Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	**Docket No.** 2007-3 CRB 2004-2005
Distribution of the	)	
2004-2005	)	
Cable Royalty Funds	)	
	)	

DEVOTIONAL CLAIMANTS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Table of Contents

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Pursuant to Section 351.14 of the rules of the Copyright Royalty Judges ("Judges"), 37 C.F.R. § 351.14, the Devotional Claimants submit the following Proposed Findings of Fact and Conclusions of Law.[1]

INTRODUCTION AND SUMMARY

The Phase I 2004-2005 Cable Royalty Distribution Proceeding involves the latest installment in the resolution of claims among parties which, for the better part of three decades, have sought a share of the cable compulsory royalties. In this proceeding, there are four claimant groups, one of which is a joint group, comprised of four individual claimant groups. The Phase I claimants in this proceeding are Joint Sports Claimants ("JSC"), Public Television Claimants ("PTV"), Commercial Television Claimants ("CTV") and Music Claimants ("Music")

[1] The abbreviation "PFOF" refers to the "Proposed Findings of Fact" set forth in the second section of this document. "PCOL" refers to the "Proposed Conclusions of Law" set forth in the final section. "DC Exhibit" refers to the exhibits offered on behalf of the Devotional Claimants. "SP Exhibit" Refers to the exhibits offered on behalf of the Settling Parties. "CDN" refers to the exhibit offered by the Canadian Claimants Group. "PS Exhibit" Refers to exhibits offered on behalf of the Program Suppliers. "Tr." refers to the transcript of oral testimony. "W.D.T." refers to the written direct testimony of the identified witness. "W.R.T." refers to the written rebuttal testimony of the identified witness.

(collectively "Settling Parties" or "SP"), Program Suppliers ("Program Suppliers" or "PS"), Canadian Claimant Group ("Canadian Claimants" or "CCG") and Devotional Claimants ("Devotional Claimants" or "DC").

Devotional Claimants programming differs from all other Phase I Parties in three key respects. First, Devotional Claimants provide programming on individual, family, and societal issues, as well as news, information, and entertainment from a distinctly religious perspective. Religious programming appeals particularly to a loyal audience that seeks spiritually-based content that serves their faith. Second, Devotional Claimants do not sell their programming to the broadcasters whose signals are distantly retransmitted; rather, they purchase airtime from the broadcasters. This practice, which dates back to the 1950s, recognizes the importance of communicating a religious themed program without the intrusion of externally imposed product advertising. Third, unlike commercial syndicators, Devotional Claimants are not driven by ratings or advertising dollars. For Devotional Claimants, which are organized as charitable, 501(c)(3) entities, viewer donations sustain their work, and underscore this programming category's market value. PFOF ¶¶127-132.

Trying to incorporate the purpose-driven programming services of Devotional Claimants into ratings-driven copyright royalty distribution system has been a challenge from the inception. In the 1979 decision of the Copyright Royalty Tribunal ("CRT"), principally at the urging of the Program Suppliers, who considered the very purchase of airtime to be a disqualification for royalties, Devotional Claimants were initially awarded a 0 share. That decision was promptly overturned by the D.C. Circuit Court of Appeals, *The Christian Broadcasting Company v. The Copyright Royalty Tribunal,* 720 F.2d 1295 (D.C.Cir., 1982), but it was been a harbinger of difficulty for Devotional Claimants in the copyright royalty distribution proceedings.

In Phase I cases, the Devotional Claimants' have a long and consistent record of supporting the JSC's surveys of cable operator valuations of program categories, and the present case is no exception. PFOF ¶127. The Bortz Survey first measured DC value commencing in 1986. In spite of this support, in disputed cases through 1992, the Devotional Claimants were relegated a 1.2 percent share, principally based on the CRT and Copyright Arbitration Royalty Panel ("CARP") reliance on Nielsen viewing data. For the calendar years 1993-2003, the Devotional Claimants settled their claims without filing a separate Phase I case. The decision to reassert the relevance of the Bortz Survey to the Devotional Claimant's claim has its roots in the 1998-1999 proceeding. In that case, the CARP finally determined that Nielsen ratings data failed adequately to measure the relative marketplace value of the program categories, and instead determined that JSC's Bortz Survey of cable operators' relative valuations of program categories was the best evidence for allocating royalties.

For present purposes, one point to underscore is that the merits of the Devotional Claimants' claim have not been revisited since 1992. In addition to relying on the 2004-2005 Bortz Survey results, Devotional Claimants believe that recognition of "changed circumstances" since the 1992 case is appropriate, based on the results of the Bortz Surveys from 1992-2005. For Devotional Claimants, quantification of changed circumstances is graphically illustrated by the near doubling of its valuation in the Bortz Survey results (compare average share in 1990-1992 surveys [3.9] to average share in 2004-2005 surveys [7.2]). Further justification of changes is set forth in the testimony of its witnesses, Dr. Charles Stanley, Bruce Johansen and Dr. William Brown. PFOF¶¶16-17, 127-163.

Even James Trautman, the Settling Parties' key witness who presented the results of the 2004-2005 Bortz Survey, acknowledged, in response to questions from Judge Roberts, that since

1998 with Devotional Claimants' Bortz Survey shares up 50%, Devotional Programming's relative marketplace value in the Bortz Surveys increased "disproportionately" compared to the other categories of programming. Tr. 187-188 (Trautman). PFOF ¶5. The 85% increase in the Devotional Claimants' Bortz shares between 1990-1992 and 2004-2005 (and 50% increase since 1998) is a basis for a significant repositioning the Devotional Claimants' relative share of compulsory royalties in this proceeding. PFOF ¶17.

That the 2004-2005 Bortz Survey results reflect value in the distant signal marketplace was corroborated by Dr. Gruen's the newly-developed survey of cable subscribers, introduced by the Program Suppliers. In the Gruen Survey, Devotional programming garnered 7.38% (2004) and 8.19% (2005) or approximately 7.75% share over the two years. PFOF¶190.

The same cannot be said for two other economic analyses that were each subject to fatal infirmities. The Waldfogel Regression Analysis sponsored by CTV's Dr. Joel Waldfogel attempted to draw conclusions regarding the relative value of program minutes attributed to each of the claimant groups by testing specific cable data. PFOF ¶¶56-66. Nevertheless, as decisively critiqued by Dr. Michael Salinger, the Waldfogel Regression Analysis was a worthless exercise, because it proved on rigorous scrutiny to be unstable and unreliable. Rather than being a predictor of relative marketplace value, Dr. Salinger established the formula was only a crude measure of the royalty formula itself. In the end, it cannot be part of any rational conclusion in this case. PFOF ¶¶67-86. It is also notable that Dr. Waldfogel's methodology as a predictor of relative marketplace value was directly challenged by another Settling Parties' witness, Dr. Robert Crandall. Tr. 230-231 (Crandall).

A similar fate befell the viewing-advertising analysis by Dr. George Ford, introduced for the Program Suppliers. Dr. Ford's hypothesis was that by his estimating the price of advertising

for categories of distantly retransmitted programming, the Judges would be able to determine the relative advertising value of program categories for purposes of this proceeding. In other words, he concluded that the unregulated broadcast market, where local stations buy programming and recoup that cost by selling commercials based on audience size and demographic, should serve as a credible proxy for establishing the relative value of distantly retransmitted programming. Tr. 2116-2119 (Ford). PFOF¶¶218-255. However, expert after expert in this case challenged Dr. Ford's thesis. As discussed in this submission, economists and experts representing Settling Parties, Devotional Claimants and CCG all noted that since cable systems are barred from selling advertising in connection with the distantly retransmitted content, a valuation dependent on ad sales tied to viewing data was unreliable and without any probative value. PFOF ¶¶256-262.

Quite significantly, the viewing data Dr. Ford used was itself flawed for measuring advertising value. Program Supplier's Nielsen witness, Paul Lindstrom, explained that the Nielsen data are neither ratings nor share, Tr. 2012 (Lindstrom), PFOF¶211, but rather "estimates of the distribution of distant cable viewing for the periods of 2004 and 2005." Tr. 1956 (Lindstrom). PFOF¶206. Such estimates play no role in a broadcast station's selling advertising. Tr. 2012-2013 (Lindstrom). PFOF¶211. Mr. Lindstrom also conceded that the results of the MPAA special viewing studies in this proceeding are not a measure of the marketplace value of the distant signal programming. Tr. 1988-1989 (Lindstrom). PFOF¶210.

In sum, the best evidence in this proceeding, the Bortz Survey of cable operators (corroborated by the Gruen Survey of cable subscribers) points to a Devotional Claimant share in the range of 7-8%. It was recognized that some adjustment of the Bortz Survey results was appropriate for all parties to account for the fact that the value of music embedded in programming was not measured by the Bortz Survey methodology. PFOF¶10. Separately, Mr.

Trautman accepted the fact that PTV and CCG's shares are somewhat undervalued because the Bortz Survey discounts results when only a PTV or CCG signal (or only a PTV and CCG signal) are carried. PFOF¶¶21-27.

Devotional Claimant witnesses separately corroborated the reasons why an enhanced DC award in the range of the Bortz and Gruen Surveys is justified by marketplace evidence. Dr. Charles Stanley, Bruce Johansen and Dr. William Brown each detailed the role religious programming plays in cable operators' acquiring and retaining subscribers. As attested to by these Devotional Claimant witnesses, and unrefuted in the rebuttal phase of the hearing, Devotional programming is niche content, reaching a small but avid and loyal viewing sector that is important to cable operators. PFOF ¶¶127-163.

Direct testimonial evidence introduced by the Devotional Claimants also established growth in the number of religious programs carried by television stations from 1992 to 2005, and a material increase in donations that sustain and support programming. Testimony established that during times of an individual viewer's personal stress, or national/world upheaval, the services provided by religious programs, including telephone counseling, corroborate the bond of viewer to program and by reasonable inference value to CATV operators. PFOF¶¶129-132.

Aware that the Bortz Survey does not provide any useful information about Music's share, Music Claimants tried to prove an alternative formula for its valuation. However, Music's attempt was materially marred by questionable data and indefensible assumptions. As a result, Music must fall back on a record established in prior cases and the absence of any material change in its share. PFOF¶¶94-109.

As to PTV, its key witness, Linda. McLaughlin, endeavored to calculate adjustments to the Bortz Survey results to perfect an enhancement of the PTV share. However, PTV's effort

was not supported by the necessary testimony of a survey design expert, and thus Ms. McLaughlin's analysis must be discounted. PFOF¶¶31-42.

CCG, in turn, relied on a "fee generation" methodology, attempting to tie the increase in particular system royalties payments to the carriage of particular Canadian television stations. PFOF¶¶110-124. CCG's fee gen approach was the focal issue in the 2000-2003 Phase I proceeding. The Judges' conclusions, based on the record that included stipulations, which narrowed the scope of the dispute and dictated the nature of the factual record, left open the status of the "fee gen" theory in this case. The record in the 2004-2005 proceeding, in which all parties presented competing theories for distribution, raised serious questions whether fee generation has any place in the allocation of fees for any party. The Devotional Claimants believe that based on the 2004-2005 record, the CCG share must be adjusted downward to reflect the Bortz Survey and Gruen Survey results and the limited probative value of fee generation evidence presented by CCG. PCOL¶¶108-118.

Based on the record evidence, the Devotional Claimants believe that the shares for all parties should be averaged for 2004-2005. PCOL ¶74. No party suggests, much less has proved, material distinctions between shares for 2004 and 2005. PCOL¶75. Further, in light of the absence of any evidence supporting a distinction between the Basic and 3.75% funds, Devotional Claimants believe the 3.75% share should be the same as the Basic share, adjusted only for the fact that PTV does not have any claim to 3.75% funds. In the case of the Syndex pool, only Program Suppliers and Music seek a share of those Fund, so those funds should be restricted to those parties. PCOL¶¶72-77.

Moreover, in light of the fact that even the best studies presented to the Judges in this case, as well as the studies presented to the CARP and CRT in prior proceedings, offer an

approximation of the relative marketplace values of the program categories within statistically reliable ranges, it is undesirable – indeed counterproductive – to award shares to tiny fractions of a percent (as has been done in recent proceedings), because such precision falsely suggests a level of accuracy that is not supported by recorded evidence. PCOL¶73. Results fall within "zones of reasonableness" and such zones need not be drawn to the fourth decimal point. Rather, Devotional Claimants believe that the shares of the Parties should generally be awarded in whole numbers, with a calculation to the nearest tenth of a percent when determining 3.75% shares. One salutary benefit of such an approach may be an end to squabbling in future years to challenge nuanced but ultimately inconsequential differences in claims of these parties.

As a result, Devotional Claimants propose the following allocations as supported by the evidence in this proceeding:

Claimant Group	**Basic**	**3.75**	**Syndex**
Settling Parties	56	53.9	3
Program Suppliers	36	37.7	97
Devotional	7	7.3	0
Canadian	1	1.1	0

DEVOTIONAL CLAIMANTS PROPOSED FINDINGS OF FACT

The Devotional Claimants hereby set forth their Proposed Findings of Fact in the 2004-2005 Cable Royalty Distribution Proceeding.

I. THE SETTLING PARTIES

1. The Settling Parties are composed for four claimant groups, Joint Sports Claimants, Commercial Television, Public Television and Music. They presented a joint case, but each group sponsored separate witnesses.

2. The Settling Parties seek a collective award equal to no less than they received in the 1998-1999 proceeding, or a little more than 60% of the Basic Fund, a little less than 60% of the 3.75% Fund and 4 percent of the Syndex Fund. [2]

3. The Settling Parties claim there was no material event in the marketplace that occurred between 1998-99 and 2004-2005 substantially to affect the relative marketplace valuations of the parties.[3] Settling Parties concede that relative marketplace value is the only standard for distribution of royalties.[4]

A. JOINT SPORTS CLAIMANTS - BORTZ SURVEY RESULTS

4. As the centerpiece of their case, the Settling Parties relied upon the 2004-2005 Bortz Survey of cable operators. James Trautman, managing director of Bortz Media, who has been overseeing the Bortz Survey for two decades, presented the survey.[5] Mr. Trautman was qualified

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[2] Tr. 9 (Garrett).

