

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

In the Matter of)
Distribution of the 2004, 2005, 2006)
2007, 2008 and 2009)
Cable Royalty Funds)
Docket No. 2012-6 CRB CD 2004-2009)
(Phase II)

In the Matter of)
Distribution of the 1999-2009)
Satellite Royalty Funds)
Docket No. 2012-7 CRB SD 1999-2009)
(Phase II)

**MPAA-REPRESENTED PROGRAM SUPPLIERS’ OPPOSITION TO SETTLING
DEVOTIONAL CLAIMANTS’ MOTION FOR RELIEF FROM PROTECTIVE ORDER**

On April 12, 2019, the Settling Devotional Claimants (“SDC”) filed a motion for relief from the Protective Orders issued in the consolidated 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding seeking permission from the Copyright Royalty Judges (“Judges”) to use, in the reopened 2000-2003 Cable Phase II Proceeding, the Nielsen and Tribune data produced by MPAA only to Independent Producers Group (“IPG”) during the initial, pre-remand phase of the 2000-2003 Cable Phase II Proceeding. SDC alleges that such Nielsen and Tribune data

(collectively, the “Data”) could potentially be utilized to replicate the Household Viewing Hours (“HHVH”) reports, which SDC intends to rely on in the 2000-2003 Cable Phase II Proceeding. As more fully articulated below, the Motion Picture Association of America, Inc. (“MPAA”) and its represented Program Suppliers claimants (“MPAA-represented Program Suppliers”) oppose the Motion because (1) contrary to SDC’s assertions, SDC was never entitled to request or receive the Data from MPAA in the 2000-2003 Cable Phase II Proceeding, as it was not an “opposing party” to MPAA in that matter; (2) the relief SDC seeks would eviscerate the protections of the Judges’ Protective Orders; and (3) SDC’s unlicensed use of the Data would run contrary to MPAA’s license agreements with third parties, and substantially impair MPAA’s ability to acquire such information in the future.

I. SDC Was Never An Authorized Recipient Of The Data From MPAA In The Initial Phase Of The 2000-2003 Cable Phase II Proceeding.

As an initial matter, SDC’s claim that it would have been entitled to receive the Data in the initial (*i.e.*, pre-remand) phase of the 2000-2003 Cable Phase II Proceeding, Motion at 5-6, is incorrect. In fact, SDC was never entitled to request or receive the Data from MPAA in the 2000-2003 Cable Phase II Proceeding, as it was never an opposing party to MPAA in that proceeding.

SDC misleadingly suggests that it was an authorized recipient that would have been entitled to receive the Data in the 2000-2003 Cable Phase II Proceeding, but ignores that the plain language of the Protective Order issued in that proceeding (“2000-2003 Protective Order”), which SDC negotiated and expressly agreed to, limited dissemination of Protected Materials such as the Data to Phase II participants in *the same* Phase II category. *See* 2000-2003 Protective Order, ¶ 4 (“Notwithstanding the foregoing, no 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).

As the Judges later determined, the copyright owners represented by the MPAA and by the SDC were in entirely separate Phase II categories. *See* Amended Joint Order on Discovery Motions, *In re Distribution of 2004-2009 Cable Royalty Funds and In re Distribution of 1999-2009 Satellite Royalty Funds*, Dckt. Nos. 2012-6 CRB CD 2004-09 (Phase II) & 2012-7 CRB SD 1999-2009 (Phase II), July 30, 2014 (“Joint Order on Discovery Motions”) (“MPAA represents copyright owners solely in the Program Suppliers category. The SDC assert claims solely in the Devotional Claimants category.”); *see also* Final Order of Distribution (Program Suppliers Category), *In re Distribution of 2000-2003 Cable Royalty Funds*, Dckt No. 2008-02 CRB CD 2000-03 (Phase II), Mar. 22, 2016 (ordering distribution of Program Suppliers funds only to the MPAA and IPG).

