

and for which funds; b) if IPG is determined to be an “established claimant” for the first time for any fund, whether there are safeguards (in addition to the pay-back agreement) the Judges can and should employ to ensure that IPG is able and willing to disgorge in the event of overpaid funds; c) if IPG were entitled to a partial distribution, what methodology should the Judges use to determine the dollar amount to which IPG is entitled, and whether the Judges would need access to Phase I confidential agreements to make the necessary calculations; and d) what special calculations would have to be made to determine IPG’s share of the various subfunds, in addition to calculating interest on (and deduction of applicable expenses).

The SDC will address these issues.

I. Individual Copyright Owners for Which IPG Filed Valid Claims, Not IPG, Are the “Established Claimants” for purposes of Partial Distributions

A. IPG is Not a Claimant; Rather it is an Agent for One or More Claimants

The CRJs have ruled on several occasions that IPG is an agent for claimants, not a copyright owner:

As a preliminary matter, those who file claims on behalf of copyright claimants act as their agents. Despite statement in Ms. Vernon’s [IPG’s President’s] letter to the contrary, the legal right to the royalties, if any, remains with the claimant. The claimant does not sacrifice that right merely because it authorizes an agent to file a claim on its behalf with the Judges or their predecessors. ... The right to apply for and collect royalties on behalf of another does not create the entitlement to royalties. The entitlement to royalties, if any, is created by the Copyright Act. “Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims,” *In the Matter of Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds* at 8 (March 21, 2013) (“2000-2003 Order”).

IPG is an entity formed for the sole purpose of representing claimants to royalties. Unlike the SDC, IPG was not formed merely to hire legal counsel for a group of claimants. Unlike MPAA, IPG is not a member organization acting on behalf of members and others to collect and distribute royalty funds. IPG is a commercial enterprise performing a service for rights holders. ... For IPG to act in the capacity of agent for the principal rights holders, IPG must have representation authority from each rights holder that IPG purports to represent. The Judges’ rules require that the claimant must have authorized IPG to file a claim on its behalf at or before the time IPG actually

makes the filing. *See* 37 C.F.R. § 360.3 (b) (2)(vii). Further IPG must have continuing authority to pursue the claimants' royalty rights through the distribution proceeding(s). "Memorandum Opinion and Ruling on Validity and Categorization of Claims," *In re Distribution of Cable Royalty Funds (Docket No. 2012-6 CRB CD 2004-09 (Phase II) and In re Distribution of Satellite Royalty Funds, Docket No. 2012-7 CRB SD 1999-2009 (Phase II)* at 6-7 (March 13, 2015) ("Ruling on Claims")

Therefore, although in the IPG Motion, IPG argues it is an "established claimant," it is actually not a claimant in any way, only an agent, and it may be subject to dismissal at any time by a legitimate copyright claimant. Indeed, as evidenced in the most recent Phase II royalty proceedings, IPG's claims to agency have been rejected, disputed or terminated. *See Ruling on Claims*, Exhibits A-1 and A-2. Such rulings make clear that one cannot rely on IPG's mere representations alone; sworn testimony and corroborating evidence are essential to ensure that only valid claims are compensated.

II. No Award to IPG Can be a Basis for Prospective Partial Distribution in the Same or other Claimant Categories

Based on IPG's long history in royalty proceedings, no award to IPG in any proceeding can be the basis for a partial distribution in any other proceeding.

A. IPG Has Notoriously Filed Claims Without Any Legal Basis or Substantiation

The evidentiary record in the proceedings in which IPG has participated clearly demonstrates that IPG notoriously files claims without any legal basis or substantiation. First, IPG has a record of filing false claims for fictitious entities. In the 1999 cable proceeding, IPG included a false claim for a fictitious entity, Tracee Productions. "Ruling and Order Regarding Claims," *In re Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 98-99 (Phase II)* at 3-4 ("1999 Claims Ruling"). IPG filed the same false claim in the 1999 satellite proceeding and never retracted it. *Ruling on Claims* at 9-10 (March 13, 2015).

Second, in every proceeding in which IPG's claims were tested, a substantial number were either expressly abandoned or dismissed, because a) IPG's agency was terminated prior to its filing a claim, b) IPG failed to present sufficient evidence to establish its authority to file a claim, c) IPG-represented entity claimants were not connected to programs claimed, d) documents IPG purported to be representation contracts lacked essential terms, e) IPG's "self-serving" correspondence was insufficient to establish a contract, and f) IPG lacked any representation agreement. *Distribution of 1993, 1994, 1995, 1996, and 1997 Cable Royalty Funds*, 66 Fed. Reg. 66433, 66434-66436 (Dec. 26, 2001); *1999 Claims Ruling* at 17-22; *2000-2003 Order* at Exhibit A, at 8-12, Exhibit B 1-7; and *Ruling on Claims*, Exhibits A1-A2.