[3] Tr. 10-11 (Garrett); James M. Trautman W.D.T. (SP Exhibit 2) Ex. 1 at 6; Judith Meyka W.D.T. at 6 (SP Exhibit 4), Tr. 277 (Meyka); Richard V. Ducey W.D.T. (SP Exhibit 8) at 2.

[4] Tr. 28 (Garrett). Tr. 225 (Crandall). Crandall W.D.T. at 4. (SP Ex. 3).

[5] Trautman W.D.T. at 2.

as an expert in market research, including survey research and valuation, in the cable broadcast and television program industry.[6]

5. The 2004-2005 Bortz Survey is a constant sum survey of cable operators, which seeks to determine how the operator would allocate a fixed programming budget to be spent on distant signal programming.[7] The Bortz Survey constant sum is a methodologically sound and appropriate means to determine the relative market value of the distant signal program categories carried by cable operators,[8] "the best tool to answer the question presented in this proceeding,"[9] and "the best source of information on relative marketplace values."[10] The person most responsible for the programming decisions made by a particular system is the survey respondent.[11] The market which the Bortz Survey had in mind was "the transaction involving the distant signal programming."[12]

6. The Bortz Survey questionnaire was identical (except for indication of year) to the 1998-99 survey.[13] The results of the Bortz Survey appear in Table 1 to Trautman W.D.T. (SP Exhibit 2) at 3 as follows:

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[6] Tr. 53-54 (Trautman).

[7] Tr. 148-149 (Trautman).

[8] Duncan W.D.T. 6-10. (SP Ex. 1),

[9] Crandall W.D.T. 7 (SP Ex. 3),

[10] Tr. 228 (Crandall).

[11] Tr. 57 (Trautman).

[12] Tr. 152 (Trautman).

[13] Tr. 63 (Trautman).

2004-2005 Bortz Survey Results

Claimant Groups	2004 Results	2005 Results
JSC	33.5%	36.9%
PS (movies, syndicated series and specials)	36.5%	37.6%
CTV	18.4%	14.8%
DC	7.8%	6.6%
PTV	3.5%	3.7%
CCG	0.2%	0.3%
MUSIC	N/A	N/A

7. In Table III-2, Trautman W.D.T. (SP Exhibit 2) at 24, the results are presented showing the standard deviations to the 95% confidence range as follows:

2004-2005 Bortz Survey Results 95% Confidence Range

Claimant Groups	2004 Standard Deviations (95% Confidence Range)	2005 Standard Deviations (95 % Confidence Range)
JSC	31.2%-35.8%	34.4%-39.4%
PS (movies, syndicated series and specials)	33%-41%	33.7%-41.5%
CTV	16.7%-20.1%	13.1%-16.5%
DC	7.1%-8.5%	5.8%-7.4%
PTV	2.6%-4.4%	2.8%-4.6%
CCG	0.0%-0.4%	0.1%-0.5%
MUSIC	N/A	N/A

8. The Bortz Survey relies on the qualified respondent to know whether a program category is carried on the distant signal, for example devotional or religious programs.[14] The use of examples of programs for categories has been rejected because of the inherent biases that can result. [15] Over the years, the Bortz Survey has addressed the issues of program categorization to ensure that the credit is properly applied to each claimant category and whether programs, such as devotional programs, have been carried on the distant signals. Based on the results over time and in 2004-2005 in particular, Mr. Trautman concludes a) there have been few questions regarding categorization,[16] b) the effect of any program miscategorization is minor and "at the fringes,"[17] and c) having considered the possibility that certain categories (e.g. devotional programs) are not carried, the results are reliable.[18]

9. Even though the Bortz Survey does not ask respondents what is the specific motivation for carrying a particular distant signal, the Bortz survey question about relative value (#4) "really answers that in [Mr. Trautman's] view."[19] If a survey respondent accords a zero or 100 percent allocation, those results are included in the survey,[20]so the survey reflects "what it is that really drives the value [of carrying the distant signal] and then allocat[ing] the percentages accordingly."[21] The Bortz Survey question about popularity is unaided and not intended to reflect relative valuations; rather, it is designed to get the respondents thinking about the kind of

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[14] Tr. 70-81 (Trautman).

[15] Tr. 83 (Trautman).

[16] Tr. 84 (Trautman),

[17] Tr. 107 (Trautman)

[18] Tr. 108 (Trautman).

[19] Tr. 87 (Trautman).

[20] Tr. 92 (Trautman),

[21] Tr. 91 (Trautman).

programming on the signals to prepare to answer the key question number 4 on relative valuation[22]:

> ...we want the respondents to think in terms of a ... de facto programming budget and popularity and translating that into a budget. We want them to think more in terms of relative value in the allocation of a budget among a fixed set of categories. And so that's our goal. We think that the Question 4-A is the best way of getting at that.[23]

10. The Bortz Survey did not measure the relative marketplace value of Music, nor did it measure CCG and PTV if the only signals carried by cable operator systems were those claimant categories.[24]

11. The Bortz survey does not have a way of identifying "noncompensable programming."[25]

12. Even though the Bortz survey did not address substituted or noncompensable programming, in general cable operators are familiar with the fact that WGN is "blackout-proof," i.e. that WGN's distant signal substitutes programming to avoid a blackout.[26]

13. According to Mr. Trautman, there were no significant changes in Bortz Survey methodology since 1992. [27] In his expert opinion, the fluctuations from year-to-year fall within

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[22] Tr. 97-98 (Trautman)

[23] Tr. 100 (Trautman).

[24] Tr. 116 (Trautman).

[25] Tr. 116-117 (Trautman).

[26] Tr. 165-166 (Trautman). Another SP witness, Dr. Richard Ducey, conceded that in his estimation "the majority [of cable operators] understand there's a difference in programming," Tr. 648 (Ducey), i.e. that WGN substitutes programming on WGN-America, the distant signal retransmitted nationally via satellite.

[27] Tr. 112 (Trautman).

the bounds of confidence intervals,[28] with results that are consistent and which do support the reliability of the survey in terms of methodology.[29]

14. Regarding the change in relative valuation after the conversion of WTBS from a distant signal to a cable network in 1998, the loss of a signal "particularly noted for certain categories of programming (e.g. movies and sports) means that what remains becomes more valuable.[30]

15. As to devotional content and the change of WTBS to a cable network (TBS), Mr. Trautman conceded: "I would acknowledge that it appears that *devotional programming disproportionately captured some of that change.*"[31]

16. Because the Devotional Claimants settled the 1998-1999 claims without participating in the Phase I proceeding, the CARP's 1998-1999 decision did not consider the Bortz Survey results for Devotional programming in making allocations for those specific years.[32]

17. Since 1990-1992, the Devotional share of programming value allocation grew from an average of 3.9% (1990-1992) to 7.2 (2004-2005). In fact, since 1997 (the last year WTBS was on cable as a distant signal) when Devotional's Bortz share was 2.3, Devotional programming has not dipped below 5.3% in the Bortz Surveys.[33]

18. Regarding WGN noncompensable programming, Mr. Trautman conceded that he was aware that for devotional content, a number of respondents allocated a "zero" value to the Devotional category.[34] This means that the Bortz Survey results took the "zero" valuation of

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[28] Tr. 183 (Trautman), Table III-2, JSC 04-05 Ex. 1 at 24.

[29] Tr. 180 (Trautman).

[30] Tr. 187-188 (Trautman).

[31] Tr. 188 (Trautman). Emphasis supplied.

[32] Tr. 193 (Trautman).

[33] Trautman, W.D.T. (SP Exhibit 2) at 23 (Table III-1).

[34] Tr. 194 (Trautman).

many respondents into account, so that "it obviously is not possible to make a further downward adjustment from zero."[35] Mr. Trautman further acknowledged that even though he has "thought about the issue" of an adjustment to devotional content for noncompensable content on WGN, "I haven't proposed or even considered a methodology for making an adjustment." [36] Therefore, Mr. Trautman did not make any calculations to support any downward adjustment of the Devotional Claimant share in the Bortz survey,[37] nor has he attempted to calculate how he would adjust the devotional claimant share where WGN and other signals are carried that accord a value to devotional content.[38]

19. Another SP witness, Linda McLaughlin, who expressed concern about noncompensable syndicated series, movies and devotional content on WGN and possible overstatement of value in the Bortz survey, conceded "I don't know" whether Bortz respondents actually gave value to noncompensable devotional content,[39] nor did she propose an adjustment to the Devotional Claimants share on that grounds.[40] Dr. McLaughlin also conceded that to the extent Bortz respondents gave devotional content a "zero" value, there was no evidence of overcompensation: "Yes, from the point of view of devotional, for a person who responded with a zero value, that person did not overcompensate due to the noncompensable programming."[41]

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[35] Tr. 196 (Trautman).

[36] Tr. 201 (Trautman).

[37] Tr. 197 (Trautman).

[38] Tr. 200 (Trautman).

[39] Tr. 474-475 (McLaughlin),.

[40] Tr. 477 (McLaughlin).

[41] Tr. 510 (McLaughlin).

20. Regarding the measure of "importance" in the Bortz Survey, on questioning from Judge Wisniewski, Mr. Trautman conceded he would not accord much weight to the Question 3 responses in general.[42]

B. PARTICULAR CRITICISMS OF BORTZ SURVEY

21. In rebuttal, CCG witness, Dr. Gary Ford, former professor and chairman of the marketing department at the Kogod School of Business at American University and an expert in marketing and survey research,[43] criticized the Bortz Survey as it applied to Canadian distant signals. He said the Bortz Survey disproportionately oversampled large systems and systematically undersampled small cable systems, with the result that respondents will place less value on niche programming or niche signal.[44] This affected Canadians, and it might also impact PTV and devotionals.[45] Dr. Ford also complains that the Bortz Survey "arbitrarily excluded" systems which only retransmitted a Canadian or PTV signal.[46]

22. According to Dr. Ford, if Bortz increased the sample size to 936 that would improve the chances of getting a large enough number of respondents who could value Canadian content.[47]

23. Dr. Ford testified that the Bortz questionnaire design, which focuses in question 2 on "most popular ... stacks the deck a bit in terms of respondents giving relatively more weight to

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[42] Tr.207-208 (Trautman).

[43] Tr. 2970 (Ford).

[44] Tr. 2974-2980 (Ford); Gary Ford, W.R.T. (CND-R-2) at 8-11.

[45] Tr. 2991 (Ford).

[46] Tr. 2981 (Ford);

[47] Tr. 2989 (Ford).

what they just mentioned is most popular and being a bit biased against niche programming that may … appeal to a small group of consumers, but still be profitable for the cable system."[48]

24. Dr. Ford had testified in prior royalty proceedings (as early as 1990 proceeding) offering similar criticism of the Bortz Survey design.[49]

25. Dr. Ford conceded the constant sum survey approach can provide useful information about relative marketplace value,[50] but stated that the Bortz Survey is not valid for CCG because of the small sample size.[51]

26. Dr. John Calfee, a resident scholar at the American Enterprise Institute, and an expert in the economics of competitive behavior in highly regulated markets,[52] questioned the Bortz Survey results from an economic sense because the Canadian share "came out implausibly low," blaming the design of the survey, which he concluded failed to capture the portion of Canadian distant signals that included movies, sports and news programming.[53]

27. In support of his criticism that the Bortz Survey results were too low for CCG content, Dr. Calfee compared the savings a system would achieve from dropping signals with low value in the Bortz Survey.[54] However, on cross-examination he conceded that he did not measure the

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[48] Tr. 2993-2994 (Ford).

[49] Tr. 3004 (Ford).

[50] Tr. 3008 (Ford).

[51] Tr. 3028-3029 (Ford).

[52] Tr. 3048 (Calfee).

[53] Tr. 3062-3063, 3079 (Calfee); John Calfee W.R.T. (CDN-R-3) at 5-9.

[54] John Calfee W.R.T. (CDN-R-3) at 6.

potential savings from a cable system's dropping a signal and also that his tables of minimum value do not represent relative value.[55]

C. OTHER JSC WITNESSES

28. As described by JSC witness, Judith Meyka, an expert in the programming carriage decision making process by cable operators,[56] by 2004-2005, the distant signal marketplace was a mature marketplace. In response to questioning from Judge Wisniewski, who sought to understand "how you come to the decision with respect to [carrying] a distant signal station," Ms. Meyka explained that "when we're talking about in 2004-2005, you're already carrying ...[distant signals] to some degree on all of these systems." Rather than starting with a "clean slate," systems are rarely launching new carriage.[57]

29. Put another way, SP witness, Linda McLaughlin explained that in the secondary retransmission market "[o]nly demand is relevant ... the demand by the cable operators for the distant signals they choose to import."[58] Since the programs are "already in existence and they're not going to get used up by being retransmitted ... a price in that circumstance is based on demand."[59]

30. As to who at the "MSO [Multiple System Operator] level" makes the decision about carrying distant signals, Ms. Meyka explains the corporate office "somewhat defer to the system

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[55] Tr.3127-3128, 3134 (Calfee).

[56] Tr. 273 (Meyka),

[57] Tr. 388-399 (Meyka).

[58] McLaughlin W.D.T. (SP Ex. 6) at 2.

[59] Tr. 515-516 (McLaughlin).

