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)**
In re **DISTRIBUTION OF 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds**	**DOCKET NO. 2012-6 CRB CD 2004-09 (Phase II)**
In re **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 GRANTING SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR RELIEF FROM PROTECTIVE ORDER

On April 12, 2019, the Settling Devotional Claimants (SDC) filed a Motion for Relief from Protective Order (Motion) in the above-captioned cases.[1] On April 25, 2019, Worldwide Subsidy Group (WSG), d/b/a Independent Producers Group (IPG), filed an Opposition (IPG Opposition) and, on April 26, 2019, the Motion Picture Association of America, Inc. (MPAA) also filed an Opposition (MPAA Opposition). The SDC filed a Reply to the two Oppositions (Reply) on May 2, 2019.

For the reasons set forth below, the Copyright Royalty Judges (Judges) **GRANT** the Motion.

I. Background

A. The Data at Issue

In 2006, the SDC engaged Mr. Alan Whitt and his company, IT Processing LLC (ITP), to prepare reports on household viewing hours of devotional programming (HHVH Reports) for the years 2000 through 2003. The HHVH Reports "summarized the distant viewing of devotional programs on selected distantly retransmitted cable signals." Motion at 5; *see also id.*, Ex. 5 at 5 (Rebuttal Testimony of Alan G. Whitt).

[1] The SDC properly filed this Motion in the three captioned proceedings because applicable Protective Orders have been entered in each proceeding, and the SDC are seeking the right to use the requested material in the 2000-2003 proceeding. This Motion is not seeking "production" of the relevant documents because they have already been produced to the SDC in a subsequent proceeding. Rather, the SDC are seeking an Order allowing them to "use" this data in the 2000-2003 proceeding, as discussed *infra*.

The SDC selected Mr. Whitt and ITP for this assignment because Mr. Whitt had previously prepared the same type of analyses for the years 2000-2003 on behalf of MPAA. MPAA had provided to Mr. Whitt and ITP access to: (1) viewership data that MPAA had acquired from the Nielsen Company (Nielsen); and (2) television program data that MPAA had obtained from the Tribune Company, now known as Gracenote. *Id.*, Ex. 5 at 3-5.[2] Mr. Whitt and ITP merged these two files into a single file that he identified as the "Rawmerge" database. *Id.*, Ex. 5 at 4.

When the SDC engaged Mr. Whitt and ITP in 2006, Mr. Whitt prepared the SDC's devotional HHVH Reports from the relevant devotional program information contained in the Rawmerge database he had created for MPAA. *Id.*, Ex. 5 at 5 ("I prepared these [devotional HHVH] Reports selectively from the "Rawmerge" file contained in the MPAA databases."). As consideration, the SDC paid ITP $5,000 for the preparation of the devotional HHVH Reports, and paid MPAA $17,500 for the data contained in the HHVH Reports. Motion at 3 and Ex. 6; Reply, Ex. A (Declaration of Arnold Lutzker, Esq., ¶¶ 3-4 and Exs. 1 & 2 (Lutzker Decl). The Nielsen data contained in the HHVH Reports prepared by Mr. Whitt and ITP for the SDC were in *aggregate* form (*aggregate* HHVH data), *i.e.*, the data did not present program-by-program devotional viewership information (*granular* HHVH data). *See* MPAA Opposition at 7; *see also* Motion at Ex. 6 (email from Mr. Whitt distinguishing the "detailed data" he used to create the devotional HHVH Reports from the "summary" data in the devotional HHVH Reports for which the SDC contracted).[3]

B. The Protective Order in the 2000-2003 Proceeding

The Judges commenced the captioned 2000-2003 proceeding in 2011. *See* 76 Fed. Reg. 7590 (Feb. 10, 2011). In 2012, the Judges entered a protective order, which provided, in pertinent part:

> The parties are directed to respect the strong presumption in favor of the public interest in access to the records of this Proceeding and will use their best efforts to designate "Protected Materials" as sparingly as possible.
>
> …
>
> [Protected Materials include] … any commercial or financial information that the Producing Party has reasonably determined in good faith either (i) would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party, or inhibit the ability of the Producing Party to obtain such information in the future; or (ii) is subject to a protective

[2] The SDC do not contend that the Gracenote television program data is subject to any applicable Protective Order. Accordingly, the Judges do not separately address that data in this Order. However, the Gracenote data apparently is of no use to the SDC, except as merged with the Nielsen viewership data.

