Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In the Matter of	)	
	)	
Distribution of the 2000-2003	)	**Docket No. 2008-2**
Cable Royalty Funds	)	**CRB CD 2000-2003 (Phase II)**
	)	

SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF THEIR MOTION FOR FINAL DISTRIBUTION UNDER 17 U.S.C. § 801(b)(3)(A) AND OPPOSITION TO INDEPENDENT PRODUCERS GROUP'S MOTION FOR SANCTIONS

In its opposition to the SDC's motion, IPG does not deny that the parties have a complete and binding agreement for distribution on the terms that were offered and accepted: "31.25% to IPG, and 68.75% to SDC across all four cable royalty years, 2000-03." *See* Ex. 1. This should end the matter. "[T]he parties' agreement regarding the final percentage distribution ends any remaining controversy with regard to the subject funds over which the Judges have jurisdiction and … neither party retains a significant interest related to this proceeding." Final Distribution Determination, 83 Fed. Reg. 38,326 (Aug. 6, 2018). The Judges have the statutory jurisdiction to determine whether the distribution of copyright royalty fees is "subject to controversy," and to authorize distribution if they find that the distribution of fees is not subject to controversy. 17 U.S.C. § 801(b)(3)(A). The Judges should authorize the parties' agreed distribution.

Far from disputing the enforceability of the parties' complete and binding agreement, IPG instead claims that the SDC have breached an implied term of the agreement by seeking the agreement's enforcement. "IPG contends that a settlement agreement had been reached with the SDC, and it was subject to the same terms of confidentiality as to which the settlement negotiations were expressly subject." IPG Opposition at 13. As set forth in the SDC's motion

and in the email chains attached to the SDC's motion, confidentiality was not a term of the SDC's offer or of IPG's acceptance. But even if it were, the Judges lack jurisdiction to enforce the terms of a private agreement other than to authorize the distribution no longer subject to controversy.

A. The Parties' Settlement Agreement Is Not Confidential.

IPG's principal argument that confidentiality was implied in the agreement is based on the label used by the SDC's trustee (but not IPG's counsel), "CONFIDENTIAL SETTLEMENT COMMUNICATION" on his settlement offer. This phrase, which was not a term of the offer and was neither referenced nor repeated in IPG's acceptance, should be viewed merely as an invocation of the principle under common law and the Federal Rules of Evidence that settlement communications are inadmissible to prove the validity or amount of a disputed claim. *See, e.g.*, Fed. R. Evid. 408. But the law is well settled that although settlement discussions "are inadmissible to prove liability or amount, they are admissible 'when the evidence is offered for another purpose.'" *Carney v. American University*, 151 F.3d 1090, 1095 (D.C. Cir. 1998) (quoting Fed. R. Evid. 408).

Therefore, of course, settlement discussions are admissible to prove the existence and terms of a settlement agreement. *See Cates v. Morgan Portable Building Corp.*, 780 F.2d 683, 691 (7th Cir. 1985) ("Obviously a settlement agreement is admissible to prove the parties' undertakings in the agreement, should it be argued that a party broke the agreement."). To rule otherwise would render all settlement agreements unenforceable, and would undermine the policy of encouraging settlement discussions. *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 294 (2nd Cir. 1999) ("The parties' prior negotiations resulted in an agreement which was subsequently repudiated by [the plaintiff], giving rise to the instant case. Thus, if anything,

permitting [the plaintiff] to exclude the settlement evidence on Rule 408 grounds would flout the policy of promoting compromises under the Rule."). *See also Bus. and Comm. Lit. in Fed. Cts.*, 4th ed. § 50:25 (ABA 2018) ("Settlement-related evidence is also admissible when a dispute arises over a completed settlement agreement. For example, where a party repudiates or breaches a settlement agreement, the agreement itself and any relevant settlement negotiations may be admitted to prove the contract claim.").

Not only was confidentiality not a term of the offer or acceptance, but the settlement discussions preceding the offer and acceptance positively establish that the parties did not contemplate that the final distribution would be confidential. As appears in the email exchange, the SDC's settlement offer that IPG accepted was a follow-up to an earlier settlement offer in which the SDC's trustee said, "IPG's share of the interest accruing on remaining balances would be in excess of the 30% share, *as the Office will calculate*." Ex. 1, email from A. Lutzker to B. Boydston, Apr. 29, 2019 (emphasis added). As is repeatedly explained, the parties lack the information to calculate interest in the manner that the Judges have previously ordered. IPG acknowledges the Licensing Division cannot calculate interest on the agreed distribution without knowing what the distribution is. Only after accepting the settlement offer did IPG object to the SDC's expectation that interest would be calculated by the Licensing Division.

