UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

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 ON IPG MOTION FOR LEAVE TO FILE AMENDED WRITTEN DIRECT STATEMENT

The issue before the Copyright Royalty Judges (Judges) is whether to grant a motion by Worldwide Subsidy Group LLC dba Independent Producers Group (IPG) to file an Amended Written Direct Statement.

I. Procedural History

The Judges commenced the distribution phase of the captioned consolidated proceedings in August 2013. *See* 78 Fed. Reg. 50113 (Aug. 16, 2013) (cable royalty funds); 78 Fed. Reg. 50114 (Aug. 16, 2013) (satellite royalty funds). The Judges conducted a distribution hearing in April 2015. At the end of the hearing and after reviewing participants' proposed findings of fact and conclusions of law, the Judges concluded that none of the parties[1] had presented fact evidence or expert opinion sufficient for the Judges to support a final distribution in the contested categories. By order dated May 4, 2016, the Judges reopened the record of the consolidated proceeding to afford the parties an opportunity to present evidence upon which the Judges could determine the relative market value of the competing claims in each program category. *Order Reopening Record and Scheduling Further Proceedings* at 1.

According to the schedule in the reopened proceeding, the parties were to file their Written Direct Statements (WDS) on or before August 22, 2016. The Judges ordered discovery in relation to the WDS, which was to conclude on October 26, 2016. Amended Written Direct Statements, if any, were due November 10, 2016.[2]

[1] At the time of the hearing, only three participants had unresolved controversies: Motion Picture Association of America (MPAA) on behalf of program suppliers, Settling Devotional Claimants (SDC) representing claimants for devotional programming, and Independent Producers Group (IPG) representing claimants in both the program suppliers and devotional categories.

[2] The Judges originally ordered a shorter case schedule; the parties stipulated to, and the Judges ordered, extended deadlines.

On August 22, 2016, all parties filed their WDS. On August 26, 2016, the SDC filed a *Notice of Consent to 1999-2009 Satellite Shares Proposed By Independent Producers Group and Motion for Entry of Distribution Order* (Notice and Motion). In the *Notice and Motion*, the SDC noted that "the SDC and IPG proposed distributions for satellite royalty years 1999-2009 are very close to each other." *Notice and Motion* at 1. Given the closeness of the proposed distribution allocations, the SDC "acknowledge[d] that all of the satellite royalty shares proposed by IPG are within a 'zone of reasonableness.'" *Id.* at 2. Consequently, the SDC consented to and accepted IPG's proposed distribution allocations in the devotional category for satellite royalties for 1999-2009. *Id.* The SDC asserted that its consent to IPG's proposed satellite royalty distributions support a finding by the Judges that there is no controversy with respect to 1999-2009 satellite royalties in the devotional category and therefore the Judges should order a final distribution of those royalties. *Id.* at 3.

On August 31, 2016, IPG filed an Amended Written Direct Statement (AWDS). On September 2, 2016, MPAA and the SDC filed motions to strike the AWDS. In response to the motions to strike, IPG asserted two arguments in support of its filing of the AWDS, one regulatory and one policy-based.[3] IPG contended that its filing of the AWDS was permissible under the Judges' procedural rules, which provide that each party in a distribution proceeding must state in its written direct statement its percentage or dollar claim to the fund but no party will be precluded from revising its claim at any time during the proceeding up to, and including, the filing of proposed findings of fact and conclusions of law. 37 CFR § 351.4(b)(3). IPG's policy argument was that neither MPAA nor SDC was prejudiced by its AWDS.

IPG failed to consider, however, the subsection that addresses the filing of amended written direct statements:

> [a] participant ... may amend a written direct statement based on new information received during the discovery process, within 15 days after the end of the discovery period. An amended [WDS] must explain how it differs from the [WDS] ... and must demonstrate that the amendment is based on new information received during the discovery process.