[3] The parties each rely on the murky facts surrounding the payments made by the SDC to support their positions, although each argument is a red herring. The SDC imply that they have already paid for the right to use the granular Nielsen data, but, as IPG correctly notes, if that were so, there would be no need for the SDC to bring this Motion seeking permission to use that granular data. IPG Opposition at 11. MPAA asserts that, because the motion record does not demonstrate that the SDC paid for the granular HHVH data they now seek to use, they should be required to negotiate a paid license with Nielsen to use it. MPAA Opposition at 4, 7. However, as explained *infra*, a requesting party's right to access and use a nonparty's purported confidential commercial information that is in the possession of the producing party, is subject to a balancing test. That balancing test does *not* include as a factor a condition that the requesting party pay the non-party for possession and use of its allegedly confidential information.

> order, nondisclosure or confidentiality agreement that is currently in effect to which the Producing Party is a bound signatory.
>
> . . .
>
> Protected Materials … shall be used by a Reviewing Party solely for the purpose of this Proceeding.
>
> . . .
>
> 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.

Protective Order at ¶¶ 2-4; 7 (Jul. 10, 2012) (*Protective Order*).

In the *Protective Order*, "Reviewing Party" includes "outside counsel of record in this Proceeding, including … any outside independent consultant or expert … who is assisting counsel or a party … to whom counsel determines it is necessary to disclose Protected Materials for the limited purpose of assisting in, or consulting with respect to, the preparation of this proceeding." *Id*. As the SDC note, their attorneys, as "outside counsel of record in this Proceeding," and counsel's outside expert (Professor Erkan Erdem) are each clearly a "Reviewing Party" within the meaning of the *Protective Order*. Reply at 7. As the SDC further note, they are not seeking to "disseminate" the granular HHVH data to any other person or entity. *Id*.

Accord to the plain language of the *Protective Order*, it would appear that the SDC are authorized to use the granular HHVH Data as potential foundational material for the SDC's HHVH Reports. However, the SDC did not acquire the granular HHVH data in discovery in the 2000-2003 proceeding, but rather acquired it in a subsequent distribution proceeding, as discussed *infra*. Thus, the SDC's right to use the HHVH granular data is not as unambiguous as it may have appeared.

C. The Hearing, Determination and Subsequent Vacating by the D.C. Circuit of the Devotional Distribution

After the initial hearing in the 2000-2003 proceeding, the Judges found that neither the SDC nor IPG had created a record sufficient to support their respective distribution proposals. *See Final Distribution Order*, *In re Distribution of 2000-2003 Cable Royalty Funds*, Dkt. No. 2008-2 CRB CD 2000-2003 (Phase II), 78 Fed. Reg. 64984, 65004 (Oct. 30, 2013) (*2013 Determination*). The Judges rejected IPG's proffered methodology as flawed, and rejected the SDC's proffered methodology – based upon the aforementioned HHVH Reports – as delinquent, because the SDC improperly delayed submitting that methodology until its rebuttal case. *Id*. at 65003-04.[4] Nevertheless, relying on other evidence in the record, the Judges ordered distribution of funds for the Devotional claimants category. *See id.* at 65004-05.

[4] Because the SDC's delinquent filing was sufficient grounds to reject its methodology, the Judges did not have occasion to reach the issue of whether its proffered HHVH Reports were supported by a sufficient evidentiary foundation.

The SDC appealed the portion of the Judges' *2013 Determination* relating to the Devotional claimant category, asserting, *inter alia*, that the Judges had erred in excluding their tardy methodology. The D.C. Circuit ruled that the Judges had properly excluded the SDC's late-filed evidence. The Court also ruled, however, that there was not sufficient creditable evidence to support the Judges' distribution percentages in the Devotional category. *See Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1120-21 (D.C. Cir. 2015). Accordingly, the D.C. Circuit vacated and remanded that portion of the *2013 Determination*. *Id.* at 1122.