Indeed, recognizing the requirements of the Protective Order and the lack of any controversy between MPAA and SDC in the 2000-2003 Cable Phase II Proceeding, neither SDC nor MPAA served *any* discovery requests on one another in that Proceeding, and instead served discovery requests solely on the party with which they each maintained a controversy, IPG. The Judges’ regulations make it clear that no party is entitled to receive discovery from a party in a royalty distribution proceeding absent serving discovery requests. *See* 37 C.F.R. § 351.6 (stating that “parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony”). Accordingly, SDC was never an opposing party to MPAA in

the 2000-2003 Cable Phase II Proceeding, never served any discovery requests on MPAA, and, as a result, was *never* entitled to receive the Data from MPAA in discovery in that matter.¹

II. The Relief That SDC Seeks Eviscerates The Very Protective Orders Under Which The Data Was Produced.

If SDC believed it was necessary to have Nielsen and Tribune data in order to replicate the HHVH reports in connection with the case it wanted to present in the remanded 2000-2003 Cable Phase II Proceeding, SDC should have licensed the Data from Nielsen and Tribune (now Gracenote) years ago. Instead, SDC chose to wait and attempt to exploit the discovery process to obtain, for free, the Data MPAA purchased for thousands of dollars. The Judges should not permit such data poaching, or enable SDC to utilize unlicensed data in CRB proceedings. Doing so would essentially render the Judges' Protective Orders meaningless.

SDC first received the Data in the consolidated 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding over MPAA's objection, following the Judges' determination that SDC and MPAA were functionally "opposing parties" in that particular Phase II Proceeding. *See* Joint Order On Discovery Motions at 4-10. However, in ordering MPAA to produce the Data to SDC, the Judges accepted SDC's particular representations regarding its intended use of the Data -- *that it was sought for SDC's use in connection with specific program categorization and methodological issues related to that particular proceeding*. Indeed, in SDC's motion to compel papers, they emphasized that SDC was seeking the Data because SDC and MPAA were

¹ SDC makes much of the fact that IPG received the Data in the 2000-2003 Cable Phase II Proceeding, and was later permitted to use the Data in the 2004-2009 Cable and 1999-2009 Satellite Proceeding over MPAA's objections. Motion, at 5-6 (citing Amended Order Denying MPAA Motion to Strike Testimony of IPG Witness, Dr. Robinson, Dckt. Nos. 2012-6 CRB CD 2004-2009 (Phase II) & 2012-7 CRB SD 1999-2009 (Phase II), July 30, 2014 ("Order Denying Motion to Strike")). However, unlike SDC, IPG maintained claims in the Program Suppliers category, and was an opposing party to MPAA in both Phase II proceedings. For this reason, and because IPG's witness Dr. Robinson used the Data in a way that brought it within the Protective Order's exception for aggregated information, the facts vis-à-vis IPG's use of the Data are distinguishable. *See* Order Denying Motion to Strike, at 5-6.

“opposing parties” as to specific categorization and methodological issues unique to the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding,² and that these issues were not present in the 2000-2003 Cable Phase II Proceeding. To wit, SDC made the following representations to the Judges in those motion papers:

To be sure, the SDC’s interests were more closely aligned with MPAA’s in the 2000-2003 cable proceedings than they are in the current proceedings....This is partly because the SDC relied in part on MPAA data and a simplified version of MPAA’s methodology in the 2000-2003 proceedings, and also because IPG had not claimed non-religious programs in the Devotional category in those proceedings. ***But the situation here is different.*** Here, MPAA and SDC are opposing parties, both as to categorization of claims and as to methodology.

* * *

In short, participation in discovery is the price of presenting a methodology. It is MPAA’s choice, but it cannot have it both ways. If MPAA chooses to use data in these proceedings, then it has to expect that other parties will be able to use ***the same data in the same proceedings.*** That is not “data poaching” –it is discovery.³

SDC also acknowledged as a part of their motion that any confidentiality concerns that MPAA had related to the Data would be covered by the Protective Orders issued in the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding.⁴ This was emphasized by the Judges, who, in granting SDC’s motion to compel in that proceeding, stated:

If there are confidentiality requirements or use restrictions relating to any other use of the requested Nielsen data (*i.e.* regarding any use ***other than the use intended by the SDC as represented by the SDC in its Motion papers***), the

² See Settling Devotional Claimants’ Motion To Compel MPAA-Represented Program Suppliers To Produce Documents, Dckt. Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), at 3-5 (June 12, 2014) (“SDC MTC”); Settling Devotional Claimants’ Reply In Support Of Motion To Compel MPAA-Represented Program Suppliers To Produce Documents, Dckt. Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 3-5 (June 25, 2014) (“SDC MTC Reply”).

