

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC**

In the Matter of)	
)	
Phase II Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds)	Docket No. 2008-2 CRB CD 2000-2003 (Phase II) (Remand)
)	

**SETTLING DEVOTIONAL CLAIMANTS’ OPPOSITION TO INDEPENDENT
PRODUCERS GROUP’S MOTION FOR ADMONITION AND SANCTIONS**

The Settling Devotional Claimants (“SDC”) hereby oppose the Motion for Admonition and Sanctions filed by Independent Producers Group. Although the SDC’s counsel made an error, which they promptly corrected, an admonishment is unnecessary and sanctions are unwarranted.

Counsel for the SDC failed to remember and failed to review files establishing that IPG had served the SDC with a Notice of Revised Claim to 2001 Cable Royalties (Devotional) on May 10, 2017, correcting IPG’s earlier failure to comply with the Judges’ prior ruling disqualifying certain IPG claimants from participation in these proceedings. The SDC’s counsel did review the Rebuttal Testimony of John Sanders repeatedly before filing it, and discussed it with Mr. Sanders several times. Also before filing the SDC’s Written Rebuttal Statement, the SDC’s counsel specifically checked the eCRB docket to try to confirm whether IPG had filed a revised claim at any time prior to the due date for rebuttal testimony. According to eCRB, IPG had filed a Motion for Reconsideration of the denial of claims for Jack Van Impe Ministries and Salem Baptist Church on May 12, 2017, along with an accompanying Notice for a Proposed Order granting the request, but there was no indication of any Notice of Revised Claim on the eCRB record. The SDC had opposed that motion, which was then denied.

Thus, at the time of the review of Mr. Sanders' testimony, the SDC's counsel was unaware that IPG had filed its revised claim and that eCRB was not a complete indication of all filings made in this docket. Regardless of the state of eCRB, the SDC counsel acknowledge they failed to carefully review their own files and emails, which would have alerted them to IPG's Notice of Revised Claim. The SDC's counsel therefore failed to recognize that the testimony was in error where Mr. Sanders said that "IPG's results in 2001 improperly include the disqualified programs claimed by IPG claimants Salem Baptist Church and Jack Van Impe," and that IPG had not filed an amendment. Because the SDC's counsel had failed to realize that IPG had filed a Notice of Revised Claim, they failed to inform Mr. Sanders of it. It was SDC's counsel's error, and not Mr. Sanders's error.

After reviewing IPG's Written Rebuttal Statement, filed on the same day as the SDC's Written Rebuttal Statement, the SDC's counsel noted Mr. Raul Galaz's testimony that IPG had filed a Notice of Revised Claim, and they conducted further investigation. At that time, they located IPG's email providing the Notice of Revised Claim in their files, and then they confirmed with Copyright Royalty Board staff that it had in fact been filed. The SDC's counsel promptly acknowledged their error, and filed an Errata to their Written Rebuttal Statement withdrawing the incorrect claim that IPG still had not corrected its improper inclusion of disqualified claimants. Counsel for the SDC apologize to the Judges and to IPG for their oversight.

The SDC are not aware of how IPG was prejudiced by counsel's oversight. For example, the SDC have not received any discovery requests or other inquiry from IPG's counsel relating to the SDC's error. But if IPG was prejudiced, counsel for the SDC apologize for that as well.

An admonishment is unnecessary, because the SDC's counsel are already self-admonished. Whenever we discover we have made a mistake, we make note of the error and resolve to do better in the future. While we cannot responsibly promise that we will never make another mistake, we at least endeavor not to make the same mistake twice.