D. The First Post-Remand Proceeding

In the first post-remand proceeding, the SDC relied on the expert valuation testimony of Mr. John Sanders. He based his estimate of relative value on *local* viewership of devotional programming. *See Order Reopening Record* at 3-4 (March 4, 2019). As a purported "reasonableness check", however, Mr. Sanders utilized the *aggregated* HHVH Reports of *distant* devotional viewing that had been prepared by Mr. Whitt – the basis for the methodology that the SDC had belatedly (and thus unsuccessfully) proffered on rebuttal in the prior (pre-remand) 2000-2003 proceeding. *See id.* at 4.

The Judges rejected Mr. Sanders's local viewership analysis as insufficient – standing alone – to provide probative evidence of distant viewing of devotional programming. *Id.* at 5-7. Importantly for the present Motion, the Judges also rejected Mr. Sanders's reliance on Mr. Whitt's *aggregated* HHVH Reports of distant viewing of devotional programming (his purported "reasonableness check"), because the SDC had not proffered evidence of any foundation – such as, potentially, the *granular* HHVH data – for Mr. Whitt's *aggregated* HHVH Reports. *Id.* at 6.[5] Because the Judges had also rejected IPG's proffered methodology, they had no choice but to re-open the record and to instruct the SDC and IPG, yet again, to submit new evidence. *Id.* at 13.

E. The Present Second Post-Remand Proceeding

In this re-opened proceeding, the SDC seek once more to rely on the *aggregated* HHVH Reports as evidence of relative viewership and thus the relative value of the devotional programming of the SDC as compared with the IPG devotional programming. Now though, the SDC seek to utilize the *granular* HHVH data that might serve as the foundational material for the *aggregated* HHVH Reports, in order to avoid the disqualifying deficiency that the Judges found in the prior (post-remand) 2000-2003 proceeding. Motion at 1; *see also* Reply at 7 ("[T]he only use to which the SDC currently intend to put the data is to authenticate the HHVH Reports that they purchased from Mr. Whitt and MPAA.").

As noted *supra*, an unusual wrinkle in this proceeding is that *the SDC already possess the granular HHVH data*, having obtained it in a subsequent consolidated proceeding regarding the distribution of cable devotional royalties for the years 2004 through 2009 and satellite devotional royalties for the years 1999 through 2009 (the Mega Case).[6] Motion at 2. However, in the Mega Case, MPAA did not voluntarily provide that granular HHVH data to the SDC. Rather, the SDC were required to file a motion to compel their production.

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[5] Mr. Sanders candidly acknowledged the problem of a lack of foundational evidence to support his reliance on the aggregated HHVH Reports. *Id.* at 6.

[6] *In re Distribution of 2004-2009 Cable Royalty Funds*, Docket No. Docket No. 2012-6 *and In re Distribution of 1999-2009 Satellite Royalty Funds*, Docket No. 2012-7.

In the Mega Case, the Judges rejected each of MPAA's arguments for refusing to provide discovery to the SDC regarding the granular Nielsen data. First, the Judges rejected MPAA's claim that the SDC's request for the data constituted "data poaching" (a form of free riding). The Judges ruled that payment for information sought in discovery is not typically required, even if the producing party acquired the information from a third-party, because all information has been created or acquired at a cost, whether incurred in-house or via payment to a third-party. *Joint Order on Discovery Motions* at 8-9 (2010-13). Second, the Judges rejected MPAA's claim that the confidentiality provision in its agreement with Nielsen preempted discovery of the granular HHVH data by the SDC, ruling that "as a matter of policy, courts will not enforce agreements that restrict discoverable information so that the proper exchange of information is compromised." *Id.* at 9. Third, the Judges rejected MPAA's assertion that the SDC's request for documents regarding the granular Nielsen data was improper because the SDC and MPAA were not adversaries and the SDC had not identified a "controversy" with MPAA in the former's Notice of Controversy. *Id.* Fourth, the Judges found irrelevant the fact that the two parties had not asserted claims in each other's program category and thus were not intra-category adversaries. *Id.*

