

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
Distribution of 2004, 2005, 2006,)
2007, 2008 and 2009 Cable)
Royalty Funds)

Docket No. 2012-6 CRB CD 2004-
2009 (Phase II)

Received

APR 10 2017

In the Matter of)
)
Distribution of 1999-2009 Satellite)
Royalty Funds)

Cour. of Copyright Board

Docket No. 2012-7 CRB SD 1999-
2009 (Phase II)

DECLARATION OF BRIAN D. BOYDSTON

I am an attorney licensed to practice law in the State of California and a partner in the law firm of Pick & Boydston, LLP, counsel of record for Appellant Worldwide Subsidy Group, LLC dba Independent Producers Group (“IPG”). The following facts are within my personal knowledge, and if called upon I could and would testify competently thereto.

1. On August 2, 2016, subject to IPG’s objection, the Judges granted a motion jointly brought by the Motion Picture Association of America (“MPAA”) and the Settling Devotional Claimants (“SDC”) to continue the filing deadline for the remanded proceedings from August 8, 2016 until August 22, 2016. IPG objected, among other reasons, because IPG had incurred premium expenses in

order to have its expert witness, Dr. Charles Cowan, complete his expert report by the original date required.

2. Nevertheless, after communicating the contents of such continuance to Dr. Cowan, Dr. Cowan advised IPG that he believed that he now had sufficient data in order to construct an analysis that, for the first time in any distribution proceeding, would attempt to implement the Shapley Valuation analysis expressly sought by the Judges. With the ambition of providing the Judges with precisely the type of analysis that other experts had argued was impossible to construct for these proceedings, IPG agreed to have Dr. Cowan pursue such endeavor.

3. Throughout the dates for which a filing continuance had been provided, I received repeated assurances from Dr. Cowan that the results of the Shapley Valuation would soon be forthcoming. Notwithstanding, I received Dr. Cowan's report and associated figures approximately one hour prior to the deadline by which I needed to provide IPG's Written Direct Statement ("WDS") to the Washington, D.C. attorney service that would file IPG's WDS on August 22, 2016.

4. Upon receipt of Dr. Cowan's report on August 22, 2016, I immediately set read through Dr. Cowan's report, but only for typographical or obvious grammatical errors. At that time I had neither the time, nor the expertise to address either the logic of Dr. Cowan's methodology, nor the accuracy of his

calculations, and could not have done so without the assistance of another expert. Such was specifically the purpose and purview of Dr. Cowan's engagement as an expert witness. In addition to not having the expertise necessary to fully understand, check or question Dr. Cowan's stated methodology or calculations, I did not have the computer software utilized by Dr. Cowan, which, I understand, is a variety typically only utilized by professionals of Dr. Cowan's expertise, and not a software generally utilized in the legal profession, and was certainly not a software with which I was familiar, then or now.

5. As a result, when the WDS was filed, I did not have a first hand understanding of Dr. Cowan's calculations in his report. Rather, I was relying upon Dr. Cowan's expertise to make such calculations, and make them correctly. Based upon my discussions with Dr. Cowan regarding his report, it was my belief that Dr. Cowan had conducted an independent analysis of the IPG and SDC devotional programming, as well as data regarding the re-broadcast and re-transmission of such programming, and come to specific conclusions as to the relative shares of royalties that IPG and the SDC were entitled. As a result, when Dr. Cowan provided me with his report, I included it in the WDS.

6. I believed that my reliance on Dr. Cowan to accurately produce his report in this matter was reasonable based upon Dr. Cowan's credentials and experience, and by the fact that Dr. Cowan had previously provided other reports

and opinions to IPG which I understood to be accurate, and whose accuracy had not been challenged by other parties.

7. After the IPG WDS was filed, Raul Galaz of IPG told me that he believed that certain program supplier calculations appeared disproportionately beneficial to IPG. I then promptly inquired with Dr. Cowan regarding such program supplier figures, to which Dr. Cowan indicated that he would review such matter and get back to me.

8. Following more than a week of review, Dr. Cowan reported that he discovered errors in all his ultimate calculations, some slight, but insisted that there was no change in his methodology. As a result, IPG solicited and received a revised report that appeared to contain minor typographical revisions from the initial report, but substantially different numeric results, and I promptly filed the revised report as part of an Amended Written Direct Statement ("AWDS") on August 31, 2016.