37 C.F.R § 351.4(c). In effect, subsection (c) provides a party with the ability to amend its WDS of right, if it does so (1) within 15 days after the end of the discovery period and (2) based on new evidence received during discovery. In this case, the parties' discovery process had barely begun, so IPG could not meet either requirement for filing an AWDS of right. Furthermore, whether filed as of right, or by permission of the Judges, the AWDS "must explain how it differs from the [WDS]...." *Id.*

IPG's policy argument consisted of a veiled claim of excusable neglect[4] and the bald assertion that neither MPAA nor SDC were or could be prejudiced by its action. The regulations

[3] The arguments in IPG's responses to motions to strike were: (1) that its expert did not change his methodology and that the changes between the WDS and AWDS were "few and obvious" and (2) that the changes were made and disclosed before the commencement of discovery on the direct statements, causing the SDC no prejudice and giving the SDC a chance to seek discovery on the AWDS. Opposition to SDC at 6, 9; Opposition to MPAA at 2, 4.

[4] The Judges are not inclined to find excusable neglect when a party's counsel intentionally does not review a document before filing it and its expert witness fails to proofread carefully a final report.

regarding amending claims and amending a WDS make no mention of either excusable neglect or prejudice.

The Judges granted the MPAA and SDC motions to strike the IPG AWDS. The Judges noted, however, that even after the period for filing an AWDS of right, they might consider a motion properly made to accept a late AWDS. *See* October 7, 2016 Order at 4 n.6. IPG filed that motion—the present motion—on October 20, 2016 (Motion). MPAA and SDC filed separate responses in opposition on October 25 and IPG filed its reply on November 3.

II. Issues

In the Motion at issue here, IPG made the same two arguments it made in response to the motions to strike. In those opposition papers, IPG claimed compliance with applicable CRB regulations. According to IPG, the provision regarding filing an AWDS after the close of discovery is *permissive* but not restrictive. Opposition to MPAA at 5-6 (*citing* 37 C.F.R. § 351.4(c)). Conflating that presumed permission to file an AWDS with the ability to revise a claim "at any time during the proceeding...," IPG attempted to equate its AWDS with a revised claim. *Id.* at 6 (*citing* 37 C.F.R. § 351.4(b)(3)). By this logic, IPG attempts to characterize its filing as a benign amendment to its WDS, the changes to which were inconsequential, "few and obvious," and certainly not methodological. At the same time, IPG admits that its submission is tantamount to a *revision* of its claims. A revision is not an inconsequential amendment.

The issue remains, nonetheless, whether the Judges should grant IPG's Motion and, if so, on what grounds.

A. Change in Methodology

In response to the Motion, both MPAA and the SDC argue strenuously that the change in the formula introduced by the IPG expert witness amounts to a change in methodology. *See, e.g.,* MPAA Opposition at 4-5; 10/25/2016 Declaration of Jeffery H. Gray, Ph.D. at 2-3, ¶¶ 6-8 (Gray Decl.).

IPG's expert, Dr. Charles Cowan, denies that his change in the formula constitutes a change in methodology. Dr. Cowan contends that a method is

> a procedure used to obtain a specific outcome—thus, 'regression' is a method that is used to minimize the distances between the actual observations and the predicted observations that one would obtain by fitting a line through all the observations. It does not change regardless of the type of dependent variable being used.

Declaration of Dr. Charles Cowan at 3, ¶ 6. According to Dr. Cowan, in his second report he used logarithmic scaling for the dependent variable (subscribers) whereas in the first report he used linear scaling.[5] Dr. Cowan insists his method of analysis, a regression analysis, remained

[5] On a linear scale, a change between two values is perceived on the basis of the difference between the values. For example, a change from 1 subscriber to 2 subscribers would be perceived as the same amount of increase as from 4 subscribers to 5 subscribers. On a logarithmic ("log") scale, a change between two values is perceived on the basis of the ratio of the two values. On a log scale, a change from 1 subscriber to 2 subscribers (ratio of 1:2) would be perceived as the same amount of increase as a change from 4 subscribers to 8 subscribers (also a ratio of 1:2). M.

unchanged. *See* 10/17/2016 Declaration of Dr. Charles Cowan at 3-4, ¶¶ 7-8 (Cowan Decl.). Dr. Cowen asserts that he discovered errors in his underlying data (*i.e.*, allocation of titles between IPG and the other parties) and that he subsequently chose a different scaling to better fit the revised data. *Id. at 2,* ¶ 5. He suggests that the changed scale (from linear to logarithmic) was an incidental tweak to better represent the changed data. *Id.*

The change Dr. Cowan made in his formula, whether described as a method or a scaling, was a change to his methodology. Describing the change as incident to updated data does not make it insignificant.

