Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of	)	
	)	
Copyright Royalty Board's	)	Docket No. RM 2005-1
Final Rules with	)	
Request for Comments	)	
	)	
	)	

INDEPENDENT PRODUCERS GROUP'S COMMENTS TO PROPOSED AMENDMENTS TO PROCEDURAL REGULATIONS

On September 11, 2006, the Copyright Royalty Board ("CRB") adopted amendments to the procedural regulations governing the practices and procedures of the Copyright Royalty Judges in royalty rate and distribution proceedings. Written comments were to be received no later than November 13, 2006. Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG"), hereby files its "Comments to Proposed Amendments to Procedural Regulations".

1. The Proposed Amendment to 37 CFR Part 350.2, Relating to the Representation by Legal Counsel, is Improvident for Numerous Reasons.

A. Introduction.

One of the procedural regulations the CRB seeks to amend is 37 CFR Part 350.2, relating to the representation of parties in proceedings before the Judges. The original version of the regulation broadly allowed parties before the CRB to either represent themselves or be represented by an attorney. This version fell squarely in line with two decades of practice before the Copyright Royalty Tribunal and the Copyright Arbitration Royalty Panel. The proposed amendment, however, would limit self-representation to "individual" parties, and now states that "[a]ll other parties [i.e., all parties other than "individual" parties] must be represented by an attorney."

The term "individual parties" is not defined, and while interpretation might appear straightforward,[1] issues relating to the representation of interests before the CRB complicate this interpretation. Initially, if the intention is to define "individual parties" as natural persons, as opposed to a non-natural entity such as a corporation, limited liability company or partnership, then the amendment runs contrary to the long-time practice of the CRT and the CARP proceedings, and disrupts the agreements that have relied on regulations allowing self-representation by a legal entity. If, by contrast, the intention is to define "individual parties" as *any* entity, natural or otherwise, that are representing solely their own interests, clarification is needed. Clarification is also necessary whether the proposed rule applies to all matters before the CRB, or only such matters as have progressed to the filing of direct cases.

IPG is a limited liability company. Commencing in 1998, IPG began entering into agreements whereby IPG was assigned the right to collect retransmission royalties that would otherwise be distributed to the assigning entity. Varying by proceeding, IPG maintains claim to thousands of programs for which the underlying copyright was held by 250 different independent producers. Although IPG makes claim for films and programs with whom the original copyright vest with others, IPG represents only itself in CARP (or CRB) proceedings. That is, IPG does not act as an agent for third parties, and is not subject to any third party's control, but rather prosecutes its rights as an individual party that has secured its rights by contractual assignment.

B. <u>The Proposed Amendment Is Unnecessary</u>.

As an initial matter, it is unclear why the proposed amendment was even promulgated. Review of service lists for multiple proceedings reflect that multiple parties participating in current CARP proceedings represent themselves, and where representation was not through legal counsel there is no indication that problems have arisen that could have been avoided by legal counsel representation.

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[1] The only citation of authority is to Rule 49(c)(11) of the Rules of the District of Columbia Court of Appeals, which rule sets forth that it constitutes the unauthorized practice of law for an officer, director or employee of a corporation or partnership to represent such entity, except in very limited circumstances.

For example, service lists for currently active cable and satellite retransmission royalty proceedings reflect representation by multiple in-house personnel, including for such notable parties as PBS, the Officer of the Commissioner of Baseball, ASCAP, BMI, the National Association of Broadcasters, Universal Studios (and its related companies), NBC, ABC and CBS.[2] The proposed amendment would preclude the participation by all of these individual representatives, except through separately engaged legal counsel.

The question is begged, therefore, as to what necessity the proposed amendment is seeking to serve. If it is according to some desire to increase the professionalism of the proceedings, then the proposed amendment is ill-suited. Self-represented "non-natural person" entities have professionally represented themselves in multiple proceedings and, indeed, forcing a party to work through legal counsel may only serve to harm the efficiency of the proceedings because of the nature of evidence reviewed.[3]

C. The Proposed Amendment Runs Contrary to Prior CRT and CARP Practice, and Disrupts the Reasonable Expectations of Contracting Parties.

