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Copyright Royalty Board

Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

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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)

**SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR SANCTIONS AGAINST  
INDEPENDENT PRODUCERS GROUP AND ITS COUNSEL**

The Settling Devotional Claimants ("SDC") bring this Motion for Sanctions against Independent Producers Group ("IPG") and its counsel for their disregard of the Judges' procedural rules.

**I. Factual Basis for Sanctions**

IPG has a long history of disregard of the procedural rules in these proceedings. The events precipitating this motion are merely the most recent, and relate to the failure of both IPG and its counsel to properly conduct themselves before the Judges.<sup>1</sup>

On August 22, 2016, IPG, through its counsel Brian Boydston, filed a Written Direct Statement that included an Expert Report of Charles D. Cowan, Ph.D. ("Cowan Report"). The

<sup>1</sup> As the Judges are aware, IPG was recently admonished for failure to comply with service rules *in this very proceeding*. See *Order Admonishing IPG*, Jan. 3, 2017. This was the *second time* IPG has been admonished, the first being in 2006 by the Copyright Office for breach of procedural rules associated with copyright royalty proceedings. *Id.* at 1-2 (As summarized by the Judges, the Copyright Office admonished IPG and warned "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.") (Emphasis in original).

Cowan Report proposed distribution of royalties in the above-captioned proceedings, including percentage allocations of satellite royalty funds to allocate to IPG and to the SDC for 1999 through 2009. Cowan Report at 10, Table 2. IPG's counsel later admitted that "IPG's counsel did not review or consider Dr. Cowan's report prior to its submission." *IPG's Opposition to the MPAA's Motion to Strike*, Sept. 12, 2016, at 3, n.4. Had IPG and its counsel followed the Judges' procedures and conducted themselves properly, a four-month battle regarding the propriety of IPG's conduct would have easily been avoided.

After reviewing the distribution numbers proposed by IPG in the Cowan Report, the SDC filed its *Notice of Consent to 1999-2009 Satellite Shares Proposed by IPG, and Motion for Entry of Distribution Order* on Aug. 26, 2016 ("Notice of Consent"). In that motion, the SDC consented to IPG's proposed satellite distributions. Had IPG and its counsel followed the Judges' procedures and conducted themselves properly, this would have allowed the Judges to enter a distribution order resolving the satellite distributions between IPG and the SDC.

Instead, IPG ignored the requirements of the Judges' procedural rules. Without providing any explanation or context to the Judges or the participants, IPG filed an Amended Written Direct Statement on August 31, 2016, which contained an Amended Expert Report of Charles D. Cowan, Ph.D ("Amended Cowan Report").

The Amended Cowan Report did not explain why or where any changes had occurred. The SDC, however, identified two important substantive changes. First, the Amended Cowan Report proposed a different distribution of royalties between IPG and the SDC, as well as between IPG and MPAA-represented Program Suppliers. The differences were almost universally in favor of IPG in the Devotional category, especially with regard to the satellite results. Amended Cowan Report at 10, Table 2. Second, the Amended Cowan Report used new

formulas and different variables to calculate those proposed distributions. Declaration of Erkan Erdem, Ph.D., Sept. 9, 2016.

In two subsequent filings, IPG deceptively contended that (1) “the methodology propounded therein was not modified,” *IPG’s Opposition to the SDC’s Motion for Entry of Distribution Order*, Sept. 2, 2016, at 1, and (2) that the change made was to correct a typo where Dr. Cowan “erringly omitted a parentheses,” *IPG’s Opposition to the MPAA’s Motion to Strike*, Sept. 12, 2016, at 2. Even IPG’s expert, Dr. Cowan, guilefully claimed that the “regression method I used in the later calculations was exactly the same. The variables I used are exactly the same.” Declaration of Dr. Charles Cowan, Sept. 9, 2016, at ¶ 5 (filed as Exhibit A to IPG’s Sept. 12, 2016 Opposition). Four days later, however, IPG admitted that there was a “corrected formula” which “changes the *scale* of the same variable expressed in the originally expressed formula.” *IPG’s Opposition to the SDC’s Motion to Strike*, Sept. 16, 2016, at 8 (emphasis in original).