B. Amendment of Written Direct Statement

In a confusing barrage of filings, IPG attempts to amend its WDS on the eve of discovery, without even a nod to regulatory guidance that might inform its efforts.[6] Rather, IPG appears to have adopted a familiar position: that it is easier to seek forgiveness than ask for permission. In its bid for "forgiveness," IPG hints at excusable neglect. In a footnote, IPG's counsel admits he "did not review or consider Dr. Cowan's report prior to its submission...." Motion at 2 n.3. IPG counsel failed to give even cursory attention to the expert report. Had he done so, counsel could not have helped but discover clear error in the results of the expert's calculations. After he filed the report, he contacted the expert and set in motion an effort to make amends.[7]

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.

In both rate determination and distribution proceedings, the Judges strive not to elevate form over substance. To inform their determinations, the Judges seek the most accurate, timely, and fairly available evidence obtainable. In the context of litigation, withheld or late produced evidence or expert opinion leads to inequities and inefficiencies in case resolution. The Judges' regulations are meant to outline procedures to avoid inequity and inefficiency. The Judges' best results are obtained when counsel abide by the regulations and act professionally and courteously.

The regulations do not cover all circumstances, however. In circumstances such as the present one, the Judges must find the course to equity and efficiency. The factors directing the Judges' decision in this circumstance are: (1) the extent of the changes revealed in the AWDS and (2) the timing of the revelations.

Deserno, Linear and Logarithmic Interpolation, Max-Planck-Institut für Polymerforschung (Mar. 24, 2004) available at https://www.cmu.edu/biolphys/deserno/pdf/log_interpol.pdf.

[6] For example, IPG did not make even a passing reference in the AWDS to how it differs from the WDS or what new information compelled the amendment. *See* 37 C.F.R. § 351.4(c). IPG's attempts to invoke the rule allowing claim amendments at any time came only after the fact. *See* 37 C.F.R. § 351(b)(3).

[7] *See* Cowan Decl. at 2, ¶ 4 ("IPG's counsel immediately inquired about the produced results ... which appeared uncharacteristically beneficial to IPG.")

As the Judges have indicated, the revision of the Cowan expert report is significant. It is unavailing that the results varied little, or in the favor of the parties other than IPG. *See* Motion at 4-6; IPG Reply at 6. It is irrelevant that the parties had "all the descriptions, mathematics, and rationale that was needed by any party to interpret what was being done ...." 10/17/16 Declaration of Charles Cowan at ¶ 17. The presence of the descriptions, mathematics, and rationale were not sufficient for opposing parties to test Dr. Cowan's conclusions, particularly as Dr. Cowan asserts that the changes inserted into the AWDS are based primarily on revised data. The point is, the AWDS changed the basics upon which the other parties could proceed to build a case.

The timing of the AWDS fits neither the rule for amending a claim nor the rule permitting AWDS at the conclusion of discovery *in the event* the party obtains new information in discovery. The fact that the AWDS surfaced (barely) before the commencement of discovery is not an achievement to be honored. Nonetheless, the parties now have the expert report and may now conduct discovery on the basis of the revised data and calculations. Further, as the parties acknowledge, it would be inappropriate and disallowable to attempt to introduce this new methodology (or new scaling) applied to new data as rebuttal. *See* MPAA Opposition at 10.

Notwithstanding the paradox of belated efficiency, IPG may file its AWDS. And all parties shall have sufficient time to conduct adequate discovery thereon.

C. Prejudice

IPG falls back on its go-to legal position, claiming the other parties were not prejudiced by its errors. Even Dr. Cowan suggests that the parties suffered no prejudice. IPG goes so far as to assert that "prejudice to an adverse party should be the *primary* issue as to whether an amended direct statement should or should not be allowed as a matter of the Judges' discretion." Motion at 9. The Judges may consider prejudice in exercising their discretion, but prejudice is not the standard by which the Judges decide this motion. Prejudice is a measure of the equitable decision before the Judges, not the legal standards they apply.