³ See SDC MTC Reply at 5, 8 (emphases added).

⁴ See SDC MTC at 8 (“With respect to MPAA’s objection that some documents might contain confidential information, MPAA can simply produce the documents pursuant to the agreed Protective Orders in these cases.”).

MPAA can seek to protect against any such further use or disclosure of the Nielsen data by taking the precautionary actions permitted under the July 1, 2014, Protective Order entered in this proceeding.

Joint Order on Discovery Motions at 9 (emphasis added).

The July 1, 2014 Protective Orders clearly limit SDC's use of the Data to the consolidated 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding, and require SDC to return the Data to MPAA when that proceeding concludes.⁵ SDC's request to eviscerate the restrictions of the July 1, 2014 Protective Orders, after obtaining the Data on the express basis that the Protective Orders would control the use of the Data, is wholly improper. SDC should not be permitted an end run around the very Protective Orders it ascribed to in order to convince the Judges to compel MPAA to produce the Data to SDC in the first place. SDC should also be estopped from seeking to use the Data now for an entirely different purpose—and in an entirely different proceeding—than the one in which SDC asked the Judges to compel its production.⁶ Indeed, SDC has had almost five years to plan for securing pertinent data to support its case in the remanded 2000-2003 Cable Phase II Proceeding, including securing a license from Nielsen and Gracenote if it intended to rely on such data as a basis for measuring the relative value of its programming. No one but SDC is responsible for the position it now finds itself in.

⁵ See Protective Orders, Dckt. Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 3 (July 1, 2014) (limiting use of Restricted Materials to “any portion of *this proceeding*” and requiring the Receiving Party of any Restricted Materials to return all Restricted Materials “including any additional copies, notes, or records in any form reflecting the contents of Restricted materials” to the Producing Party within 21 days after the conclusion of “*this proceeding*.”) (emphases added).

⁶ See Order Regarding Discovery, Dckt. No. 14-CRB-0010-CD (2010-13) at 6 (“The doctrine of estoppel in an adjudicatory context precludes a party from changing its earlier position after it has persuaded a court or agency to accept its earlier position, and when opposing parties would be unfairly disadvantaged after having relied on the earlier position.”). Here, MPAA is clearly unfairly disadvantaged by SDC's attempt to use the Data contrary to MPAA's licensing agreements with third parties, as it impairs MPAA's ability to obtain such proprietary information in the future. See text *infra* at 7-8.

III. The Relief That SDC Seeks Violates The Terms Of MPAA's Agreement With Nielsen, And MPAA's License With Gracenote.

Besides setting precedent that a party can modify an agreed Protective Order contrary to its own prior representations whenever it is convenient, granting SDC's Motion would undermine MPAA's (and other claimants') ability to license data from Nielsen and Gracenote in the future because it would essentially open the floodgates for use of unlicensed, proprietary data acquired through discovery in multiple CRB proceedings, and create economic concerns for the licensors of such data.⁷

In a futile attempt to address this serious licensing concern, SDC asserts that it already paid for and received the devotional HHVH reports from MPAA and its then-contractor, Alan Whitt, in 2006. Motion, at 6. However, as is clear from the email exchange SDC produced (Motion at Ex. 6), the HHVH reports are *an aggregated analysis* of the Data. The HHVH reports are not, themselves, the Data. The Data consists not only of the proprietary, raw details of the Nielsen diary viewing data, but also proprietary Tribune programming information. Moreover, although SDC asserts that it paid MPAA for "access to" the Data (which it did not), there is no evidence in the cherry picked email exchanges attached to the Motion (Motion at Ex. 6) of any actual payments or financial arrangements between SDC and MPAA. Only MPAA licensed the use of the Data from Nielsen and Gracenote, and it did so under terms that heavily restrict dissemination of the Data. *See, e.g.*, Motion at Exhibit 3, Nielsen Service Agreement, ¶ 3.1.

⁷ For example, IPG has notified MPAA of its intention to also seek permission from the Judges to use the Data in connection with IPG's Devotional category case in the remanded 2000-2003 Cable Phase II Proceeding if the Judges grant SDC's motion. *See* Ex. A, Declaration of Lucy Holmes Plovnick, at Ex. A (email from Brian Boydston, counsel for IPG, to Gregory Olaniran, counsel to MPAA). To MPAA's knowledge, IPG (like SDC) has also never sought or acquired a license to use the Data from either Nielsen or Gracenote.