... because they're the ones that are there on the front lines and know more their constituency."[60] If the local operator strategy was at odds with the general strategy of the MSO, then the purchase decision would be more carefully reviewed. [61]

D. PUBLIC TELEVISION

31. The PTV portion of the Settling Parties case was presented by two witnesses. John Wilson, senior vice present and chief TV programming executive of PBS, provided an overview of PTV programming, including children's programs, and programming of a variety of subjects (history, science, medicine, technology, the arts, news, and public affairs).[62]

32. Linda McLaughlin, an expert economist with experience in the economic attributes of entertainment and media markets and the valuation of copyrighted works in those marks,[63] testified that "there were no major changes" comparing 1998-1999 and 2004-2005 in the factors that would affect the relative marketplace demand, particularly for PTV content.[64] She relied on 1998-1999 and 2004-2005 data relating to distant signal carriage per subscriber, and distant subscriber incidents;[65] however, she conceded that such data has not been used by PTV as an indication of relative marketplace value.[66]

33. Under questioning from Judge Roberts, Ms. McLaughlin was asked in concluding there was no major change, whether she assessed if there was less sports programming on distant

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[60] Tr. 390-391 (Meyka).

[61] Tr. 390 (Meyka).

[62] Wilson W.D.T. 8-12. (SP Exhibit 5).

[63] Tr.404-405 (McLaughlin).

[64] Tr. 409 (McLaughlin). McLaughlin W.D.T. 2 (SP Exhibit 6).

[65] Tr. 466-469 (McLaughlin).

[66] Tr. 471-473. (McLaughlin).

signals, and whether if so, that "might impact the relative value of sports programming?" While she felt less sports programming "might impact the relative value of sports programming," she concluded "*that's the type of question that I would think that ... the Bortz survey could get at.*"[67]

34. Regarding PTV content and competition from cable networks, on further questioning from Judge Roberts, Ms. McLaughlin conceded that more science, nature, music, documentary and news programs on CATV networks might reflect "changed circumstances, but you'd have to consider not just the quantity, but the quality." [68] When asked how one measures "quality," she pointed to "revenues," and added, "... you could look at the amount spent on programming, the programming budgets. I'd have to think more about the question of – of how to measure program quality."[69] On later questioning, she added that by "quality" she actually meant a measure of "attracting and retaining subscribers."[70]

35. Ms. McLaughlin also assessed the Bortz Survey results from the perspective of PTV and CCG. She explained that the survey "rules as ineligible ... cable systems that carry only public television or only Canada." She cites to 10 systems in 2004 and 2005 whose survey results were not counted. [71] In her view, the right answer to the value question if only a PTV was carried would be 100%;[72] based on this conclusion, she then proceeded to "augment" the Bortz Survey

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[67] Tr. 415 (McLaughlin). Emphasis supplied.

[68] Tr. 417 (McLaughlin).

[69] Tr. 419 (McLaughlin).

[70] Tr. 483-484 (McLaughlin).

[71] Tr. 420-421 (McLaughlin).

[72] Tr. 423 (McLaughlin).

results by adding back in the ineligible cable systems, taking into account response rates and whether only a PTV, only a CCG or both were carried but deemed ineligible.[73]

36. Based on her augmented results, Ms. McLaughlin urged that the PTV shares should be increased from 2.9% to 6.2% (2004) and 3.6% to 5.9%-6.2% (2005). For the CCG Bortz shares, Ms. McLaughlin proposed an increase from 0.3% to 0.5% (2004) and 0.3% to 1.5%-1.8% (2005). The 2005 range for PTV and CCG signals resulted from her adjustment for systems that carried two distant signals, one a PTV station and the other a CCG signal, and attributing either 0% or 100% to the PTV or CCG category.[74] The shares of all other parties would fall proportionately.[75]

37. Since PTV does not seek any share of the 3.75% or Syndex funds, Ms. McLaughlin made further adjustment of the PTV share to reflect its proportionate percentage of the basic fund only. The Bortz shares of all other categories were proportionately reduced to reflect these adjustments.[76]

38. On questioning from Judge Roberts, who posed a question about a survey respondent whose system carried several distant signals, including PTV, but gave PTV a "zero" value, how should that response be treated, Ms. McLaughlin indicated this was a question for "a survey design expert" and that "I don't know what that does to the survey, you know, validity... I'm not

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[73] Tr. 427-429; McLaughlin (SP Exhibit 6) Appendix 2.

[74] McLaughlin (SP Exhibit 6) at 7, 11.

[75] Id.

[76] McLaughlin (SP Exhibit 6) at 12.

sure what the right answer is in that. I think it just requires more expertise than I have on the topic." [77]

39. Following Ms. McLaughlin's concessions regarding her lack of expertise in survey design, Devotional counsel moved to strike Ms. McLaughlin's augmented Bortz analysis. The Judges denied the motion, noting that the objection "raises very difficult problems with the testimony identified in the objection for the expertise that Ms. McLaughlin has been qualified," but ruling that her testimony "is an economic analysis of the survey conducted by Bortz, and the matters raised in the objection address the weight to be given to her testimony, but not a submission."[78]

40. Regarding her adjustment to Bortz data, Ms. McLaughlin acknowledged that more than one claimant category can be on distant signals, including PTV stations, and that in such case she would assume that respondents "followed the instructions."[79] However, she never asked to review "raw survey results" in order to better determine how respondents actually responded to the questionnaire.[80] She also conceded that she made no independent analysis of PTV's marketplace value, other than looking at adjusting the Bortz survey results.[81]

41. Ms. McLaughlin offered that her adjustment "changes the Bortz study from a study of cable operators that carry U.S. Commercial stations into cable operators that carry distant stations. … And so in that respect, it's not – it's not comparable – it's two different universes,

[77] Tr. 437-439 (McLaughlin).

[78] Tr. 443-465 (McLaughlin).

[79] Tr. 492-493 (McLaughlin).

[80] Tr. 493-496 (McLaughlin).

[81] Tr. 485-486 (McLaughlin).

so it's not comparable in terms of robustness."[82] Nevertheless, Ms. Laughlin did not calculate what changes in the standard errors her adjustment would make, conceding that any calculation of "confidence intervals … would be virtual."[83]

42. In rebuttal, CCG witness Dr. Gary Ford criticized Ms. McLaughlin's analysis, because he said she "missed a system in …. the Seattle, Washington, area that was a large system that only imported a Canadian signal."[84] Adding that signal in for 2004, he said would change the CCG the calculation from 0.5% to 1.9%.[85]

E. COMMERCIAL TELEVISION

1. Dr. Richard Ducey

43. In its support of the claim of the Settling Parties, CTV presented testimony of four witnesses.

44. Jonda Martin authenticated Cable Data Corporation data reports and described a methodology for calculating distances between a distant signal's city of license and prime city of a CATV system that carries the signal.[86]

45. Dr. Richard Ducey, an expert in research and analysis of the cable and broadcast television industries, including television programming, presented data regarding programming minutes that WGN substituted when its signal was transmitted off the satellite, including an analysis of the share of subscriber-weighted compensable minutes on WGN.[87] Dr. Ducey

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[82] Tr. 500-501 (McLaughlin).

[83] Tr. 502 (McLaughlin).

[84] Tr. 3000 (Ford).

[85] Tr. 3001 (Ford).

[86] Martin W.D.T. (SP Exhibit 7).

[87] SP Exhibit 15.

claimed that this time is noncompensable for compulsory licensing purposes.[88] Although Dr. Ducey believed that the Judges should consider the fact that WGN substituted certain local programming on its national feed,[89] he did not address the fact that a substantial amount of WGN's local newscasts are also substituted and do not appear on the national feed.[90] This is essentially a time-based analysis,[91] which is not determinative of relative marketplace value.[92]

46. Dr. Ducey's time data indicates that Program Suppliers' experienced a significant drop in program time comparisons (1992, 1998-1999, 2004-2005), while CTV, PTV and CCG experienced an increase and JSC and DC remained relatively flat.[93] Dr. Ducey attributed the bulk of the PS change to a reduction in compensable time on WGN.[94]

47. Dr. Ducey also presented a study to show that excluding five superstations, 93% of distant signal carriage is clustered within 150 miles of a broadcast station's local market,[95] suggesting that the local programming has appeal in the distant market.

48. Dr. Ducey recognized that any suggestion of regional appeal of local programming applies also to devotional programming:

> Q. And could the clustering effect that you've identified here also be beneficial, if you will, to the extent it's benefit to Commercial Television category programming, could it also be beneficial to devotional programming?

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[88] Tr. 559 (Ducey); Ducey W.D.T. (SP Exhibit 8) at 6.

[89] Ducey W.D.T. (SP Exhibit 8) at 6; Tr.703 (Ducey).

[90] Tr. 711-716 (Ducey) ("Q. But when you looked for the match for the 5 a.m. newscast and you didn't find it, you don't tell us anything about that, do you? A. Not in this study, no." Tr. 716 (Ducey)).

[91] Tr. 598 (Ducey).

[92] Tr. 570-571 (Ducey).

[93] Ducey (SP Exhibit 16).

[94] Tr. 574-575 (Ducey).

[95] SP Exhibit 17; Tr. 581 (Ducey).

> A. Sure, it could. I mean, I actually worked with devotional stations, and their programming mix tends to be from some local ministries, and those have a lot of value for the local viewers, and then also some national ministries. So just in terms of how religious stations program themselves, they have – they have a different kind of programming mix that the national programming, I would think, would be interesting to subscribers even on a distant signal.[96]

49. Dr. Ducey provided his "minutes analysis" to Dr. Joel Waldfogel for use in the Waldfogel Regression Analysis, which Dr. Ducey considers a "time-based" analysis.[97] Dr. Ducey's "minutes analysis" contained no adjustment for audience size, time of day, gender, age or other demographics.[98] He did not factor into his analysis that devotional programmers buy time from broadcast stations,[99] nor did he determine whether his selection of specific days created any prejudice for or against any party.[100] The only adjustment he made was in terms of subscribers.[101]

50. In response to questioning from Judge Wisniewski regarding Dr. Ducey's statement in his written testimony that "there were no such radical shifts in the distant signal programming marketplace since the year covered by the last proceeding,"[102] Dr. Ducey quantified what he meant by a "radical shift" in shares:

> I mean, 50 percent, yes, I would consider that a significant shift if somebody went up or down 50 percent, depending on the base; but if I had a share and it changed by 50 percent and that was my category, I would consider that significant.[103]

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[96] Tr. 699 (Ducey).

[97] Tr. 612-163 (Ducey).

[98] Tr. 633-634 (Ducey).

[99] Tr. 688-689 (Ducey).

[100] Tr. 695-697 (Ducey).

[101] Tr. 634 (Ducey).

[102] Ducey W.D.T. (SP Exhibit 8) at 2.

[103] Tr. 662 (Ducey).

51. In questioning from Judge Roberts and Judge Sledge, who sought clarification of Dr. Ducey's view on the nature of a radical change, whether it was a "watershed moment," and how the Judges could assess that in the context of the current proceeding, Dr. Ducey clarified that in his view, "there hasn't really been any major changes since that time [the 1998-99 CARP proceeding]; so starting from where the awards were last time, it probably makes sense."[104]

52. When pressed by Judge Wisniewski to explain his claim that the Waldfogel Regression Analysis "provide strong independent confirmation of the Bortz survey's measure of relative market value,[105] Dr. Ducey testified:

> A. In the 2004-2005 period, if you're saying you bought a certain lot of programming and what are the different kinds of programs worth, it makes some sense if you say one kind of programming is worth more than another kind and there's more of that in your shopping basket of program categories, it makes no sense that you would see that. So to me, that's corroboration.
>
> JUDGE WISNIEWSKI: I see. So you're simply saying that the quantity, irrespective of whatever price might be attached to the quantity somehow indicates a value which is a price proposition for most economists that involves more than just quantity?
>
> A. Right. So – so quantity – let's see.
>
> JUDGE WISNIESKI: ... *I'm not sure that we still agree that the word "corroboration" applies* –
>
> *A. Okay.*[106]

53. Even though Dr. Ducey's work focused on a time-based formula for program categories, Dr. Ducey repeatedly stated that he believed the Bortz Survey was the best measure of relative marketplace value.[107]

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[104] Tr. 664 (Ducey).

[105] Ducey W.D.T. (SP Exhibit 8) at 2, 9; Tr. 678 (Ducey).

[106] Tr. 6780679 (Ducey) Emphasis supplied.

[107] Tr. 642, 677, 682, 684 685 (Ducey).

54. As to Devotional programming, Dr. Ducey was not aware whether Bortz respondents, whose only retransmitted signal was WGN, accorded devotional content a "zero" value.

55. *When asked if "there [is] any reason that you have to divert from the Bortz study as far as the Devotional share is concerned," Dr. Ducey responded, "No."*[108]

2. Dr. Joel Waldfogel

56. Dr. Joel Waldfogel, an expert economist with experience in the empirical analysis of media market, indicated that the purpose of the proceeding is "to determine how to allocate the royalty pool among the programming categories and Claimants," and he deemed the Bortz Survey "useful evidence about the task before this – this Tribunal."[109]

57. The bulk of Professor Waldfogel's testimony concern a multiple regression analysis in which the dependent variable is copyright fees paid semi-annually by cable systems. He interpreted the regressions as "hedonic regressions"[110] in which minutes of programming are the key measures of the quantity of each type of programming on retransmitted distant signals.[111]

58. In addition to the programming category minutes variables, Professor included independent variables primarily reflecting system characteristics as "controls." By multiplying these coefficients by the amount of total compensable programming in each category, Dr. Waldfogel says he can estimate "the value or something proportional to the value of the

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[108] Tr. 718 (Ducey). Emphasis supplied.

[109] Tr. 734-735 (Waldfogel).

[110] Hedonic regression is a regression in which the observations are different products available in a market, the dependent variable is the product price, and the independent variables are product features. Under certain assumptions, the coefficients on the variables measuring product features can be interpreted as the market value of these features. Rosen, Sherwin (1974) "Hedonic prices and implicit markets", *Journal of Political Economy*, Vol 82, 1974, pp.34-55.