IPG subsequently failed to produce data during discovery to support the proposed satellite distribution numbers in either the original Cowan Report or the Amended Cowan Report. Declaration of Erkan Erdem, Ph.D., Sept. 22, 2016, at ¶ 2 (“the satellite results of these calculations currently do not seem to match the results in either Dr. Cowan’s original or amended statements”). In response, IPG provided the SDC with an affidavit from Dr. Cowan indicating that the Amended Cowan Report, which purported to correct an error in the satellite distribution numbers from the original Cowan Report, instead included another purported error in those numbers. Dr. Cowan stated that “I erroneously included two tables in the body of the [Amended Cowan Report] that were incorrect ... these two tables were taken from an earlier analysis of an incomplete data file, and needed to be replaced.” Affidavit of Dr. Charles Cowan, Sept. 23,

2016, at ¶ 2. This meant that it took a full month and two sets of “mistakes” after its Written Direct Statement was due for IPG to produce – but not file with the Judges – a set of proposed satellite distribution numbers for the SDC to review (a month that included extensive briefing and discovery on this very topic).

It was not until after the Judges granted the SDC’s and MPAA’s motions to strike the Amended Cowan Report that IPG actually filed its third set of numbers for a proposed distribution of satellite royalties along with a *Motion to Amend Direct Statement* on October 17, 2016. This included yet another Amended Expert Report of Charles D. Cowan, Ph.D. (“Second Amended Cowan Report”), which included numbers for a satellite distribution that matched those in Dr. Cowan’s Sept. 23 Affidavit. Second Amended Cowan Report at 10, Table 2. Along with this third iteration of his report, Dr. Cowan submitted a declaration attempting to explain the changes made. *See* Declaration of Dr. Charles Cowan, Oct. 17, 2016. Dr. Cowan’s declaration suggests that the errors were known to IPG’s counsel “immediately” upon reviewing the original Cowan Report. *See* Declaration of Dr. Charles Cowan, Oct. 17, 2016, at ¶ 4 (“After preparation of the August 22nd report, IPG’s counsel immediately inquired about the produced results ... during the course of the next week I discovered errors.”).<sup>2</sup> If IPG and its counsel had immediately and properly filed a motion to amend with such a declaration when they first identified the purported errors in the original Cowan Report, the Judges would have been able to rule on whether the changes were appropriate or sufficiently explained almost two months earlier.

In attempting to understand the three iterations of Dr. Cowan’s report, in addition to retaining the expert services of Dr. Erkan Erdem, the SDC were forced to file a Motion to

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<sup>2</sup> Despite this assertion, IPG had waited nine days to correct the record, which was five days after the SDC had filed their *Notice of Consent*.

Compel, seeking “communications that are expected to explain why IPG’s expert, Dr. Cowan, made multiple rounds of material changes to his calculations of the proposed satellite royalty shares.” *SDC’s Motion to Compel IPG to Produce Documents*, Oct. 17, 2016, at 1. The Judges granted this motion in part and ordered IPG to produce

any and all portions of documents that fall within the SDC’s follow-up requests that contain or describe Dr. Cowan’s interim data and calculations on which he relied to correct his original report and to create his Amended Report. Further, the Judges order IPG to produce from within those documents any and all portions that explain why Dr. Cowan made corrections to his original report and incorporated those corrections into his Amended Report.

*Order Granting in Part and Denying in Part SDC’s Motion to Compel IPG to Produce Documents*, Jan. 3, 2017, at 6.

Quite surprisingly, IPG has flatly denied that any responsive document of any kind exists – including not only data files, but also any type of email or communication addressing or describing the errors or how Dr. Cowan would correct them. *See* Declaration of Brian D. Boydston Pursuant to Order of January 3, 2017, on Jan. 17, 2017; Declaration of Raul Galaz Pursuant to Order of January 3, 2017, on Jan. 12, 2017; Affidavit of Charles D. Cowan, Ph.D., Jan. 13, 2017. Both Mr. Boydston and Raul Galaz, using identical language, claimed that “Dr. Cowan never communicated to IPG, or me, the interim data and calculations on which he relied to correct his original report and to create his amended report ... [and] he never provided explanations.” Boydston Declaration, Jan. 17, 2017 at ¶ 3; Galaz Declaration, Jan. 12, 2017, at ¶ 3. For his part, Dr. Cowan claimed that “[i]n the week between the first and second reports, we worked assiduously to correct the data sets we were given. Because intermediate data sets were considered to be incorrect, we overwrote these data sets as they were not relevant to our findings, and those overwritten interim data sets are not retrievable.” Cowan Affidavit, Jan. 13, 2017, at 1.