Indeed, it is for precisely this reason that the SDC found it necessary to file the entirety of the parties' settlement discussions, rather than only the offer and acceptance, so as to demonstrate that the terms that IPG "presumed" are inconsistent with the parties' discussions. Without the entirety of the discussion, the Judges would have been left to guess whether other portions of the discussion would have shed light on the agreement's terms, and would not have

been able to see that confidentiality of the final terms would have been inconsistent with the parties' discussions.

Without the entire email chain, the Judges also would not have been able to see that the SDC filed the parties' settlement discussions only reluctantly, after IPG refused the SDC's repeated exhortations to submit an agreed order or, failing that, to stipulate "that these two emails constitute a complete and enforceable settlement agreement, and that there are no other terms." Ex. 3, email from M. MacLean to B. Boydston, July 23, 2019. There was no option remaining to the SDC but to offer the parties' discussions for the plainly admissible purpose of proving the existence and content of the parties' agreement.

IPG argues that the SDC should have attempted to file the settlement discussions under seal. IPG Opposition at 3. But the settlement discussions contained no information that was restricted under a protective order, and there is no other authority by which the SDC's counsel could have filed the exhibit under seal. *See, e.g.,* 37 C.F.R. § 302.1(a) ("Records of proceedings before the Board will be available for public inspection ….") and § 303.5(i) (providing for electronic filing under seal of "restricted" documents subject to protective order). The SDC gave IPG two days' advance notice that they intended to file a motion attaching the settlement negotiations, and repeatedly invited a response. Exhibit 3, emails from M. MacLean to B. Boydston, July 23 and 24, 2019. IPG could have moved for a protective order, or it could have asked the SDC's counsel for more time to prepare such a motion. IPG did neither.

IPG seems to suggest that confidentiality was implied by the parties' course of conduct, asserting that confidentiality could have been implemented by appointing a common agent for distribution, which IPG asserts "has existed with *each and every* settlement between IPG and the SDC for the last two decades …." IPG Opposition at 6 (emphasis in original). The assertion is

baffling. IPG infamously attempted to repudiate the *only* previous settlement agreement that has ever existed between the SDC and IPG, resulting in extended litigation before the Judges and the D.C. Circuit, and placing the SDC at risk because they had disbursed funds pursuant to the agreement as common agent for distribution. *See Independent Producers Group v. Library of Congress*, 759 F.3d 100, 101 (D.C. Cir. 2014) ("[IPG] challenges the distribution of royalties from that fund for religious programming broadcasts on cable television in 1998. The complication for IPG is that, eleven years ago, its former president signed settlement agreements that fully disposed of IPG's interest in those 1998 royalties.").

Ironically in light of the substance of IPG's opposition, IPG's attempt to repudiate the only prior settlement agreement that has existed between IPG and the SDC resulted in the public filing of that "confidential" agreement, with only payment information and payment amounts redacted in the public version. Attached as Exhibit 4 is the confidential agreement filed publicly in the D.C. Circuit.

The only other resolution that had some characteristics of a settlement between SDC and IPG was in the 2010-2013 distribution proceeding, which the SDC and IPG's successor-in-interest, Multigroup Claimants, resolved by a motion for a consent order of final distribution. The parties provided the agreed shares to the Judges publicly, and those shares are published "for the world to see" in the Federal Register. *See* 83 Fed. Reg. 38,326. Neither party sought confidentiality, a common agent, or any other "boilerplate" terms that IPG claims it "presumed" the parties would include here.

To be sure, the SDC might have been willing to agree to confidentiality if IPG had proposed a practical and acceptable means of implementing confidentiality, and the SDC gave

IPG the opportunity to try to make such a proposal. *See* Ex. 3. But at the end of the day, the SDC were unable to accept the only proposal that IPG made.

IPG speculates incorrectly that the SDC's motive for not agreeing to the appointment of a common agent for distribution was "to avoid keeping the settlement agreement confidential …." IPG Opposition at 7. In fact, the reverse was true. The SDC could not agree to confidentiality in significant part because the SDC would not agree to appointment of a common agent for distribution.