[111] Tr. 887 (Waldfogel).

programming. And then I divide the product of this coefficient and its associated compensable minutes divided by the sum of each of those products."[112]

59. Professor Waldfogel concluded that the estimates of category shares based on this methodology are "pretty similar" to the adjusted Bortz results. Dr. Waldfogel concludes that his regression analysis 1) corroborates the adjusted Bortz numbers and 2) provides a methodology to adjust or augment Bortz numbers.[113]

60. Professor Waldfogel's regression analysis was modeled after analysis presented by Dr. Gregory Rosston in the 1998-1999 proceeding. The CARP had criticized the Rosston study for "parameter instability across years"[114] and because there were significant variations in the coefficients when the nonprogram minute variables were altered, thereby failing the test of robustness.[115]

61. To try to address the first concern, Professor Waldfogel estimated an additional regression in which he allowed the coefficients on the programming minutes variables to be different for 2004 than for 2005. He then tested the hypothesis that the coefficients were different in 2004 than in 2005. Unable to reject that hypothesis, Professor Waldfogel concluded that the coefficients are stable over time.[116]

62. To address the second concern, he reported the results of seven different regressions, each with one of the control variables removed. He found that the exclusion of these variables

[112] Tr. 777 (Waldfogel); Waldfogel W.D.T. (SP Exhibit 18) at 13, Table 3.

[113] Tr. 797 (Waldfogel).

[114] Tr. 803 (Waldfogel).

[115] Tr. 805 (Waldfogel).

[116] Waldfogel W.D.T. (SP Exhibit 18) at Appendix 3 at 3.

did not alter the results materially.[117] From that, he concluded that his regression results are "robust to … changes…[and] stable in the ways that we would want it to be."[118]

63. While Professor Waldfogel concluded that his regression results largely corroborated the results of the Bortz Survey, there was one respect in which he concluded that his results did not do so. He estimated a negative coefficient on the variable measuring minutes of devotional programming on retransmitted distant signals. He also testified that he tested and was able to reject the hypothesis that the coefficient he estimated on devotional minutes implied Devotionals' Bortz share. Based on this result, he testified that his results imply that the appropriate share for Devotional is zero.[119]

64. Professor Waldfogel's hypothesis tests depend in material part on his estimates of the standard errors of his regression coefficients. As Professor Michael Salinger testified on behalf of the Devotional Claimants in the Rebuttal portion of the proceeding, those estimates were based on the assumption that the 4,954 observations in the study are all independent of each other even though the data set contains multiple observations (four, typically) on individual cable systems. Professor Salinger testified that when he re-estimated the standard errors taking account of the correlation for the observations over time from a single system, the estimated standard errors increased from 40% to 60%.[120] Professor Salinger further testified that one could not reject the hypothesis that Professor Waldfogel's estimates on Devotional Minutes was consistent with Devotionals' Bortz share.[121]

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[117] Id. at 1-3.

[118] Tr. 807-808 (Waldfogel).

[119] Tr. 912 (Waldfogel).

[120] Tr. 2795-2796 (Salinger)

[121] Tr. 2797 (Salinger)

65. The negative estimated coefficient on the Devotional Minutes was not the only anomalous result in Professor Waldfogel's regressions. He also estimated a negative and apparently statistically significant coefficient on income, a result that he could not explain.[122]

66. With respect to his robustness analysis, Professor Waldfogel was asked about the problem of "omitted variable bias."[123] He acknowledged its importance, but did not indicate that he had given any consideration to other variables that should have been included in the regression. When asked whether his methodology required inclusion of variables reflecting programming on cable channels carried by a cable operator, he responded that he did not see why doing so was necessary.[124] He did not attempt to reconcile that answer with the statement in his report that the interpretation of coefficients in a hedonic regression as prices of product features requires that "all the important determinants of market price are included in the regression."[125]

3. Dr. Michael Salinger's Criticism of the Waldfogel Regression Analysis

67. In the 1998-1999 CARP Proceeding, the Panel evaluated Dr. Rosston's regression analysis and found key concerns that made the study suspect. These included "1) the volatility (instability) of its results; (2) the variability (wide confidence intervals) of the results; and, to a lesser extent, (3) its seemingly limited explanation power."[126] As shown by Dr. Salinger, the

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[122] Tr. 927-928 (Waldfogel).

[123] Tr. 899-900 (Waldfogel).

[124] Tr. 910-911 (Waldfogel).

[125] Waldfogel W.D.T. (SP Exhibit 18) at 8.

[126] *Report of the CARP Panel to the Librarian of Congress, In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No.2001-9 CARP CD 98-99 at 49 (October 21, 2003).

same problems that afflicted Dr. Rosston's regression analysis afflict the Waldfogel Regression Analysis. Dr. Waldfogel's study is unstable and imprecise, and neither robust, nor reliable.[127]

68. In rebuttal testimony, Dr. Salinger, identified three central flaws with the Waldfogel Regression Analysis "that are so severe that each of them, by itself, would be a sufficient basis for regarding it altogether."[128] Specifically:

> The first is that even if you take the results completely at face value, the results statistically are so imprecise that the methodology is inherently unstable and, therefore, unreliable. The second is that even if the results were measured sufficiently precisely to be of value, which they're not, Dr. Waldfogel has misinterpreted what the results would mean. Dr. Waldfogel has argued that the results would indicate something about the relative market value of different classes of programming, whereas really all the model is is a bad way of estimating the formula -- the regulatory formula for determining copyright payments. And the third reason is that even if the results were measured sufficiently precisely and even if the results did say anything about the relationship between distant signals -- the programming on distant signals and the market value of programming carried by a cable system -- and neither of those is true, but if they were true, to attribute the regression coefficients -- or to interpret the regression coefficient as reflecting the effect of just the programming on the distant broadcast signals without controlling for the programming on the other signals that were being carried by a cable system is a misinterpretation of the results.[129]

69. The instability of Dr. Waldfogel's analysis is depicted in Table 1 to Dr. Salinger's report. By simply breaking out Dr. Waldfogel's own data for 2004 and 2005, rather than combining the two years together, Dr. Salinger established that the Waldfogel Regression Analysis is highly unstable from year to year, generating differences in shares ranging from 33% to 7247%. [130]

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[127] Salinger W.R.T. (DC Exhibit 4) at 3-36.

[128] Tr. 2785 (Salinger).

[129] Tr. 2785-2786 (Salinger); Dr. Michael Salinger W.R.T. (DC Exhibit 4) at4-5.

[130] See also Dr. George Ford, W.R.T. (PS Exhibit16) at 17-20. Dr. Ford tests Dr. Waldfogel's data on half-year bases and shows similar unstable and unreliable results.

Table 1
Instability of Professor Waldfogel's Regression Results

	Entire Sample	2004	2005	2004-2005 %
	(1)	(2)	(3)	(4)
Program Suppliers	0.075 **	0.111 **	0.032	-71%
	(0.037)	(0.047)	(0.055)	
	(2.04)	(2.35)	(0.58)	
Sports	2.770 ***	2.709 **	3.791 *	40%
	(0.989)	(1.127)	(2.185)	
	(2.8)	(2.4)	(1.74)	
Commercial TV	0.256 *	0.152	0.329	116%
	(0.141)	(0.176)	(0.216)	
	(1.82)	(0.87)	(1.52)	
Public Broadcasting	0.042	0.001	0.081	7247%
	(0.043)	(0.046)	(0.072)	
	(0.96)	(0.02)	(1.13)	
Devotional	-0.067	-0.058	-0.094	63%
	(0.123)	(0.153)	(0.191)	
	(-0.54)	(-0.38)	(-0.49)	
Canadian	0.282 **	0.355 *	0.221	-38%
	(0.124)	(0.207)	(0.14)	
	(2.28)	(1.72)	(1.58)	
Low Power	-0.115	-0.148	-0.099	-33%
	(0.334)	(0.446)	(0.496)	
	(-0.34)	(-0.33)	(-0.2)	
Mexican	0.886 **	1.470 ***	0.452	-69%
	(0.413)	(0.308)	(0.404)	
	(2.15)	(4.77)	(1.12)	
Lagged Subscribers	0.864 ***	0.830 ***	0.892 ***	7%
	(0.029)	(0.038)	(0.044)	
	(29.48)	(22.14)	(20.29)	
R-squared	0.75	0.75	0.75	
Standard Error	37,491	33,595	41,301	
Observations	4,954	2,604	2,350	

Notes: Columns (1) - (3) report regression results for the entire period, the 2004 sub-period, and the 2005 sub-period respectively. The dependent variable is royalty payments. The independent variables are same as those in Table 2 of Dr. Waldfogel's Report (with the exception that the two sub-period regressions leave out the accounting period indicator variables that are included in the whole period regression). (Column (1) is a reproduction of Dr. Waldfogel's results.) The Table reports only the results for the coefficients on the programming minutes variables and the lagged subscribers variable. See Table A1 in Appendix A for the full set of regression coefficients. Column 4 reports the percentage difference between the coefficients in column 3 and column 2. The values below each estimated coefficient are the coefficient standard error estimated with the same technique used by Dr. Waldfogel and the implied t-value, respectively. (See, however, the critique of Dr. Waldfogel's methodology for estimating standard errors in the text.) A single asterisk, double asterisks, and triple asterisks indicate significance at the 10%, 5%, and 1% significance levels respectively.

70. By comparing Column 1 (Dr. Waldfogel's 2 year analysis) with Columns 2 and 3 (2004 and 2005 data calculated separately), Dr. Salinger establishes

> ... that the "regression suggests that the relative market value of the different kinds of programming was much different in the two years. So if you take the first row, which is Program Suppliers, in 2004 the coefficient was .111. In 2005, it was .032. So the ... value of a minute of programming under Professor Waldfogel's interpretations was three times as great in 2004 as in 2005. If you want to pick out another extreme example, look at public broadcasting. The coefficient in 2005 was .081. The coefficient in 2004 was .001. So the public broadcasting coefficient – public broadcasting, under this methodology, is estimated to have been 81 times more valuable in 2005 as in 2004. And across these categories there's a big difference with every one. I mean, even in sports where the difference is small compared – compared to a lot of the others, the value of a minute of sports is estimated to be 40 percent greater in 2005 than it was in 2004.[131]

71. Table 2 in Dr. Salinger's Rebuttal Testimony[132] provides a summary report on the extreme imprecision of Dr. Waldfogel's methodology:

Table 2
Instability of Shares From Professor Waldfogel's Methodology

	Entire Sample (1)	2004 (2)	2005 (3)	2004-2005 % (4)
Program Suppliers	24.7%	35.4%	10.2%	-71%
Sports	42.3%	47.4%	45.1%	-5%
Commercial TV	22.8%	12.9%	29.2%	127%
Public Broadcasting	6.8%	0.2%	12.9%	7303%
Devotional	0.0%	0.0%	0.0%	N/A
Canadian	3.3%	4.1%	2.5%	-38%
Low Power	0.0%	0.0%	0.0%	N/A
Mexican	0.1%	0.1%	0.0%	-66%

Notes: Column (1) reports results from reproduction of Professor Waldfogel's Table Y. Columns 2 and 3 report the results from the same methodology applied to the 2004 and 2005 sub-samples, respectively. Column 4 reports the percentage difference between the coefficients in column 3 and column 2.

72. Because of the imprecision, any resemblance of the Waldfogel Regression Analysis to the Bortz Survey results is "at best merely a coincidence."[133]

[131] Tr. 2790-2791 (Salinger).

[132] Salinger W.R.T. (DC Exhibit 4) at 11.

73. Reviewing Dr. Waldfogel's own data, Dr. Salinger directly challenged the suggestion that the Waldfogel Regression Analysis disputes the Bortz share for Devotional Claimants:

> With a proper estimate of the standard errors, he could not reject a coefficient on the Devotional minutes variable that, using his methodology, would imply that Devotional Claimants should get their Bortz share. Even if he could statistically reject such a value (which he cannot), his insinuation that the result would imply that the Judges should reject the Bortz share for Devotional Claimants would still rest on the validity of his interpretation of the regression coefficients as reflecting the value of different types of programming on retransmitted broadcast signals (which they do not).[134]

74. In Dr. Salinger's rebuttal testimony, he challenges Dr. Waldfogel's assertion that his regression is closely related to a "hedonic regression," and criticizes Dr. Waldfogel's Regression Analysis as a "bad statistical model of the royalty formal."[135]

75. According to Dr. Salinger, "The vast majority of the explanatory power in the regression comes from the subscriber variable. ... All the other variables combined (including such obvious measures as the indicator variable for paying 3.75% royalties), add relatively little explanatory power."[136]

76. Dr. Salinger establishes this by showing first a "good statistical model,"[137] one in which the standard errors of the coefficients are very small, so the model measures factors "very precisely," and the results are stable over time.[138]

77. While Dr. Salinger's Table 3 is "close to an accounting identity" and "economically, it's not that interesting ... the point is that what Professor Waldfogel has done is a poor version of this in that he has variables that are just proxies for what is, in effect, an accounting identity."[139]

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[133] Salinger W.R.T. (DC Exhibit 4) at 13.

[134] Salinger W.R. T. (DC Exhibit 4) at 17-18; see also Tr. 2797 (Salinger).

[135] Tr. 2799 (Salinger).

[136] Salinger W.R.T. (DC Exhibit 4) at 15.

[137] Salinger W.R.T. (DC Exhibit 4) at 21, Table 3.

[138] Tr. 2799-2800 (Salinger).

