7. The instant motions followed.

II. IPG Motion to Strike

On April 21, 2017, IPG filed a motion to strike the MPAA Reply and the SDC Reply (IPG Motion to Strike Replies). The SDC and MPAA filed timely responses (SDC Response to IPG Motion to Strike Replies; MPAA Response to IPG Motion to Strike Replies). IPG replied to each.

IPG argued that the Judges' *January 10 Order* invited motions and responses, but not replies from the moving parties. IPG contends that the Judges' omission of replies from the January 10 Order precludes the moving parties from filing replies. IPG Motion to Strike Replies at 2.²

The SDC responded that "[i]n the absence of an order addressing a reply, procedures are governed by 37 C.F.R. § 350.4(f), which provides that 'replies to oppositions shall be filed within four business days of the filing of the opposition.'" SDC Response to IPG Motion to Strike Replies at 1.

MPAA similarly contended that "[t]he January 10 Order did not address replies *at all* — it neither prohibited them nor set a deadline for filing them. Absent an order from the Judges addressing replies, the procedure for filing replies was governed by the then existing 37 CFR § 350.4(f)"³ MPAA Response to IPG Motion to Strike Replies at 2.

IPG replied that "[p]arties are not entitled to file reply briefs as a matter of right, and certainly not entitled when the Judges have proscribed [sic] a different process to follow, with

² The remainder of the IPG Motion to Strike Replies seeks to contravene the substance of the MPAA Reply and the SDC Reply. The Judges do not consider those portions of the IPG Motion to Strike Replies that consist of improper surreply arguments.

³ The Judges' amended their procedural rules effective April 20, 2017. 82 Fed. Reg. 18563 (Apr. 20, 2017). Among other changes, the Judges increased the time for filing responses in opposition to motions from five to ten business days, and for filing replies from four to five business days. Since the IPG Motion to Strike and all subsequent documents in this pleading cycle were filed after April 20, 2017, the amended rules apply.

specific response dates that expressly mention moving and opposition briefs, but not reply briefs.” IPG Reply in support of IPG Motion to Strike Replies at 3. IPG cites section 350.1 for this proposition. *See id.* Section 350.1 states:

This subchapter governs procedures generally applicable to proceedings before the Copyright Royalty Judges in making determinations and adjustments pursuant to the Copyright Act, 17 U.S.C. 801(b).

37 C.F.R. § 350.1.

The *January 10 Order* was silent concerning filing of replies. The Judges find that their silence cannot reasonably be construed as a prohibition. In the absence of an express statement to the contrary, the existing rule on replies governed. Section 350.1 supports the conclusion that, absent language or context that establishes a specific procedure, the generally applicable procedures apply. The Judges **DENY** the IPG Motion to Strike Replies.

III. Parties’ Arguments

A. Moving Parties

MPAA and the SDC point to a number of actions by IPG and its counsel, in addition to those recited above, to justify the imposition of sanctions. MPAA, for example, states that IPG was not candid with the parties or the Judges about the nature of the changes that Mr. Cowan made to his methodology. MPAA Motion at 2-3. The SDC recite a litany of IPG’s alleged wrongdoing in this proceeding and argue that IPG’s conduct is part of “a long history of disregard for the procedural rules” SDC Motion at 1-6. The SDC also allege failures by IPG to produce data during discovery relating to Dr. Cowan’s original and amended reports owing to Dr. Cowan’s failure to preserve the data. *See* SDC Motion at 3-5.

MPAA and the SDC ask the Judges to impose one or more of the following sanctions on IPG and/or IPG’s counsel for IPG’s conduct in connection with its AWDS:

- Striking IPG’s AWDS from the record, MPAA Motion at 4, 10-11, or imposing an adverse inference that IPG’s AWDS is not properly supported. SDC Motion at 11-13.
- Disqualifying or debarring IPG from representing claimants in proceedings before the Judges. SDC Motion at 10-11.
- Dismissing IPG from this proceeding. MPAA Motion at 4, 6-10.
- Awarding to MPAA and the SDC of monetary sanctions (attorneys’ fees, expert witness fees, and costs) against IPG’s counsel. SDC Motion at 8-10; MPAA Motion at 4-5, 11-14.

