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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **Proceedings of the Copyright Royalty Board; Violation of Standards of Conduct**	**No. 17-CRB-0013-RM**

REPLY COMMENTS OF THE ALLOCATION PHASE PARTIES

The undersigned representatives of certain of the Allocation Phase (formerly "Phase I") claimant categories to which Section 111 cable royalties have been allocated in prior cable royalty allocation proceedings ("Allocation Phase Parties")[1] submit the following comments in response to the Judges' notice soliciting reply comments (82 Fed. Reg. 28800 (June 26, 2017)) on their proposed rule for standards of conduct ("Conduct Rule") (82 Fed. Reg. 18601 (Apr. 20, 2017)).

I. The Proposed Conduct Rule Is Constitutional.

Contrary to the suggestions of Raul Galaz and Worldwide Subsidy Group, LLC, dba Independent Producers Group ("IPG")[2], the Conduct Rule is fully consistent with constitutional guarantees of due process and equal protection. The rule expressly provides for "notice and opportunity for hearing" before the suspension or debarment of any person or entity. 82 Fed. Reg. 18603. Moreover, the Conduct Rule does not contemplate any type of automatic exclusion or sanction; rather, it provides that the Judges "may" temporarily or permanently revoke the privilege of participating before the Copyright Royalty Board. *Id.* The outcome would be a

[1] The Allocation Phase Parties joining these comments are Program Suppliers, Joint Sports Claimants ("JSC"), Commercial Television Claimants, Public Broadcasting Service, Settling Devotional Claimants, Canadian Claimants Group, and National Public Radio.

[2] Because the comments of IPG and Mr. Galaz make the same arguments, the Allocation Phase Parties will address them together.

discretionary determination, based on the specific facts and circumstances presented to the Judges.

Thus, the authorities cited by IPG regarding automatic, blanket disqualifications for felony conviction are plainly inapposite. *See* IPG Comments at 19-24 (citing *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977); *Kindem v. Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977)). The statutes at issue in those cases imposed sweeping "across-the-board" disqualifications from employment. *See Miller*, 547 F.2d at 1315 (invaliding ordinance prohibiting issuance of chauffeur's license to "*any* person convicted of certain crimes") (emphasis added); *Kindem*, 502 F. Supp. at 1111 (striking down an "across-the-board ban on hiring ex-felons"); *Smith*, 440 F. Supp. at 1080 (disapproving "blanket exclusionary rule"). But, "[t]his is not to say that a prior felony conviction can never be a factor in public employment decisions." *Kindem*, 502 F. Supp. at 1112. The infirmity with the provisions in those cases was their imposition of an automatic, universal ban.

In contrast, the Conduct Rule does not impose any "blanket exclusionary rule." Rather, a prior felony conviction – and its facts and circumstances – can be *considered* by the Judges, but its mere existence does not mandate any particular result or penalty. Such a rule is entirely appropriate. Indeed, the rules of the U.S. Patent and Trademark Office ("USPTO") similarly provide that conviction of "serious crime" – which is defined to include "[a]ny criminal offense classified as a felony" – may be grounds for discipline or suspension. *See* 37 C.F.R. §§ 11.1, 11.19, 11.25. Other agencies have similar rules. *See*, *e.g.*, 31 C.F.R. §§ 10.50(a), 10.51(a) (IRS may suspend or disbar practitioner for conduct including conviction of "any criminal offense involving dishonesty or breach of trust," "any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service," or any "any criminal offense under the Federal tax laws"); 17 C.F.R. § 201.102(e)(2) ("any

person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the [Securities Exchange] Commission").

There is likewise no merit to IPG's suggestion that the Conduct Rule is "overbroad" because it gives the Judges the discretion to suspend or debar practitioners found to be "incompetent or disreputable" (IPG Comments at 5). This mirrors the statutory standard applicable to practitioners before the USPTO. *See* 35 U.S.C. § 32 (permitting USPTO Director to suspend or exclude "any person, agent, or attorney shown to be incompetent or disreputable"); *see also Bender v. Dudas*, 490 F.3d 1361 (Fed. Cir. 2007) (affirming USPTO exclusion of practitioner pursuant to 35 U.S.C. § 32 and USPTO rules). IRS regulations similarly provide that "[t]he Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of §10.51)."[3] 37 C.F.R. § 10.50(a).