78. Even though Dr. Waldfogel aspires to address behavioral issues, Dr. Salinger explains he fails in this effort. All he is able to show conclusively is "that there's one variable that is most important in explaining system receipts, and that's lagged subscribers."[140]

79. Dr. Salinger's Tables 4-5 in his rebuttal testimony[141] illustrate this portion of his analysis. These Tables, using Dr. Waldfogel's data, show that the Waldfogel Regression Analysis merely "predict these different components of the royalty formula."[142]

80. Nevertheless, one surprising result is that the estimated coefficients for Program Suppliers and Sports, "the two categories that, according to Professor Waldfogel ... merit the highest royalty payments"[143] are negative. According to Dr. Salinger, this means

> ...they're not statistically significant. But it means that, on average, controlling for other things, having more Sports minutes is associated with lower system receipts, not higher receipts. ... *it's quite problematic for Professor Waldfogel's interpretation of his results, because he's interpreting the results on ... regression coefficients in his royalty equation as reflecting the value that cable operators get from these different classes of programming. So where do [cable systems] get value? ... the value to the cable operators is through getting higher system receipts ... which is either more subscribers or being able to charge a higher price for the same number of subscribers, or a combination of the two. ... So under his interpretation of these coefficients reflecting value to the cable operator ... he would have to get positive and significant coefficients on these variables ... on these program categories that he says matter most. But he doesn't get them.*"[144]

81. However, when Dr. Salinger runs the Waldfogel data in a regression related to "Effective Distant Signal Equivalents," he has a "statistically significant coefficients" for Sports and Program Suppliers:

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[139] Tr. 2800-2801 (Salinger).

[140] Tr. 2803 (Salinger).

[141] Salinger W.R.T. (DC Exhibit 4) at 24-29.

[142] Tr. 2802 (Salinger).

[143] Tr. 2804 (Salinger).

[144] Tr. 2805 (Salinger). Emphasis supplied.

> And the other thing that's really interesting about it is that the coefficient on the Sports variable is so much bigger than the coefficient on the Program Suppliers variable, bigger by a factor of more than ten. And that explains why the coefficient in Profressor Waldfogel's regression on the Sports variable is so much higher than the coefficient on the Program Suppliers variable. It's because in a statistical model – to predict from a regulation standpoint how many distant signal equivalents the cable system has to pay for, the amount of Sports programming as a statistical matter turns out to get this much greater weight. *But it's reflecting a regulatory formula. It's not reflecting anything about the relative market value of the programming.*[145]

82. In short, Dr. Salinger explains that the Waldfogel Regression Analysis is "just capturing ... the regulatory formula ... for determining royalties. And that it's just ... an imprecise model of the regulatory formula because, even though these variables have some power for predicting the number of effective DSEs, it's nowhere near a perfect fit."[146]

83. Dr. Salinger levels one more criticism of the Waldfogel Regression Analysis, that it omits key variables, such as sports programming on other channels the system is carrying. With such key variables - assuming the regression was able to measure relative value *which he reiterates it cannot* – the regression analysis might be in a better position to explain some conclusions.[147] The omission of necessary variables means the regression is not a "hedonic type" as claimed by Dr. Waldfogel, because the regression does not reflect causality.[148] By omitting particular variables, the cause of the results (relative value) cannot be predicted.

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[145] Tr. 2806-2807 (Salinger) Emphasis supplied; *see also* Salinger W.R. T. (DC Exhibit 4) at 31("Whatever the explanation, the relationship between minutes of programming and DSEs reflect a regulatory formula for computing DSEs, not relative market value.")

[146] Tr. 2808 (Salinger).

[147] Salinger W.R.T (DC Exhibit 4) at 32-36; Tr. 2808-2815 (Salinger).

[148] Tr. 2811 (Salinger).

84. The issue of the omitted variable from the Waldfogel Regression Analysis consumed much of the cross-examination by CTV counsel of Dr. Salinger,[149] and prompted numerous questions from the Judges.

85. However, in response to the question, "Dr. Salinger, would adding this missing variable save Dr. Waldfogel's regression formula?" his terse response was "No."[150]

86. By contrast with the Waldfogel Regression Analysis, Dr. Salinger reiterated his long-held belief that the Bortz Survey was the best study for awarding royalties in this proceeding:

> Q. Why is the Bortz the correct study for helping in this proceeding?
>
> A. I think it asks the question that's relevant for this proceeding because it's getting at the relative market value that the cable operators get from the different classes of programming. And it asks it to the relevant party, which is the cable operators.[151]

4. Jerald Fritz

87. CTV's final witness was Jerald Fritz, an expert in television station operations and programming. Mr. Fritz testified regarding his belief that cable systems operating in communities adjacent to major markets, like Little Rock, Arkansas, delivered programming of interest to viewers in distant locations. He cited news and sports programming in particular.[152]

88. Dr. Ducey noted a similar phenomenon regarding religious programming on local stations.[153]

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[149] Tr. 2873-2896 (Salinger).

[150] Tr. 2905 (Salinger).

[151] Tr. 2906 (Salinger).

[152] Tr. 969 (Fritz).

[153] Tr. 699 (Ducey).

89. Mr. Fritz indicated that the revenue model for local television stations does not tie programming decision to the appeal or viewership in distant cable markets. Distant viewing does not translate into higher advertising revenue for the local station.[154]

F. MUSIC CLAIMANTS

1. Music Witnesses

90. The fourth party within the SP Group, Music Claimants, consists of the three principal music performing rights organizations, ("PROs"), ASCAP, BMI and SESAC. Music is the only member of SP that asserts claims in all three categories, and Music asks that the Judges make an independent determination of Music's share.[155] Music seeks 5.2% of the all three funds for 2004 fund and 4.6% for 2005.[156] While it received 4% in 1998-1999 proceeding and does not argue there was a change in circumstances with 2004-2005, Music argues that the increase is justified by a change in calculation of its methodology.[157]

91. In support of its independent claim, the Music Claimants presented four witnesses. Alexandra Patsavas, owner and operator of Chop Shop Music Supervision, a company that supervises the use of music by television shows and motion pictures,[158] indicated that in a typical one hour television program, it is common for there to be 12-14 minutes of music inserted in each program, comprising 6 to 8 songs.[159] Her testimony described the process of using music in programming, which she asserts "intensifies the experience for the viewer and

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[154] Tr. 992 (Fritz).

[155] Tr. 1003 (Lopez, Opening Statement); Tr. 1123-1124 (O'Neill); Tr. 1139 (Zarakas).

[156] Id.

[157] Tr. 1124-1125 (O'Neill).

[158] Alexandra Patsavas, W.D.T. (SP Exhibit 24) at 1.

[159] Id. at 6.

may be used to capture the mood of a scene or create a distinct, signature sound for a film or television program."[160]

92. Seth Saltzman, Senior Vice President of ASCAP, provided background on the Music Claimants, including the role of PROs and the ways in which broadcast stations use music, and in particular as featured works, themes, and background.[161] Mr. Saltzman agreed with the stated position of Settling Parties that there were no "changed circumstances" since the last determination, explaining: "What's on now is somewhat different, perhaps, but different only in that the other music is used now than music that was used then, perhaps."[162] Even though Mr. Saltzman's written testimony stated that music's role was "valuable – and increasing,"[163] he conceded he did not provide any evidence to support that conclusion;[164] nor did he offer evidence that music was targeted to a younger demographic,[165] or that programs featuring music were more frequently distantly retransmitted in 2004-2005 than in 1998-1999.[166]

93. Michael O'Neil, Senior Vice President, Licensing of Broadcast Music, Inc. (BMI) provided an overview of the PROs' licensing practices of local television broadcast stations and cable system operators.[167] He testified regarding licensing broadcast stations, including independent and network affiliates, and negotiating with the Television Music License Committee ("TMLC").[168] He explained the differences between the blanket license (a single fee

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[160] Id. at 10.

[161] Seth Saltzman, W.D.T. (SP Exhibit 25) at 3-18.

[162] Tr. 1041 (Saltzman).

[163] Seth Saltzman, W.D.T. (SP Exhibit 25) at 18.

[164] Tr. 1042-1044 (Saltzman).

[165] Tr. 1044-1046 (Saltzman).

[166] Tr. 1072-1075 (Saltzman).

[167] Michael O'Neill W.D.T. (SP Exhibit 26) at 4.

[168] Tr. 1083-1085 (O'Neill).

allows unlimited use of music), the per program license (the agreement which gives stations credit when no music of a PRO is performed), and the direct license (securing rights directly from the source rather than the PRO).[169] BMI received $85 million in 2004 from blanket licensing, and $85 million in 2005 on an interim basis; the PROs do not know how much stations paid in direct licensing.[170] PROs also license CATV systems on a blanket basis; in 2004 the rate for BMI was 8.3 cents per subscriber (about $5 million net); collectively, Mr. O'Neill estimated the PROs received in excess of $10 million in 2004.[171]

94. William P. Zarakas, a Principal with the Brattle Group, an economic consulting firm, and an expert on the valuation of assets and businesses in the communications and media industries,[172] testified regarding the methodology for determining the appropriate Music Share. Mr. Zarakas' methodology, described as the "music ratio," "consists of a numerator, which are music license fees, an indication of the value of music, and a denominator, which is the totality of copyright content in the – in the over-the-air market. The denominator specifically is the sum of music license fees plus broadcast rights."[173]

95. The denominator consists of four components: a) payments actually made by local television stations to copyright holders; b) payments that are made by the networks to copyright holders for programming that is transmitted over the local television stations, less payments

[169] Tr. 1086-1087 (O'Neill).

[170] Tr. 1088-1089 (O'Neill).

[171] O'Neill W.D.T. (SP Exhibit 26) at 7.

[172] Tr. 1136-1137 (Zarakas).

[173] Tr. 1140 (Zarakas).

made by ABC, NBC and CBS for network programming; c) payments for in-house productions by television stations; and d) payments for music licenses.[174]

96. For the numerator or music license fees, Mr. Zarakas only used blanket music license fees, even though as Mr. O'Neill testified music license fees consist of blanket fees, per program fees and direct or source license fees,[175] and as Mr. Zarakas conceded there is a difference between negotiated blanket license fees and the actual payments to PROs.[176] Mr. Zarakas explained that he considered blanket fees "the only indicator of comprehensive music value that I'm aware of." He states he had no data on direct licenses.[177] Therefore, his total for music license fees underestimated actual expenses[178] and in response to questioning from Judge Roberts, he could not state what the actual fees were, indicating "I really feel uncomfortable about trying to say that I am certain that it is roughly equal to the actual payments, that it is more or less, because I have no empirical basis to define the dollars associated with the direct license payments."[179]

97. Although the Music Ratio formula is a mathematical methodology relying on calculation of actual expenditures by broadcast stations, Mr. Zarakas did not have access to the actual data consisting of the elements for the numerator and denominator. For example, he estimated music licensee fees based on the amount negotiated by TMLC and the PROs, not actual payments.[180] He estimated broadcast station expenses by using NAB survey data for 2004 and 2005 and

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[174] Tr. 1141-1142 (Zarakas).

[175] Tr. 1086-1087 (O'Neill).

[176] Tr. 1161 (Zarakas).

[177] Tr. 1142-1144 (Zarakas).

[178] William Zarakas W.D.T. (SP Exhibit 27) at 14.

[179] Tr. 1188-1190 (Zarakas).

[180] Tr. 1144-1145 (Zarakas).

averaging the payments made by network and independent stations.[181] He lacked information regarding in-house programming broadcast station programming costs, so he estimated using the value attributed to such programming in the 1998-1999 proceeding, increased by a factor related to the shares of JSC, PS, DC and CTV.[182] Nevertheless, he conceded that the costs incurred in producing a program in a given year are "not synchronized for a given year" because of amortization.[183] As a result, he

> ... found no indication of market value for local programming in any research that I've done, from Kagan to the NAB to other sources.
>
> Q. ... in your opinion, was the value of local programming in '98-'99 the same as it was in 2004 and 2005?
>
> A. I'm not sure. And I'll also add if the Judges found that the value would be different, it's a very easy adjustment to make in my calculation. So in my – under my methodology, if – if the values were different for 2004-2005, I, or, for that matter, I think I made it simple enough that many parties could easily plug that number in, exchange it for my 18.5 percent on average and estimate the relative value of music quite easily.[184]

98. U.S. Census Bureau data, used in the 1998-1999 proceeding to support the amounts for music license fees and broadcast rights payments in music ratio formula, were not calculated after 1998 and there was no comparable source in 2004-2005.[185] For the "non-Big 3 networks" (Fox, UPN and WB), he used SNL Kagan data; however, Kagan does not track broadcast rights data.[186]

99. Because the Music Ratio relies on broadcast station expenses, Mr. Zarakas determined it was necessary to weight the results to achieve a conclusion that was related to distantly

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[181] Tr. 1146 (Zarakas).

[182] Tr. 1151, 1195-1202 (Zarakas).

[183] Tr. 1201-1202 (Zarakas).

[184] Tr. 1202-1203 (Zarakas).

[185] Tr. 1170 -1171 (Zarakas).

[186] Tr. 1147-1148 (Zarakas).

retransmitted signals to CATV systems.[187] As a result the unweighted ratios were 3.1% (2004) and 2.8% (2005), but the weighted ratios were 5.2% (2004) and 4.6% (2005).[188]

100. The weighted ratios attempt to estimate the relative value of music in the retransmitted marketplace.[189] He used instances of distant subscriber access to signals as the basis for weighting signals and station types.[190]

101. With respect to WGN, Mr. Zarakas testified he treated the signal as a WB (non-Big 3 network) affiliate for estimating total broadcast station rights payments in Table 3 of his written testimony,[191] and for calculating the denominator (music license and broadcast rights fees).[192] Later, he explained he treated WGN as an independent signal for purposes of establishing a weighted value for independent stations (non-WB affiliates),[193] even though in unweighted calculations, he treated WGN as a WB affiliate (non-Big 3 network) affiliate.[194] He also treated other WB, Fox and UPN affiliates differently,[195] even though all are independent stations for compulsory royalty calculation purposes.

102. For weighting purposes, Mr. Zarakas treated WGN as an independent signal, with a higher weighted value. Weighted value for independent stations accounted for 48% of the Music's claimed share in 2004 (2.5%) and 54% in 2005 (2.47%), compared to WB's value of 2% in 2004 (0.10%) and 2005 (0.08%).