The moving parties contend that the Judges have authority to issue these sanctions by virtue of the Judges’ express authority under 17 U.S.C. § 801(c) to “make any necessary procedural or evidentiary rulings in any proceeding,” and inherent or implied statutory authority to police participants and their representatives in adjudicatory proceedings. *See* MPAA Motion at 4-14 (and cases cited therein); SDC Motion at 7-13 (and cases cited therein).

B. IPG

In response, IPG disputes the underlying facts and the application of the Judges' procedural rules to those facts. IPG argues that the Judges lack authority to impose the sanctions MPAA and the SDC seek. IPG also argues that sanctions are not warranted because MPAA and the SDC were not prejudiced by any actions of IPG and its counsel. Finally, IPG contends that the Judges have declined to impose sanctions on IPG's adversaries for conduct that IPG characterizes as "far more egregious instances of abuse." Opposition at 31.

IPG now contends that, immediately upon receiving Dr. Cowan's report (about one hour before the filing deadline), IPG's counsel "set upon to review Dr. Cowan's report, but only for typographical or obvious grammatical errors." Opposition at 3-4. IPG characterized the inconsistency between its current statement and its previous statements that counsel did not review or consider the report as a clarification: "A clearer statement is that IPG's counsel reviewed such report, but only for non-substantive purposes." *Id.* at 4 n.1. IPG argues that counsel was entitled to rely on Dr. Cowan's report and lacked the expertise (and the software) to verify Dr. Cowan's methodology or calculations. *See id.* at 4-18. IPG cites case law under Fed. R. Civ. P. 11 for the proposition that "IPG cannot be sanctioned for substantive errors made by its expert witness, Dr. Cowan." *Id.* at 9 (citing *Coffey v. Healthtrust, Inc.*, 1 F.3d 1101, 1104 (10th Cir. 1993)).⁴

IPG also disputes the SDC's allegation that it failed to produce material in discovery, averring that "IPG timely produced all data in its possession and the possession of Dr. Cowan relating to *both*" its WDS and AWDS. *Id.* at 6.

IPG devotes nearly a third of its Opposition to its contention that MPAA and the SDC suffered no prejudice due to IPG's actions. *See id.* at 18-30. In essence, IPG argues that MPAA's and the SDC's actions, including reviewing and preparing discovery requests on multiple iterations of IPG's WDS and comparing the results of Dr. Cowan's successive analyses, were either unnecessary, or entailed little time and effort.⁵

Finally, referring to the Judges' invitation to MPAA and the SDC to file the instant motions, IPG states that "[t]o IPG's knowledge, no comparable solicitation has ever occurred by the Judges in prior proceedings despite the existence of far more egregious abuse." *Id.* at 31. IPG then refers to circumstance surrounding the SDC's effort to introduce viewership data in a prior distribution proceeding. *Id.*

IV. Analysis

A. Allegedly Sanctionable Conduct

In two separate filings with the Judges, IPG stated that its counsel "did not review or consider" Dr. Cowan's written testimony. IPG Opposition to MPAA Motion to Strike IPG's Amended Direct Statement, at 3 n.4. (Sept. 12, 2016); *see October 7 Order*, at 4 & n.5. Section

⁴ The *Federal Rules of Civil Procedure*, including Rule 11, do not apply to proceedings before the Judges. Participants and counsel must act in accordance with the Judges' procedural rules in 37 C.F.R. subchapter B (including § 350.6(e)(1)). However, the Judges may, in their discretion, apply case law developed under the *Federal Rules* as persuasive authority in interpreting the Judges' rules. *See, e.g., Order Granting in Part and Denying in Part SDC's Motion to Compel IPG to Produce Documents*, at 2 n.3 (Jan. 3, 2017); *Order Denying Motion for Rehearing*, Docket No. 2006-1 CRB DSTR, at 1 (Jan. 8, 2008).

⁵ In view of the Judges' analysis, *infra*, they need not consider this argument.

350.6(e)(1) of the Judges' rules states that "the signature of an attorney [on a filed document] constitutes certification that the contents of the document are true and correct, to the best of the signer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" 37 C.F.R. § 350.6(e)(1). Filing written testimony without reviewing or considering it does not constitute reasonable inquiry under the present circumstances.