9. As of August 31, 2016, no discovery had been propounded in these proceedings. Nonetheless, when both the SDC and MPAA propounded discovery, with minor revisions to their document requests, both parties included requests for documents associated with the content of both IPG's WDS and AWDS. In

response, IPG timely produced all data in its possession and the possession of Dr. Cowan relating to both filings.

10. Following IPG's production, the SDC inquired why certain of the devotional programming calculations appearing in Dr. Cowan's amended expert report did not comport with the electronic data produced. IPG immediately submitted such query to Dr. Cowan, who determined that two of the tables included in his amended report had apparently been taken from some interim version of his report, in error. Such fact was immediately communicated to the SDC.

11. At no time did Dr. Cowan tell me that a methodological change was the basis for his revised calculations submitted as part of IPG's AWDS, and specifically confirmed the contrary.

12. My understanding of past orders by the Copyright Royalty Judges ("the Judges") was that the Judges disapproved of anyone, parties or counsel included, exerting undue influence over the calculations and analysis performed by expert witnesses in these proceedings. As a result, I did not see it as my place as counsel to IPG to meddle in Dr. Cowan's calculations and analysis. I also did not, and do not believe that I have the expertise to do so.

13. In IPG's *Motion for Leave to File Amended Written Direct Statement*, IPG attached the discovery requests of both the MPAA and SDC, and directed the Judges to those provisions relating to IPG's AWDS. See **Exhibits C and D** to *IPG Motion for Leave to File Amended Written Direct Statement*). As reflected therein, the opening paragraph of the MPAA requests expressly refers to IPG's AWDS, and the inclusion of a mere seven (7) additional requests uniquely directed at the AWDS, adding to the seventy-six (76) requests already drafted. Those additional requests reflect that four simply address, on a table-by-table basis, the four revised percentage allocation tables appearing in Dr. Cowan's amended report; two address documents reflecting the differences between the initial and revised report; with a final request generally requesting all documents underlying the amended report.

14. The SDC discovery requests simply added the phrase "and the Amended Cowan Report" where there was any reference to "the Cowan Report".

15. IPG only suspected possible error with *certain* program supplier figures and, while uncharacteristically low, did not consider any devotional figures to be outside the range of plausibility under the methodology that IPG was only first witnessing. Only after seeing the recalculations that appear in the AWDS did IPG become aware that the devotional figures were also subject to a miscalculation.

16. At the time IPG filed its AWDS, discovery in the remand proceeding had not even commenced. The MPAA and SDC only had in its possession IPG's WDS, which attached Dr. Cowan's initial report. The text of Dr. Cowan's 13-page, double-spaced, amended report differed from his initial report in only a handful of ways, predominately the substitution of table percentages and the correction of typographical errors (e.g., reference to "IDC" instead of "IPG"). The status of the proceedings is significant because the MPAA and SDC did not yet have in their possession, nor were yet entitled to receive, the underlying data that stood as the basis for the revisions that resulted in Dr. Cowan's amended report.

17. Notwithstanding, as the MPAA discovery reveals, the MPAA expressly sought all documents reflecting differences between IPG's WDS and AWDS and, by incorporation, the differences between Dr. Cowan's initial and amended reports. See **Exhibit D** to *IPG Motion for Leave to File Amended Written Direct Statement* (MPAA discovery requests), Request No. 83. IPG did not object to the request, and produced all responsive documents, including all underlying data relating thereto, on September 12, 2016. Moreover, because responsive documents were produced to the MPAA in this proceeding, IPG also produced such documents to the SDC. Regardless, because the MPAA and SDC complained in their respective motions to strike IPG's AWDS that IPG had failed to detail the textual differences between IPG's WDS and AWDS, IPG also

identified such differences in IPG's opposition thereto, also filed on September 12, 2016. Moreover, if either the MPAA or SDC had believed that IPG had not satisfactorily produced such documents, either could have issued follow-up requests, which neither party did.