One of the reasons that the SDC would not agree to serve as a common agent for distribution is because of their prior experience in which IPG sought to repudiate a settlement agreement after a distribution was made. *See supra.* If IPG had been successful in its challenge to the distribution, then the SDC's then-trustee, as the agent who received and disbursed the distribution, may have been at risk of having to recoup the loss. The SDC are unwilling to accept that risk again.

Relatedly, the common agent for distribution assumes a fiduciary duty to the beneficiaries of the distribution - the copyright owners. IPG is not a copyright owner, but is merely an agent for the claimants it purports to represent. *See* Memorandum Opinion and Ruling on Validity and Categorization of Claims, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Mar. 13, 2015) at 6-7. The SDC have frequently expressed their view that IPG has engaged in conduct incompatible with that of a faithful agent. *See, e.g.,* SDC's Comments to IPG's Motion for Partial Distribution (May 1, 2019) at 5-11. If the SDC were to accept the responsibility to disburse funds directly to IPG without disclosing their reasonable concerns to IPG's claimants, it could give rise to claims against the SDC for breach of fiduciary duty. *Chao v. Merino*, 452 F.3d 174, 182-84 (2nd Cir. 2006) (affirming judgment

against trustee for disbursing funds to beneficiaries' faithless agent. "Knowing—and having expressed the prudent view more than once—that [the agent] could not be trusted, [the trustee] did not exercise reasonable care when she simply proceeded to trust him."). Again, the SDC are unwilling to accept that risk.

For similar reasons, the SDC could not allow IPG to serve as a common agent for distribution. If IPG failed to disburse funds to the SDC as required, the SDC would have only themselves to blame for failing to foresee the possibility.

Therefore, the SDC's settlement offer did not contemplate appointment of a common agent for distribution, and the SDC have not agreed to such a term. As both parties agree, confidentiality is impractical or impossible without a common agent for distribution. So it is clear that the SDC cannot and could not agree to confidentiality.

B. There Is No Authority for Sanctions Against the SDC or Recusal of the Judges.

IPG cites no authority for its extraordinary claim that the Judges may impose "significant sanctions" for the SDC's motion for distribution. The parties' settlement does not provide for confidentiality. But even if confidentiality were a term of the parties' agreement, and even if proving the content and existence of a settlement agreement were not a well-recognized exception to confidentiality, an alleged breach of a confidentiality agreement would be a civil matter outside of the Judges' statutory purview.

IPG does not contend that the SDC have violated any rule or order, and IPG did not seek a protective order. While the Judges have inherent and implied statutory authority to enforce their rules and orders and to govern the conduct of the proceedings before them, they have no inherent or implied authority to enforce the terms of a private agreement, through sanctions or otherwise, other than their statutory authority to order distribution of fees that are not subject to

controversy. 17 U.S.C. § 801(b)(3)(A); *see also IPG*, 759 F.3d at 107 ("Indeed, the kinds of legal questions that might arise from a settlement agreement, such as contractual disputes or questions of agency law like IPG raises, are not questions of law 'under this title,' 17 U.S.C. § 802(f)(1)(D), and would likely fall entirely outside the jurisdiction of the Royalty Judges."); *National Broadcasting Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1295 (D.C. Cir. 1988) (Copyright Royalty Tribunal was authorized to decide issues of distribution, not "common law claims of entitlement").

Nor is there any authority for IPG's equally extraordinary claim that the Judges must recuse themselves from future proceedings now that they are aware of the terms of the SDC's and IPG's non-confidential settlement agreement. "[J]udges 'shall disqualify' themselves in any 'proceeding in which [their] impartiality might reasonably be questioned.'" *In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019). The test is what "would appear to a reasonable person ... knowing all the circumstances." *Id.* (quoting *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 860–61 (1988)).

"A judge need not recuse himself because of knowledge of a party gained in a judicial capacity." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). *See also U.S. v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992) ("[T]he district court could not be disqualified for bias, because the bias alleged 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'") (quoting *Grinnell Corp.*, 384 U.S. at 583). Here, the Judges have learned of the parties' settlement agreement strictly in a judicial capacity in the course of exercising their statutory authority under 17 U.S.C. § 801(b)(3)(A) to determine if the distribution of fees is subject to controversy. Indeed, it is difficult to imagine how the Judges could exercise their authority under 17 U.S.C. §

801(b)(3)(A) in this matter without being informed of the content of the settlement agreement. The Judges cannot be disqualified for learning what they must know to decide the matters properly before them.