These statements raise a serious concern about the conduct of IPG and its counsel, separate from the question of whether it is credible that no communication or record exists, either

among Dr. Cowan and his staff or among the various IPG representatives involved in preparing the various reports, to explain in any way how or why these changes were made. It appears that IPG and its expert believed it appropriate to delete “incorrect” data sets, while in the midst of preparing an amended report intended to correct errors in such data sets. It also appears that neither IPG nor its counsel ever advised Dr. Cowan by email or other written communication to retain all files used in revising the submissions to the Judges. Such a “litigation hold” should have been deemed necessary at least by counsel under the circumstances. Had IPG or its counsel properly instructed its expert to preserve documentation in order to explain those errors in the first instance – as required by the Judges’ regulations – this loss of data almost certainly would have been avoided.

As the Judges have already concluded,

Counsel’s failure to review the report caused consternation on the part of the other parties, resulted in the aforementioned barrage of filings, occupied the limited resources of the Judges and their staff and delayed the current proceeding and other pending business with which both Judges and staff are fully occupied.

*Order on IPG Motion for Leave to File Amended Written Direct Statement*, Jan. 10, 2017 (“Jan. 10, 2017 Order”), at 4.

There was also harm to other parties, as “withheld or late produced evidence or expert opinion leads to inequities and inefficiencies in case resolution.” Jan. 10, 2017 Order, at 4. The Judges have already found this conduct by IPG and its counsel amounted to a violation of 37 C.F.R. § 351.4(c). Ultimately, the Judges invited the SDC and MPAA to file motions for sanctions, stating that:

the Judges hereby permit the SDC and MPAA to file, on or before March 10, 2017, 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. IPG may respond to the sanctions motion(s), if any there be, no later than 30 days after filing of the motion(s).

Jan. 10, 2017 Order, at 7.

## II. Inherent or Implied Statutory Authority

The starting point to discern the powers of the Copyright Royalty Board is its grant of statutory authority. In this regard, the Judges have recognized that “the Copyright Act does not grant express authority to debar or sanction participants. The Judges’ rules are equally silent on the matter.” *Ruling and Order Regarding Claims*, Docket No. 2008-1 CRB CD 98-99 (Phase II), June 18, 2014, at 6. Similarly, the Administrative Procedure Act also does not “authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.” 5 U.S.C. § 500(d)(2). However, the lack of an explicit grant of authority does not end the inquiry, because neither statute serves to “limit” the discipline of agents or individuals appearing before the agency.

The D.C. Circuit has held that this language in the Administrative Procedure Act does “not limit [the] inherent power of agencies to discipline professionals who appear or practice before them.” *Polydoroff v. I.C.C.*, 773 F.2d 372, 374 (D.C. Cir. 1985) (citing *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 n. 13 (2d Cir.1979)). Thus, “[w]hether agency or court, any institution engaging in the adjudicative process must have the power to police the professionals who practice before it.” *Polydoroff*, 773 F.2d at 375. This grant of authority flows from the general authority any agency has to regulate proceedings before it in order to discharge its duties. *Stahlman v. F.C.C.*, 126 F.2d 124, 128 (D.C. Cir. 1942) (“The Commission’s right to . . . to make rules and regulations necessary to the carrying out of the provisions of the Act, implies the grant of all means necessary or appropriate to the discharge of the powers expressly granted.”). Similarly, in the case of procedural violations by IPG, Congress has provided by statute that the “Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter.” 17 U.S.C. § 801(c). With respect to a designated agent like IPG,

the Copyright Act specifically provides that it shall be subject to “requirements that the Copyright Royalty Judges shall prescribe by regulation” when filing joint claims for the distribution of satellite royalties. 17 U.S.C. § 119(5)(A). Ultimately, as an adjudicative agency, the Copyright Royalty Board has inherent authority to discipline those who participate in its proceedings as part of the “the power to protect the integrity of the agency’s administrative processes.” *Checkosky v. S.E.C.*, 23 F.3d 452, 455 (D.C. Cir. 1994).