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[187] Tr. 1153-1159 (Zarakas).

[188] William Zarakas W.D.T. (SP Exhibit 27) at 31, Table 12.

[189] Tr. 1254-1255 (Zarakas).

[190] Willaim Zarakas W.D.T. (SP Exhibit 27) at 12.

[191] William Zarakas W.D.T. (SP Exhibit 27) at 17, Table 3; Tr. 1193 (Zarakas)

[192] William Zarakas W.D.T (SP Exhibit 27) at 25, Table 8; Tr. 1218 (Zarakas).

[193] William Zarakas W.D.T. (SP Exhibit 27) at 27, Table 9 and 28 n.30.

[194] Id. compare Table 11 at 30 with Table 12 at 31.

[195] See Id at 29 (Tables 10), 30 (Table 11) and 31 (Table 12); Tr. 1229-1232 (Zarakas).

103. According to Mr. Zarakas, the relative value of music may change markedly from year to year. The difference between 2004 and 2005 is 10%. "If I did it in 2006, it might be completely different. If I did it in 2002, it might be different. Different factors come in and different types of broadcasts are made. So those are the ratios at those points in time."[196]

104. He explains, "It's a relative valuation,"[197] which estimates music share of total programming expenditure.

2. Critique of the Music Ratio Analysis

105. On rebuttal, PS witness, Dr. John R. Woodbury, Vice President at Charles River Associates, an expert economist with expertise and experience in valuing music rights as transmitted on different delivery systems, including cable and satellite, challenged the accuracy and reliability of Mr. Zarakas's estimates. Dr. Woodbury testified that Mr. Zarakas 1) "relied on assumed payments" made to PROs, "vastly overestimat[ing]" actual payments; and 2) created a weighting system by station types that "bears no resemblance to anything that would meaningfully reflect the value of the music on those various station types."[198]

106. Dr. Woodbury challenged the use of the negotiated blanket license fees and the failure to account for the per program and direct license fees,[199] indicating that he believed stations opt for per program and direct license fees because they would be less than blanket fees.[200] Further, he testified, "I don't believe that Mr. Zarakas ever explained any rationale, any justification" for

[196] Tr. 1256-1257 (Zarakas).

[197] Tr. 1258 (Zarakas).

[198] Tr. 3286-3287 (Woodbury).

[199] Tr. 3289-3290 (Woodbury).

[200] Tr. 3322 (Woodbury).

weighting of station values by fraction of subscriber instances.[201] Noting that TMLC uses Nielsen viewership to establish the blanket fees, he explained that viewership "has no obvious relationship to the fraction of subscriber instances accounted for by the particular distant signal on a particular cable system"[202] and that, as an economist, the "weighted music ratio result" is not reliable.[203]

107. Dr. Woodbury also criticized the treatment of WGN: "There is no particular reason that the music ratio that applies to ordinary independents would also apply to WGN America."[204] The result of such treatment "was to likely inflate dramatically the weighted music ratio that Mr. Zarakas calculated."[205]

108. In response to questioning from Judge Roberts, Dr. Woodbury stated he believed that some particular weight should be given to WGN-America, perhaps tied to viewership, not subscriber instances.[206]

109. Dr. Woodbury presented his own estimate of Music's relative value by estimating actual music rights payments based on data provided in discovery. According to Dr. Woodbury, Music's share for 2004 was 2.04% and for 2005 was 1.94%.[207] These calculations were made

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[201] Tr. 3298 (Woodbury).

[202] Tr. 3299 (Woodbury).

[203] Tr. 3303 (Woodbury).

[204] Tr. 3302 (Woodbury).

[205] Tr. 3303 (Woodbury).

[206] Tr. 3304-3305.

[207] John Woodbury W.R.T. (SP Exhibit 14) at 5-6 and Appendices 2-3.

without adjustment for distant signal market,[208] or the Big 3 networks,[209] or direct licensing,[210] or Census Bureau updated, corrected data regarding broadcast rights payments.[211]

II. CANADIAN CLAIMANTS GROUP

110. The CCG case encompasses non-US programming on Canadian signals retransmitted as distant stations by US cable operators.[212]

111. The CCG seek the following awards before any adjustment for Music[213]:

Fund	2004	2005
Basic	2.49332	2.63844
3.75%	2.10172	1.95301
Syndex	0	0

112. CCG presented four witnesses, including Janice de Freitas, Canadian Broadcasting Corporation Rights Administrator, whose testimony described the CCG claim and CCG's methodology, as "fee generation."[214]

113. By fee generation, CCG asserts that the Judges can trace the royalties paid by cable systems for the carriage of specific signals utilizing fee generation methodology. CCG made the following showing regarding fees they claim were "generated" by CCG signals[215]:

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[208] Tr. 3312 (Woodbury).

[209] Tr. 3317-3318 (Woodbury).

[210] Tr. 3318 (Woodbury).

[211] Tr. 3327-3330 (Woodbury).

[212] Tr. 1261 (Satterfield).

[213] Tr. 1262-1263 (Satterfield).

[214] Janice de Freitas W.D.T. (CND-Exhibit 1).

[215] Janice de Freitas W.D.T. (CND-Exhibit 1) EXHIBIT M.

Year	Fees Gen Canadian Signals	Fees Gen All other signals	Change from 1998-99 CCG	Change from 1998-99 Others
2004: Base Fund	$3,435,724	$79,283,949	43%	19%
2005: Base Fund	$3,862,437	$84,655,274	60%	27%
2004:3.75%Fund	$679,898	$18,739,622	1409%	87%
2005:3.75%Fund	$560,260	$16,785,846	1144%	68%

114. CCG also claimed that Distant Subscriber Instances (DSI - the number of subscribers who can access a distant Canadian television station[216]) was 5,374,795 (2004) and 5,880,257 (2005), representing 10% and 21% increases over 1998-99 data.[217]

115. CCG data also revealed that compared with the 2000-2003 period, the average annual base fee generated royalties and DSI declined slightly. According to the CCG data, the annual fee generated base royalties declined from $3,819,778 (2000-2003) to $3,649,081 (2004-2005), about -5%,[218] and the DSI declined from 5,687,347 (2000-2003) to 5,627,526 (2004-2005), about 11%.[219]

116. Although CCG data shows that the annual average fees generated from 3.75% royalties for 2004-2005 increased over 2000-2003, for the last two years, the fees generated for the 3.75% Fund from Canadian signals actually declined (from $624,264 to $620,079, about -1%).[220] In sum, compared to the recent 2000-2003 proceeding, CCG showed no material change.

[216] Janice de Freitas, W.D.T. (CND-Exhibit 1) at 14.

[217] Janice de Freitas W.D.T. (CND-Exhibit 1) Exhibit R.

[218] Id. Exhibit M.

[219] Id. Exhibit R.

[220] Id. Exhibit M.

117. Recognizing that Canadian station content consists of content claimed by CCG and other US Phase I parties, notably JSC and PS, Debra Ringold, an expert in survey research,[221] testified regarding her estimate of the value of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators in the United States.[222] Dr. Ringold conducted surveys for 2004 and 2005 of cable system program decisionmakers.[223] Her conclusion was that 60% of the relative value of content on Canadian signals was Canadian for 2004 and 2005.[224]

118. As to US programming, JSC's share of Canadian signals was 27% (2004) and 30% (2005), and PS's share was 14% (2004) and 10% (2005).[225]

119. In the Rebuttal phase of the proceeding, CCG presented Jonda Martin, president of Cable Data Corporation ("CDC"), to sponsor two CDC data analyses. CDC data projected the minimum and maximum ("min/max") fees that could be attributed to Canadian signals applying the base rate and 3.75% rate under the assumptions that the Canadian signals were credited effectively on a first in or last in basis,[226] and that all fees paid were properly attributed to the carried distant signals.[227]

120. CDC's standard procedure is not to pick one signal first over the other; rather, for fee generation purposes, it typically allocates the fees evenly between the affected distantly retransmitted stations.[228]

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[221] Tr. 1282 (Ringold).

[222] Tr. 1287 (Ringold).

[223] Debra Ringold W.D.T. (CND-Exhibit 4) Exhibit CDN-4-A.

[224] Debra Ringold W.D.T. (CND-Exhibit 4) at 3.

[225] Id.

[226] Tr. 2917 (Martin); Jonda Martin, W.R.T. (CDN-R-1) at 4 (Table 2) and 5 (Table 3).

[227] Tr. 2952 (Martin).

[228] Tr. 2920-2921 (Martin).

121. On cross-examination, Ms. Martin acknowledged that regarding the Seattle cable system, which accounts for 40% of all Canadian fees generated in 2004 ($688,256), that system would pay the same amount whether the Canadian station was carried or not.[229]

122. Therefore, because of the minimum fee rule, the Seattle cable system paid nothing extra for carrying the Canadian station as a distant signal, and the system would save nothing if it dropped the Canadian station.[230] CDC data for 2005, showing a similar result, was introduced by SP as a cross-examination exhibit.[231]

123. In connection with a New York State cable system (second most fee generated for CCG, which paid approximately $154,000 in 2004 in connection with carriage of two Canadian stations), if both were dropped, the system would save $30,000 or about 20%.[232]

124. The CDC "min/max" analysis does not indicate what would be saved by dropping particular signals.[233]

III. DEVOTIONAL CLAIMANTS

A. DR. CHARLES STANLEY

125. The Devotional Claimants did not provide any independent econometric study. As they have in prior proceedings, the Devotional Claimants endorsed the results of the Bortz Survey and ask for their Bortz Survey shares (7.8% in 2004, 6.6% in 2005, or an average for each year of 7.2%).[234] Dr. Charles Stanley, Senior Pastor of First Baptist Church of Atlanta, Georgia and the

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[229] Tr. 2938-2942 (Martin); SP Exhibits 58-59.

[230] Tr. 2940 (Martin).

[231] SP Exhibit 59; Tr. 2942 (Martin).

[232] Tr. 2945-2946 (Martin), SP Exhibit 60.

[233] Tr. 2949 (Martin).

[234] *See* Bortz Survey results, *supra* at 11.

founder and president of In Touch Ministries reiterated their commitment to the Bortz Survey as the best evidence of relative marketplace value for allocation of shares in this proceeding.[235]

126. Devotional programming is syndicated programs that have a religious theme or are produced by a religious entity. The primary aim of such programs is not simply to entertain, but rather to address life's greatest questions and the deepest needs of the human heart. Devotional programming serve as an important and strongly desired alternative to the often trivial, provocative, or objectionable programming that is so prevalent on television today.[236]

127. Dr. Stanley testified that he regularly meets individuals from around the country who tell him how much they are impacted for the better by Devotional programs and how much devotional programming means to them and their families. He stated that viewers say that devotional programs are among the most important, if not *the* most important and valuable programs available to them on television.[237]

128. Devotional programs retransmitted on distant signals in 2004 and 2005 include traditional church services, sermons, personal and family counseling, and programs featuring news and information, cartoons and content for children, music, talk, debate and history. The programming is primarily delivered in English, but there is a growing emphasis on Spanish language content, serving the Latino and Hispanic television audience.[238]

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[235] Dr. Charles S. Stanley W.D.T. (DC Exhibit 1) at 8.

[236] Dr. Charles S. Stanley W.D.T. (DC Exhibit 1) at 1.

[237] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 1.

[238] Dr. Charles S. Stanley W.D.T. (DC Exhibit 1) at 1-2 and 6-7. Exhibit 2 to Dr. Stanley's Testimony selected web pages from 2004 or 2005 and other published materials regarding selected Devotional Claimants and their programming. Exhibit 3 to Dr. Stanley's Testimony is an 8 minute video produced for this proceeding that shows samples of a number of devotional programs telecast in 2004 or 2005.

129. Dr. Stanley cited his ministry program *In Touch With Dr. Charles Stanley* as an example of the origins and growth of devotional programming. In 1972, his church started broadcasting Sunday sermons as a half-hour program on an Atlanta broadcast television station. As the audience expanded, In Touch Ministries was incorporated as a separate public charity in 1982. *In Touch With Dr. Charles Stanley* addresses life's profound questions from a distinctively spiritual and biblical perspective, while also providing practical guidance on such issues as parenting and finances, personal addictions and relationship difficulties. [239]

130. While In Touch Ministries serves its followers through radio broadcasts, CDs, DVDs, books, magazines, the Internet and portable MP3 players with sermon content, the popularity of In Touch's television programming has been key to the growth of In Touch's other public outreaches.[240]

131. Between 1992 (the last time the Devotionals Claimants were an active Phase 1 party) and 2004-2005, In Touch Ministries, like many other Devotional Claimants, experienced huge growth. In Touch's television affiliates grew from 129 full and lower power stations in 1992 to 435 by the end of 2005. As a consequence, In Touch's retransmitted broadcasts also increased similarly. In 1992, In Touch's English language telecasts were translated into two additional languages, Russian and Arabic. By 2005, In Touch broadcast in 91 languages, 51 of which translations began in the 2004-2005 period. By 1992, In Touch's annual distribution of books, CDs, videos, DVDs, etc., was approximately 150,000; by 2004-2005, the annual number had increased to over 2 million.[241]

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[239] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 2.

[240] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 3.

[241] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 4-5.

132. Since 1996, the number of calls from viewers and listeners to In Touch's hotline was 8.2 million, or an average of 40,000 calls a month. However, In Touch's call center activities spiked dramatically during times of national crises, like September 2001 (when it received 750,000 in one month alone), and time of war and national disasters.[242] Responding to such outpouring of public need is unique for claimants in this proceeding, and helps explain the bonds and loyalty of all viewers (including cable viewers) to religious programming.[243]

B. BRUCE JOHANSEN

133. Bruce Johansen, an experienced program industry executive and former President and CEO of National Association of Television Program Executives ("NATPE"), the television industry's principal convention for marketing syndicated programming, testified regarding the significance of devotional programming for the television program industry. Mr. Johansen's work in syndication and his tenure at NATPE (1992-2003) gave him insight into the value of religious programming.[244]

134. Mr. Johansen described two types of syndication, "off net" and "first run." The former represent reruns of network series and reality programs. The latter consists of programs, including devotional programs, which bypass the networks and are licensed directly to television stations. Syndicated programming has several revenue streams from television stations. In one case, the broadcast station pays a license fee, or it exchanges advertising time for programming (barter).[245]

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[242] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 5.

