

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
Distribution of 2000, 2001, 2002) Docket No. 2008-2 CRB CD
And 2003 Cable Royalty Funds) 2000-2003 (Phase II) (Second
) Remand)
)
_____)

**INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO
MOTION OF SETTLING DEVOTIONAL CLAIMANTS FOR
RELIEF FROM PROTECTIVE ORDER**

Worldwide Subsidy Group LLC (a Texas limited liability company)
dba Independent Producers Group ("IPG") hereby submits its *Opposition to
the Motion of Settling Devotional Claimants for Relief from Protective
Order.*

ARGUMENT

**A. THE SDC SEEK TO UTILIZE THE MPAA DATA AND
METHODOLOGY IN ORDER TO APPLY IT TO
DEVOTIONAL PROGRAMMING, WITHOUT FURTHER
ANALYSIS, EXPERTISE, OR MANIPULATION.**

The issue presented by the SDC motion is whether a party can obtain
(via the Judges' order) data purchased and developed by a non-adverse party

for the purpose of simply utilizing the non-adverse party's methodology in the exact same manner, but applied to a different claimant category.¹ Such issue is distinct from whether a party may use such data in the same claimant category, either to defend criticism of its own methodology or to challenge an adverse methodology. Such issue is distinct from whether a party may use such data in an aggregated manner for entirely different purposes. It is a novel question before the Judges because no party has ever proposed simply expropriating another party's methodology and data before, as the SDC propose here.

Logically, the only circumstance in which this issue could arise is when a proceeding has been remanded for proceedings to begin anew, as has occurred here, and a participant has gotten ahold of a non-adverse party's data from a prior proceeding. In this second remand of 2000-2003 cable proceedings, determining the appropriate distribution in the devotional programming category, the SDC seek to use 2000-2003 data purchased and developed by the MPAA as part of the methodology presented by the

¹ As reflected in Exhibit 1 to the SDC motion (March 26, 2018 email, at para. 3.c.), the SDC have asserted that they "are not proposing to aggregate the data in any new way. We simply want to be able to use the files to verify the HHVH results."

MPAA in the Program Suppliers category, but simply “plug in” the devotional programming measurements. See fn. 1. Although the SDC have represented that they “simply want to be able to use the files to verify the HHVH results”, it is not verification of the Program Supplier programming results previously reported by the MPAA that is sought (which would have no relevance to devotional proceedings), but modification of the program code commands in order to apply the MPAA methodology to devotional programming.

A. THE SDC AND MPAA ARE NOT ADVERSE PARTIES.

As the Judges are aware, the MPAA participates in the distribution/Phase II proceedings relating exclusively to the Program Suppliers category. The SDC participates in the distribution/Phase II proceedings relating exclusively to the devotional category. For distribution/Phase II purposes, those parties are not adverse to each other, nor ever have been.

Although the SDC’s brief suggests otherwise, it is obviously insignificant that the MPAA has used its 2000-2003 data as part of its presented methodology in any prior proceedings – the MPAA purchased and developed the data and is free to use it as it pleases.

B. THE MPAA’S 2000-2003 DATA WAS NOT PRODUCED IN THE 2000-2003 PROCEEDINGS, AND HAS NOT BEEN USED BY IPG IN THE 2000-2003 PROCEEDINGS.

Notably, the SDC’s first argument brashly misrepresents that “the underlying data is already in the lawful possession of all parties in the 2000-2003 cable proceeding”. Initially, the MPAA’s 2000-2003 data was not produced to the SDC (or IPG, for that matter) in the initial round of the 2000-2003 cable proceedings. Further, it was not produced in the first remand, where the MPAA was not a participant, and IPG did not utilize such data. On what basis the SDC makes its lead argument, is therefore befuddling.

Second, the SDC misrepresent that IPG actually used the MPAA’s 2000-2003 data in the 2000-2003 proceedings. It did not. In fact, in the *initial* 2000-2003 proceedings, IPG’s most significant criticism was that the MPAA had failed to produce all of the data underlying its 2000-2003 HHVH calculations, meaning that the MPAA’s HHVH results could not be

replicated.² It was not until the MPAA utilized such 2000-2003 data in the consolidated 1999-2009 satellite, 2004-2009 proceedings, that the 2000-2003 underlying data was actually produced in its entirety. Nonetheless, in the *first remand* of the 2000-2003 cable proceedings, IPG *still* did not use such data. As noted *infra*, IPG's only possible reason to use the MPAA's 2000-2003 data related to IPG's engagement of a "daypart weight factor", which IPG expressly removed from its methodology as part of the first

² See, e.g., *IPG Rebuttal to Written Direct Statement of MPAA-Represented Program Suppliers*, Testimony of Raul Galaz, Section I (May 15, 2013), and IPG Proposed Findings of Fact and Conclusions of Law In Connection With the 2000-2003 Program Suppliers Category, Section IV.A. (June 14, 2013) (citing testimony and exhibits of Dr. Laura Robinson).