Although not laudable, inadvertent errors are generally not sanctionable. All participants in these proceedings have made mistakes from time to time. *See, e.g., Order Granting in Part Multigroup Claimants' Expedited Motion to Continue Distribution Proceedings Following Resolution of Pending Motions*, Nos. 14-CRB-0010-CD (2010-13), 14-CRB-0011-SD (2010-13) (Aug. 11, 2017), at 2 n. 2 (noting that SDC were in error to say that "methodologies" (instead of "calculations") can be adjusted following issuance of claims rulings, and also noting that the SDC had given an incorrect date in citing an order); *Order Granting IPG's Motion for Final Distribution of 1999 Cable Royalties (Devotional Category)*, No. 2008-1 CRB CD 1998-99 (Phase II) (June 12, 2017), at 1 n. 1 (noting IPG's error in claiming that it withdrew its appeal of the 1999 cable decision, when in fact IPG's counsel had just argued its appeal to the D.C. Circuit a few months earlier); *Order on IPG Motions for Modification*, 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Apr. 9, 2015), at 5 (granting in part IPG's motion for modification on the basis of an exhibit overlooked by the Judges); *Order Granting IPG Fourth Motion for Modification of March 13, 2015 Order*, 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Oct. 27, 2016) (granting motion for reconsideration based on change in precedent, and noting IPG's error in referring to re-opened proceedings as a "remand"); Transcript, 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II), Dec. 9, 2014, at 251:4-14 (Judges' acceptance of SDC's counsel's apology for absent-mindedly exiting courtroom before Judges had left, and remitting sentence to "lash[ing] with wet

noodles.”). All participants in these proceedings are human and therefore, by definition, will make errors. This state of affairs, while regrettable, is likely to persist until either the practice of law becomes fully automated, or Heaven reigns on Earth.

Given that the first five pages of IPG’s 10-page motion focus exclusively on the SDC’s motion for sanctions against IPG in another case – a motion that was invited by the Judges in that case – it may be that IPG’s motion for sanctions was intended as a renewed defense against the SDC’s pending motion for sanctions. If so, it is not properly filed in this proceeding. Because the “administrative record” in a case for review under the Administrative Procedure Act consists of “the full administrative record that was before the [decision-maker] at the time he made his decision,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), a pleading in one case that is intended to influence decisionmaking in another case could complicate compilation of the administrative record for review in one or both cases.

But to the extent IPG believes that the SDC’s motion for sanctions was hypocritical in light of the SDC’s counsel’s admitted fallibility, the SDC disagree. The SDC have never sought sanctions because of a mere error. To the contrary, as the SDC specifically said in pleadings on their motion for sanctions against IPG,

[T]he SDC are not faulting IPG or its counsel for failing to recognize an error in Dr. Cowan’s expert opinion. ... The SDC are faulting IPG and its counsel for filing a report without conducting any reasonable review or inquiry, and then burdening the parties and the Judges with multiple rounds of amended reports after conducting the review and inquiry that should have been conducted in the first place.

SDC’s Reply in Support of Motion for Sanctions Against IPG and Its Counsel, No. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Apr. 14, 2017). The issue underlying the SDC’s motion for sanctions is not that IPG submitted erroneous testimony, but that IPG submitted testimony that IPG’s counsel admitted (and then later denied) that he “did not

review or consider ... prior to its submission” See *IPG’s Opposition to the MPAA’s Motion to Strike*, No. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Remand) (Sep. 12, 2016), at 3 n. 4; *IPG’s Opposition to the SDC’s Motion to Strike Amended Direct Statement of IPG* No. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Sep. 15, 2016), at 8 n. 9. The contrast is that while the SDC’s counsel attempted to make a reasonable inquiry before making an inadvertent error, IPG’s counsel intentionally did not conduct any inquiry to ensure that signed pleadings had evidentiary support. The conduct is distinguishable, both in character and in severity.

Similarly, the SDC acknowledged earlier in the pleading cycle of the same case, when moving to strike IPG’s improperly filed Amended Direct Statement in that case, that “the SDC do not suggest that a party may never seek leave to amend a pleading to correct a genuine error or mistake” *SDC’s Reply in Support of Their Motion to Strike Amended Direct Statement of IPG*, Nos. 2012-6 CRB CD 2004-2009 (Phase II), No. 2012-7 CRB SD 1999-2009 (Phase II) (Sep. 22, 2016), at 5. The Judges expressly noted the SDC’s statement in their decision, effectively acknowledging the distinction between inadvertent errors and changes in methodology. *Order Granting MPAA and SDC Motions to Strike IPG Amended Written Direct Statement and Denying SDC Motion for Entry of Distribution Order*, No. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Oct. 7, 2016), at 4 n. 6. As the SDC and MPAA demonstrated in that case, IPG’s Amended Direct Statement did not correct errors (or did not only correct errors), but presented a substantially modified distribution methodology.