SDC's position that their proposed use of the Data in the 2000-2003 Cable Phase II Proceeding complies with the Nielsen Service Agreement, Motion at 7, is inaccurate for two reasons. First, consistent with MPAA's understanding, Nielsen has taken the express position that SDC would have to license the Data directly from Nielsen in order to use it in the 2000-2003 Cable Phase II Proceeding. *See* Ex. A, Declaration of Lucy Holmes Plovnick, at Ex. B (email from Mark Davis, VP, Business Development at Nielsen, confirming that SDC is not entitled to use the Data in the separate 2000-2003 Cable Phase II Proceeding absent an SDC license from Nielsen). Second, even if the Nielsen Service Agreement allowed the Data to be used in any proceeding before the Copyright Royalty Board (which it does not), Article 3 of the Nielsen Service Agreement heavily limits what may be used in CRB proceedings. *See, e.g.*, Nielsen Service Agreement, ¶ 3.1(c), Amendment, ¶ 4 (providing that MPAA may only use "limited portions of the Nielsen Information"). Indeed, MPAA is *contractually obligated* to object to the use of the Data that SDC seeks to employ here, precisely because SDC's use would violate the terms of the Nielsen Service Agreement. *See* Nielsen Service Agreement, ¶ 3.3. If MPAA is not able to enforce its agreement with Nielsen, Nielsen will be reticent to license critical and meaningful data in future proceedings, knowing that the terms of its agreements will be rendered meaningless. Similarly, the Tribune data that MPAA produced to SDC in the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding is restricted, proprietary data. SDC can easily license such information directly from Gracenote, and the Judges should direct SDC to do so.

IV. Conclusion

For the foregoing reasons, MPAA respectfully requests that the Judges deny SDC's motion to use the Data in the reopened 2000-2003 Cable Phase II Proceeding.

Respectfully submitted,

/s/ Gregory O. Olaniran

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*Attorneys for MPAA-represented Program
Suppliers*

EXHIBIT A

**Before the
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2007, 2008 and 2009)	(Phase II)
Cable Royalty Funds)	
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In the Matter of)	
)	
Distribution of the 1999-2009)	Docket No. 2012-7 CRB SD 1999-2009
Satellite Royalty Funds)	(Phase II)
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DECLARATION OF LUCY HOLMES PLOVNICK

I, Lucy Holmes Plovnick, declare:

1. I am over 18 years of age and an attorney at law duly licensed to practice law in Rhode Island, Massachusetts, and the District of Columbia. I am a partner in the law firm of Mitchell Silberberg & Knupp LLC, attorneys of record for Motion Picture Association of America, Inc. (“MPAA”) and other program suppliers who have agreed to representation by MPAA in the captioned proceedings.

2. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

3. Attached hereto as Exhibit A is a true and correct copy of email correspondence between Brian Boydston, counsel for Independent Producers Group (“IPG”) and my law partner, Gregory O. Olaniran (dated April 23, 2019).

4. Attached hereto as Exhibit B is a true and correct copy of email correspondence between myself and Mark Davis, VP, Business Development at Nielsen, and Stanley Hui, also of Nielsen (dated March 18, 2019).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April, 2019, at Washington, D.C.



Lucy Holmes Plovnick

EXHIBIT A

Plovnick, Lucy

From: Olaniran, Greg
Sent: Tuesday, April 23, 2019 3:56 PM
To: Plovnick, Lucy
Subject: FW: SDC Motion for Relief

Gregory O. Olaniran | Partner, through his professional corporation
T: 202.355.7917 | goo@msk.com
Mitchell Silberberg & Knupp LLP | www.msk.com
1818 N Street NW, 7th Floor, Washington, DC 20036

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-----Original Message-----

From: Brian D. Boydston, Esq. <brianb@ix.netcom.com>
Sent: Tuesday, April 23, 2019 3:54 PM
To: Olaniran, Greg <goo@msk.com>
Subject: SDC Motion for Relief

Dear Greg,

The due date for briefs opposing the SDC's motion for relief from the protective order, effectively allowing the SDC's use of the MPAA's data, is due in a few days. Please note that it is IPG's intention to seek clarification that if the SDC is allowed to use the MPAA's data, IPG will also be allowed to utilize such data as part of any methodology presented by IPG in the second remand proceedings.

