Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
DISTRIBUTION OF CABLE ROYALTY FUNDS	)	**NO. 14-CRB-0010-CD (2010-13)**

REPLY IN SUPPORT OF ALLOCATION PHASE PARTIES' MOTION TO DISMISS MULTIGROUP CLAIMANTS

The Joint Sports Claimants, Program Suppliers, Commercial Television Claimants, Public Television Claimants, Canadian Claimants Group, and Settling Devotional Claimants (collectively, "Allocation Phase Parties") submit this reply to Multigroup Claimants' ("MGC") Opposition to Allocation Phase Parties' Motion to Dismiss Multigroup Claimants and Motion for Sanctions Against Allocation Phase Parties (dated February 1, 2017) ("Opposition").

MGC (including its ostensible predecessor Independent Producers Group ("IPG")) has *never* filed a direct case in any Phase I (now called Allocation Phase) proceeding to establish the relative value of any program category. Thus, MGC has *never* received any discovery, or otherwise participated, in such a proceeding. Indeed, in the nearly four decades of copyright royalty distribution proceedings, the Allocation Phase Parties are not aware of any instance where a party was allowed to participate in Phase I (and receive discovery) if it did not file written testimony explaining, and supporting, its position on royalty allocation.

The fact that the Copyright Royalty Judges ("Judges") have chosen to conduct the Allocation Phase in these proceedings simultaneously with the Distribution Phase (formerly called Phase II) does not support a different result. Nothing in the Judges' orders governing these proceedings suggests that the Judges intended to overturn the longstanding, and statutorily-

mandated, precedent that a party's failure to file a written direct statement requires the automatic dismissal of that party. It is uncontroverted that MGC failed to file a written direct statement in the Allocation Phase of these proceedings. Accordingly, as in prior Phase I proceedings, MGC may not participate in any way in the Allocation Phase of these proceedings – whether in discovery, motions practice, examination of witnesses, submission of proposed findings and oral argument, or otherwise.

MGC will not suffer any prejudice if the Judges adhere to precedent and preclude MGC from participating in the Allocation Phase of these proceedings. If any of MGC's claims survive the pending motions to disallow, MGC presumably will participate in the Distribution Phase. MGC already has received discovery relevant to Distribution Phase issues involving the claims process. *See* Opposition at 2. And if MGC files a written direct statement in the Distribution Phase, MGC will be entitled to discovery underlying the written direct statements of other Distribution Phase parties who file Distribution Phase written direct statements. That is all MGC reasonably needs, and all to which MGC is entitled. MGC has never even claimed, let alone demonstrated, that participation in the Allocation Phase is necessary for participation in the Distribution Phase. Indeed, MGC (IPG) has managed to litigate several prior Phase II (Distribution Phase) proceedings without participating in any Phase I (Allocation Phase) proceedings.

I. MGC's Failure To File A Written Direct Statement In The Allocation Phase Precludes MGC From Participating In The Allocation Phase, For Purposes of Discovery Or Otherwise.

MGC has failed to fulfill the most fundamental procedural prerequisite for participation in the Allocation Phase of these proceedings – the filing of testimony and exhibits supporting a position as to how the 2010-13 cable royalties should be allocated among the different categories of claimants. When confronted with that procedural default, MGC responded that "IPG [*sic*] is

not participating in the allocation phase (formerly known as Phase I)." Jan. 4, 2017 email from B. Boydston to A. Lutzker et al. (emphasis added) (Ex. 1). However, MGC now claims entitlement to discovery from the Allocation Phase Parties – even though MGC has not propounded any specific discovery requests to any of these Parties during the six weeks since they filed their written direct statements.

The Judges' rules make clear that filing a written direct statement is not optional and that, contrary to MGC's claim, MGC did have an "obligation to submit a written direct statement addressing allocation issues . . . ." Opposition at 6. Section 351.4(a) of those rules states that anyone who files a petition to participate also "*must* file a written direct statement." 37 C.F.R. § 351.4(a) (emphasis added). That provision is mandated by Section 803(b)(6)(C)(i) of the Copyright Act, which provides that written direct statements "of *all* participants in a proceeding . . . *shall* be filed by a date specified by the Copyright Royalty Judges . . . ." 17 U.S.C. § 803(b)(6)(C)(i) (emphasis added). *See* H.R. Rep. No. 108-408, at 31 (2004) ("Subsection 803(b)(6)(C) requires that the CRJs must, at minimum, issue the regulations that include the following: (i) A required date by which participants' written direct statements must be filed . . . .").

