

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

DISTRIBUTION OF CABLE ROYALTY
FUNDS

CONSOLIDATED PROCEEDING
NO. 16-CRB-0009 CD (2014-17)

**SETTLING DEVOTIONAL CLAIMANTS' OPPOSITION TO PROGRAM SUPPLIERS'
MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE TESTIMONY OF
PROFESSOR ROBERT A. PAPPER**

The Settling Devotional Claimants (“SDC”) oppose Program Suppliers’ motion *in limine* to exclude portions of the Written Direct and Rebuttal Testimonies of Commercial Television Claimants witness Professor Robert A. Papper.

The SDC take no position on the reliability of the Radio Television Digital News Association (“RTDNA”) survey results discussed by Professor Papper. However, the SDC ask that the Judges, in ruling on Program Suppliers’ motion *in limine*, take care not to inhibit the ability of expert witnesses to cite to published, independent studies of the kind that an expert in the field would rely upon, even if underlying documents have not been retained or are inaccessible for reasons unrelated to CRB proceedings. As far as the SDC are aware, the RTDNA surveys were independently created and not commissioned for the purpose of answering the valuation question posed in this proceeding.

The document retention requirement of 37 C.F.R. § 351.10(e) should apply to any study or analysis that is reasonably anticipated to be used in copyright royalty proceedings, but it would be impractical to apply a Copyright Royalty Board rule to studies or analyses independently prepared for other purposes and that were not reasonably anticipated for use in copyright royalty proceedings. Rigid application of the document retention rule to independent

studies that were prepared other than for copyright royalty proceedings would tend to relegate the parties exclusively to the use of non-independent “hired gun” studies prepared for the purpose of supporting a party’s position in copyright royalty proceedings. As we have seen, when subject to appropriate discovery and scrutiny, such “hired gun” studies can be unreliable or deceptive.

In urging the Judges to exclude Professor Papper’s testimony, Program Suppliers either fail to recognize or seek to erase the distinction between a study commissioned by a party for the purpose of copyright royalty proceedings and a published study that was not prepared in connection with copyright royalty proceedings, even if the testifying expert had some relationship to the study. If successful, the motion relying on this conflation would threaten the ability of experts in all future proceedings to cite third party research, published industry studies, or even their own work that is unrelated to the CRB proceedings.

The availability of underlying data (or lack thereof) may sway the Judges to assign greater or lesser weight to Professor Papper’s testimony – or to the testimony of any expert who cites published studies. But these are questions of reliability, not discovery or retention obligations under 37 C.F.R. §§ 351.10(e).

Conclusion

For the forgoing reasons, Program Suppliers’ motion *in limine* should be denied.

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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Dated: February 24, 2023

CERTIFICATE OF SERVICE

I certify that on February 24, 2023, 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/ Michael A. Warley_____

Michael A. Warley

Proof of Delivery

I hereby certify that on Friday, February 24, 2023, I provided a true and correct copy of the Settling Devotional Claimants' Opposition to Program Suppliers' Motion in Limine to Exclude Portions of the Testimony of Professor Robert A. Papper to the following:

SESAC Performing Rights, LLC, represented by Timothy L Warnock, served via E-Service at twarnock@loeb.com

Public Television Claimants, represented by Ronald G. Dove Jr., served via E-Service at rdove@cov.com

ASCAP, represented by Sam Mosenkis, served via E-Service at smosenkis@ascap.com

Multigroup Claimants, represented by Brian D Boydston, served via E-Service at brianb@ix.netcom.com

Program Suppliers, represented by Lucy H Plovnick, served via E-Service at lh@msk.com

National Public Radio, represented by Gregory A Lewis, served via E-Service at glewis@npr.org

Commercial Television Claimants / National Association of Broadcasters, represented by David J Ervin, served via E-Service at dervin@crowell.com

Global Music Rights, LLC, represented by Scott A Zebrak, served via E-Service at scott@oandzlaw.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via E-Service at ted@copyrightroyalties.com

Canadian Claimants, represented by Lawrence K Satterfield, served via E-Service at lksatterfield@satterfield-pllc.com

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via E-Service at jennifer.criss@dbr.com

Joint Sports Claimants, represented by Michael E Kientzle, served via E-Service at

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Signed: /s/ Caroline Block