

Before the  
**COPYRIGHT ROYALTY JUDGES**  
Washington, D.C.

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

**MPA RESPONSE PERMITTED BY ORDER GRANTING MPA LEAVE TO RESPOND TO SDC MOTION FOR LEAVE**

The Motion Picture Association, Inc. (“MPA”), as the 2000-2003 cable Program Suppliers category representative, submits the following response to the Settling Devotional Claimants’ (“SDC”) October 15, 2020 Motion For Leave To Reply To MPA’s Supplemental Response To Order Directing Recalculation Of Royalty Allocations In The Devotional Category And Seeking Additional Guidance (“Motion”), as permitted by the Copyright Royalty Judges (“Judges”) in their *Order Granting MPA Leave To Respond To SDC Motion For Leave* (October 27, 2020). For all of the following reasons, SDC’s Motion should not be granted, and the Judges should disregard the pleading that SDC attached to its Motion.

**I. SDC’s Motion Seeks Leave To File An Improper Sur-reply.**

As an initial matter, SDC’s Motion should be rejected because it seeks leave to file an unsolicited and improper sur-reply to MPA’s Supplemental Response to Order Directing Recalculation of Royalty Allocations in the Devotional Category and Seeking Additional Guidance (“Supplemental Response”). The Judges’ September 24, 2020 *Order Granting MPA-Represented Program Suppliers And Joint Sports Claimants Leave To File Supplemental Responses To August 28 Order* clearly solicited supplemental responses only from MPA and the Joint Sports Claimants (“JSC”), and did not permit any other party to file supplemental responses

or submit so-called “replies” responding to any supplemental responses filed by MPA or JSC. *See* September 24 Order at 2. Moreover, the Judges’ rules do not permit parties to file a reply in this context, *see* 37 C.F.R. § 303.3(c)(3) (contemplating “replies in support of motions”), and do not permit parties to file sur-replies *at all*. It is clear that SDC’s purported “reply” is actually an improper sur-reply, seeking to reply to MPA’s Supplemental Response, which was not an opposition to a motion filed by SDC, but rather a filing specifically requested by the Judges in their September 24 Order in this proceeding. Accordingly, SDC’s Motion should be denied on procedural grounds.

## **II. SDC’s Calculations Are Plainly Erroneous.**

SDC’s Motion and the attached sur-reply also have no merit and should be denied. SDC’s purported “reconciliation” is plainly erroneous, both because it does not comport with the steps that the Licensing Division actually took in calculating the April 2016 final distributions for the Program Suppliers category in this proceeding, and because it fails to address the unique and unprecedented circumstances of that distribution. In the 2000-2003 Cable Phase II proceeding, the Judges decided to depart from precedent and, for the first time in the forty-year history of royalty distribution proceedings, decided to award Independent Producers Group (“IPG”) retroactive interest on its 2000-2003 cable final distribution shares in the Program Suppliers category because IPG had not received any 2000-2003 cable funds in partial distribution prior to receiving its final distributions. *See Restricted Order Directing Accounting of 2000-2003 Cable Royalties Disbursed To The Program Suppliers Category*, at 4 (November 25, 2015). Accordingly, the Judges directed the Licensing Division to develop a methodology for calculating IPG’s share of interest on its royalty awards, and the Licensing Division applied that methodology in order to determine the shares that IPG was due to receive, plus interest, from

the Program Suppliers category in this proceeding. After determining the amount due to IPG in the Program Suppliers category for each of the 2000-2003 cable royalty years, Judges then directed the Licensing Division to distribute all of the funds remaining in the Program Suppliers category for those royalty years to MPA. *See Final Order Of Distribution (Program Suppliers Category)* at 1-2 (March 22, 2016); *see also Order Regarding IPG's Motion For Clarification Of Order Regarding Final Distribution For The Program Suppliers Category (Restricted)* at 1-5 and Attachment A (December 23, 2016).

SDC's so-called "reconciliation" purports to apply the same interest calculation methodology employed by the Licensing Division to calculate IPG's 2000-2003 cable awards in the Program Suppliers category to MPA. *See Motion at 2 and attached Reply, MacLean Declaration Exhibit 1.* However, the Licensing Division clearly did not utilize that interest calculation methodology to calculate MPA's April 14, 2016 distributions.<sup>1</sup> Indeed, it would not have been proper for the Licensing Division to calculate retroactive interest on MPA's 2000-2003 cable final distribution awards in the same manner it did for IPG, as MPA received 2000-2003 cable royalties in partial and further distributions prior to April 2016 based on its confidential settlement agreements with the Phase I Phase Parties. As a result, SDC's calculations do not reflect the methodology utilized by the Licensing Division in calculating MPA's 2000-2003 cable final distributions. Instead, the calculations merely represent SDC's

---

<sup>1</sup> The Licensing Division did not provide MPA with a worksheet in connection with its April 14, 2016 royalty distribution of 2000-2003 Cable royalties to MPA, despite multiple emails from MPA requesting such a worksheet. Instead, the Licensing Division made a single distribution of \$16,329,555.16 in royalties to MPA on April 14, 2016 for all of the 2000-2003 cable royalty years, without identifying the amount of royalties being distributed to MPA separately for each of the 2000-2003 cable royalty years, or the calculations applied by the Licensing Division to calculate those totals. Despite not having access to the Licensing Division's worksheet, MPA is able to determine the dollar amount of royalties distributed to MPA for each of the 2000-2003 cable royalty years by utilizing information publicly available on the Copyright Office's website regarding the total dollar amounts distributed on April 14, 2016 from each royalty fund, and deducting the royalty shares awarded to IPG. *See <https://www.copyright.gov/licensing/distribution-fund.pdf>* (last visited November 3, 2020); *Final Order Of Distribution (Program Suppliers Category)* at 1-2 (March 22, 2016).

attempts to manipulate numbers in order to provide some semblance of justification for SDC to receive a royalty windfall to which it is not entitled. The Judges should reject SDC's purported "reconciliation" outright.