In short, IPG is wrong to blame the SDC for seeking sanctions “for the acts of IPG counsel, even though the acts of IPG counsel were far less culpable.” IPG Motion at 9. The SDC have always made clear that sanctions are not appropriate for mere errors.

As its first request for relief, IPG asks the Judges to “admonish SDC counsel in no less harsh a manner than IPG’s counsel was admonished in the Judges’ *Order on IPG Motion for Leave to File Amended Written Direct Statement* (January 10, 2017), Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket No. 2012-7 CRB SD 1999-2009 (Phase II).” *Id.* But the Judges did not formally admonish IPG or its counsel in that order. The Judges decided the motion before them, and they invited the SDC and MPAA to move for sanctions.

Even in the one instance in which the Judges formally admonished IPG, for failing to serve MPAA and the SDC with a motion for reconsideration, the conduct that resulted in the admonishment was not merely an inadvertent error. IPG’s apparent failure to email the pleading to opposing counsel (possibly the result of “an unlikely cyber-failure,” as the Judges inferred based on their acceptance of IPG’s counsel’s signature as a certification that the contents of IPG’s response was true and accurate and offered only after reasonable inquiry) may have been unintentional; but IPG advertently failed to effect service by overnight mail as was then required by the Judges’ rules. *Order Admonishing IPG*, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Jan. 3, 2017). Even more concerning, it was a repeat offense, and IPG had previously been admonished by the Copyright Office that “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.*” *Id.* (quoting Order, No. 2008-1 CARP CD 98-99 (June 26, 2006), at 6). There was prejudice, or at least a high risk of prejudice, because MPAA and the SDC were deprived of the opportunity to respond to IPG’s motion before the Judges ruled. The high risk of prejudice, especially coupled with IPG’s advertent failure to follow the rules and the repeated nature of the offense, warranted an admonishment (i.e., a warning) to ward against the possibility of future prejudice.

While acknowledging that any ruling other than an admonishment of counsel would be “draconian,” IPG Motion at 9, IPG’s second request for relief is for “a ruling on SDC’s written rebuttal statement that is no less onerous against IPG than any sanctions levied against IPG (if any) in the consolidated 1999-2009 satellite and 2004-2009 cable proceedings.” *Id.* at 10. IPG’s conclusion underscores that this filing is really a misplaced attempt to reassert IPG’s opposition to the SDC and MPAA pending motions for sanctions. The SDC take to heart the Judges’ prior observation, “The most frequent and least effective rationalization is: we might have proceeded erroneously, but you erred too, and your error was more egregious.” *Order Denying in Part and Granting in Part MPAA Motions Relating to IPG Testimony and Exhibits*, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (July 20, 2015), at 5. The SDC therefore urge the Judges to consider each motion for sanctions on its own merit.

Conclusion

The SDC respectfully request the Judges to deny IPG’s Motion for Admonition and Sanctions.

Date: January 29, 2018

Respectfully submitted,

/s/ Michael Warley

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Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

I, Michael A. Warley, hereby certify that a copy of the foregoing was served electronically on January 29, 2018, to the following:

INDEPENDENT PRODUCERS GROUP

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/s/ Michael Warley

Michael A. Warley

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Phase II Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds)	Docket No. 2008-2 CRB CD 2000-2003 (Phase II)
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**DECLARATION OF MATTHEW J. MACLEAN IN SUPPORT OF SETTLING
DEVOTIONAL CLAIMANTS’ OPPOSITION TO INDEPENDENT PRODUCERS
GROUP’S MOTION FOR ADMONITION AND SANCTIONS**

I, Matthew J. MacLean, hereby state and declare as follows, based on my personal knowledge:

1. I am a partner in the law firm of Pillsbury Winthrop Shaw Pittman LLP, and am counsel for the Settling Devotional Claimants (“SDC”) in the above-captioned proceedings.
2. At my direction and with my approval, on January 8, 2018, counsel for the SDC filed the SDC’s Written Rebuttal Statement of the Settling Devotional Claimants, containing the Testimony of John S. Sanders. Among other points raised in rebuttal to the Written Direct Statement filed by Independent Producers Group (“IPG”), Mr. Sanders included the following statement in para. 9 of his testimony:

In addition to these reasons why IPG’s methodology cannot be relied upon in any circumstances, IPG’s results in 2001 *improperly* include the disqualified programs claimed by IPG claimants Salem Baptist Church and Jack Van Impe. Despite IPG’s concession that it “inaccurately attributed value” to these two programs and that it “shall forthwith amend its claim,” to my knowledge, no such amendment has been filed in more than eight months since the commitment to “forthwith amend” the claim was made.