IPG's subsequent assertion that its counsel "set upon to review Dr. Cowan's report, but only for typographical or obvious grammatical errors" raises serious questions of credibility, since both statements cannot be true. If the Judges are to believe IPG's later assertion, what are they to make of IPG's earlier assertion? Which of these two statements are the Judges to believe?

Because, as discussed below, the Judges find that it would not be appropriate to grant any of the sanctions requested by the SDC and MPAA, the Judges need not resolve those factual questions. Nor must they determine the level of inquiry that section 350.6(e)(1) requires of counsel when filing testimony of an expert witness.

B. Requested Sanctions

For the following reasons the Judges will not grant any of the sanctions requested by the moving parties.

1. Striking Dr. Cowan's Written Testimony or Imposing an Adverse Inference

MPAA argues that IPG's conduct warrants, "at a minimum, striking the IPG [AWDS] from the record and prohibiting IPG from introducing any evidence based, or otherwise relying, on the IPG [AWDS]." MPAA Motion at 10. The SDC concur, and argue that if the Judges do not strike IPG's AWDS, the Judges should "at least impose an adverse inference that IPG's Second Amended Cowan Report is not properly supported." SDC Motion at 12. They contend that "the failure of IPG to justify its actions, provide evidence justifying its amendments, or provide records to substantiate its stated reasons for its actions will justify an adverse inference that IPG's action – the submission of its Second Amended Cowan Report – did not have merit and should not be considered by the Judges. *Id.*

Shortly before the hearing in this matter, IPG disclosed that Dr. Cowan would not appear to testify or submit to cross-examination. In response to a joint motion from MPAA and the SDC, the Judges excluded Dr. Cowan's written testimony. *See Order Granting in Part Joint Motion in Limine and Denying Joint Motion for Summary Judgment*, at 1 (Apr. 6, 2018). The moving parties' requests that the Judges strike, or at least apply an adverse inference to Dr. Cowan's written testimony is, therefore, moot.

2. Disqualifying or Debarring IPG

The SDC contend that the Judges can disqualify IPG from participating in distribution proceedings under their inherent authority to "police the conduct of those who practice before them or participate in their programs." SDC Motion at 10 (quoting *Davy v. S.E.C.*, 792 F.2d 1418, 1421 (9th Cir. 1986)). "[T]he power to suspend, debar, or otherwise sanction those who appear in agency proceedings can extend to non-attorney professionals who serve parties to the proceeding in a representative capacity." *Id.* The SDC argue that, as a designated agent representing copyright claimants in distribution proceedings, IPG falls within that authority. *Id.* at 10-11.

The Judges previously addressed requests to disqualify and/or dismiss IPG for alleged misconduct in distribution proceedings. The Judges have declined to rule on their authority to do so. In 2014, the Judges found it unnecessary to reach the question of their authority because they found the moving party “failed to make a sufficient factual case that debarment or sanctions [were] warranted” in that particular instance. *Ruling and Order Regarding Claims*, Docket No.2008-1 CRB CD 98-99 (Phase II), at 7 (June 18, 2014).

A year later, in this proceeding, the Judges also declined to disqualify IPG, “[a]ssuming, without deciding, that the Judges do possess the inherent authority to debar or otherwise disqualify a claimant representative for misconduct . . .” *Memorandum Opinion and Ruling on Validity and Categorization of Claims* at 9 (Mar. 13, 2015) (citing *Gonzales v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964)) (*Claims Ruling*). The Judges found that “it would be inappropriate to exercise that authority in the absence of regulations governing how, and under what circumstances they may do so.” *Id.* The Judges noted that “[p]articipants are entitled to ‘official . . . guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found.’” *Id.* (quoting *Gonzales*, 334 F.2d at 578).⁶

The SDC contend that the Judges should depart from what the SDC describe as a narrow interpretation of *Gonzalez*:

Gonzalez does not apply so narrowly for two reasons. First, it involved an attempt to debar a party without a hearing for a substantive, rather than procedural, violation of the agency’s regulations. Second, the *Gonzalez* court recognized that the requirements of fairness and notice could be met without previously-issued regulations on the specific misconduct at issue.

SDC Motion at 13.

The SDC’s first argument for a broader interpretation of *Gonzalez* rests on the SDC’s earlier argument concerning the differing treatment of agency sanctions for substantive violations versus procedural violations. *See* SDC Motion at 11.⁷ The Judges are skeptical of this argument. The D.C. Circuit did not articulate a distinction between the (purportedly substantive) violation before it and a procedural violation. Consequently, it appears unlikely that the court relied on that distinction.