**III. The Judges Should Not Award Royalties To SDC In Excess Of The Share Of The Reserve SDC Agreed To For The Devotional Category.**

All of the royalty distributions of 2000-2003 cable funds made to MPA and SDC (and all of the other Phase I Phase Parties) prior to August 14, 2015 were made by agreement of the Phase I Parties, and were consistent with their confidential settlement agreements. On August 14, 2015, the Phase I Parties filed their Joint Response Of The Phase I Parties To IPG's Motion For Final Distribution Of 2000, 2001, 2002, And 2003 Cable Royalty Funds In The Program Suppliers Category (August 14, 2015) (Restricted) ("Joint Response"), and informed the Judges how the Phase I Parties had agreed the 2000-2003 cable funds remaining on reserve should be allocated between the Program Suppliers and Devotional categories. *See* Joint Response at 3 (attached to MPA's Supplemental Response as Exhibit A). Counsel for SDC was a signatory to the Joint Response, and agreed to the reserve allocation between the Program Suppliers and Devotional categories presented in the Joint Response.

Apparently sensing an opportunity to collect a windfall, SDC *now* seeks to avoid the Phase I Parties' agreement regarding the reserve allocation in the Joint Response and argue, more than five years after the Joint Response was filed, that it should be entitled to receive more in final distribution than the Phase I Parties agreed that the Devotional category was entitled to receive. Not only is this argument plainly erroneous, it is specious and self-serving. Counsel for SDC agreed to the reserve allocations for the Program Suppliers and Devotional categories set forth in the Joint Response on August 14, 2015, and filed the Joint Response with the Judges as a signatory to the pleading with all of the other Phase I Parties. The Judges have held that joint

filings like the Joint Response should be considered stipulations among the parties and relied on by both the parties and the Judges. *See, e.g., Order Regarding Discovery*, Docket No. 14-CRB-0010-CD (2010-13) at 4-7 (July 26, 2016). The same logic should bind SDC to its agreement with the Phase I Parties regarding the 2000-2003 cable reserve allocations for the Program Suppliers and Devotional categories, and SDC should be estopped from seeking royalty funds in excess of the reserve for the Devotional category established in the Joint Response. SDC's eleventh hour attempt to mount a collateral attack on the Joint Response should not be entertained by the Judges—especially when presented through an unsolicited and impermissible sur-reply.

#### **IV. SDC's Waiver Argument Is Misplaced.**

SDC argues, implausibly, that MPA should be deemed to have waived any further interest in the 2000-2003 cable funds because MPA accepted the funds that the Licensing Division distributed on April 14, 2016 and did not “object” to the distribution at that time. *See* Motion, attached Reply at 4 (asserting that the Judges should find that all the Phase I Parties waived any further interest in the 2000-2003 cable funds because they accepted “final distributions four or more years ago without raising any timely objection”). However, SDC's waiver argument is misplaced as to MPA. As explained above, *see* note 1, the Licensing Division distributed a single lump sum royalty payment to MPA on April 14, 2016, without providing MPA with a worksheet or any information regarding what portion of the royalties was attributable to each of the 2000-2003 cable royalty years, or explaining how the Licensing Division calculated MPA's royalty distribution. MPA requested such a worksheet from the Licensing Division repeatedly, but none was provided, leaving MPA without the information necessary for it to discover that the April 14, 2016 distributions for the Program Suppliers

category were inconsistent with the Joint Response. MPA received Appendix A to the Judges' August 28 Order in this proceeding from counsel for SDC on September 23, 2020, discovered that the amounts distributed to the Program Suppliers category on April 14, 2016 were inconsistent with the Joint Response, and filed its Supplemental Response on October 9, 2020. Accordingly, once MPA was aware that discrepancies existed between the April 14, 2016 distribution amounts and the Joint Response, MPA brought the discrepancies at issue to the Judges' attention promptly. SDC's assertion that MPA waived its entitlement to claim additional 2000-2003 cable royalty funds is therefore misplaced.

### **CONCLUSION**

For all the reasons expressed herein, the Judges should deny SDC's Motion, disregard the attached improper sur-reply, and proceed to distribute the remaining 2000-2003 cable royalties in a manner consistent with MPA's Supplemental Response.

Respectfully submitted,

Dated: November 2, 2020

**MPA-REPRESENTED PROGRAM  
SUPPLIERS**

*/s/ Gregory O. Olaniran*

---

Gregory O. Olaniran  
DC Bar No. 455784  
Lucy Holmes Plovnick  
DC Bar No. 488752  
MITCHELL SILBERBERG & KNUPP LLP  
1818 N Street NW, 8th Floor  
Washington, DC 20036  
Telephone: (202) 355-7917  
Facsimile: (202) 355-7887  
goo@msk.com  
lhp@msk.com

*Attorneys for MPA-represented Program  
Suppliers*

**CERTIFICATE OF SERVICE**

I certify that on November 2, 2020, I caused a copy of the foregoing to be served on all parties registered to receive notice by eCRB by filing through the eCRB filing system.

*/s/ Lucy Holmes Plovnick*

---

Lucy Holmes Plovnick



# Proof of Delivery

I hereby certify that on Monday, November 02, 2020, I provided a true and correct copy of the MPA Response Permitted By Order Granting MPA Leave To Respond To SDC Motion For Leave to the following:

Settling Devotional Claimants (SDC), represented by Benjamin S Sternberg, served via ESERVICE at ben@lutzker.com

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

Signed: /s/ Lucy H Plovnick