3. I reviewed Mr. Sanders’s testimony multiple times before we filed it, as did all other counsel of record for the SDC, as did SDC’s Allocation Phase counsel and trustee, Arnold Lutzker. Mr. Lutzker and I both spoke with Mr. Sanders several times about his testimony

before filing it, and our discussions specifically included the passage cited above. During all of these discussions, I believed the statement was accurate. To try to confirm that the statement was accurate, Mr. Lutzker checked the eCRB docket. He found IPG's Motion for Reconsideration on the eCRB docket, filed on May 10, 2017, but he did not find any reference to a revision of IPG's results for 2001. However, I and other SDC counsel failed to conduct a thorough review of our own emails and files.

4. After we filed the SDC's Written Rebuttal Statement, we received IPG's Written Rebuttal Statement. On review, we noted footnote 4 of the Rebuttal Testimony of Raul Galaz, in which he said, "I had errantly included the 2001 broadcasts of Salem Baptist Church and Jack Van Impe Ministries. IPG acknowledged this error and revised its claim accordingly pursuant to IPG's *Notice of Revised Claim to 2001 Royalties (Devotional)*, filed May 10, 2017."

5. I did not recall receiving IPG's Notice of Revised Claim, so I checked my emails from May 10, 2017. Sure enough, IPG's counsel Brian Boydston had sent me an email on May 10, 2017, attaching IPG's Notice of Revised Claim. It appears that I also forwarded that email to SDC's other counsel, and saved the attachment to an electronic file. Although I have not located a hard copy of the Notice of Revised Claim, it appears based on records that we received a delivery by overnight mail at approximately the time when the Notice was filed, and I do not doubt it was properly served.

6. I also had counsel for the SDC contact Copyright Royalty Board staff, to confirm that the Notice of Revised Claim was properly filed. We were informed that it was filed, and that the eCRB docket contains only some, but not all, of the filings made before it was fully live.

7. In spite of the fact that the Notice of Revised Claim was apparently properly served and filed, and the fact that I had forwarded the email and saved its attachment, I had

forgotten it by the time I was reviewing Mr. Sanders's testimony seven months later (and I still do not recall seeing it at the time it was served, although I evidently did see it). Because IPG's Motion for Reconsideration was filed and served on the same day as IPG's Motion for Reconsideration in this case, I believe I lost focus on the Notice of Revised Claim because I was focused on the Motion for Reconsideration.

8. At my direction and with my approval, on January 16, 2018, the SDC's counsel filed their Errata to Written Rebuttal Statement of the Settling Devotional Claimants, acknowledging counsel's error and withdrawing the erroneous contention that IPG had not corrected its erroneous inclusion of disqualified claimants in its claim for 2001. Although IPG has described our Errata as "coy," I believe we were forthright in taking responsibility for our error.

9. To my knowledge, the SDC have not received any discovery requests or other communications from IPG's counsel relating to this error or its withdrawal. I have double-checked my emails and files in an effort to verify that this is the case, and I have checked with all other SDC counsel as well.

10. Mr. Sanders did not know and could not have known about the Notice of Revised Claim before his written testimony, because I did not remember it and therefore had not told him about it. Because the error was counsel's error, and not Mr. Sanders's error, we did not believe it was necessary to file amended testimony, and believed that it would be sufficient to affirmatively withdraw the erroneous contention with an explanation from counsel. Of course, if the Judges would prefer us to submit amended testimony from Mr. Sanders, instead of an Errata, we will certainly do that.

Certificate of Service

I hereby certify that on Monday, January 29, 2018 I provided a true and correct copy of the Settling Devotional Claimants' Opposition to Independent Producers Group's Motion for Admonition and Sanctions to the following:

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Signed: /s/ Michael A Warley