The SDC’s second argument relies on the court’s statement that “it construed ‘the pertinent statutory scheme as authorizing debarment but as not authorizing debarment without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of appellants.’” *Id.* at 14 (quoting *Gonzalez*, 334 F.2d at 580 (triple emphasis added by the SDC)). In context, the Judges are not convinced that the D.C. Circuit held that “basically fair treatment” was an adequate substitute for established standards and

⁶ The Judges invited the parties to submit petitions for rulemaking discussing the Judges’ authority and the proposed content of rules regarding sanctions. Since no party filed such a petition, the Judges published a Notice of Proposed Rulemaking on their own initiative. 82 Fed. Reg. 18601 (Apr. 20, 2017). That rulemaking remains pending.

⁷ The SDC argue that “[a]lthough an agency cannot fashion punitive or deterrent remedies for substantive violations of its regulations, it can do so for violations of a procedural rule.” *Id.* at 11. They maintain that “the D.C. Circuit recognizes that sanctions for violations of an agency’s procedural rules are ‘analytically distinct from substantive provisions,’ because they are intended ‘not to augment its enforcement arsenal but to protect its administrative processes.’” *Id.* (quoting *Checkosky v. S.E.C.*, 23 F.3d 452, 456 (D.C. Cir. 1994)).

procedures. The court appears to have been observing that neither was present in the case before it. Moreover, the court stated earlier in the decision that “debarment cannot be left to administrative improvisation on a case-by-case basis.” *Gonzales*, 334 F.2d at 578. The court explained:

The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.

Id. Even if *Gonzalez* does not require the Judges to have regulations governing debarment in place before meting out that particular sanction, it strongly suggests that that would be the more prudent course of action.

The Judges will follow the *Claims Ruling* and decline to impose the sanction of disqualification or debarment “in the absence of regulations governing how, and under what circumstances they may do so.” *Claims Ruling* at 9.

3. Dismissing IPG for Procedural Violations

MPAA argues that, during the CARP era, the Register of Copyrights (Register) exercised “unambiguous authority” to dismiss a party for procedural violations. MPAA Motion at 6 (citing *Order*, Docket No. 2001-8 CARP CD 98-99 (June 26, 2006) (*June 2006 Order*). MPAA contends that “the Judges and their predecessor tribunals have routinely dismissed parties for a failure to comply with the regulations governing royalty distribution proceedings.” *Id.* at 6-7.

The particular order that MPAA cites stated:

While the [Copyright] Office will excuse a party’s occasional lapse in following the regulations, even those governing proper service, the Office cannot and will not tolerate a party’s persistent failure to comply as is the case here. IPG’s repeated failure to effect proper service even after the Office had cited the appropriate rules demonstrates a flagrant disregard of the rules governing these proceedings and of Orders issued therein, as well as a lack of respect for the Office and the other parties in these proceedings. Administrative proceedings cannot be run effectively or efficiently where parties to the proceeding disregard the carefully developed procedures governing the process, and a party will be, and indeed has been, dismissed from a proceeding for failure to adhere to its rules and comply with its orders.... Accordingly, any future failure by IPG to comply with the Office’s regulations, especially those governing the proper service of pleadings, will result in IPG’s dismissal from these proceedings.

MPAA Motion at 6 (quoting *June 2006 Order*, at 5-6). In her *June 2006 Order*, the Register did *not* dismiss IPG. Rather, she warned IPG about possible future dismissal if it failed to comply with Copyright Office regulations. Therefore, the Judges view the Register’s statement concerning dismissal as dicta.