**A. Sanctions are Appropriate Against Attorneys Appearing Before an Agency**

The Judges have authority to discipline both IPG and IPG’s attorney, Brian Boydston, for misconduct that undermines the procedures for practice before them. The Judges’ authority to regulate their adjudicative proceedings includes the power to regulate the practice of attorneys who appear before them. *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 117, 122 (1926) (“Our view, on the contrary, is that so necessary is the power and so usual is it that the general words by which the board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys.”). This power allows sanctions for violations of procedural rules in order to “prevent the disruption of proceedings.” *Checkosky*, 23 F.3d at 456. The D.C. Circuit explained that the key limitation on such attorney discipline is that the Administrative Procedure Act “merely prohibits agencies from erecting their own supplemental admission requirements,” but concluded that there “can be little doubt that the Commission, like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it.” *Polydoroff*, 773 F.2d at 374.

This authority is also found in 37 C.F.R. § 350.4(e)(1), which requires that the “signature of an attorney constitutes certification” that “allegations and other factual contentions have evidentiary support.” Thus, an attorney who fails at this duty may be subjected to discipline by



the Judges. In this case, the Judges have already found that IPG's counsel "disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification." Jan. 10, 2017 Order, at 7.<sup>3</sup> The breach of professional conduct by IPG and its counsel is thus clear and would justify a sanction to vindicate the Judges' authority and the integrity of their proceedings.

A permissible sanction against counsel – lighter than more severe sanctions of suspension or disbarment – is ordering payment of attorneys' fees required as a result of counsel's conduct. While an agency generally may not award attorney's fees as a substantive remedy unless authorized by statute, its authority to do so is broader when addressing misconduct in the adjudicative process. This is because "fee shifting is akin to a fine for civil contempt: both serve the purpose of vindicating the tribunal's authority over a recalcitrant litigant." *HTH Corp. v. N.L.R.B.*, 823 F.3d 668, 680 (D.C. Cir. 2016). The *HTH Corp.* court concluded that fee-shifting was impermissible for violations of the substantive labor regulations because the statute at issue did not authorize punitive remedies for such conduct, but recognized that fees might be shifted as a remedy for misconduct in the adjudicative process. As a result, a fee-shifting award would be justified in a case like this, where punishment of IPG and its counsel is required to vindicate the Judges' authority and deter similar conduct in the future by other litigants. *See Polydoroff*, 773 F.2d at 375 ("When the lawyer deviates from professional standards as blatantly as in the case sub judice, the penalty must be consonant with the transgression against the integrity of the institution.").

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<sup>3</sup> *See also Order Admonishing IPG*, Jan. 3, 2017 (Commenting on IPG's counsel's assertion that he emailed IPG's Motion to five attorneys in two different firms, none of whom acknowledged receiving it, the Judges noted: "The complete failure of delivery seems anomalous and suggests an unlikely cyber-failure.")

In a similar case where the attorney exhibited a “reckless disregard of the duty owed to the court” by ignoring the fact that the claims he had filed were “medically implausible,” the court held that a sanction requiring the attorney to pay fees for his “unreasonable multiplication of the proceedings.” *In re Silica Prod. Liab. Litig.*, 398 F. Supp. 2d 563, 674-76 (S.D. Tex. 2005). Likewise, here, Mr. Boydston’s failure even to read expert testimony before submitting it to the Judges has vastly and unreasonably multiplied the proceedings, to the prejudice of the Judges and the participants.