18. From the outset, the means by which two incorrect tables appeared in the amended written direct statement that IPG first sought to file, i.e., the document stricken from the record by the Judges, had been thoroughly explained to the SDC, including the fact that Dr. Cowan surmised that the two tables had come from some intermediate iteration of his calculations, that he no longer had whatever iteration of electronic data that may have generated the two tables, and that whatever electronic data may have existed had never been provided to either IPG or its counsel. See generally, *Opposition to Settling Devotional Claimants' Motion to Compel Independent Producers Group to Produce Documents*. Nevertheless, and undeterred from casting gratuitous aspersions on IPG personnel, IPG counsel, and Dr. Cowan, the SDC filed its motion to compel production. However, the SDC's requests were not narrowly tailored to address communications regarding Dr. Cowan's reports and calculations, but broadly sought any and all communications between IPG, Dr. Cowan, and IPG's former expert witness, Laura Robinson and her consulting firm, regardless of their content.

19. In these proceedings, the Judges solicited the SDC and MPAA to submit motions seeking the imposition of “financial or other sanctions”. To IPG’s knowledge, no comparable solicitation has ever occurred by Judges in prior proceedings, despite the existence of far more egregious abuse. Most recently, and before this identical panel of Judges, in the 1998-1999 cable proceedings (devotional), attorneys representing the SDC submitted a direct statement advocating an allocation of royalties for which such attorneys had firsthand knowledge that supporting evidence did not exist at the time of the filing (and was later “reconstructed”), and further submitted “expert” testimony endorsing the results of a study on the pretext that such non-existent evidence had been considered and validated by the expert witness prior to such endorsement. Such abuse was verified only after IPG was required to file a motion to compel production of documents, which was granted, and no supporting electronic data was produced. IPG consequently filed a motion to strike those portions of the SDC direct statement relying on the non-existent evidence. See generally, *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014).


20. Despite the Judges’ scheduling of a separate proceeding to address whether a study could be relied upon without the production of all the data responsible for producing the result, and IPG’s incurrence of extraordinary

expenses to appear and to have IPG's expert witness appear at such special proceeding in Washington, D.C. to testify regarding such matter, no sanctions were issued, or much less solicited by the Judges.

21. By contrast to the foregoing scenario, whereby the SDC obfuscated its lack of intermediate data that was *required* by regulation to have been maintained by the SDC, IPG and its counsel have openly and genuinely described in detail the circumstances surrounding IPG's Direct Statement and Amended Direct Statement. While unfortunate, the errors that resulted in the content of those filings were not the product of a "circumstance in which a party has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification." Rather, the errors were simply the product of errors by IPG's expert witness under rushed circumstances, with no malice, no intent to deceive, and certainly not as part of any "dilatory practice" by IPG.

I declare under penalty of perjury that the foregoing is true and correct.


Executed this 10th day of April, 2017.



Brian D. Boydston, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2017, a copy of the foregoing was sent by electronic mail and next day mail to the parties listed on the attached Service List.



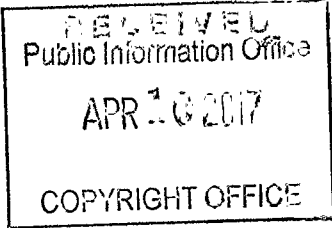
Brian D. Boydston

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DECLARATION OF RAUL GALAZ

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2. Nevertheless, after communicating the contents of such continuance to Dr. Cowan, Dr. Cowan advised IPG that he believed that he now had sufficient data in order to construct an analysis that, for the first time in any distribution proceeding, would attempt to implement the Shapley Valuation analysis expressly sought by the Judges. With the ambition of providing the Judges with precisely the type of analysis that other experts had argued was impossible to construct for these proceedings, IPG agreed to have Dr. Cowan pursue such endeavor.

3. After IPG filed its Written Direct Statement (“WDS”) on August 22, 2016, I reviewed Dr. Cowan’s report and it appeared to me that certain program supplier calculations appeared disproportionately beneficial to IPG. I then promptly relayed this to Brian Boydston, counsel for IPG, who, I understand, relayed it to Dr. Cowan.

4. Following more than a week of review, Dr. Cowan reported that he discovered errors in all his ultimate calculations, some slight, but insisted that there was no change in his methodology. As a result, IPG solicited and received a revised report that appeared to contain minor typographical revisions from the initial report, but substantially different numeric results, and, through counsel, IPG filed the revised report as part of an Amended Written Direct Statement (“AWDS”) on August 31, 2016.

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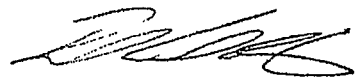
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April, 2017.



Raul Galaz

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I hereby certify that on this 10th day of April, 2017, a copy of the foregoing was sent by electronic mail and next day mail to the parties listed on the attached Service List.



Brian D. Boydston

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