Despite IPG's lead rebuttal argument that the MPAA analysis had never been produced in discovery, a fact supported by the testimony of IPG's expert witness, not one sentence in the CRB final distribution order acknowledged such issue. IPG explained that the MPAA had produced only portions of its analysis, equating its production to providing certain (but not all) of the ingredients, but not the final integrated study or processes utilized to obtain its purported results. (CRB 345 at pp. 22-27). IPG argued that IPG was unable to test any of the purported conclusions of the MPAA analysis, even as basic as confirming the purportedly resulting figures. The MPAA did not submit its analysis into evidence. When IPG attempted to introduce the aggregate of evidence actually produced by the MPAA, in order to establish the absence of the MPAA final integrated study, the Judges inexplicably refused to admit such data into evidence. (CRB 344 at p.857).

remand of the 2000-2003 cable proceedings. Consequently, the MPAA's 2000-2003 data was of no relevance to IPG.

IPG's only use of the MPAA's 2000-2003 data was in connection with the consolidated 1999-2009 satellite, 2004-2009 cable proceedings, in order to address anticipated criticisms of IPG's "daypart weight factor". As would seem obvious, use of an adverse party's data for the purpose of addressing an adverse party's criticisms, would appear evidently acceptable. Prior criticism of IPG's "daypart viewing factor" was that it was based on too generalized information, so Dr. Robinson utilized the 2000-2003 MPAA HHVH results to give credibility to such "daypart viewing factor". See *infra*. Nonetheless, such use was in an aggregated manner that, by its use, no longer deemed such data "Protected Materials" under the applicable protective order and, as noted, was already being used by the MPAA in the consolidated proceedings. See *infra*.

C. IPG'S USE OF THE MPAA'S 2000-2003 DATA, OR ANY MPAA DATA, IN OTHER PROCEEDINGS WAS IN AN ENTIRELY DIFFERENT MANNER THAT WAS ALLOWED BY THE APPLICABLE PROTECTIVE ORDER.

Also contrary to the suggestion of the SDC, IPG has never used any MPAA data in the manner being contemplated by the SDC here, i.e.,

application of HHVH figures (derived from the MPAA methodology applying regressions) to devotional programs.³ Rather, IPG’s use of MPAA data has always been in a fundamentally different way, by aggregating the measurements for any half-hour or quarter-hour period, regardless of the station or community being measured, regardless of the program being measured, then determining what percentage of the aggregate ratings each aggregated time period represents.⁴

Specifically, in the consolidated 1999-2009 satellite and 2004-2009 cable proceedings, IPG utilized data produced by the MPAA from the 2000-2003 cable proceedings in a manner that did not make it “Protected Materials”.⁵ At the outset of the 2000-2003 cable proceedings, the MPAA

³ The MPAA methodology assigned a “household viewing hours” (“HHVH”) measurement based on a variety of inputted data, including Nielsen data, and regression analysis. As noted, IPG was unable to test the accuracy of such 2000-2003 measurements because the underlying data creating such results was not produced in its entirety.

⁴ For example, IPG used the MPAA data in order to discern what percentage of *all* HHVH measurements that the HHVH measurements for broadcasts from 8:00 to 8:15 pm represented, e.g., 0.5% of the total, 0.4% of the total, etc.

⁵ It bears noting that IPG did not rely on the data underlying the MPAA 2000-2003 HHVH results, because IPG did not even have such information

petitioned the Judges for entry of a protective order, which was adopted in all material respects by the Judges. Docket no. 2008-2 CRB CD 2000-2003 (Phase II), *Motion for Protective Order*, filed June 20, 2012; *Order Adopting Protective Order and Amending Discovery Schedule*, filed July 10, 2012. The protective order was drafted by the MPAA, and paragraph 3 thereof required the Producing Party (e.g., the MPAA) to submit "an affidavit or other sworn statement" to demonstrate that all designated materials meet the definition of "Protected Materials". Notwithstanding, the protective order provided an exception to the definition of "Protected Materials", and according to paragraph 2 thereof:

“Protected Materials *shall not include . . . (3) an aggregate of quantitative information* which has been designated as Protected Materials, so long as such aggregated information cannot be manipulated to disclose any portion of the Protected Materials constituting such aggregated information.” (emphasis added)

In preparation for the 1999-2009 satellite and 2004-2009 cable consolidated proceedings, Dr. Laura Robinson aggregated the viewing data for the 2.29 Million broadcasts appearing in the 2000-2003 Nielsen Data

in its possession. Rather, IPG relied on the reported 2000-2003 HHVH results, but aggregated in the manner described herein.