**B. Disqualification is an Appropriate Sanction for Agents Appearing Before an Agency, such as IPG**

The Judges’ authority to discipline a participant in adjudicative proceedings is not limited to lawyers. Rather, the 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. In *Touche Ross & Co. v. S.E.C.*, the Second Circuit addressed a ruling by the S.E.C. that an accounting firm had failed to follow generally accepted accounting standards and thus could be suspended from appearing before it in future proceedings. 609 F.2d 570, 572-73 (2d Cir. 1979). The court concluded that this was a permissible exercise of the S.E.C.’s power to “preserve the integrity of its own procedures, by assuring the fitness of those professionals who represent others before the Commission.” *Touche Ross*, 609 F.2d at 579. The D.C. Circuit has agreed with the Second Circuit’s “well-settled” judicial interpretation. *Polydoroff*, 773 F.2d at 374.

This authority gives an agency to “the power to police the conduct of those who practice before them or participate in their programs.” *Davy v. S.E.C.*, 792 F.2d 1418, 1421 (9th Cir. 1986). In this context, IPG is a professional agent that participates in the Copyright Royalty Board’s procedure for the distribution of copyright royalties. IPG is not a copyright owner.

Rather, the Judges have previously ruled that they “view IPG as a ‘designated agent’” for the purpose of collecting copyright royalties on behalf of copyright owners. *Ruling and Order Regarding Claims*, Docket No. 2008-1 CRB CD 98-99 (Phase II), June 18, 2014, at 12; *see also Memorandum Opinion and Ruling on Validity and Categorization of Claims*, Mar. 13, 2015, at 6 (“IPG is a commercial enterprise performing a service for rights holders”). Thus, a sanction against IPG is merely a sanction against a professional designated agent that the Judges have allowed to participate in these proceedings on behalf of certain underlying copyright owners. If a sanction of disqualification were applied to IPG, those copyright owners could retain their claims for royalties and the ability to seek a new agent or counsel to represent their interests in these proceedings without IPG’s involvement – no different than in a case in which counsel is suspended or disbarred.

Although an agency cannot fashion punitive or deterrent remedies for substantive violations of its regulations, it can do so for violations of a procedural rule. In analyzing the difference in statutory authority for procedural versus substantive violations, 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.” *Checkosky*, 23 F.3d at 456. Accordingly, because the SDC’s request for sanctions is based on IPG’s repeated violations of procedural requirements, this general limitation on agency authority does not protect IPG from potential disqualification to represent copyright owners before the Judges.

**C. An Adverse Inference is a Permissible Sanction**

The SDC join MPAA’s request to strike IPG’s amended written direct statement as a sanction for its misconduct. At a minimum, if the Judges do not strike the amended direct

statement, they should at least impose an adverse inference that IPG's Second Amended Cowan Report is not properly supported.

The Judges may fashion a sanction by drawing an adverse inference from IPG's conduct. IPG's failure to explain or justify its changes in methodology and calculations could, for example, give rise to an inference that the proposed satellite royalty distributions in the Second Amended Cowan Report lack a reasonable basis. The "adverse inference rule" provides equitable justification for this finding: "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). Thus, a party's "unexplained failure to support and substantiate its economic justification ... renders the purported reasons dubious and also warrants drawing an inference that if such [records] had been produced, they could not have been favorable." *Id.* In this case, 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.

Under similar circumstances, a federal court allowed a negative inference sanction against a party that destroyed relevant records related to the agency's proceedings where the existence of proceedings "should have evinced in Defendants an even greater awareness of the need for preserving any records which might be necessary to the investigation." *Shiple v. Dugan*, 874 F. Supp. 933, 940 (S.D. Ind. 1995). Much like in this case, "ignorance of the specific dictates of a federal regulation is no excuse." *Id.* Methodologies in these proceedings, in which IPG and its counsel have participated for many years, are analytical and highly-data

specific. The regulations require attorneys to reasonably review the documents they submit in order to fulfill their professional duties. 37 C.F.R. 350.4(e)(1). Thus, IPG should have known that such basic diligence and general professionalism would be expected of them.