MGC offers no explanation for failing to comply with the statutory mandate and Judges' rules that require filing of a written direct statement. Under settled precedent, this default means that MGC may not participate in the Allocation Phase of these proceedings. *See* Allocation Phase Parties' Motion to Dismiss Multigroup Claimants at 1-3 (Jan. 25, 2017) ("Motion"). As the Judges have ruled, "a participant's failure to file a written direct statement in a proceeding before the Copyright Royalty Judges is grounds for automatic dismissal." *Order Granting SoundExchange Motion to Dismiss Muzak LLC*, No. 2006-1 CRB DSTRA (January 10, 2007)

(Motion, Ex. A); *accord, Order Granting SoundExchange's Motion to Dismiss Persons and Entities That Did Not File a Written Direct Statement,* No. 2005-1 CRB DTRA (January 20, 2006) (Motion, Ex. B).

MGC claims that this precedent is "inapplicable and irrelevant" because it is "derived from proceedings with a segregated Phase I and Phase II proceeding." Opposition at 5. But the Judges' orders in these proceedings plainly state that there are two phases – Allocation (formerly Phase I) and Distribution (formerly Phase II). *See, e.g., Order Regarding Discovery*, No. 14-CRB-0010-CD (2010-13) (July 21, 2016), at 4 n.7. The Judges decided to conduct these two phases at the same time for the sole purpose of "expedit[ing] the distribution of royalties to copyright owners . . . ." *Id.* at 4. Nothing in any of the orders cited by MGC suggests that the Judges intended to exempt any party from the rule that requires filing a written direct statement. Indeed, the Judges could not properly do so because that rule is statutorily mandated. It also serves the salutary purpose of ensuring that all parties have adequate notice of each other's positions, and the support for those positions, on the issues concerning royalty allocation.

II. MGC Is Not Entitled To Allocation Phase Discovery Because, Having Failed To File A Written Direct Statement, MGC Is Not An "Opposing Party" And Only An "Opposing Party" Is Entitled To Discovery.

As a party that is subject to automatic dismissal and is not entitled to participate at all in the Allocation Phase, MGC plainly has no right to discovery in that phase; discovery is not a one-way street where a party may demand underlying documents from everyone else while insulating itself from the same demands by failing to file any written testimony or exhibits. Furthermore, Section 351.6 of the Judges' rules states that a party may request discovery only from "*an opposing party*." 37 C.F.R. § 351.6 (emphasis added). MGC, which did not file a written direct statement – and thus did not advocate or contest *any* allocation share for *any* program category – cannot properly be considered an "opposing party" to any party in the

Allocation Phase. Thus, under Section 351.6 of the Judges' rules, MGC is not entitled to discovery of underlying documents from any Allocation Phase Party.

That result also is statutorily-mandated. Section 803(b)(6)(C)(viii) of the Copyright Act provides: "The rules and practices in effect on the day before the effective date of the Copyright Royalty and Distribution Reform Act of 2004, relating to discovery in proceedings under this chapter to determine the distribution of royalty fees, shall continue to apply to such proceedings on and after such effective date." 17 U.S.C. § 803(b)(6)(C)(viii). The CARP rules in effect prior to the CRDRA provided that only "opposing" parties may request discovery from each other. *See* 37 C.F.R. § 251.45(c)(1) (repealed) ("A Copyright Arbitration Royalty Panel shall designate a period following the filing of written direct and rebuttal cases with it in which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony."). Moreover, the Librarian of Congress and Register of Copyrights adopted the practice in CARP proceedings of dismissing, and thus not permitting discovery by, any party who failed to file a written direct statement. *See Order*, Docket No. 2000-9 CARP DTRA 1&2 (April 23, 2001) (Motion, Ex. C). Section 803(b)(6)(C)(viii) of the Copyright Act requires continuation of that practice as well.

There is no merit to MGC's argument that the Allocation Phase Parties' service of written direct statements on MGC means that MGC is entitled to receive Allocation Phase discovery. Opposition at 3. MGC conflates the rules governing service of pleadings with the different and distinct rules governing discovery. The Allocation Phase Parties served their written direct statements on MGC pursuant to 37 C.F.R. §§ 350.4(g) and (h), which provide for the service of pleadings on all parties included in the Judges' service list. In contrast, discovery of underlying

documents may be sought only from "an opposing party" (37 C.F.R. § 351.6), as discussed above.