into 96 quarter-hour dayparts in order to create a Daypart Viewing Summary. The Daypart Viewing Summary could not be “manipulated to disclose” the HHVH or any portion of the Nielsen Data, whether according to any measured broadcast, station, or program. Dr. Robinson’s Daypart Viewing Summary was not appended to IPG’s Direct Statements; IPG produced Dr. Robinson’s Daypart Viewing Summary to all parties in discovery in the proceedings, and no others; IPG did *not* produced the Nielsen Data upon which the Daypart Viewing Summary was derived to any party in the proceedings, other than to the MPAA, pending the Judges determination regarding whether production was appropriate.

Consequently, IPG’s use of the MPAA 2000-2003 data was in a very narrow manner, the generality of which transformed otherwise protected materials into non-protected materials that did not run afoul of the applicable protective order. Such was IPG’s argument, which was accepted by the Judges in response to the MPAA’s Motion to Strike. See Amended Order Denying MPAA Motion to Strike Testimony of IPG Witness, Dr. Robinson, Docket nos. 2012-6 CRB CD 2004-2009 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) at 5 (July 30, 2014).

Somewhat differently, in the 1998-1999 cable proceedings and the 2000-2003 cable proceedings, IPG utilized the MPAA's 1997 HHVH measurements and aggregated them into half-hour measurements. Again, no "program by program" measurements, or "station by station" measurements were utilized. See *IPG Direct Statement*, Docket nos. 2008-1 CRB CD 1998-1999 (Phase II) and *IPG Second Amended Direct Statement*, 2008-2 CRB CD 2000-2003 (Phase II), at 21. While IPG argued that its use effectively transformed the 1997 MPAA data into unprotected material, in response to the MPAA's *Motion to Compel Compliance and for Sanctions* filed in the 1998-1999 cable proceeding, the Judges ruled that the MPAA had waived IPG's use of such information (in the aggregated manner) by not challenging IPG's use of the same information (in the same aggregated manner) in the (prior) 2000-2003 cable proceeding. See *Order on MPAA Motion to Compel Compliance and for Sanctions (Aug. 11, 2014)*, Docket no. 2008-1 CRB CD 1998-1999 (Phase II).

Consequently, IPG's use of MPAA data has always been in a very different manner than the use intended by the SDC. Any argument by the SDC attempting to draw comparison to IPG's prior use of MPAA data would be substantially misplaced.

D. THE MPAA/SDC AGREEMENT TO SEE THE RESULTS OF THE 2000-2003 DATA DOES NOT ALLOW FOR ITS USE IN THE MANNER SOUGHT BY THE SDC.

Despite representing that the SDC have “already paid for and received authorization from the MPAA to receive the devotional HHVH reports themselves”, an agreement for the use contemplated by the SDC clearly is not in place. To state the obvious, if an agreement already existed, the SDC would not have to seek permission from either the MPAA or the Judges to use the MPAA’s 2000-2003 data.

Moreover, the only evidence of an “agreement” produced by the SDC appears at Exhibit 6 to its motion. Thereat, three emails appear, none from the MPAA agreeing to allow the SDC to even receive the 2000-2003 MPAA HHVH results, much less to receive the data underlying such calculations, much less to utilize such data in retransmission royalty proceedings.

E. ANY GRANT OF THE SDC MOTION TO USE MPAA DATA MUST BE EQUALLY APPLICABLE TO IPG.

Contrary to the argument of the SDC, prior rulings relating to the use of another party’s data in these proceedings do not provide a precedent for the use of the MPAA 2000-2003 data contemplated by the SDC.

Nonetheless, if the Judges are to rule differently, and allow use of the MPAA's 2000-2003 data in connection with different program categories, then any order applicable thereto must apply equally to all parties.

Consequently, if the Judges grant the SDC motion, equity requires that IPG also be allowed to utilize such data in the second remand of the 2000-2003 cable proceedings (Phase II).

CONCLUSION

For the foregoing reasons, the SDC's motion should be denied in its entirety or, if granted, be granted as to all parties participating in the 2000-2003 cable proceedings (Phase II).

Respectfully submitted,

Dated: April 25, 2019

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this April 25, 2019, a copy of the foregoing was electronically filed and served on the following parties via the eCRB system.

_____/s/_____
Brian D. Boydston

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Proof of Delivery

I hereby certify that on Thursday, April 25, 2019 I provided a true and correct copy of the Response in Opposition on Motion of the Settling Devotional Claimants for Relief from Protective Order to the following:

Settling Devotional Claimants (SDC), represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

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Signed: /s/ Brian D Boydston