## II. Procedural Requirements for Fairness

In the past, the Judges have refrained from the sanction of debarment of IPG from representing claimants before them, citing *Gonzales v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964). *Gonzales* held that the authority to debar an agent or representative “is inherent and necessarily incidental to the effective administration of the statutory scheme.” *Gonzalez*, 334 F.2d at 577. Nevertheless, the Judges have indicated that “it would be inappropriate to exercise that authority in the absence of regulations governing how, and under what circumstances they may do so.” *Memorandum Opinion and Ruling on Validity and Categorization of Claims*, Mar. 13, 2015, at 8. However, *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.

First, the *Gonzalez* decision involved a government corporation which debarred a contractor because it determined the contractor had engaged in “misuse of official inspection certificates.” *Gonzalez*, 334 F.2d at 577. The agency decision to debar was made in order to “deal with irresponsible bidders and contractors,” not to vindicate its procedural rules during an adjudicative proceeding. *Id.* Thus, when debarment was deployed as a substantive remedy, the bar was higher for the agency to ensure “uniform minimum fairness as to all.” *Id.*

Second, when addressing the fairness requirements necessary before debarment could be imposed, the *Gonzalez* court was reviewing an agency action where “At no time was there any detailed specification of charges . . . No hearing was held, no evidence recorded, no findings were made. At no point were appellants in a position to cross-examine officials.” *Id.* at 579. Given the factual circumstances and the fact that the ruling was substantive, not procedural, it is no surprise the court concluded that the punishment was issued with insufficient due process.

Yet the court did not conclude that all of those procedures and formal rules describing them prior to the misconduct were necessary to debar. Rather, 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 580 (emphasis added). The Supreme Court has held that administrative actions must simply have the “traditional procedural safeguards of confrontation and cross-examination” required by due process. *Greene v. McElroy*, 360 U.S. 474, 493 (1959). Similarly, the Administrative Procedure Act provides that a sanction may be imposed only after providing the opportunity for an evidentiary hearing. 5 U.S.C. § 556(d). The Judges can satisfy those requirements with a hearing that gives IPG and its counsel the opportunity to present its own evidence and confront any evidence and arguments against it. It does not require strict regulations that specify exactly how the Judges must conduct such a proceeding, as long as there is notice and an opportunity to be heard. *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 894-95 (1961) (holding that the “nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”).

In light of all the facts set forth above and the two admonishments previously imposed on IPG (*see n.1, supra*), the Judges can, therefore, sanction IPG despite the lack of previously issued

regulations defining the type of conduct IPG engaged in and setting forth procedures for attendant sanctions. The proposed sanction is not for a substantive violation of the Copyright Royalty Board's statutory scheme in which regulated entities must have clear notice of what the law requires of them. It is instead explicitly for violations of "procedural" rules. In the procedural context, it is not expected that agencies should have established regulations for every conceivable procedural transgression. In this case, IPG's right to due process is already well-protected by notice of potential sanctions, its extensive opportunity for multiple rounds of briefing and submission of documentary evidence on this subject, its opportunity to respond to this motion, and all of the safeguards of an evidentiary hearing. This case involves a high governmental interest in vindicating the integrity of the Judges' proceedings. The Judges should move forward with sanctions.

### **Conclusion**

For the foregoing reasons, the Motion for Sanctions should be granted and the following sanctions issued:

1. An award against both IPG and its counsel for reasonable attorneys' fees and expert witness fees incurred by the SDC in responding to IPG's multiple rounds of revisions to its Written Direct Statement (the SDC will provide evidence of these fees as ordered by the Judges);
2. Disqualification of IPG from representing copyright owners as an agent before the Copyright Royalty Board;
3. Dismissal of IPG's Amended Direct Statement or, in the alternative, an inference that the proposed shares for distribution of satellite royalties in the Devotional category found in the Second Amended Cowan Report lack a reasonable basis; and

4. Such further relief as the Judges deem appropriate.

Date: March 10, 2017

Respectfully submitted,

  
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#### CERTIFICATE OF SERVICE

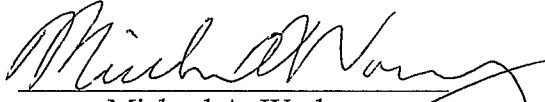
I, Michael A. Warley, hereby certify that a copy of the foregoing was sent electronically and by overnight mail on March 10, 2017, to the following:

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