The Register, however, did cite two previous instances when she (or the Librarian, acting on her recommendation) actually dismissed parties from a CARP proceeding for “failure to adhere to [procedural rules] and comply with [the Register’s] orders.” *June 2006 Order*, at 6. In

2003, the Register dismissed a participant from a proceeding to set rates and terms under sections 112 and 114 after repeated warnings that its failure to abide by the rules governing service of documents would result in dismissal. *See Dismissal Order*, Docket No. 2002-1 CARP DTRA3 (Aug. 15, 2003) (*August 2003 Order*). The participant’s “notice of intent to participate” did not provide sufficient evidence of its significant interest in the proceeding. Its repeated failure to serve documents properly occurred in the course of attempting to remedy that deficiency. *Id.*

In 1996 the Librarian, on the Register’s recommendation, dismissed two parties from a DART proceeding. The Librarian dismissed one participant because he failed to state a percentage or dollar claim in his Written Direct Statement (WDS) as required by previous orders and regulations, and he presented no testimony or other evidence in his WDS to support his claim. *Recommendation and Order*, Docket No. 95-1 CARP DD 92-94, at 3-4 (May 9, 1996) (*May 1996 Order*).⁸ The Librarian dismissed another participant because it filed its WDS after the deadline, failed to serve its WDS on other participants, and failed to include in its WDS any testimony or other evidence to support its claim. *Id.* at 4-6.

Since the CARP era, the Judges also have dismissed participants for certain procedural failures. For example, in the 2010-13 cable distribution proceeding, the Judges dismissed a party from the allocation phase for failing to file an allocation phase WDS. *See Order Granting in part Allocation Phase Parties’ Motion to Dismiss Multigroup Claimants* (Aug. 11, 2017; reissued Dec. 15, 2017) (*August 2017 Order*).⁹ The Judges found that “[a]rticulating one’s allocation methodology and presenting the evidence supporting it is the most basic, indispensable element of any party’s participation in adjudicating allocation issues. Failing to do so is inimical to a party’s continued participation in the category allocation decision.” *Id.* at 3.

The Judges conclude that they have discretionary authority to dismiss a participant that fails to comply with the Judges’ procedural rules and orders. The Judges and their predecessors have reserved that sanction for particularly egregious circumstances—*e.g.*, where the procedural failure is so significant that it is “inimical to a party’s continued participation” in the proceeding, or the party’s “persistent failure” to comply after repeated warnings “demonstrates a flagrant disregard of the rules.” *August 2017 Order*, at 3; *June 2006 Order*, at 5; *August 2003 Order*, at 4.

MPAA cites multiple instances of IPG failing to abide by the Judges’ rules and orders, including:

- False testimony by an IPG witness;
- Failure to remove a fraudulent claim from its claims list;
- Failure to incorporate the Judges’ *Claims Ruling* into its WRS;¹⁰ and
- Failure to serve participants with a copy of a motion filed with the Judges.

⁸ The Register also noted that the participant did not serve his response to the motion for his dismissal in accordance with Library regulations. *Id.* at 2. It does not appear that his dismissal turned on this procedural default.

⁹ To be precise, the Judges ordered that the defaulting party could no longer participate in the allocation portion of the proceeding, even though it remained a participant in the distribution phase. *Id.* at 4.

¹⁰ The WRS referred to is the one IPG filed before the Judges reopened the record. IPG went through multiple rounds of revisions of its exhibits during the course of the April 2015 hearing before finally providing exhibits properly incorporating the *Claims Ruling*. *See* MPAA Motion at 8 n.18.

See MPAA Motion at 7-8.

As MPAA has noted, the Judges have responded to IPG's previous infractions with appropriately measured approaches. After determining that IPG's claims list included a fraudulent claim and that IPG's witness testified falsely, the Judges found it appropriate to withhold from IPG the benefit of the evidentiary presumption of claims validity. *See Claims Ruling*, at 7.¹¹ IPG has asserted that this sanction resulted in the dismissal of a number of IPG claims. *See, e.g.*, IPG Motion for Modification of March 13, 2015 Order, at 13 (Mar. 17, 2015). The Judges also admonished IPG, on the SDC's and MPAA's motion, for failing to serve the SDC and MPAA with a copy of an IPG motion. *See Order Admonishing IPG*, at 2 (Jan. 3, 2017).

The Judges are not persuaded that their foregoing prior actions – meted out on a case-by-case basis – warrant their exercise of discretion through a dismissal of IPG in this instance. The Judges have already imposed significant sanctions on IPG for its conduct during this proceeding. The Judges find that dismissal of IPG at this point for a supposed pattern of misconduct would, essentially, constitute sanctioning IPG for conduct for which it has already been punished. Moreover, the Judges are well aware that the sanctions motions at issue here have been pending for quite some while, and that all parties (including IPG) have expended time and resources continuing to litigate this proceeding to its conclusion. *See Final Distribution of Royalty Distribution* (Feb. 14, 2019). The Judges find, under the circumstances, that dismissal of IPG would not serve the interests of justice.

