

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**Distribution of Satellite Royalty Funds**

**CONSOLIDATED PROCEEDING**  
**DOCKET NUMBER 14-CRB-0011-SD**  
**(2010-13)**

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**ORDER AFTER *IN CAMERA* REVIEW**

The Copyright Royalty Judges (Judges) conducted an *in camera* review, pursuant to their [Order](#) dated September 12, 2019, of documents previously withheld as protected by the work-product rule by Commercial Television Claimants (CTV) in response to document requests by Settling Devotional Claimants (SDC). The Judges also considered the privilege log submitted by CTV. Based on their review, the Judges find and conclude that certain of the documents were properly withheld by CTV pursuant to the work-product rule, and that other documents, including some incorporated by reference in the documents produced *in camera*, are not covered by the work-product rule and must be produced to SDC. Portions of several other documents remained redacted by CTV, and those redacted portions must be made available to the Judges immediately for further *in camera* review.

**I. The Standard for Evaluating Claims that the Work-Product applies to Communications between a Participant’s Counsel and its Expert**

Consistent with the framework set forth by the Judges in their prior orders compelling production and ordering the *in camera* inspection, the Judges conclude that *Fed. R. Civ. P.* 26(b)(4)(B) and (C) provides analogous guidance for determining whether: (1) documents constituting communications between counsel and experts; or (2) drafts of expert reports are protected by the work-product rule, or fall within an exception and are therefore discoverable.<sup>1</sup> Further, as the Judges have previously noted, they also will not apply the work-product rule to any portions of draft reports that were substantively prepared *by counsel* for a participant, rather than by the expert. [Order Granting the Settling Devotional Claimants’ Motion To Compel](#) at 7 (Jul. 18, 2019). This limitation on the work-product rule is appropriate because portions of drafts substantively prepared by counsel are not actually “expert drafts,” and thus do not fall within the protections otherwise made available to draft reports prepared by experts.

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<sup>1</sup> *Fed. R. Civ. P.* 26(b)(4)(B) and (C) protect from disclosure communications between counsel and an expert providing a report (for present purposes, analogous to an expert’s written direct or rebuttal testimony). However, these provisions do not protect attorney-expert communications that: (1) identify *facts or data* that the attorney provided and the expert considered in forming his or her opinions; or (2) identify *assumptions* that the attorney provided and upon which the expert relied in forming his or her opinions. *Fed. R. Civ. P.* 26(b)(4)(C)(ii) and (iii).

## II. Applying the Standard to the Documents at Issue

The bulk of the withheld documents relate to the time period in which CTV's cable allocation expert, Gregory Crawford, was in the process of preparing his expert testimony. Professor Crawford's cable analysis – particularly his regression coefficients – have been relied upon by CTV's expert, Dr. Randal Heeb, in the present satellite proceeding. These documents consist of attorney-expert communications and drafts of Professor Crawford's Written Direct Testimony in the cable proceeding. A much smaller tranche of documents constitute attorney-expert communications relating to the time period in which CTV's experts were preparing their analyses in this satellite proceeding.

The Judges find that all the documents comprising “communications” between Professor Crawford and CTV's counsel are subject to the work-product rule and were properly withheld from discovery in this proceeding. Alternatively stated, none of the exceptions identified above apply to any of the communications between the expert and CTV's counsel, including communications contained within the draft versions of Crawford's written testimony. Additionally, all of the drafts of Professor Crawford's Written Direct Testimony constitute material that is protected by the applicable provisions of *Fed. R. Civ. P.* 26, and the Judges find those provisions to be applicable in this instance. Further, the attorneys' notes on the margins of those drafts are not substantive in nature and do not reflect authorship of the report, in whole or in part by counsel, nor do those notes provide facts, data or assumptions provided to counsel that would trigger any of the exceptions regarding the work-product rule contained in *Fed. R. Civ. P.* 26.

However, *attached* to several of the documents comprising such communications were non-final spreadsheets of implied allocation shares prepared by Professor Crawford and/or other experts or assistants to those experts. By merely attaching such interim documents to otherwise protected communications, counsel and the expert could not and did not transform this otherwise discoverable material into protected communications. Accordingly, the Judges order that CTV produce these documents to SDC. These documents are identified by CTV as follows:

Priv. Log # 4; Bates # CTV-PRIV 006 through 008;  
Priv. Log # 14; Bates # CTV-PRIV 119 through 120.

CTV produced for the Judges' *in camera* review some documents that are redacted, in whole or in part. Such redactions were improper, given that the purpose of the *in camera* review is to determine if the documents should be redacted or withheld. These redactions must be removed and the fully unredacted versions emailed to the Judges immediately, *i.e.*, within one business day. These documents are as follows:

Priv. Log # 32, Bates # CTV-PRIV 473  
Priv. Log # 33, Bates # CTV-PRIV 475

Finally, several documents identify materials reviewed by the experts in conjunction with their satellite work. Specifically, Priv. Log #32, Bates # CTV-PRIV 473 (BGC-Consulting folder); Priv. Log #33, Bates # CTV-PRIV 475 (SNL Kagan satellite data); and Priv. Log #35, Bates # CTV-PRIV 484 through 491 (SNL Kagan satellite data). These identified materials within the emails should be produced, because nothing in the previous motion records, the *in*

*camera* production or the privilege log sets forth a reason why they should be protected pursuant to the work-product rule.<sup>2</sup>

### **III. ORDER**

CTV shall produce to the SDC, within two (2) days of the date of this Order, the following documents:

Priv. Log # 4, Bates # CTV-PRIV 006 through 008;  
Priv. Log # 14, Bates # CTV-PRIV 119 through 120;

CTV shall produce to the Judges, via email (rather than on eCRB), within one (1) day, the following documents *without any redactions*:

Priv. Log # 32, Bates # CTV-PRIV 473;  
Priv. Log # 33, Bates # CTV-PRIV 475.

**SO ORDERED.**

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Jesse M. Feder  
Chief Copyright Royalty Judge

DATED: September 23, 2019

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<sup>2</sup> These documents are the subject of the SDC's September 18, 2019 [motion](#) to compel CTV to respond to inquiries from SDC as to why these documents should not be produced. By ordering the production of these documents, this order moots that portion of the SDC's motion.