Third, in the 2000-2003 Cable Proceeding, the Judges took "a dim view of IPG's mischaracterization of BGEA's [Billy Graham Evangelistic Association's] rights under the Copyright Act," determining that IPG used "strong-arm tactics" to prevent BGEA "from severing the principal/agency relationship that BGEA had clearly revoked." *2000-2003 Order* at 8. These actions required the Judges to have IPG notify BGEA directly of its ruling and order production of a letter to the CRB stating BGEA's intentions.

In short, IPG has seen its putative authority not simply questioned by other parties in the proceedings, but affirmatively terminated by copyright owners. All this leads to two reasonable conclusions:

a) IPG's initial assertion of entitlement to represent a royalty claimant cannot be accepted at face value and must be backed up by proof that has been subjected to discovery, cross-examination and review by the Judges; and

b) IPG's claim to a specific share of funds in any proceeding in any calendar year cannot be based on past rulings.

To underscore this point, the SDC refer to the Judges' recent order in the 1999-2009 Satellite Proceeding. *Order Granting Final Distribution of 2008 Satellite Royalties for the Devotional Category* (Dec. 22, 2015) ("December 22 Order"). In the December 22 Order, the Judges determined that IPG's represented share of 2008 satellite royalties was 0%. The December 22 Order followed an analysis of IPG's claims, its behavior in the proceeding, and the conclusions of the experts for both the SDC and IPG. Had an IPG motion for partial distribution in that proceeding been approved, it would have given IPG access to funds to which it was not entitled.

B. IPG's Status as an Agent for Valid Claimants has Become Final In Only One Category

To date, the CRB has held that IPG represents valid claimants in only two categories (Program Suppliers and Devotional), and IPG has achieved a final determination, not subject to appeal, in only one case, in one category, 2000-2003 Cable Proceeding/Program Supplier Category. All other rulings are either vacated, subject to appeal and/or remand, or are awaiting final determination.

As set forth above, what is also notable about the claims that IPG asserts, in both the Program Supplier and Devotional categories, is that when tested, a substantial number of claims fail. Moreover, IPG's history as an agent in royalty proceedings has demonstrated that its evasive actions during discovery can result in sanctions that further limit claims. *See Ruling on Claims* at 39 (Judges grant the SDC motion to disallow certain claims based on IPG's failure to produce evidence in discovery). As a result, claimants represented by IPG may be disqualified in a proceeding, even if a prior claim was held valid. This history places all of IPG's prospective claims into a "suspect" status, regardless whether a prior claim for that entity was held valid. Unlike all other parties who participated in partial distribution requests for more than three

decades, IPG's claims cannot be taken at face value. In short, what is past for IPG is not prologue, and nothing may be affirmatively stated about IPG's prospective claims based on prior rulings.

C. In light of IPG's History, Even if IPG were Deemed an "Established Claimant" for Phase I Program Supplier Purposes (which as Noted Above Should Not Be the Case), that Status Should Not Carry Over To Any Other Claimant Category, Nor To Any Other Year, Nor To Any Other Royalty Pool.

Even if the Judges determine that the 2000-2003 cable ruling in the Program Supplier category has some relevance to IPG's status as an "established claimant" in that category (which the SDC assert should not be the case), that status should not carry over to any other claimant category, nor to any other year, nor to the satellite royalty pool.

First, on at least two occasions (in the 1997 Phase II cable proceeding and in the 1999-2009 satellite/2004-2009 cable Phase II proceedings) IPG's principal witness, Raul Galaz, committed perjury on the witness stand. *See In the Matter of Phase II Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) Tr. Vol 1, 85 (Galaz) and SDC Exhibit 317; *Ruling on Claims* at 7-8. With such a history, nothing IPG alleges can be taken for granted or presumed applicable to other proceedings.