If the purpose of the amendment is to limit practice before the CRB to attorneys (when non-natural persons are the participants), then IPG would strongly object for several reasons. As noted, such a rule has not been in effect for the two decades of proceedings before the CRT and the CARP. While most parties are represented by legal counsel, it was always their perogative to represent themselves. Based on the reasonable expectation that IPG would be allowed to represent itself through its officers and employees, many of whom have extensive legal experience, IPG has entered into hundreds of agreements based on its reasonable expectation of expenses. Such

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[2] IPG cites these entities for example only, and does not suggest their agreement or disagreement with IPG's position herein.

[3] The bulk of issues addressed by the royalty distribution proceedings are not legal in nature, but factual. That is, they involve the review of evidence relating to a fair and equitable distribution of royalties based on reports, studies and other considerations, not the presentation and review of published legal precedent. Such evidence is often internalized by personnel within companies, who must deal with such evidence on a daily basis. The involvement of outside legal counsel simply for the purpose of further communicating this information, is unnecessary and superfluous.

reasonable expectation did not include the legal fees that will necessarily be incurred if representation by legal counsel is required in all CRB proceedings. Quite simply, the *ex post facto* application of the proposed amendment to proceedings for which claims have long since been made, would be inequitable.

If, by contrast, the proposed amendment seeks only to require legal counsel when a party is acting as an agent representing the interests of multiple parties, then clarification of this interpretation is needed. Clarification is also necessary whether the proposed amendment is intended to apply to all matters before the CRB, including matters prior to the filing of direct cases, or only such matters as have progressed to the filing of direct cases.

D. <u>The Proposed Amendment Substantially Increases the Cost to Appear Before the CRB, and thereby Creates an Unfair Advantage to Certain Participants</u>.

In any proceeding exceeding $10,000 at issue, the legal fees that are minimally necessary in order for a party to fully prosecute its rights makes rights prosecution cost-prohibitive except for the largest of companies capable of funding litigation.[4] This fact is exacerbated by the fact that prior Copyright Office rulings have established a system whereby royalties have been advanced to the larger, long-term participants in the retransmission royalty distribution scheme, while more recent participants (even IPG, which has participated since 1998) have been advanced *no monies* for its vast claims. Consequently, for proceedings *from 1998 to present* only certain parties have been advanced royalties, allowing those parties to fund their proceeding costs from such advances, while requiring relative newcomers to fund such costs out-of-pocket.

The obvious consequence of such a system is to effectively preclude entry by newcomers, irrespective of the legitimacy of their claims. While it is a fact of life that

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[4] IPG has initiated and responded to motions in most proceedings, without the assistance of legal counsel. IPG has participated in only one CARP proceeding which included the submission of direct cases, and engaged legal counsel in such matter. In the course of such CARP proceeding, and despite IPG's drafting and presentation of the bulk of motions, discovery, etc., IPG expended approximately $500,000 in legal fees. IPG's adversary, the MPAA, represented in such proceeding that it had incurred $2.5-3.0 Million in legal fees and costs.

larger, well-heeled entities are better capable of funding litigation, it should not be the role of the CRB to establish regulations that will further increase this disparity between participants, where fairness is the only casualty.

E. The Proposed Amendment Runs Contrary to the Nature of Administrative and Regulatory Proceedings.

Finally, requiring that a party be represented by counsel runs contrary to the nature of administrative and regulatory proceedings. The CRB's sole citation, to rules promulgated by the District of Columbia Court of Appeals, is inapposite for the simple distinction that such rules relate to the practice of law before appellate courts, not the submission of claims to a governmental agency.

A long-time distinction between representation before courts and administrative agencies is the ability of a party to represent itself before an administrative agency in matters relating to its interests. There is no general requirement set forth in the practice before federal administrative agencies that mandates the presence of legal counsel.[5] Comparable federal agencies explictly allow for self-representation. For example, in proceedings before the Federal Communications Commission, " any party may be heard in person, or by an attorney", and "a duly authorized corporate officer or employee may act for the corporation in any matter which has not been designated for an evidentiary hearing and, in the discretion of the presiding officer, may appear and be heard on behalf of the corporation in an evidentiary hearing proceeding." 47 C.F.R. Section 1.21. These regulations recognize the informality, and often non-legal nature, of proceedings before their agency, erring on the side of self-representation rather than a hard-and-fast rule requiring outside legal counsel representation in all circumstances.