[243] Dr. Charles Stanley W.D.T. (DC Exhibit 1) at 5-6.

[244] Bruce Johansen W.D.T. (DC Exhibit 2) at 1-2.

[245] Bruce Johansen W.D.T. (DC Exhibit 2) at 3-4.

135. Mr. Johansen also explains a third form of syndication:

> Another system of syndication involves long form media sales. In this case, the station sells a block of time and the purchaser controls the content within that time period. Devotional programming typically operates in this system, as the religious syndicators want to assure that their spiritual content is not interrupted by, for example, beer or car ads. While commercial syndicators find the cash or barter systems enable them to make a profit, devotional programmers, almost universally charitable, non-profit organizations, are not out to make a profit. That does not mean they are not seeking financial or in-kind support for their religious and public services.
>
> It would be surprising in any event, if the total remuneration received by Devotional Claimants did not exceed (perhaps substantially exceed) the cost of paid time. In this regard, the Devotional Claimants are closely aligned with barter syndicators, who make their programming available to broadcast stations not for a license fee, but rather for the commercial avails within the program which are then sold to advertisers on an ad hoc network basis. In both barter and long form media sales, the syndicator exercises total control over the content of messages within the program. However, one advantage for devotional programmers is that, since many focus on their local and regional congregants and audiences, they are not obliged to assemble 80% coverage of TV markets, as their barter syndication counterparts need to in order to price advertising successfully. Instead, they can reach discrete communities served by the broadcast signal and the cable retransmissions without delivering an arbitrary number of homes to advertisers. [246]

136. During his tenure at NATPE, Mr. Johansen noticed an increase in convention attendance by Devotional programmers, which he explained led broadcast stations to find "a highly diverse collection of devotional-themed product being marketed at the annual conference and … an opportunity to reach a loyal and under-served contingent within the larger audience universe."[247]

137. Mr. Johansen recognized that the public audience that was interested in devotional programming was of value to not only broadcasters, but also cable operators:

> … it would be a serious mistake to assume that broadcasters and cable operators were not interested in reaching the audience for devotional programming, or that these groups found no value in religious programming. Quite the contrary, when there is a cohesive audience that is loyal to a category of

[246] Bruce Johansen W.D.T. (DC Exhibit 2) at 4-5.

[247] Bruce Johansen W.D.T. (DC Exhibit 2) at 4-5.

> programs, broadcasters and cable operators are attracted to this base and want an association with it. Moreover, as the devotional syndicators grew more sophisticated, they placed varied program offerings designed to appeal to broader cross-sections of America, including scripted programming with high production values, and lifestyle programming on social issues such as abortion, marriage and parent counseling, health, teen and children's programming.
>
> From my perspective as a former broadcaster, syndicator and as head of the premiere association representing the syndication marketplace, it became clear to me that broadcast stations embraced the opportunity to carry paid religious programming for two very significant reasons: 1) since they were paid for the time, there was a clear financial benefit to do so; but equally 2) *it demonstrated to the viewers that the station cared about the diverse interests of its audience base, providing programming for the niche interests in the broader community it serves*.[248]

138. As to Mr. Johansen's last point, the carriage of religious programming not only was financially justified, but it helped meet the program service obligations of broadcast stations to the broader community.

139. Mr. Johansen points to the rise of the number of cable networks (he cites more than a score specializing in religious programming) as evidence "of public interest in this genre."[249]

140. While Mr. Johansen testifies he "understands that for cable copyright royalty purposes," cable networks are noncompensable; yet, he believes evidence of the rise of religious networks have import for the Judges' decision:

> First, from the perspective of program syndication, distributors of religious programming respond to public interest in content. There simply would not be so many devotional networks if there was not a clearly-recognized, public interested in the programming. That interest began and remains deeply rooted in the broadcasting of devotional content by FCC-licensed television signals, many of

[248] Bruce Johansen W.D.T. (DC Exhibit 2) at 9. Emphasis supplied.

[249] Bruce Johansen W.D.T. (DC Exhibit 2) at 10.

> whose signals are retransmitted on a distant basis to cable systems that pay compulsory royalties, the subject of this proceeding.
>
> Second, cable operators respond to perceived subscriber interest in content. Cable operators would not devote significant channel capacity to program content that does not have a subscriber base to which they can market. Making one, two, three channels of a particular kind of programming available to subscribers can certainly meet a cable operator's need to appeal to a subscriber base or fulfill a cable operator's community obligation for service. But making dozens of channels of programming available tells a vastly different story- it means that the cable operator believes that there is a diverse, widespread subscriber based that wants more opportunity for particular content. This is sound business for cable operators, because it is well known that there are few elements of American society that are
>
> more universal, yet fundamentally diverse, than religion. ...
>
> Third, the number of devotional networks has continued to grow since 2004-2005. This means that many of the recently established cable networks had their roots in pervasive public interest in devotional programming demonstrated during 2004-2005. Given the lead time needed to build a cable network (from creating the programming concept to securing funding, to obtaining programming rights and equipment, to launching, to obtaining CATV operator acceptance and channel space), it is clear to me that the devotional programming landscape in the 2004-2005 period – a period I would add during which America was in particular need for spiritual guidance after 9-11 and while at war against Al Qaeda was the catalyst for this new dynamic growth.
>
> In sum, devotional programming has shown itself to be not simply a durable format, but more formidably, a vital programming niche that attracts impressive and growing sources of program production and outlets of distribution.[250]

141. Mr. Johansen rejects the prior royalty allocations for devotional content based on Nielsen ratings and minutes. As an experienced program syndicator familiar with the strengths and weaknesses of the Nielsen system, he recognizes the shortfalls of relying on Nielsen ratings for allocating compulsory royalties generally, and religious programming in particular, as well as to attempt a time-based calculation:

> The most commonly used figures for estimating audience size for television programs are the Nielsen ratings. Nielsen conducts

[250] Bruce Johansen W.D.T. (DC Exhibit 2) at 10-11.

> continuous research on a statistically representative basis on audiences of broadcast and cable programs using a complex and often controversial formula. These results then become the justification for advertising rates and, ultimately, a program's survival. But even Nielsen admits to its shortfalls and is refining its techniques to include factors such as psychographics to attempt to better understand the complex nature of audience composition.
>
> Some of the problems of relying on Nielsen data include the following: differentiating between overlapping programs and incorrectly crediting one at the expense of another, measuring tuning activity rather than actual viewing activity, and the lack of meaningful sample size reflecting the diversity of the community being measured.
>
> As Dr. Horsfield points out, Nielsen ratings for syndicated programs in general may be too low since they represent the average quarter-hour audience for each program in spite of the fact that some viewers may tune out in a given quarter-hour, to be replaced by different viewers in the next quarter-hour. *Religious Television: The American Experience* (http://www.religion-online.org/showchapter.asp?title=1627&C=1582), Therefore, the average audience figures provided by Nielsen may be understating the total viewing level of any given program at any given time. Horsfield further suggests that there may be as much as two-thirds more "total audience" for a given program than there is "average audience" at any given quarter-hour.[251]

142. For Mr. Johansen, Devotional viewers are *appointment viewers*, whose dedicated interest in niche devotional content is most meaningful to CATV operators, whose interest is in building and maintaining their subscriber base.

143. Mr. Johansen urges that the Judges "weigh the impact of these viewers on the overall assessment of the viewing public and retransmission operations."[252]

C. DR. WILLIAM BROWN

144. Dr. William Brown, Professor and Research Fellow at the School of Communication and the Arts at Regent University in Virginia Beach, Virginia, where he served as Dean of the School

[251] Bruce Johansen W.D.T. (DC Exhibit 2) at 13-14.

[252] Bruce Johansen W.D.T. (DC Exhibit 2) at 14-15.

for ten years was qualified as an expert in communication theory and research with emphasis on the media, religion and social change.[253] Dr. Brown testified about a) the growth of religious television and the devotional audience from 1992 to 2005; b) social changes that affected the avidity and loyalty of the devotional audience; and c) the implications of these changes for the perceived value of the devotional audience to CATV owners."[254]

145. Dr. Brown pointed to Gallup studies on religion in 1998 and 1999, indicating that 68%-70% of those polled "reported being a member of a church or synagogue."[255] Moreover, "Pentecostal Christianity experienced great growth among Latin Americans, fueling the desire for more evangelical television programming among this growing audience segment both in the U.S. and in Latin America."[256]

146. Since the cable copyright proceedings began in the 1970s, television ministries have evolved. According to Dr. Brown: "By ascertaining the needs of television audiences through market research and telephone counseling centers, devotional television programs shifted their focus away from the heavy teaching and preaching of the 1980s to a focus on counseling, healing, interpersonal relationship and holistic living during the 1990s. The result has solidified the important place of religious television programming in the lives of people who practice and value their religious faith and who look to devotional programs as a source of spiritual nourishment, growth and support."[257]

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[253] Tr. 1402-1403 (Brown).

[254] Tr. 1403-1404 (Brown).

[255] William Brown W.D.T. (DC Exhibit 3) at 4.

[256] William Brown, W.D.T. (DC Exhibit 3) at 5. Footnote omitted.

[257] William Brown W.D.T. (DC Exhibit 3) at 6.

147. A 2002 Barna Study, which referenced the growth of religious programming from cable and satellite services, found the aggregate audience for Christian television programming was 90 million people (approximately equal to those attending churches services), and in 2005 Barna research found that in a typical month, 45% of the national adult television audience tuned into one or more devotional programs.[258]

148. *Dr. Brown concludes that in percentage terms, the audience for religious programming has been stable at 40%-45% between the 1980s and 2000s, but with the population growth of 60 million during that time, the overall audience has grown significantly*. He also concludes that the cumulative audience is greater than ratings data suggests and cable entrepreneurs "can readily see the value of this content for attracting and maintaining subscribers."[259]

149. Dr. Brown looked at the important social changes between 1992 and 2005 and identified "the important social changes interrelated with media that occurred during that time period that affect the avidity and loyalty of the devotional audience."[260] These include a) the amount of sexual content on television from 1992-2005 and growing amount of violence; b) increased desire for more moral and spiritual content on television; c) conflicts, he defined as "cultural wars," reflecting the hostility of intellectual elite towards religious faith; d) general distrust of media, particularly news media, in getting at truth behind major news stories such as 9/11 attacks; e) important demographics, including the rise of the Hispanic-American population, and the importance of devotional content for that community and the African-American population;

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[258] William Brown W.D.T. (DC Exhibit 3) at 6-7.

[259] William Brown W.D.T. (DC Exhibit 3) at 7.

[260] Tr. 1404 (Brown).

f) the threat of radical Islam and the wars in Afghanistan and Iraq; g) the desire for political awareness; and h) technology growth and competition.[261]

150. *Dr. Brown's determinations were based on his scholarly research and his testimony included extensive citation to scholarly literature and surveys by publicly recognized survey and research companies like Kaiser Family Foundation, Harris, Anneburg-Gallup, Barna, American Psychiatric Association, and National Television Violence Study.*[262]

151. For example, Dr. Brown cited to a 2008 Harris Interactive study, which determined that *"37% of cable or satellite subscribers expressed a willingness to change their program provider in order to receive a news channel that provided devotional content, and 24% non-cable and non-satellite subscribers expressed a willingness to obtain service if such a channel were offered."*[263]

152. While acknowledging that the Harris survey was taken in 2008, Dr. Brown nevertheless concluded that "it is consistent with other contemporary evidence over the last decade that devotional content has achieved an avid, loyal following. I have no reason to believe that the results would have been any different in 2004 or 2005." [264] In his opinion, this survey result is consistent with other findings that cable audiences want access to family-oriented and devotional programming.[265]

153. Dr. Brown ties the increased perceived value of devotional programming, particularly during 2001-2005 period, directly to the heightened awareness, especially among evangelical Christian community, of the threat of radical Islam generated as a result of the 9-11 attacks:

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[261] Tr. 1405-1411 (Brown); William Brown W.D.T. (DC Exhibit 3) at 7-18.

[262] William Brown W.D.T. (DC Exhibit 3) at 25-31 "Works Cited."

[263] William Brown W.D.T (DC Exhibit 3) at 14.

[264] William Brown W.D.T. (DC Exhibit 3) at 14-15.

[265] William Brown W.D.T (DC Exhibit 3) at 15.

> In particular, programs providing spiritual guidance and support, and political and international commentary from a perspective of faith were appreciated with heightened understanding. As borne out in the Harris survey, those loyal and avid followers of devotional programming have a measure of distrust of the traditional media, which seeks a devotional perspective to news and events. Specifically, the Harris Interactive poll cited earlier found that 87 percent of the sample believed "the major news media report on radical Islam from a politically correct perspective rather than its real impact on world peace." These research results further demonstrate that devotional viewers want to hear the perspective of religious broadcasters on the ongoing world conflict with Islamic terrorists.[266]

154. *Dr. Brown testified that the avidity and loyalty of the devotional audience, regardless of ratings, can translate into enhanced value to the cable operator, because the devotional audience is "more like a community.* When people are watching devotional programming, there's a different dynamic happening than when they're watching a football game, a movie or a soap opera. I think it's very important for these proceedings that we distinguish the difference between the amount of time people are watching programming and the value of that programming."[267]

155. As he explained, "We're talking about people's lives being changed through their interaction with devotional programming as it relates to also these ministries and calling them and talking to counselors and—and being part of this community of -- of faith that people see themselves as a part of as they're watching these programs."[268]

156. Dr. Brown also testified that audience support in the form of donations helps continue access to programming:

> The devotional viewers know that people providing their devotional programming are not … getting advertising. They see there's not advertising dollars there.