Second, given the fact that IPG previously withheld documents that undermined its claim to representation,¹ has made claims for fictitious entities, has asserted rights to programs that are not owned by its putative claimant, and has seen scores of putative claims dismissed, every claim that IPG makes must be tested by complete discovery responses, live testimony and cross-examination. In short, IPG has earned the dubious reputation that it is entitled to no presumption

¹ *See Order on IPG Motions for Reconsideration of Evidentiary Rulings* at 2, Docket No. 2008-2, CRB CD 2000-2003 (Jan. 11, 2013) (rejecting IPG's argument that it can withhold evidence that a claimant terminated its services because it did not "rely" on that termination in preparing its direct case).

regarding the validity of any claim it asserts. Whether this reputation can be improved may be the subject of future CRB orders; however, at this time, there should be no carry over effect from one case to another, one year to another, one royalty pool to another.

III. Additional Safeguards for Dealing with any Partial Distribution to IPG Are Necessary

A. IPG's History of Failing to Account to Claimants for Royalties It Received and Its Litigiousness Against Copyright Owners Who Terminate IPG Should Dissuade the Judges From Making Any Partial Distribution Directly to IPG

The Judges should understand that the SDC believe there is no reason for concluding that IPG can be trusted with any partial distribution of funds. Although the claim was not technically before the Judges in the 1999-2009 satellite and 2004-2009 cable proceeding, the testimony of Walter Kowalski of Bob Ross, Inc., was compellingly illustrative of this fact. Mr. Kowalski testified that IPG wrongfully claimed a share of the Public Television claimant category for his company's programming, received payment from Phase I category representative PBS based on that wrongful claim, and failed to pay over to Bob Ross, Inc., the share the legitimate copyright owner was entitled to receive. *See In the Matter of Phase II Distribution of the 2004-2009 Cable Royalty Funds and 1999-2009 Satellite Royalty Funds*, Tr. Vol. 4, 208-283 (Kowalski) (Dec. 11, 2014). The SDC understands that to this day, IPG has neither returned the wrongful payment to PBS, nor paid Bob Ross, Inc.

Moreover, IPG has shown a propensity to resort to aggressive (and indubitably expensive) civil and appellate litigation against claimants who dare challenge or dismiss IPG. *See Worldwide Subsidy Group, LLC v. Worldwide Pants, Inc.*, Case No. 2:14-cv-03682-AB-AS (CDCA, Complaint filed April 7, 2014); *Worldwide Subsidy Group v. Federation Internationale de Football Association*, Case No. 2:14-cv-00013-MMM-MAN (CDCA, Complaint filed May 13, 2014). With IPG's aggressive and highly public reputation to sue copyright owners who

seek an end to IPG's agency in royalty cases, there is little wonder that Devotional claimant BGEA acceded to IPG's request to represent it in the 2002-2003 cable proceeding. It bears underscoring that BGEA is now represented by the SDC in all proceedings. Thus, no IPG motion for a partial distribution based on any prior award for a claimant that dismissed IPG, like BGEA, should be allowed.

B. Strong Safeguards Are Needed to Prevent IPG From Abusing the Partial Distribution Process

Given this history of perjury and deceptive practices, it is very doubtful that IPG can or should be trusted with any partial distribution. IPG's suggestion that if a partial distribution of royalty funds constitutes an overpayment in one year, then the overpayment could be recovered from funds in a later year, is another "red flag" that IPG lacks the appropriate intent to receive funds prior to a final award and make repayment as required by a final determination. *See* "IPG's Reply in Support of Motion for Partial Distribution of 2004-2009 Cable Royalties and 2000-2009 Satellite Royalties" in Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SC 1999-2009 (Phase II) at 7-8 (filed Oct. 1, 2015). IPG's *ad hoc* solution to an inability to reimburse the pool reveals IPG's intent to expend the partial distribution, leaving itself unable to reimburse the proper recipients of the funds or properly to account for the money.

Because the royalties are license fees paid by cable and satellite companies to the CRB for distribution to copyright owners, the CRB and the Licensing Division of the Copyright Office function as the custodians or trustees of the royalty funds, not their owner.² The CRB is relieved

² The Judges acknowledged that the royalty proceedings "are akin to interpleader actions in federal court," with the Licensing Division functioning like a stakeholder responsible to turn funds over to claimants (i.e. copyright owners). "Amended Joint Order on Discovery Motions," *In re Distribution of 2004-2009 Cable Royalty Funds Dkt. No. 2012-6 CRB CD 2004-09 (Phase II)*, *In re Distribution of 1999-2009 Satellite Royalty Funds Dkt. No. 2012-7 CRB SD 1999-2009*

of liability in connection with partial distributions when “acting in good faith.” 17 U.S.C. §801(b)(2)(D). Therefore, the Judges should take good faith steps to discharge their duty to safeguard and protect the funds entrusted to them when dealing with any IPG motion for partial distributions.