Brian Boydston

EXHIBIT B

Plovnick, Lucy

From: Mark Davis <mark.davis2@nielsen.com>
Sent: Monday, March 18, 2019 4:26 PM
To: Plovnick, Lucy
Cc: Stanley Hui; Olaniran, Greg
Subject: Re: Nielsen Custom Analysis Licensing Question

Hi Lucy - yes, you are correct. SDC would have to license the data set in question in order to use for another purpose, whether it be in front of the CRB or elsewhere.

Thanks for checking on this.

best regards,
Mark

On Mon, Mar 18, 2019 at 10:54 AM Plovnick, Lucy <lhq@msk.com> wrote:

Thanks, Stanley. It is basically a contractual/use of data issue that we wanted to discuss with you. Here is a brief description of the issue:

MPAA licensed a custom analysis of Nielsen diary data for the years 2000-2003 for use in connection with CRB proceedings. MPAA relied on the data in the 2004-2009 Cable and 1999-2009 Satellite Phase II Proceeding before the CRB ("the Proceeding"), and produced the data in discovery in the Proceeding to opposing parties subject to a protective order, which limits those opposing parties from using the data other than in connection with the Proceeding.

One of the opposing parties who received the 2000-2003 Nielsen data from MPAA in the Proceeding was the Settling Devotional Claimants ("SDC"). SDC has now contacted MPAA and asked MPAA to give them permission (or indicate that we will not object) to SDC using the 2000-2003 Nielsen data in another CRB proceeding related to the 2000-2003 Cable funds. MPAA has refused to give SDC permission to use the 2000-2003 Nielsen data in another CRB proceeding, and has informed SDC that if they make any attempt to use the data in another proceeding we will object (both because they will be in violation of the protective order and because we do not believe MPAA's license with Nielsen permits such use by SDC). We have informed SDC that if they want to use Nielsen data in the 2000-2003 Cable proceeding, they need to contact Nielsen and license it directly from Nielsen.

We wanted to schedule a call with you to talk through the situation described above, make you aware of SDC's request, and to confirm with you that MPAA has a correct understanding/interpretation of the limitations of MPAA's license (i.e., that it does not permit SDC to use the 2000-2003 Nielsen data).

Thanks,

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

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From: Stanley Hui <stanley.hui@nielsen.com>
Sent: Monday, March 18, 2019 10:25 AM
To: Plovnick, Lucy <lh@msk.com>
Cc: Mark.Davis2@nielsen.com; Olaniran, Greg <goo@msk.com>
Subject: Re: Nielsen Custom Analysis Licensing Question

Hi Lucy,

Sure, I can schedule a call. Is your question regarding contractual/use of data or is it a methodology/data related question?

Best regards,

Stanley Hui
Director, Advertiser Plus
Nielsen
Phone: (914) 809-0678
www.nielsen.com

On Fri, Mar 15, 2019 at 6:31 PM Plovnick, Lucy <lh@msk.com> wrote:

Mark and Stanley,

We wanted to reach out to you and see if we can schedule a conference call with you both sometime next week to discuss a licensing-related question that has arisen recently related to a custom analysis of Nielsen data that MPAA ordered several years ago (related to the years 2000-2003). Can you please let us know when you can be available for a call? If we can pick a date and time that works for everyone, I am happy to circulate a call in number.

Thanks,

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

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--

[Mark Davis](#)

VP, Business Development

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2019, a copy of the foregoing pleading was provided to each of the parties listed below, either electronically through the Copyright Royalty Judges' eCRB electronic filing system, or for those parties not receiving service through eCRB, by Federal Express overnight mail.

/s/ Lucy Holmes Plovnick

Lucy Holmes Plovnick

SETTLING DEVOTIONAL CLAIMANTS

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Proof of Delivery

I hereby certify that on Friday, April 26, 2019 I provided a true and correct copy of the MPAA-Represented Program Suppliers' Opposition To Settling Devotional Claimants' Motion For Relief From Protective Order to the following:

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Devotional Claimants, represented by Matthew J MacLean served via Electronic Service at matthew.maclean@pillsburylaw.com

Signed: /s/ Lucy H Plovnick