Conclusion

For the foregoing reasons, the SDC's motion for final distribution under 17 U.S.C. § 801(b)(3)(A) should be granted, and IPG's motion for sanctions should be denied.

August 8, 2019

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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Certificate of Service

I certify that on August 8, 2019, 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/ Matthew J. MacLean
Matthew J. MacLean

Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In the Matter of	)	
	)	
Distribution of the 2000-2003	)	**Docket No. 2008-2**
Cable Royalty Funds	)	**CRB CD 2000-2003 (Phase II)**
	)	

DECLARATION OF MATTHEW J. MACLEAN IN SUPPORT OF SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF MOTION FOR FINAL DISTRIBUTION UNDER 17 U.S.C. § 801(b)(3)(A)

I, Matthew J. MacLean, hereby state and declare as follows, based on my personal knowledge:

1. I am a partner in the law firm of Pillsbury Winthrop Shaw Pittman LLP, and am counsel for the Settling Devotional Claimants ("SDC") in the above-captioned proceedings.

2. Attached hereto as Exhibit 4 is a publicly filed version of the only settlement agreement that the SDC and Independent Producers Group ("IPG") have entered into prior to their settlement of July 16, 2019. This settlement agreement was the subject of *Independent Producers Group v. Library of Congress*, 759 F.3d 100, 101 (D.C. Cir. 2014), in which IPG unsuccessfully attempted to repudiate it.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and accurate.

Executed August 8, 2019, in Washington, DC.

/s/ *Matthew J. MacLean*
Matthew J. MacLean

EXHIBIT 4

CONFIDENTIAL

DEVOTIONAL CLAIMANTS 1998 CABLE ROYALTY AGREEMENT

This DEVOTIONAL CLAIMANTS 1998 CABLE ROYALTY AGREEMENT is entered into as of the __ day of July, 2003, among The Christian Broadcasting Network, Inc. ("CBN"), Crystal Cathedral Ministries, Inc. ("CCM"), In Touch Ministries, Inc. ("ITM"), Independent Producers Group ("IPG"), Coral Ridge Ministries Media, Inc. ("Coral Ridge") and Oral Roberts Evangelistic Association ("OREA"), collectively referred to as the "Parties."

BACKGROUND

Pursuant to the Copyright Act of 1976, as amended, royalties are collected for the cable retransmission of television programs and distributed by the Copyright Office. The purposes of this Agreement are (a) to implement an internal settlement (known as a Phase II agreement) among the Parties for the 1998 cable royalty proceeding and (b) to facilitate 1998 Phase II settlement with all other claimants.

AGREEMENT

NOW, THEREFORE, in consideration of the promises and covenants contained herein it is mutually agreed as follows:

1. **Introduction.**

   A. The Copyright Office has made partial distribution of 1998 Cable Royalties. The Devotional Claimants' shares have been placed in an escrow account with [redacted] as follows: Account No. [redacted] with balance as of June 30, 2003 of $[redacted] This represents a 75% distribution of proceeds based on an award finally determined in the 1990-1992 Cable Royalty Distribution Proceeding plus earned interest ("1998 Escrow Account").

   B. On November 15, 2002, the Devotional Claimants filed a Stipulation with the Copyright Office, agreed to by all parties, settling the share to be awarded the Devotional Claimants and releasing them from participation in the 1998-1999 Phase I Cable Royalty Distribution Proceeding.

2. **1998 Cable Claims Internal Settlement.**

   A. **Claimants.** The Parties to this Agreement represent the larger, qualified claimants to the Devotional Claimant category entitled to cable copyright royalties for calendar year 1998. The Parties have now settled claims among themselves. In addition, they have settled with Jimmy Swaggart Ministries ("JSM") for [redacted] Liberty Broadcasting Network ("Liberty") for [redacted] and National

Associations of Broadcasters ("NAB") for [redacted].