If the Judges believe in the good faith exercise of their statutory responsibility that they should permit a partial distribution for the benefit of established claimants represented by IPG, then safeguards must be implemented to assure that the funds go directly to copyright owners, i.e. the actual claimants, rather than to IPG. Moreover, the copyright owners, not IPG, should execute the agreement with the Licensing Division, committing to return any excess payment. This process should be implemented by the CRB, not IPG, and only then, should a partial distribution be authorized. Only in this manner could the Judges be assured that the proper claimants are both aware of the preliminary, partial distribution and prepared to comply with the terms of the partial distribution repayment system, if necessary. IPG and the claimants could then handle their contractual relationship, with the Judges satisfied that they have not placed the copyright royalties in untrustworthy hands. This safeguard is essential in the case of IPG-represented claims precisely because of IPG’s history of prevarication, perjury and litigiousness.

IV. The Methodology Used to Determine Partial Distributions

Under the Copyright Act, the Judges have a statutory obligation to consider a partial distribution based upon a motion of one or more claimants, after publication in the Federal Register. *See* 17 USC Section 801(b)(3)(C). Rather than relying upon a particular methodology (for indeed, in all contested proceedings there are competing methodologies, each likely to produce a different results), the parties to past motions have sought distributions based on

(Phase II) at 5 (July 30, 2014). As a stakeholder who wishes only valid claimants to receive funds, the Judges should exercise prudence when dealing with IPG.

agreement and the prior rulings of the Judges. Such practice should continue, as the Phase I parties have shown their ability to agree upon the amount to be distributed, and have executed agreements that would allow such funds to be returned, if a final decision resulted in a lesser final award.

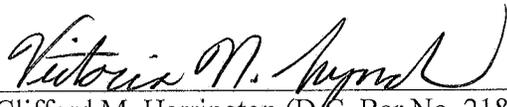
In the case of IPG, the matter is more complicated. Unlike all the Phase I claimant groups to whom partial distributions have been made, many of IPG's claimed representations have not been validated, and numerous other claimants have terminated or otherwise discontinued IPG's authority to represent them. There is no assurance that a group of claimants that IPG represented in one year will be the same group in a subsequent year. Even though IPG, as agent for particular claimants, received a final determination in the Program Supplier category for 2000-2003, there is no assurance these will be the same claimants in subsequent years. Only after the portion of a proceeding dedicated to determining the validity of IPG-represented claims is concluded could a partial distribution even be considered. Based on the objections of other parties, one or more of IPG's claims to agency may remain in contention and subject to appeal. Therefore, it would be premature to order partial distribution of funds to IPG before conclusion of the validity of claims phase of a proceeding, and a determination is made that the opposing parties will not appeal the ruling regarding IPG's agency of claimants determined to be qualified.

As to the methodology employed, after IPG's proposed methodology has been rejected no fewer than three times by the Judges, it should have no credibility whatsoever as a basis for the partial distribution. Any award must be tied to the most recent final determination, the specific claims that were deemed qualified and not subject to appeal, and the confirmation by those specific claimants that IPG's agency remains current and valid. To avoid the specter of

improper pressure on the claimants, the CRB staff, not IPG, should make inquiry of those claimants.

Regarding the question whether the Judges must have access to Phase I confidential agreements to make necessary calculations, there has never been such a need in the past, and the SDC does not see any such need in the future.

Respectfully submitted,



Clifford M. Harrington (D.C. Bar No. 218107)
Matthew J. MacLean (D.C. Bar No. 479257)
Victoria N. Lynch (D.C. Bar No. 1001445)
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036-3006
Telephone: 202-663-8525
Facsimile: 202-663-8007
E-Mail: Clifford.Harrington@PillsburyLaw.com

Counsel for Devotional Claimants

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2016, the following were served a copy of this COMMENTS OF SETTLING DEVOTIONAL CLAIMANTS ON INDEPENDENT PRODUCERS GROUP MOTION FOR PARTIAL DISTRIBUTION by Federal Express overnight mail:

PROGRAM SUPPLIERS

Gregory O. Olaniran
Lucy Holmes Plovnick
Alesha M. Dominique
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W.
8th Floor
Washington, D.C. 20036

INDEPENDENT PRODUCERS GROUP

Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024



Victoria N. Lynch