Weighing prejudice in this circumstance, the Judges consider whether IPG's disregard of practice and procedures, attributable primarily to the inattention of counsel, has disadvantaged both MPAA and the SDC. Initially, IPG filed and delivered the AWDS on the day before the deadline to initiate discovery. Noting that the parties propounded discovery requests addressing the AWDS, IPG claims they were not prejudiced. The ability of counsel to apply "muscle" to a last minute task does not translate to a lack of prejudice. The receiving parties met the challenge, but in so doing incurred costs resulting from IPG's last minute changes.

Specifically, MPAA asserts prejudice because it had to file a Motion to Strike the AWDS in order to get even basic information regarding the form and substance of the amendments. IPG's response to the Motion to Strike (1) did not describe, let alone explain, the reasons for or the substance of the changes incorporated in the AWDS, (2) characterized the changes as "few and obvious", (3) mischaracterized the changes as (a) merely occasioned by a change in the underlying data points and (b) "typographical" or insignificant. MPAA Opposition at 7-9. The Judges addressed these failings in their Order Striking IPG's AWDS. *See Order Granting MPAA and SDC Motions to Strike ...* (Oct. 7, 2006). Meanwhile, MPAA had to engage its

expert, Dr. Gray, to analyze the AWDS and Dr. Cowan's Amended Report to ascertain the sum and substance of the allegedly "few and obvious" revisions to the AWDS.

The SDC also argue that they have been prejudiced by IPG's conduct, and claim the prejudice alone is sufficient for the Judges to deny IPG's Motion. *See* SDC Opposition at 5-6. The SDC ask the Judges to prohibit IPG from filing the AWDS because (1) IPG is now asserting a position contrary to an earlier position in this proceeding (judicial estoppel) and (2) the SDC relied on IPG's earlier position to propose a settlement of satellite royalty issues, which IPG rejected based on its changed position (equitable estoppel). The SDC also contend that IPG's papers portend additional changes as IPG refines its theories and arguments.[8] For example, at the time of the Motion, IPG's expert explained that he had to revise the data set to which he applied his regression analysis because he received data (presumably from IPG) that he did not have at the time of his initial report. *See id.* at 7. Dr. Cowan also asserts that his regression methodology is new to the CRB; it is not. *Id.* In any event, the SDC assert that IPG has failed to provide adequate explanation or justification for the changes and IPG now claims that Dr. Cowan "overwrote" his earlier calculations, making them unavailable to the opposing parties' experts.[9]

The thrust of the prejudice arguments proffered by MPAA and the SDC is that they were required to spend extra time, effort, and money to try to ascertain information that IPG coyly withheld or obfuscated.

The Judges accept that MPAA and the SDC have been prejudiced by IPG's dilatory practices. Neither party quantified the prejudice suffered to date and even if they had, the Judges are without express statutory or regulatory authority to engage in cost-shifting or award monetary sanctions to address prejudice to other parties. To attempt redress for the prejudice, the Judges permit MPAA and the SDC to reopen discovery, solely in relation to Dr. Cowan's amended report and IPG's AWDS. At any time following the conclusion of this discretionary additional discovery the SDC and MPAA may include any information discovered in the extended discovery in an AWDS.

III. Conclusion

The Judges shall accept as filed the Amended Written Direct Statement of IPG.

To the extent the SDC or MPAA require additional discovery *solely* related to the Amended Written Direct Statement, including Dr. Cowan's attached report, or any current amendment thereto, they shall complete and deliver the discovery requests on or before 15 days after the date of this Order; IPG shall respond fully and completely within 15 days of receipt of the discovery requests. MPAA and the SDC may file an AWDS to incorporate relevant, newly discovered information on or before the expiration of 15 days from the date they receive full and complete discovery responses from IPG.

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[8] The SDC's fear of a moving target is not unfounded, given the repeated 11th hour amendments and substitutions of information from IPG in prior proceedings. *See* MPAA Opposition at 9.

[9] This overwriting of documentation is revealed in the context of the SDC's Motion to Compel discovery from IPG filed October 17, 2016. The Judges rule separately on that discovery motion.

In addition, 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).

In this proceeding, IPG is barred from filing any further amendment to its Amended Written Direct Statement or Dr. Cowan's expert report, except in strict compliance with 37 C.F.R. § 351.4(c).

SO ORDERED.

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Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: January 10, 2017.