F. Conclusion.

In sum, if the intention of the amendment is to now require any non-natural person to engage legal counsel, then the proposed amendment is unnecessary, inequitable for its post-hoc application, exacerbates an already unfair system that requires remedy in order to create a level playing field, and is generally contrary to the nature of

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[5] Section 500(d)(1) of the Administrative Procedures Act explicitly states that it "does not grant or deny to [a non-attorney or non-CPA] the right to appear for or represent a person before an agency or in an agency proceeding." 17 U.S.C. Section 500(d)(1).

administrative proceedings which historically allow legal entities to represent themselves. The proposed amendment will only serve to increase costs to those parties that are already plagued with a system that provides their competitors with royalty advances, while denying them royalty advances despite vast, legitimate claims. At minimum, application of the proposed amendment to claims that have been submitted prior to the proposed amendment (in some cases, eight years prior) must be prohibited.

If, by contrast, the intention of the amendment is to require legal counsel if the party before the CRB is representing a group of parties, as opposed to a single entity, or requires legal counsel only after the submission of direct cases, then such clarifications should be made. IPG, however, advocates no change in the practice that has existed for at least two decades, and for which IPG and other parties have relied, i.e., self-representation before the CRB.

2. <u>The Proposed Amendment to 37 CFR Part 350.4(f), Relating to the Filing Dates for Opposition and Reply Briefs, Creates Unnecessary Time Constraints</u>.

Another amendment proposed by the CRB is to reduce the number of days by which a party may respond to a motion, either by an opposition brief or a reply brief. The existing regulation established that opposition briefs must be filed within seven business days, and reply briefs within five business days, and the proposed amendment seeks to reduce such response times by two business days each.

Attempting to be charitable in its characterization, IPG finds no benefit in the imposition of response dates that are far more difficult to satisfy than any others for which IPG is aware, either in the administrative or judicial context. Although IPG agrees with the CRB's desire to expedite proceedings where possible, the practical effect of this proposed amendment would be to create unnecessary time constraints on all parties, particularly those parties not residing within the Washington, D.C. area.

Specifically, because the CRB does not currently accept the electronic filing of opposition and reply briefs, the filing of briefs by any party residing out of the Washington, D.C. area already reduces the actual response time by one business day, the time necessary to send a package by overnight courier to the CRB for filing. Moreover, 37 C.F.R. Part 350.4(h), which allows service electronically, does not appear to allow the recipient party to compel electronic service. Therefore, service by overnight courier

further reduces the response time by at least one business day, the amount of time that it takes a recipient to receive an adversary's filing. In fact, in IPG's experience, even when overnight couriers have been engaged, IPG has oftentimes received an adversary party's filing as late as 7:00 p.m. on the day following filing, effectively reducing IPG's response time by *two* business days.

The unintended consequence of the proposed amendment is obvious. Rather than allow a reasonable amount of time for a party to responsibly and professionally respond, an unnecessary rush is imposed. Rather than having the desired seven or five business days to respond, the practical effect for any party residing outside of Washington, D.C. is to possibly have only four or two business days to respond, respectively.

Such a restraint as would be imposed by the proposed amendment does not promote good practice before the CRB. In the absence of any other modifications to the regulations, the only solution is for participants residing outside of Washington, D.C. to unnecessarily engage legal counsel in the Washington, D.C. area in order to handle their filings, or sacrifice the quality of their filings. Neither option is attractive or equitable simply because a party does not reside in Washington D.C.

IPG notes, however, that it would have no objection to the proposed amendment *if* the reduction in response time were coupled with (i) an entitlement for the service recipient to mandate service electronically, i.e., an ability to compel electronic service, and (ii) the CRB's acceptance of electronic filings.[6] By doing so, communication is immediate and documented, yet an adequate amount of time for response is provided, irrespective of where a party resides.

In the absence of some further modification to the CRB rules, as articulated above, IPG strongly opposes any modification to the current regulations relating to the appropriate opposition and reply brief response dates.

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[6] Presumably, the CRB is capable of receiving motions electronically, through simple email, as demonstrated by the CRB's receipt of July claims filings electronically.

CONCLUSION

For the reasons set forth above, IPG submits that the proposed amendments to 37 C.F.R. Part 350.2 and 37 C.F.R. Part 350.4(f) should be rejected.

Respectfully submitted,

Independent Producers Group

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