MGC also points to its receipt of discovery in the claims process. *See* Opposition at 7. But that process goes to Distribution Phase issues and has no bearing on which parties are, and are not, entitled to discovery of underlying documents in the Allocation Phase. Despite MGC's assertions, nothing in the Judges' prior discovery orders suggests that a non-participant in the Allocation Phase would be entitled to discovery in that phase – contrary to the rules and practices limiting discovery to opposing parties that filed written direct statements. Likewise, the SDC email cited by MGC (Opposition at 8 & n.2) expressly pertained to "Distribution Phase Discovery Production" and did not even include counsel for parties that are not participating in the Distribution Phase. It certainly cannot be read as an agreement to provide future Allocation Phase discovery to parties who failed to file the mandatory written direct statement in that phase. MGC reproduced only a snippet of that email chain as Ex. B to its Opposition; a copy placing SDC's email in context with others in the chain is attached hereto at Ex. 2.

III. There Is No Proper Basis Supporting MGC's Request For Sanctions.

MGC's request for an unspecified "substantial sanction" (Opposition at 8) is baseless. For the reasons discussed above, the Allocation Phase Parties' good faith position is amply supported by the Copyright Act, the Judges' rules and longstanding precedent. Moreover, to date, MGC has not served a single discovery request on any Allocation Phase Party – other than to make a blanket demand for everything that everyone else produces, while producing nothing itself. Nor did the Judges' orders require any type of unsolicited production of underlying documents in the Allocation Phase; rather, they simply set a deadline for the conclusion of Allocation Phase discovery. *See Order Regarding Discovery*, No. 14-CRB-0010-CD (2010-13) (July 21, 2016), at Ex. A thereto. The fact that the Allocation Phase Parties – the parties who

actually *did* file written direct statements – voluntarily agreed to exchange underlying documents with one another is laudable, not sanctionable. And they certainly had no obligation to include MGC in that agreement because MGC alone failed to file a written direct statement and advised that it was "not participating in the allocation phase." *See* Ex. 1.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Allocation Phase Parties' Motion, the Judges should preclude MGC from participating in the Allocation Phase of these proceedings. They also should reject MGC's request for sanctions.

Dated: February 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, a copy of the foregoing filing was provided electronically and sent by Federal Express overnight to the parties listed below:

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Troy Strunkey

EXHIBIT 1

From: Arnie Lutzker <arnie@lutzker.com>
Sent: Wednesday, January 04, 2017 5:40 PM
To: Brian D. Boydston, Esq.
Cc: MacLean,Matthew J.; Harrington,Clifford M.
Subject: RE: 2010-2013 Allocation Phase

Brian – We appear to have a different understanding of what it means to be a party participating in this case, particularly where one's Petitions to Participate stated an express intent to participate as a Phase I (now allocation case) devotional category claimant. If you thought you didn't have to file a written direct statement, perhaps it would have been wiser to seek the Judges' ruling on that point, rather than ignore the rule. Happy to discuss further tonight.
Arnie

From: Brian D. Boydston, Esq. [mailto:brianb@ix.netcom.com]
Sent: Wednesday, January 4, 2017 4:17 PM
To: Arnie Lutzker <arnie@lutzker.com>
Cc: MacLean,Matthew J. <matthew.maclean@pillsburylaw.com>; Harrington,Clifford M. <clifford.harrington@pillsburylaw.com>
Subject: Re: 2010-2013 Allocation Phase

Arnie, please clarify what you are trying to accomplish. IPG is not participating in the allocation phase (formerly known as Phase I). Notwithstanding, and as the Judges' prior orders make clear, the allocation and distribution phases are all considered aspects of the same proceeding. That is, an entity is either a party to the proceeding or not, and is not considered a "party" to only certain aspects of the proceeding. This is why all parties were compelled to share discovery and documents relating to distribution in certain programming categories even with those parties not participating in the distribution of royalties in such category.

Brian

-----Original Message-----
From: Arnie Lutzker
Sent: Jan 3, 2017 9:59 AM
To: "Brian D. Boydston, Esq."
Cc: "MacLean, Matthew J." , "Harrington, Clifford M."
Subject: 2010-2013 Allocation Phase

Brian – Regarding the 2010-2013 proceeding, we see that Multigroup Claimants did not file any written direct statement in the Allocation Phase of the case. As I'm sure you know, under the Judges' rules, the filing of a written direct statements is obligatory for all party participants. With that rule in mind, we believe that Multigroup has forfeited its party status for this phase of the case and should not continue as a participant in this part of the litigation. Therefore, we ask that you advise us that you agree to withdraw as a party in the Allocation Phase no later than on our call tomorrow evening, and then promptly file a motion to withdraw. If you are not inclined to do this, we advise you that we will prepare and file our own motion asking the Judges to dismiss Multigroup as a party in the Allocation Phase of the case.
Arnie