IPG also argues that the Conduct Rule is overly broad because it could be read to apply to "any" regulatory infraction (IPG Comments at 5). The Allocation Phase Parties do not believe that the Judges intended to provide for suspension or debarment in the case of any regulatory

[3] If the Judges deem it advisable to further define the phrase "incompetent or disreputable," the IRS definition may provide a useful point of reference. Under that definition, incompetence and disreputable conduct includes, among other things, criminal convictions for offenses involving dishonesty or breach of trust, violation of the Federal tax laws, or any felony "for which the conduct involved renders the practitioner unfit to practice" before the IRS; "[g]iving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading . . ."; "the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment"; "[m]isappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States"; and "[d]isbarment or suspension from practice as an attorney, certified public

infraction, even a minor and inadvertent one. In order to clarify this point, the May 22, 2017 Comments of the Allocation Phase Parties ("APP Comments") suggested that the Judges revise the proposed Conduct Rule to state that it applies to "[a]ny person **who has demonstrated a pattern of persistent failure to abide by** Copyright Royalty Board rules or regulations**, or who has committed a violation of Copyright Royalty Board rules or regulations that threatens the integrity of the proceedings**." *See* APP Comments at 4-5 (proposed addition in bold). The Allocation Phase Parties stand by that suggestion.

Finally, there is no basis for IPG's argument that the Conduct Rule would run afoul of the Bill of Attainder Clause (IPG Comments at 25-27). A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). None of those features is present here. The Conduct Rule applies generally to all persons appearing before the Judges, and it does not inflict any punishment, on Mr. Galaz or anyone else, let alone without trial.[4] As discussed above, no action against any person or entity is automatic under the rule, and notice and a hearing would precede any action. The Judges' reference to Mr. Galaz's prior misconduct in discussing the background to the rule is simply a reflection of the historical facts and cannot transform the rule into a bill of attainder. *See Nixon*, 433 U.S. at 471-72 (act governing preservation of presidential materials did not offend the Bill of Attainder Clause in referring to former president by name).

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accountant, public accountant or actuary by any duly constituted authority . . . ." *See* 31 C.F.R. § 10.51(a).

[4] For the same reason, there is no basis for IPG's suggestion that the Conduct Rule somehow conflicts with the sentence imposed on Mr. Galaz after his guilty plea (IPG Comments at 7-10). In adopting the rule, the Judges would not be "sentencing" or punishing Mr. Galaz in any way.

II. IPG's Remaining Arguments Are Without Merit.

Inexplicably, IPG argues that the Conduct Rule may somehow violate Title VII prohibitions against discrimination by employers (IPG Comments at 28-30). This is not an employment matter, and Title VII is simply irrelevant to the Conduct Rule. Moreover, as discussed above, the Conduct Rule does not mandate any blanket exclusion based on a prior conviction; it is simply a factor the Judges may consider.

There is likewise no merit to IPG's argument that the Conduct Rule is contrary to the Federal Rules of Evidence (IPG Comments at 31). While under those rules evidence of a prior conviction goes to credibility of a witness's testimony and not its admissibility (*see* Fed. R. Evid. 609(a)), nothing in those rules suggests that agencies and tribunals cannot police the practitioners and experts who appear before them. *See, e.g.*, 17 C.F.R. § 201.102(e) ("Rule 2(e)") (providing for suspension and disbarment of persons appearing or practicing before the SEC); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 572-73 (2d Cir. 1979) (affirming SEC's authority to bar expert accountants from its proceedings under Rule 2(e)).

