

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

Distribution of 2000, 2001, 2002, and 2003
Cable Royalty Funds

Docket Number 2008-2 CRB CD 2000-03
(Phase II) (Remand)

**ORDER DENYING SDC MOTION
TO STRIKE IPG WRITTEN DIRECT STATEMENT**

The parties to this remand proceeding are Worldwide Subsidy Group LLC dba Independent Producers Group (IPG) and the Settling Devotional Claimants (SDC), a consortium of copyright owners asserting claims to funds allocated to the Devotional Programs category. On April 15, 2016, the parties filed their respective Written Direct Statements addressing the issue of the appropriate allocation of cable retransmission royalties payable for the years 2000 to 2003, inclusive, between and among the copyright owners represented by IPG and those represented by the SDC.

On April 14, 2017, the SDC filed a Motion to Strike the Written Direct Statement (WDS) filed by IPG (Motion). IPG filed its response in opposition on April 20, 2017 (Response). The SDC filed a reply on April 26 (Reply). After having considered the parties' papers, the Copyright Royalty Judges (Judges) **DENY** the Motion.

I. Discussion

A. SDC position

The SDC ask the Judges to “strike”¹ the WDS filed by IPG in this remand proceeding. The SDC note that the Judges’ Order for Proceedings on Remand ... (Jan. 14, 2016) (Remand Order) expressly stated that “IPG’s methodology is not an issue on remand.” *Id.* at 2, n.1. The SDC assert that the IPG WDS (1) repeats a methodology previously rejected by the Judges in the underlying proceeding (2) applies the IPG methodology erroneously by including claims the Judges previously disallowed, and (3) presents expert testimony that is devoid of analysis. Motion at 3-9.

B. IPG position

IPG counters that the methodology it proffers in the remand WDS differs from its initial methodology by the deletion of the “Time Period Weight Factor” as an element of the analysis. IPG also asserts that it submitted its original methodology to an expert to “review, verify, and

¹ The Judges cannot “strike” a pleading once it is filed and made a part of the official record of the proceeding. When warranted, on motion of a party or *sua sponte*, the Judges may disregard some or all of the contents of a record in making a decision.

critique” Response at 3. Finally, IPG contends that the only erroneous attribution of claims in the underlying proceeding related to programming owned by Jack Van Impe Ministries and Salem Baptist Church for the year 2001.² *Id.* at 9. In any event, IPG contends that, if it eliminates any claim to fees relating to those two claimants, its proportion of the 2001 Devotional Programming category funds would change only minimally and that IPG would “forthwith amend its claim ...” accordingly. *Id.* at 9, n.9.

II. Judges’ ruling

A. IPG has presented a Modified Methodology

In the Judges’ original determination in this matter they found IPG’s distribution methodology to be too deficient to permit them to rely upon it as a basis for distributing royalties. *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds, Final Distribution Order*, 78 Fed. Reg. 64984, 64999-65003 (Oct. 30, 2013) (Original Determination). IPG did not appeal the Judges’ decision and, as a consequence, the Judges rejected IPG’s belated efforts to reargue the point on remand. *See Remand Order* at 2, n.2. In effect, the SDC contends that IPG has merely re-presented its previously rejected methodology. Motion at 4. The Judges disagree.

IPG has identified at least two ways in which its presentation of a methodology differs from its presentation prior to appeal. First, IPG has eliminated the “Time Period Weight Factor” from its methodology in response to the Judges’ criticism.³ *See* Response at 2. Second, IPG has secured the testimony of an expert witness in the field of economics to address the Judges’ criticism that Raul Galaz was the sole presenting witness for IPG’s methodology.⁴ *See* Response at 3-5.

The SDC acknowledges the foregoing steps that IPG has taken, but argues that they are insufficient. The SDC contends that “this is not a new, changed, or different methodology” but “merely a truncated presentation of the already-rejected methodology.” Motion at 4. The SDC points out other defects that the Judges identified with IPG’s methodology in the *Original Determination* and argues that IPG has done nothing to address them. *See id.* As to IPG’s use of expert testimony, the SDC states that IPG’s expert “does not present any expert opinion on Mr. Galaz’s methodology or its results.” *Id.* at 5.

The Judges find that IPG has presented a modification to its original methodology. To be sure, IPG has not changed every element of its earlier methodology; nor has it sought to address every criticism the Judges articulated in the *Original Determination*. But IPG need not do so in order for the Judges to consider its methodology not to be the same one it previously presented.

² IPG moved for reconsideration of the Judges’ March 21, 2013 ruling on the validity of claims. By separate order issued concurrently with this order and for the reasons stated therein, the Judges denied that reconsideration.

³ *See Original Determination*, 78 Fed. Reg. at 65001 (criticizing “Time Period Weight Factor”); *see also id.* at 65003 (noting that “IPG’s formula produced absurd results in the Devotional category”).

⁴ *See Original Determination*, 78 Fed. Reg. at 65000 (finding Mr. Galaz to be “an imperfect messenger” due to his lack of economic or econometric expertise, financial stake in the outcome of the proceeding, and lack of credibility due to prior false testimony and a conviction for fraud).

The Judges will consider IPG's modified methodology on its merits.⁵ The Judges express no view at this stage whether IPG's methodology, as modified, can be relied on as a basis for distributing royalties.

B. IPG Improperly Incorporated Programming Previously Disallowed by the Judges

IPG acknowledges that its calculations ascribe value to programming of two claimants—Jack Van Impe Ministries and Salem Baptist Church Ministries—that the Judges have disallowed. *See* Response at 6-7. Specifically, IPG admits that it included broadcasts of those claimants' programs made in 2001 in its computation of IPG's royalty share. *See id.* The SDC ask the Judges to “strike” IPG's WDS on that basis. *See* Motion at 6-8.

The Judges decline to apply such a draconian remedy for IPG's improper incorporation of disallowed programming in its computations. The Judges, of course, will not consider any computations made by IPG that erroneously include claims the Judges previously disallowed or removed from the list represented by IPG. However, IPG may revise its claim in accordance with 37 C.F.R. § 351.4(b)(3) in order to purge it of any value improperly ascribed to disallowed programming or claimants.

III. Conclusion

In light of the foregoing analysis, the Judges **DENY** the Motion. The Judges will consider IPG's methodology on its merits and determine what weight, if any, to give that methodology in allocating devotional programming funds between the SDC and IPG. The Judges, however, will not consider any calculations made by IPG that erroneously include claims that the Judges previously disallowed.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: October 6, 2017.

⁵ The Judges will also consider Dr. Cowan's discussion in his report of other methodologies he may have considered and rejected and determine what weight, if any, to give that testimony. It is appropriate to include in an expert report “alternative courses of action considered” by the expert. 37 C.F.R. § 351.10(e).