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EXHIBIT 2

From: Brian D. Boydston, Esq. <brianb@ix.netcom.com>
Sent: Sunday, July 31, 2016 9:20 PM
To: Plovnick,Lucy; 'Stewart,John'; Arnie Lutzker; Mace,Ann; Harrington,Clifford M. (clifford.harrington@pillsburylaw.com); MacLean,Matthew J. (matthew.maclean@pillsburylaw.com); Lynch,Victoria N. (victoria.lynch@pillsburylaw.com); Garrett, Robert; Laane, M. Sean; Kientzle, Michael; Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com); Ervin,David; Olaniran,Greg; Dominique,Alesha
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

I cannot be available for a conference call then, but please go ahead without me. Multigroup Claimants reads the CRB's orders as requiring production of discovery to all parties regardless of Phase I category. To the extent that all other parties agree to some limitation on that, MC will most likely agree as well.

Brian Boydston

-----Original Message-----
From: "Plovnick, Lucy"
Sent: Jul 29, 2016 12:14 PM
To: "'Stewart, John'" , Arnie Lutzker , "Brian D. Boydston, Esq." , "Mace, Ann" , "Harrington,Clifford M. (clifford.harrington@pillsburylaw.com)" , "MacLean,Matthew J. (matthew.maclean@pillsburylaw.com)" , "Lynch,Victoria N. (victoria.lynch@pillsburylaw.com)" , "Garrett,Robert (Robert.Garrett@APORTER.COM)" , "Laane,M. Sean (Sean.Laane@APORTER.COM)" , "Kientzle,Michael (Michael.Kientzle@aporter.com)" , "Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com)" , "Ervin, David" , "Olaniran, Greg" , "Dominique, Alesha"
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

MPAA is available to participate in a meet and confer call on Monday at 4pm.

Lucy

From: Stewart, John [mailto:JStewart@crowell.com]
Sent: Friday, July 29, 2016 3:04 PM
To: Arnie Lutzker; Brian D. Boydston, Esq.; Plovnick, Lucy; Mace, Ann; Harrington,Clifford M. (clifford.harrington@pillsburylaw.com); MacLean,Matthew J. (matthew.maclean@pillsburylaw.com); Lynch,Victoria N. (victoria.lynch@pillsburylaw.com); Garrett,Robert (Robert.Garrett@APORTER.COM); Laane,M. Sean (Sean.Laane@APORTER.COM); Kientzle,Michael (Michael.Kientzle@aporter.com); Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com); Ervin, David
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

Thanks, Arnie. Could you send me the ruling in the 2000-2003 case that you're referring to?

If everyone is willing, would you be available for a telephonic meet and confer on Monday, August 1, at 4:00 Eastern Time?

Thanks,
John

From: Arnie Lutzker [mailto:arnie@lutzker.com]
Sent: Friday, July 29, 2016 2:55 PM
To: Stewart, John; Brian D. Boydston, Esq.; Plovnick,Lucy; Mace, Ann; Harrington,Clifford M. (clifford.harrington@pillsburylaw.com); MacLean,Matthew J. (matthew.maclean@pillsburylaw.com); Lynch,Victoria N. (victoria.lynch@pillsburylaw.com); Garrett,Robert (Robert.Garrett@APORTER.COM); Laane,M. Sean (Sean.Laane@APORTER.COM); Kientzle,Michael (Michael.Kientzle@aporter.com); Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com); Ervin, David
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

John - the SDC has already indicated that we have agreed with this position and also that we have already produced the SDC documents to all parties. We do not believe that any party should withhold documents in this proceeding from other parties. The Judges previously ruled in the context of the 2000-2003 case that even though SDC and MPAA were not disputing the same funds, because it was a consolidated proceeding, we were each entitled to all discovery in the proceeding. There may be evidentiary rulings applicable to one category that implicate another, and no party should be at a discovery deficit when dealing with such matter. We are happy to participate in a meet and confer, but our positon is quite clear.
Arnie