4. Awarding Monetary Sanctions

In response to the Judges' solicitation of motions presenting "authoritative legal analysis addressing the Judges' authority, if any, to impose financial or other sanctions," the SDC and MPAA argued that the Judges possess authority to award attorneys' fees, expert witness fees, and costs against IPG's counsel. *See* MPAA Motion at 4-5, 11-14; SDC Motion at 8-10.

The SDC contend that "[t]he Judges' authority to regulate their adjudicative proceedings includes the power to regulate the practice of attorneys who appear before them." SDC Motion at 8 (citing *Goldsmith v. U.S. Bd. Of Tax Appeals*, 270 U.S. 117, 122 (1926) and *Checkosky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994)).¹² The SDC argue that that power includes the authority to order "payment of attorney's fees required as a result of counsel's conduct." *Id.* at 9. While the SDC concede that "an agency generally may not award attorney's fees as a substantive remedy unless authorized by statute," they argue that the Judges' authority to award attorney's fees "is broader when addressing misconduct in the adjudicative process." *Id.* (citing *HTH Corp. v. N.L.R.B.*, 823 F.3d 668, 680 (D.C. Cir. 2016)).

The Judges read *HTH* more narrowly. The D.C. Circuit held that an administrative agency, "[a]s a creature of statute ... has only those powers conferred upon it by Congress" expressly or implicitly.¹³ *HTH*, 823 F.3d at 679. The N.L.R.B. acknowledged that it did not have

¹¹ The Judges denied the presumption of validity principally to assure the reliability of the evidentiary record, and not as a sanction against IPG.

¹² *Goldsmith* and *Checkosky* both involved challenges to enforcement of an agency's rules governing attorneys practicing before them. As that is not the case before the Judges, these cases are not directly on point.

¹³ The court observed that it has often described as "inherent" powers that are more accurately described as "statutorily implicit." *Id.* It also points out that "the distinction between inherent authority and implicitly granted

express statutory authority to award attorney’s fees, but rested on its inherent (or implicit) authority to “control and maintain the integrity of its own proceedings.” *Id.* The court rejected the Board’s argument. The court held that nothing in the Board’s underlying statute granted punitive powers. *Id.* at 679. It found that fee-shifting is punitive, “akin to a fine for civil contempt [because] both serve the purpose of vindicating the tribunal’s authority over a recalcitrant litigant.” *Id.* at 680. It also rejected the Board’s argument that its award of litigation expenses was compensatory, not punitive, because that argument “runs into the basic underpinning of the American rule.” *Id.*

The Judges lack express statutory authority to impose attorney’s fees. The SDC has not provided the Judges with persuasive arguments that the Copyright Act grants the Judges implicit authority to impose attorney’s fees. The Judges, therefore, reject the SDC’s arguments.

MPAA points to Fed. R. Civ. P. 11(c) as support for the Judges’ authority to impose attorney’s fees. *See* MPAA Motion at 11-14. MPAA notes that, although the penalty for violating 37 C.F.R. § 350.4(e)(1) is not set forth in the regulations, “the Judges can look to the Federal Rules of Civil Procedure as instructive authority.” *Id.* at 12. Rule 11(c) states expressly that a court may grant attorney’s fees for a Rule 11 violation. “Thus [Rule 11(c)] provides clear guidance for an award of attorney’s fees and costs” *Id.* at 14.

The Judges reject MPAA’s argument. While the Federal Rules may serve as persuasive authority in interpreting the Judges’ procedural rules,¹⁴ they are not a substitute for express or implied statutory authority. The Judges must look to the Copyright Act and any regulations that the Judges might adopt under that Act for such authority, and, as stated above, the moving parties have not persuaded the Judges that it can be found there.

V. Conclusion

For the foregoing reasons, the Judges **DENY** both motions for sanctions.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

DATED: March 12, 2019.

authority is a subtle one—so subtle that this court generally overlooked it until Judge Pillard pointed it out in *Ivy Sports [Med., LLC v. Burwell]*, 767 F.3d 81, 93 (D.C. Cir. 2014) (Pillard, J., dissenting).” *Id.*

¹⁴ *See supra* note 4.