IPG also speculates that the Conduct Rule may prevent a party from engaging its counsel of choice (IPG Comments at 32-34). The Allocation Phase Parties agree that disqualification of counsel is an extreme remedy that should be imposed only if necessary in the circumstances, but in adopting the Conduct Rule the Judges would not be disqualifying any party's counsel. In the event of any future action that applied to counsel, such action would follow notice, a hearing, and due consideration of the facts and circumstances by the Judges. The fact that a remedy may be invoked only rarely and in serious circumstances does not mean that it should be beyond the Judges' discretion.

III. The Music Community's Concerns Regarding Licensed Professionals Can Be Alleviated By Clarifying That The Conduct Rule Does Not Apply To Conduct Unrelated To The Integrity Of These Proceedings.

The comments filed by the Music Community Participants ("Music Community Comments") expressed concern that the rule's provisions regarding "any person whose license to practice" as a professional "has been revoked or suspended in any State" might be read to apply to conduct that does not suggest any risk to the integrity of the proceedings before the Judges, such as "a formerly-suspended cosmetologist working as an accountant," or an attorney or accountant who had a prior suspension due to a ministerial matter like the late payment of professional dues or failure to document continuing education requirements. Music Community Comments at 14-18. The Allocation Phase Parties did not understand the Conduct Rule to contemplate such a result, and are confident that the Judges would exercise their discretion appropriately in addressing the specific facts and circumstances before them. However, to alleviate the Music Community's concerns, the Judges could state expressly in the final Conduct Rule, or in the accompanying commentary, that any suspension or debarment by the Judges based on the suspension or revocation of a person's professional license will be limited to circumstances where the underlying conduct indicates a risk to the integrity of the proceedings before the Judges.

IV. The Judges Should Adopt the Conduct Rule to Supplement the Currently Available Remedial Measures.

The Allocation Phase Parties believe that, while the Judges already have the authority to impose a variety of sanctions for misconduct in proceedings before them, the Conduct Rule would provide a useful supplement to that authority. This is illustrated by the history of repeated misconduct involving Mr. Galaz and IPG, which did not end with Mr. Galaz's guilty plea and conviction for making fraudulent submissions to the Copyright Office. Rather, as the Judges are

aware (and as detailed in the separate reply comments filed by various parties), Mr. Galaz, IPG and affiliated entities have persisted in their misconduct and disregard of the Judges' rules despite the repeated imposition of various evidentiary sanctions, admonishments, and dismissals of claims.[5] Recidivism of this sort is better addressed by the process envisaged by the proposed rule than solely by the continuing imposition of *ad hoc* responses to particular incidents of misconduct. Just as the USPTO, IRS, and SEC have found it useful to adopt general rules governing suspension or debarment rather than relying only on case-by-case sanctions (*see* 37 C.F.R. §§ 11.1 *et seq.*; 31 C.F.R. §§ 10.50 *et seq.*; 17 C.F.R. § 201.102(e)), the Judges also will benefit from the adoption of rules of conduct for their proceedings.

Respectfully submitted,

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[5] For example, in the Sports category in which JSC participates, IPG repeatedly has sought to pursue claims for FIFA programming – despite the fact that FIFA had expressly disavowed any such authority – and sought to hide that fact from the Judges and JSC through a "blatant discovery violation by IPG." *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 138 (D.C. Cir. 2015); *see also Order on Joint Sports Claimants' Mot. for Summ. Adjudication Dismissing Claims of Indep. Producers Grp.*, Nos. 2012-6 CRB CD 2004-2009, 2012-7 CRB SD 1999-2009 (Aug. 29, 2014); *Mem. Op. and Order Following Prelim. Hr'g on Validity of Claims*, No. 2008-2 CRB CD 2000-2003 (Phase II) (Mar. 21, 2013). As set forth in the individual reply comments filed by various parties, there are numerous additional examples of continuing misconduct by IPG/Mr. Galaz.

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Dated: July 26, 2017

Certificate of Service

I hereby certify that on Wednesday, July 26, 2017 I provided a true and correct copy of the Reply Comments of the Allocation Phase Parties to the following:

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