Because the SDC obtained the granular HHVH data in the Mega Case, MPAA also relies now on the terms of the July 1, 2014 protective order entered in that case (*Mega Case Protective Order*). However, the *Mega Case Protective Order* does not contain any provisions inconsistent with the *Protective Order* in this proceeding. Both orders express the "strong presumption in favor of the public access to the records of the subject proceeding." *Mega Case Protective Order* at 1. And, as under the 2000-2003 *Protective Order*, the SDC and their expert each fall within the ambit of a "Receiving Party." *Mega Case Protective Order* at 2. In each protective order, the prohibition on "dissemination" across program categories prohibits dissemination *by* a Receiving Party, not dissemination *to* a Receiving Party. *Mega Case Protective Order* at 3.

II. Analysis and Ruling

A. Burden of Proof and Balancing of Interests

As the "Producing Party," pursuant to the *Protective Order* in this proceeding, MPAA "bear[s] the burden of justifying the limitation it seeks to impose." *Protective Order* at 12; *see also Mega Case Protective Order* at 4 (same). For the reasons set forth below, the Judges find that MPAA has not met its burden of limiting the SDC's use of the HHVH granular data in this proceeding.

One purpose of discovery in a distribution proceeding is to allow participants to obtain "underlying documents related to the written exhibits and testimony." 37 C.F.R. § 351.6. Discovery also allows for the development of an evidentiary hearing record – including documents produced in discovery or other relevant evidence identified through the discovery process. *See Protective Order* at 1 ("The Judges sign protective orders in … distribution proceedings … to facilitate the discovery process and conduct of the proceeding *and to ensure a complete record*.") (emphasis added). This fundamental purpose has particular application here, where the participants have been subjected to sequential "do-overs" (in the form of a remand and a reopened record) because of the lack of sufficient evidence on which the Judges could rely.

Accordingly, when clearly discoverable and potentially vital documents may contain proprietary or confidential business information, a protective order serves to *balance* the commercial need for restricted access against the Judges' (and hence the public's) interest in

facilitating discovery and creating a complete record. In the present case though, MPAA's objection to the SDC's use of the Nielsen data could interfere with the creation of a complete record. Such restriction would only be justified if there were sufficient counter-balancing interests, as considered below.

Beginning with the interest of the nonparty, Nielsen, whose proprietary information is at issue, the Judges can discern no overriding interest of Nielsen that would be served by prohibiting the *use* of the data it compiled by participants who have already received that data but who have not disseminated it to any third-parties. Nielsen has not claimed it would be commercially harmed by the SDC's use of the granular HHVH data;[7] rather, Nielsen wishes to be paid by the SDC for any further use of the data. *See* Declaration of Lucy Plovnick, Esq., Ex. B (April 26, 2019) (email from Mark Davis at Nielsen to Ms. Plovnick, stating that "SDC would have to license the data set in question in order to use for another purpose … in front of the CRB …."). Nielsen's desire to increase profits by requiring the SDC to pay for further use of this data, while understandable, does not implicate any confidentiality rights. That commercial desire – no matter its reasonableness – cannot outweigh the SDC's otherwise legitimate discovery needs and the Judges' need for a complete record.[8]

Turning to the opposing parties' claimed interests, MPAA does not assert any substantive basis of its own for seeking to restrict discovery, save for its claim that Nielsen might be unwilling *in futuro* to license information to MPAA if the SDC are permitted to use the Nielsen granular data the SDC already possess. However, the record on this Motion does not include any assertion by Nielsen of its present reluctance to sell information to MPAA if the SDC make use of Nielsen's granular HHVH data from 2000-2003. Thus, MPAA has not demonstrated, as required by the 2012 Protective Order, that it has "reasonably determined in good faith" that the SDC's intended use of the HHVH granular data would "inhibit [MPAA's] ability … to obtain such information in the future …." *Protective Order*, ¶ 3.