B. **1998 Cable Royalty Allocation.**

1. The Parties agree that in full settlement of all claims they individually may have with respect to 1998 cable royalties, whether previously distributed to the Escrow Account as provided above in this Agreement, or later distributed by the Copyright Office, they will receive the following percentages of the remaining funds after payments pursuant to agreements with JSM, Liberty and NAB, subject to any banking fees and expenses associated with transferring the funds:

   a. CBN: [redacted]%
   b. CCM: [redacted]%
   c. IPG: [redacted]%
   d. OREA and Coral Ridge collectively: [redacted]%
   e. ITM: [redacted]%.

2. All funds distributed to the Parties shall first be transferred to and deposited in the IOLTA Account of Shaw Pittman LLP ("IOLTA Account"), and thereafter shall be distributed promptly to the Parties and to JSM, Liberty and NAB once written agreements are executed with those entities.

3. **Negotiations for Settlement of 1999 Phase II Devotional Cable Royalty Claims.** The Parties agree that as soon as relevant data is available, they will commence negotiations in good faith among themselves and with other additional claimants who are qualified to participate in the 1999 Cable Royalty Distributions for settlement of 1999 Phase II Devotional claims.

4. **Notification to Copyright Office of Internal Settlements.** The Parties agree that at such time as it is appropriate, they shall advise the Copyright Office that for Phase II purposes, they have settled their claims and the funds remaining for the Devotional Claimants should be distributed to the IOLTA Account without resort to a CARP.

5. **Binding Agreement.** The undersigned representatives of the Parties acknowledge they have authority to execute this Agreement on behalf of the individual Devotional Claimant(s) for which they sign. The Parties agree that this Settlement Agreement constitutes their entire agreement as to cable copyright royalties for the 1998 claim year [redacted]. It is intended to be binding upon them and their successors, representatives and assigns as to all matters contained herein and supersedes any prior oral or written agreement. In consideration of this settlement, the parties hereby release each other and their successors and assigns from any claim to all proceeds now in 1998 Cable Royalty Escrow Accounts, or which may be placed in said accounts at any time in the future, except as expressly set forth herein.

6. **Release.** By entering into this Agreement and making the payments required herein and agreeing to the terms hereof, it is expressly acknowledged, understood and agreed that this arrangement is by way of compromise and settlement of claims and none of the Parties admits or concedes the validity, correctness or merits of the claims or allegations made. The Parties agree that this Agreement shall not be binding upon the Parties as to any future proceedings or distributions other than this 1998 cable royalty proceeding [redacted] nor shall it constitute evidence of a reasonable or acceptable formula, nor shall any Party offer it in evidence or in any way refer to it in any future Copyright Office or court proceeding of any sort.

7. **Confidentiality.** The Parties agree not to disclose the terms or substance of this Agreement or the basis for it except to (a) their counsel; (b) their accountants, or (c) pursuant to a court order or otherwise as required by law.

8. **Counterparts.** This Agreement may be executed in counterparts each of which will constitute an original and all of which, when taken together, will constitute one agreement. Facsimiles of signatures shall be deemed original for purposes hereof.

IN WITNESS WHEREOF, each of the parties executed this Agreement by its authorized representative as of the date written above.

THE CHRISTIAN BROADCASTING NETWORK, INC.

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By:

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ORAL ROBERTS EVANGELISTIC ASSOCIATION

By Counsel:

George R. Grange, II, Esq.
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6. **Release.** By entering into this Agreement and making the payments required herein and agreeing to the terms hereof, it is expressly acknowledged, understood and agreed that this arrangement is by way of compromise and settlement of claims and none of the Parties admits or concedes the validity, correctness or merits of the claims or allegations made. The Parties agree that this Agreement shall not be binding upon the Parties as to any future proceedings or distributions other than this 1998 cable royalty proceeding (and 1999 royalties as applied to JSM), nor shall it constitute evidence of a reasonable or acceptable formula, nor shall any Party offer it in evidence or in any way refer to it in any future Copyright Office or court proceeding of any sort.

7. **Confidentiality.** The Parties agree not to disclose the terms or substance of this Agreement or the basis for it except to (a) their counsel; (b) their accountants, or (c) pursuant to a court order or otherwise as required by law.

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Proof of Delivery

I hereby certify that on Thursday, August 08, 2019, I provided a true and correct copy of the Reply in Support of Motion for Final Distribution Under 17 U.S.C. § 801(B)(3)(A) and Opposition to Independent Producers Group's Motion for Sanctions to the following:

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

Signed: /s/ Matthew J MacLean