From: Stewart, John [mailto:JStewart@crowell.com]
Sent: Friday, July 29, 2016 2:48 PM
To: Brian D. Boydston, Esq. <brianb@ix.netcom.com>; Plovnick,Lucy <lhp@msk.com>; Mace, Ann <AMace@crowell.com>; Arnie Lutzker <arnie@lutzker.com>; Harrington,Clifford M. (clifford.harrington@pillsburylaw.com) <clifford.harrington@pillsburylaw.com>; MacLean,Matthew J. (matthew.maclean@pillsburylaw.com) <matthew.maclean@pillsburylaw.com>; Lynch,Victoria N. (victoria.lynch@pillsburylaw.com) <victoria.lynch@pillsburylaw.com>; Garrett,Robert (Robert.Garrett@APORTER.COM) <Robert.Garrett@APORTER.COM>; Laane,M. Sean (Sean.Laane@APORTER.COM) <Sean.Laane@APORTER.COM>; Kientzle,Michael (Michael.Kientzle@aporter.com) <Michael.Kientzle@aporter.com>; Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com) <ted@copyrightroyalties.com>; Ervin, David <DErvin@crowell.com>
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

We have not followed this approach to date, instead producing only to the parties participating in the distribution-phase proceedings in the Program Suppliers category in which we are pursuing claims. (We have produced documents to both MPAA and Multigroup Claimants regardless of which of them made the discovery request.) While your interpretation of the language (which appears to be limited to parties asserting "the existence of a controversy involving validity or categorization of a claim," not a distribution share controversy) might have made sense against the backdrop of the past several Phase II cases, in which IPG was making claims in each of three categories, it may not make sense in our current situation. It's not clear why we should be producing documents regarding station syndicated programs and claimants to the Sports and Devotional representatives. Moreover, given that we are engaged in a combined Phase I/Phase II proceeding, we may have reasons not to want to produce what otherwise would be non-discoverable confidential information to parties who oppose us in the Phase I portion of the case.

I am not averse to following the same approach if everyone is in agreement and appropriate protections can be put in place, but I suggest we have a meet and confer to discuss the issue further. Would the parties agree to participate in such a discussion?

Thanks,
John
John I. Stewart, Jr.
jstewart@crowell.com
Direct: 1.202.624.2685 | Fax: 1.202.628.5116

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From: Brian D. Boydston, Esq. [mailto:brianb@ix.netcom.com]
Sent: Friday, July 29, 2016 2:29 PM
To: Plovnick,Lucy; Stewart, John; Mace, Ann; 'arnie@lutzker.com' (arnie@lutzker.com); Harrington,Clifford M. (clifford.harrington@pillsburylaw.com); MacLean,Matthew J. (matthew.maclean@pillsburylaw.com); Lynch,Victoria N. (victoria.lynch@pillsburylaw.com); Garrett,Robert (Robert.Garrett@APORTER.COM); Laane,M. Sean (Sean.Laane@APORTER.COM); Kientzle,Michael (Michael.Kientzle@aporter.com); Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com)
Subject: Re: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

Lucy,

Multigroup Claimants understands that you have correctly interpreted the Judges' order, and can confirm that Multigroup Claimants has thus far served all parties with all documents served on any party.

Is there a particular reason that you are making this inquiry at this time, i.e., has any party failed to serve other parties with all documents served on any party?

Brian

-----Original Message-----
From: "Plovnick, Lucy"
Sent: Jul 28, 2016 3:43 PM
To: "Brian D. Boydston (brianb@ix.netcom.com)" , "'JStewart@crowell.com' (JStewart@crowell.com)" , "'AMace@crowell.com' (AMace@crowell.com)" , "'arnie@lutzker.com' (arnie@lutzker.com)" , "Harrington, Clifford M. (clifford.harrington@pillsburylaw.com)" , "MacLean, Matthew J. (matthew.maclean@pillsburylaw.com)" , "Lynch, Victoria N. (victoria.lynch@pillsburylaw.com)" , "Garrett, Robert (Robert.Garrett@APORTER.COM)" , "Laane, M. Sean (Sean.Laane@APORTER.COM)" , "Kientzle, Michael (Michael.Kientzle@aporter.com)" , "Edward S. (Ted) Hammerman, Esq (ted@copyrightroyalties.com)"
Subject: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

Counsel,

It is our understanding that the Judges' March 16, 2016 Order in the 2010-13 cable and satellite proceedings requires all parties participating in the distribution phase of these proceedings to serve all other parties participating in that phase of the proceeding with copies of all discovery documents that they produce in the proceeding to any party. *See* March 16 Order at 2 ("Parties asserting the existence of a controversy involving validity or categorization of a claim shall provide full disclosure to all other claims parties, whether or not they believe the other parties have a specific interest in the claims controversies they present."). To that end, on April 6, 2016, MPAA served each of you with copies of the documents that it produced in these proceedings regarding its Program Suppliers claims. Please confirm that you share this understanding of the Judges' Order, and that you have provided (and will continue to provide) MPAA with copies of your discovery production in these proceeding, regardless of which party requested the documents being produced.

Thanks,
Lucy

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