Indeed, the email from Mr. Davis of Nielsen indicates quite the opposite – Nielsen apparently would exploit the commercial value of its data by licensing that data to the SDC for an acceptable fee. Nielsen's expression of a normal commercial desire to receive consideration for the licensing of its data belies MPAA's speculation that Nielsen would forego subsequent opportunities to license its confidential information to MPAA at an acceptable price.

As for IPG, like MPAA, IPG does not assert any substantive basis of its own for seeking to restrict discovery of the Nielsen data, although it does request that if the Judges grant SDC's motion that use of that data apply equally to all parties. IPG Opposition at 12. [9] Nevertheless, IPG clearly has a strategic interest in restricting the SDC's use of the Nielsen data because doing so would prevent the SDC from obtaining potentially foundational evidence for the SDC's aggregate HHVH Reports. If the *granular* HHVH data ultimately were to provide sufficient evidentiary foundation to support the admission of the *aggregated* HHVH Reports, those reports

[7] Neither Nielsen nor MPAA has explained why viewership data that is now 16-19 years old remains confidential and proprietary. It is conceivable that data could remain confidential and proprietary after such a length of time, but, as noted *supra*, the burden of justifying a proposed limit on discovery is borne by MPAA, and MPAA has not met that burden in this proceeding.

[8] The Judges have previously explained why the license agreement between MPAA and Nielsen does not preclude the SDC's discovery and use of the granular HHVH data and why such use does not constitute impermissible "data poaching" by the SDC. *See* Mega Case, *Amended Joint Order on Discovery Motions* at 8-9

[9] IPG's request for relief, buried in its opposition to the SDC's motion, is not properly before the Judges.

could support a reduction in IPG's royalty award in the devotional category for the years 2000 through 2003. A self-serving interest in frustrating discovery is not only irrelevant, but also antithetical to the purposes of discovery. In any event, aside from that potential interest, IPG, to put it colloquially, has "no dog in the fight" between MPAA and the SDC.

B. MPAA's "Judicial Estoppel" Argument

MPAA also asserts that the SDC are "judicially estopped" from using the granular HHVH data as a potential foundation for the aggregate HHVH Reports. According to MPAA, the SDC obtained the right to discovery of the granular HHVH data in the Mega Case by successfully arguing that MPAA and the SDC were "opposing parties" in that proceeding. MPAA Opposition at 4-6 & n.6. However, the SDC were compelled to address this "opposing party" argument only as a response to MPAA's refusal to allow discovery based on the alleged lack of adverseness between the parties.

As an initial matter, the Judges note that, as a Reviewing Party and recipient of the granular HHVH data, the SDC (and its counsel and expert) are authorized under the *Protective Order* to use that material "for the purposes of this Proceeding." *Protective Order* ¶ 7. It would make no sense to estop the SDC from exercising this right merely because they had previously objected to MPAA's failed attempt to curtail that right.

Further, the rationales for invoking "judicial estoppel" are not applicable here. In its seminal ruling on judicial estoppel, the Supreme Court identified three factors that typically inform the decision whether to apply the doctrine in a particular case: (1) a party's later position must be "clearly ea *inconsistent* with its earlier position"; (2) the potentially estopped party had "*succeeded* in persuading a court to accept that party's earlier position, thus creating a perception that either the party's first or second position was *misleading*;" and (3) the potentially estopped party "would derive *an unfair advantage or impose an unfair detriment* on the opposing party if not for the estoppel …." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (emphasis added).

None of these factors – clear inconsistency, success-through-misleading, or unfair advantage/detriment – apply here. First, there is no clear inconsistency in the SDC's two positions. In the Mega Case, the SDC were responding to MPAA's assertion of adverseness as a prerequisite for the discovery of the granular HHVH data. The SDC did not maintain that the requested discovery was permitted only when such adverseness exists. Rather, it was MPAA that had cast adverseness as a necessary precondition for discovery. The SDC can – without any disqualifying inconsistency – assert on the present motion that discovery of the granular HHVH data is appropriate regardless of the adverseness of its position vis-à-vis MPAA, without rendering that assertion inconsistent.

