

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DISTRIBUTION OF 2000-2003 CABLE
ROYALTY FUNDS**

**DOCKET NO. 2008-2 CD 2000-03
(Phase II) (Remand)**

**ORDER DIRECTING RECALCULATION OF ROYALTY ALLOCATIONS
IN THE DEVOTIONAL CATEGORY
AND SEEKING ADDITIONAL GUIDANCE**

On May 1, 2020, the Copyright Royalty Judges (Judges) issued an Order Directing Parties to Review Calculations of Apportionment of Accrued Interest (May 1 Order) in the captioned matter. In the Order, the Judges advised the parties that the Licensing Division of the Copyright Office (Licensing Division) had carried out the requisite calculations as directed by the Judges consistent with their January 9, 2020 Order Granting SDC Motion for Final Distribution. The Judges directed the parties to review the calculations (which were attached as an Appendix to the May 1, 2020 Order) and file a notice with the Judges stating whether or not they believed that “any clarifications to the calculations are necessary and, if so, an explanation of all proposed clarifications.” May 1 Order at 1.

The Judges received responses from Independent Producer’s Group (IPG) and the Settling Devotional Claimants (SDC). IPG was able “to garner little to no relevant information from” the Licensing Division’s calculation. IPG Response at 2. Specifically, IPG stated that the Licensing Division’s calculations

provide no information from which one can determine what dollar amounts are attributed to the devotional programming category, or when advance distributions were made. Without such information, it is impossible to properly allocate the accrued interest between the various Phase I categories, *i.e.*, the starting point for the [Appendix’s] page 1 calculations, much less allocate devotional royalties between the only two devotional programming participants.

Id.

IPG stated that it nevertheless “finds the amounts that the Licensing Division has attributed to the devotional programming category to be highly suspect, and entirely at odds with amounts previously reported to IPG in 2012.” *Id.* IPG asserts that the amounts that the Licensing Division provided as available for distribution to the Devotional Category “reflect discrepancies for certain royalty pools of over \$1 Million annually, as compared to what was reported to IPG in 2012.” *Id.* at 3. IPG noted that the Licensing Division’s calculations did not reflect an “advance distribution” that was made to SDC from the cable royalty pool. *Id.* at n.1. IPG contends that “the accuracy of allocation between IPG and the SDC is also incapable of determination.” Specifically, IPG notes that it is unclear “whether the Licensing Division simply allocated [IPG’s share of accrued interest] to the entire devotional programming category, or whether it allocated accrued interest only to the devotional category royalties that remained

undistributed, as the Licensing Division was directed to do.” *Id.* at 4. IPG proposes that the Licensing Division proceed under a two-stage approach. In Stage 1, the Licensing Division would calculate what amounts are allocable to the devotional category and state on what basis the Licensing Division has made such determination, identifying when advance distributions allocable to such category have been made and to whom. In Stage 2, the Licensing Division would calculate what amounts were previously distributed to the SDC and when and what interest accrued and was allocable to the undistributed funds that remained owed to IPG and the SDC. *Id.* at 5.

In its response, the SDC identified “apparent discrepancies” in the Licensing Division’s calculations and requested that the calculations be clarified by correcting them. SDC Response at 1. The SDC also opined that they had previously identified “apparent discrepancies” in final distributions that were already made to Program Suppliers, that result in surplus and shortfall amounts (depending upon the royalty year at issue) remaining for distribution to the devotional programming category.

First, the SDC believe that the Licensing Division’s calculations omit a partial distribution of \$791,052.37 from the 2003 royalty fund made to SDC by the common agent from the distribution on September 7, 2006. *Id.* at 1. The SDC also contend that the Licensing Division allocated too much accrued interest to IPG in 2000, 2001, and 2002. The SDC speculate that these overallocations occurred because the Licensing Division calculated IPG’s accrued interest allocation based on the total funds available to all categories prior to any partial distributions, as opposed to calculating IPG’s accrued interest only on those funds that remained undistributed after partial distributions were made. The SDC contend that the current interest allocations for IPG are incorrect because “IPG’s ‘base’ amount already included the interest that would have accrued through the date of the partial distribution” and that, under the Licensing Division’s calculations, IPG “is incorrectly awarded both the “base” amount (which already included interest through the date of the partial distribution) and the calculated interest on the partial distribution (which includes a second award of interest through the date of the partial distribution, thereby double-counting interest).” *Id.* at 3. The SDC estimate that this purported double-counting of interest resulted in an overstated royalty allocation to IPG of \$14,072.06 for 2000, \$7,378.49 for 2001, and \$4,419.10 for 2002. The SDC note that IPG’s interest award for 2003 is \$0 solely because the Licensing Division did not include the SDC’s partial distribution for that year. *Id.* at 4. The SDC estimate that the double counting of interest would result in an overpayment to IPG of \$25,869.65, plus compound interest. *Id.*

The SDC also assert that the actual funds that are currently available for distribution to the devotional claimants category (the last category that has not received a final distribution for 2000, 2001, 2002, and 2003) vary from the amounts that the SDC believe should be available for distribution to that category. The SDC believe that there is too much money available for distribution for 2000 and not enough for the remaining years by the following amounts:

2000: \$1,083,560.34 (too much available)
2001: \$8,561.64 (not enough available)
2002: \$13,053.95 (not enough available)
2003: \$216,347.71 (not enough available)

Id. at 6-7.