Second, the Judges were not "misled" by the SDC in the Mega Case and are not being misled by the SDC now. Again, the SDC were simply responding to MPAA's argument on adverseness as a precondition for this discovery, not affirmatively acknowledging that adverseness was a precondition. (In essence, the SDC were arguing in the alternative, assuming *arguendo* the validity of MPAA's "adverseness" requirement.). Indeed, it would be fundamentally unfair if a party opposing discovery could sandbag the requesting party by interposing a purportedly necessary condition on discovery, thereby requiring the requesting party to oppose that position, and, after the tribunal has rejected that condition, then demand an

estoppel because its own argument had been successfully opposed by the requesting party. That tactic appears to the Judges as "too clever by half."

Third, the SDC would not gain an unfair advantage – nor would MPAA suffer an unfair detriment – if the SDC have the right to use the granular HHVH data. In fact, MPAA would suffer no detriment[10] and the SDC's "advantage" is simply that they will be obtaining the right to use in discovery that which they already possess.

Further, the Judges note that the principle of judicial estoppel is both equitable and discretionary. *See New Hampshire v. Maine*, 532 U.S. at 750 ("Because the rule is intended to prevent improper use of judicial machinery … judicial estoppel is an equitable defense invoked by a court at its discretion."). Given the balancing of interests, discussed *supra*, and giving particular consideration to the Judges' need for a sufficient factual record, the equities in this case certainly do not support the discretionary application of the judicial estoppel sought by MPAA.

C. Other Potential Uses of the Granular HHVH Data by the SDC

In their Reply, the SDC unilaterally attempt to "reserve the right to use the [granular HHVH] data for an alternate methodology if necessary, even as it acknowledges that "the only use to which the SDC currently intends to put the data is to authenticate the HHVH [R]eports that they purchased from Mr. Whitt and MPAA." Reply at 5.

The Judges reject the SDC's attempt to reserve such a right. This Order does not provide the SDC with the foregoing unilaterally reserved right. The Judges find nothing in the record to support the SDC's further and open-ended use of the granular HHVH data. As noted *supra*, the process of applying the provisions of the Protective Orders involves a balancing of relevant interests. SDC's vague reservation of future uses does not provide the Judges with a record sufficient to engage in such a balancing test. If the SDC intend to utilize the granular HHVH data for any other purpose, they must abide by the letter and spirit of the applicable Protective Orders or seek an exception in a subsequent motion.

D. Delay in the SDC's Use of the Granular HHVH Data

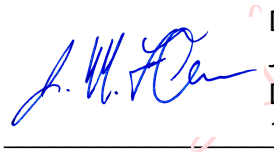
The Judges note that paragraph 15 of the *Protective Order* provides that, if the Judges permit material to be re-designated, "such materials nevertheless shall be subject to the protection afforded by the Protective Order until three (3) business days after the receipt of any order by the Judges on the matter." *Id*. The Judges consider their ruling allowing the SDC to use the HHVH granular data as a potential foundation for the aggregate HHVH Reports to be in the nature of a "re-designation," and incorporate that proviso into the present Order. Thus, the SDC shall not use the granular HHVH data as permitted by this Order until three business days after the receipt of this Order by MPAA. That delay will allow MPAA sufficient time to notify Nielsen (and Gracenote), to determine whether to initiate an action in a court of competent jurisdiction to restrain or enjoin the SDC's use of the granular HHVH data. If the SDC are not informed by MPAA or any entity of the request for such a judicial order within this three-business-day period, the SDC may use the granular HHVH data now in their possession in the manner authorized by this Order.

[10] As noted *supra*, IPG could suffer a detriment, but there is nothing unfair about a party potentially being confronted with evidence potentially unfavorable to its position.

III. Conclusion

For the foregoing reasons, the SDC's Motion is hereby **GRANTED**.

SO ORDERED.



Jesse M. Feder
Chief Copyright Royalty Judge

DATED: July 9, 2019.