The SDC were unsure what the reasons were for the apparent discrepancies, but believes that the discrepancies could have been the result of inconsistencies in the ways in which the Licensing Division used to apportion interest. *Id.* at 7.¹ The SDC estimate that the 2000-2003 cable royalty funds collectively had earned interest totaling \$47,455,866.07 as of April 14, 2016, when a final distribution was made in the Program Suppliers category. The SDC assert that “[e]ven small variations over time in the methodologies used to apportion interest could easily generate the net surplus and shortfalls in the amounts remaining.... In essence, the aggregate sums of the effects of all variations in interest allocations over all of the distributions made in all categories have wound up in the amounts remaining in the one small category that has not received a final distribution.” *Id.* at 8.

The SDC believe there are three potential options to resolve the purported surplus.

Option 1: Allow the Licensing Division’s methodology to stand (after correcting the purported errors with respect to the omitted partial distribution to SDC for 2003 and the purported overallocation of interest to IPG).

Option 2: Use the purported surplus for 2000 to make up for the purported shortfalls in the funds available for distribution for 2001, 2002, and 2003, and distribute the remaining surplus to the devotional and program suppliers category.

Option 3: Use a consistent methodology and perform a full accounting of all amounts distributed to all claimant categories, recoup payments from parties that have received excess amounts and redistribute as necessary.

The SDC favor Option 3, even though they believe that Option 1 (or Option 2) would be more favorable to them, because they believe that Option 3 would advance the goals of confidence, consistency, and certainty in the royalty distribution process, and would ensure that all parties are paid correct amounts under consistent accounting practices. *Id.* at 9-10. The SDC believe that support for either Option 1 or Option 2 could rest on the fact that the claimant categories that have already accepted final distributions effectively waived any rights they might have had to any of the funds that remain available for distribution.

Judges Conclusions and Additional Request for Guidance

The Judges agree with the SDC that, to the extent the Licensing Division omitted a partial distribution to SDC for the 2003 cable fund in determining the final distribution totals to be allocated between the SDC and IPG, it should recalculate the allocation to reflect that partial distribution, including any changes that the omission would have on the accrued interest that IPG and SDC, respectively, would have earned had that partial distribution been included.

The Judges also agree that, to the extent that the Licensing Division based IPG’s accrued interest allocation for the 2000, 2001, and 2002 cable funds on the base amounts available prior to any partial distributions for those years, it should recalculate IPG’s interest allocations for

¹ The SDC believe that it would be difficult to pinpoint the reason(s) for the purported discrepancies without knowing how all of the distributions to all claimant categories were calculated, including partial and final distributions in all claimant categories, and potentially including distributions made to and by the common agent. *Id.* at 7.

those years and base IPG's interest on the base amount available *after* any partial distributions for each respective year was made.² For each of the funds, the Licensing Division should clearly identify the dates and amounts of any partial distributions it made and the party or party to which each such distribution was made. The Licensing Division should also clearly identify any interest variable that it applies (*i.e.*, the rate) and the base on which it applies it. The Judges request that the Licensing Division perform these recalculations (if warranted) and submit them to the Judges as soon as practicable.

With respect to the third issue that the SDC identified, *i.e.*, that the amounts that are available for distribution vary from the amounts that SDC believes should be available for distribution, the Judges seek guidance from all of the Allocation Phase parties on whether they believe that the SDC's calculations are correct and, if so, the preferred means for addressing the discrepancies. From an administrative efficiency standpoint, the SDC's proposed Option 1 is the most desirable approach of those that SDC proposed. At the other extreme is Option 3, which would no doubt require additional information from the Allocation Phase parties as well as from the common agent. It would also require additional Library staff resources, which could, potentially involve an independent third party to assist in any recalculation (and possible redistribution) of royalty payments already distributed. This process, which could result in a more accurate accounting of royalties for each year, would likely be time-consuming and costly, which may or may not be justified by the end result. Therefore, before making a final decision regarding which alternative, if any, to pursue, the Judges seek the Allocation Parties' guidance, as well as any additional feedback that the SDC and IPG may wish to provide.³ The Judges direct the interested parties to provide any responses to this order, **no later than September 18, 2020**. Parties should select the "responsive brief" document type in eCRB when filing any responses.

SO ORDERED.

Jesse M. Feder
Chief Copyright Royalty Judge

DATED: August 28, 2020.

² To be clear, any interest that IPG had earned prior to a partial distribution would be based on all of the funds available prior to the distribution. IPG's interest allocation for the remaining funds available after a partial distribution, however, would be calculated using the base of those remaining funds, taking into account IPG's increased allocation of those funds relative to the parties that received a partial distribution. Consistent interest calculations should also be made for 2003.

³ In addition to guidance on the three options that the SDC proposed, and the two stages that IPG suggested, the Judges seek guidance on any other viable alternatives for a fair and speedy resolution of this matter.