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[266] William Brown W.D.T (DC Exhibit 3) at 17.

[267] Tr. 1412 (Brown).

[268] Tr. 1413 (Brown).

> They know that the cost of that programming is being provided for by those ministries and those producers. Therefore, they know, they're very cognizant that their donations are going to continue to support the programming. Even if someone doesn't outwardly ask, although many of them do, they will let the viewer know that your contributions help keep this program on the air. So it's much akin to like if you … want to pay pay-per-view to see the certain films you want or if I … subscribe to the NFL Network and want to see a bunch of games, I am paying extra money for that to receive that television programming. In the same way, devotional audience members are giving donations. That's why there's a direct correlation you'll see between the amount of donations and amount of viewers. They're giving donations to keep their programs on the air because they value those programs. Those programs are very important to them.[269]

157. *In response to a question from Judge Wisniewski regarding data supporting the correlation between donations and viewing, Dr. Brown testified, "[M]y statement comes from me, personally, conducting dozen of donor studies in which we see a direct relationship, positive relationship between viewers giving and their watching programs."*[270]

158. While there are other appeals than just helping to produce future programs, such as "humanitarian work" (e.g. "feeding hungry people, providing clothing, overseas disaster relief and so forth"), Dr. Brown stated his studies do not show the viewers "separate out those specifically."[271]

159. When asked on cross-examination to compare the experience of watching an inspirational movie about becoming a football player and devotional program, Dr. Brown testified:

> I would say that just on substance, somebody saying that as a result of a devotional programming, that they've had a type of a spiritual encounter, which many claim that they have, even what many claim would be a salvation

[269] Tr. 1414-1415 (Brown).

[270] Tr. 1415 (Brown). Emphasis supplied.

[271] Tr. 1416 (Brown).

> experience, that they, just by the nature of it, would even be a greater event than becoming successful at a career as a football player. ... they're both emotional experiences. I would say, in the case of a devotional viewer, if I'm talking about a salvation experience, from that viewer's perspective, that's not only affecting their life here on earth, that's affecting eternity.[272]

160. While conceding that the emotional experiences tied to watching television content "is subjective ... is, by definition, a subject of personal experience,"[273] Dr. Brown testified that "doesn't mean that you can't use objective methodologies, such as social scientific research, to ask people about those experiences and then to – and to use statistical data to sum up those experiences collectively, which is what we do when we conduct communications research."[274]

161. As to how to measure the appeal of programming for cable operators, whom Dr. Brown says "the primary concern is maintaining current subscribers and attracting new ones,"[275] Dr. Brown underscored that the Bortz Survey reflects the fact even though a niche audience, devotional viewers are a vocal and influential community:

> For the cable television operator, their goal isn't the highest-rated programs ... which is why I say, in my testimony, Nielsen falls way short of being a very good measure for measuring the value of devotional programming or any programming. It's the total number of customers for the cable operator. They want a greater variety of customers. And I believe that in the beginning of my testimony, when I talked about increased sexual content and violence on television, I believe the cable operators are very aware of that and complaints that – that – public complaints and so forth. And part of a mitigating factor against that is to provide good, devotional programming for devotional viewers in order to mitigate those kinds of complaints. *They want to keep the devotional audience happy because the devotional audience is a very active audience, a very engaged audience and an audience that would make a lot of noise because the program –*

[272] Tr. 1426-1427 (Brown).

[273] Tr. 1428, 1431 (Brown).

[274] Tr. 1431-1432 (Brown).

[275] Tr. 1437 (Brown).

if the programs were – were taken away from them or they couldn't get them any more.[276]

162. Dr. Brown further testified that the eight factors he cited his in testimony are "qualitative measures [that] help explain the results of the Bortz study. If you're looking for an explanation of why the Bortz study has shown a continual … growth of the importance, the perceived value of the devotional television audience, there are some very specific social changes that explain why that has happened." [277]

163. In follow up to that testimony, Judge Wisniewski asked whether "an unspoken assumption" in his answer is that "programs with high ratings are essentially reflecting the same audience?" Dr. Brown, citing to "my experience as a communications scholar that has been studying television viewers and television programming for the last 25 years,"[278] replied:

> A. That's correct. What Nielsen is measuring is the amount of time that a television receiver is tuned to a program. It's the most superficial level of effects, as I say in my testimony, when we look at 13 levels of media effects, it doesn't – it won't even measure whether you've been paying attention to the program, what you're learning for it or how it's impacting you. And so my argument is that's a very poor way to measure the value of a program because there is not a correlation between the amount of minutes that you're watching and the value and impact of that experience of watching a program.
>
> JUDGE WISNIEWSKI: I understand your intensity argument, but … your written testimony and your testimony a few minutes ago talks about the highest rating that appeal to a narrow market. I assumed you were assuming that, in fact, the high ratings covered the same audience – the same kind of audience all the time.
>
> A. Yes. … and I'm thinking of it from … a cable supplier's point of view. *If I'm a cable supplier, my goal is I want the greatest number of people subscribing to my cable station. If I have, you know, a highly rated program, yeah, that's good, but that's not going to necessarily attract more viewers as compared to providing a great diversity of programming. So my primary concern as a*

[276] Tr. 1438-1439 (Brown). Emphasis supplied.

[277] Tr. 1451 (Brown).

[278] Tr. 1443 (Brown). See also Tr. 1469 (Brown).

cable operator would be the diversity of programming over the highest-rate programs.[279]

IV. PROGRAM SUPPLIERS

164. The Program Suppliers seek shares from all the cable royalty funds as follows:

Year	Basic	3.75%	Syndex
2004	68.283%	74.412%	96%
2005	74.961%	78.002%	96%

A. PROGRAM SUPPLIER WITNESSES

1. Alex Paen

165. The written testimony of Alex Paen, a producer of syndicated programs, described the nature of the syndication business and costs and risks of production.[280]

2. Jonda Martin

166. Jonda Martin, President of Cable Data Corporation ("CDC"), provided data utilized by PS in their studies.[281]

3. Marsha Kessler

167. Marsha Kessler explained her participation in the MPAA Special Viewing Studies regarding determination of distant and local counties, program categorization used by Program Suppliers and her role in the viewing and subscriber studies. Ms. Kessler indicated that Program Suppliers' claim includes non-team sports programming, such as NASCAR and World Wresting

[279] Tr. 1440-1442 (Brown). Emphasis supplied.

[280] Alex Paen, W.D.T. (PS Exhibit 1).

[281] Jonda Martin, W.D.T. (PS Exhibit 2).

Entertainment,[282] and that pre- and post-game programs appearing on a single station would be CTV programming, and on more than one or a series, PS programming.[283] Ms. Kessler assisted the Gruen Survey by picking exemplars of syndicated programming, but she did not determine whether the programs were carried on any particular station, specifically WGN.[284]

4. John Mansell

168. John Mansell, an expert in sports programming carriage on television, cable, satellite and other new distribution media,[285] testified regarding the migration from 1990 to 2005 of sports programming from broadcast stations to cable networks and other new media. With respect to live team sports claimed by JSC, Mr. Mansell concluded that "over the past 20 years, the number of live team sports games on local over-the-air stations have significantly declined, while, at the same time, the number of games on cable television regional sports networks has dramatically increased." He testified that this trend has accelerated since 1998-99 to the present. [286]

169. According to Mr. Mansell, the number of local Major League Baseball games telecast on local broadcast stations declined from 1656 in 1999 to 1150 in 2005 and 1066 in 2005. There were significantly fewer baseball games on WGN in 2004 (94) and 2005 (99) than in 1999 (150).[287] The number of National Basketball Association games telecast on local stations in 1999 was 534. The number increased in 2004 to 790, but fell back to 558 in 2005. For National

[282] Tr. 1575 (Kessler).
[283] Tr. 1608 (Kessler).
[284] Tr. 1591, 1601 (Kessler).
[285] Tr. 1614 (Mansell).
[286] Tr. 1621 (Mansell).
[287] Tr. 1635 (Mansell).

Hockey League games, the number of local broadcast station telecasts dropped from 269 (1999) to 194 (2004). Due to a NHL lockout, there were zero telecasts in 2005.[288]

170. Conversely, the number of NASCAR programs on broadcast stations increased from 25 (1999) to 37 (2005).[289] The number of team sports telecasts on regional cable sports networks grew substantially during the same period.[290]

171. On questioning from Judge Roberts, Mr. Mansell conceded that other than games carried on WGN, WOR and WPIX, his testimony does not address the change in the distant retransmission of live team sports programming.[291]

172. In rebuttal, Mr. Mansell provided further analysis of sports migration, this time focusing on the decline on Bortz's Survey stations.[292]

5. Howard Homonoff

173. Howard Homonoff, an expert in how the market for buying and selling cable programming works, testified that in 2004 and 2005, that most programming on the most widely distributed cable networks would be classified as Program Supplier category content.[293]

174. Mr. Homonoff further testified that most cable subscribers are served by cable multiple system operators ("MSOs").

175. Given the large number of programming services, MSOs need to prioritize choices, and the programming track record or success would impact choices.[294] Mr. Homonoff concluded

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[288] John Mansell, W.D.T. (PS Exhibit 6) at 5.

[289] Tr. 1646 (Mansell).

[290] John Mansell, W.D.T. (PS Exhibit 6) at 12, 14, 15.

[291] Tr. 1721-1725; John Mansell W.D.T. (PS Exhibit 6) at 19, 21.

[292] John Mansell, W.R.T. (PS Exhibit 15).

[293] Tr. 1740 (Homonoff).

[294] Tr. 1745 (Homonoff).

that 74% of the most widely distributed cable networks in 2004-2005 consisted of 74% PS content, 14% sports networks and 12% news networks.[295]

176. Mr. Homonoff further analyzed individual programs on the top 25 networks and concluded that 90.2% of the 2004 shows and 89% of the 2005 shows would be considered Program Supplier content.[296]

177. Regarding fees paid by cable operators for cable networks, Mr. Homonoff concluded that cable systems paid an average of $6.85 per subscriber per month in 2004 and $7.19 in 2005 for 37 of the top 50 cable networks that he characterized as Program Supplier networks, whereas they paid $4.92 for sports networks in 2004, and $5.53 in 2005, and $1.18 for news networks in 2004 and $1.22 in 2005.[297]

178. *Significantly, Mr. Homonoff's definition of "Program Supplier" programming for all these calculations included religious programming.*[298]

179. *In other words, the value of all religious programming is incorporated into the Program Supplier content for purposes of Mr. Homonoff's testimony. Put another way, all the Program Supplier numbers provided by Mr. Homonoff are inflated by the inclusion of Devotional Claimant content.*

180. On cross examination, Mr. Homonoff conceded that he was not indicating anything about the relative amounts that cable operators would spend on different types of distant signal programming.[299]

6. Dr. Arthur Gruen – The Gruen Survey

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[295] Tr. 1748-1749 (Homonoff).

[296] Tr. 1751 (Homonoff); Howard Homonoff W.D.T. (SP Exhibit 7) at 18-21, Exhibits 5 and 6.

[297] Tr. 1755 (Homonoff); Howard Homonoff W.D.T. (SP Exhibit 7) at 22, Exhibits 7 and 8.

[298] Howard Homonoff W.D.T. (SP Exhibit 7) at Exhibits 5 and 6.

[299] Tr. 1761 (Homonoff).

181. Dr. Arthur Gruen, a expert in the field of economics, specializing in entertainment, media and telecommunications, testified that he, along with his business partner, David Wilkofsky, Dr. Martin Frankel, Dr. Alan Rubin and Marsha Kessler, developed a survey of cable subscribers (the "Gruen Survey").[300]

182. In explaining the purpose of the Gruen Survey, Dr. Gruen explained:

> It's my understanding that this proceeding is premised on a valuation based on attracting and retaining subscribers. So I would think to the extent that a survey is being used to make that valuation or is given some weight in making that valuation, it seems to make sense that we should ask cable subscribers how they would value the various categories ...
>
> Q. [W]hy is it better to ask cable subscribers?
>
> A. Well, the subscribers would know how they would value different program categories more than operators estimating how subscribers would value categories. Also, ... the operators, in their course of doing business, don't routinely make these valuations. They select different channels to carry on their cable systems and -- but they don't have to value the different program categories within those channels and – talking about both cable and -- channels and distant signal channels. Subscribers, on the other hand, are always making these types of decisions. They decide what programs they want to watch. If they choose to record programs, they decide which programs they want to take the effort to record. So they're making these relative valuations of programming on a routine basis.[301]

183. Dr. Gruen further clarified:

> [T]he point of this exercise was to try to keep, as much as possible, the – the structure of the Bortz questionnaire, but then focus it on subscribers to see whether subscribers would answer differently than the operators would. So we presented them with an allocation – my view is that people are used to allocating budgets, so if they were presented with a dollar, they would – they could allocate it. We didn't ask them to value distant signals, per se.[302]

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[300] Tr. 1817 (Gruen); see also Martin R. Frankel, W.D.T. (PS Exhibit 3) and Alan M. Rubin W.D.T. (SP Exhibit 4).

[301] Tr. 1836-1838 (Gruen).

[302] Tr. 1936 (Gruen).

184. On cross-examination, Dr. Gruen described the Gruen Survey as "an attitudinal study of how subscribers would put relative values on the various program categories."[303] Dr. Gruen took into account the Bortz Survey in preparing his survey of cable subscribers.[304]

185. The Gruen Survey a) did not have any analysis to determine whether there was a representative sampling of demographic groups, b) did not have any gender analysis, c) applied valuations to the entire household, not the individual respondent, and d) made no effort to determine that distant signals were viewed.[305] Nevertheless, Dr. Gruen believes

> ... whether they [the respondents] watch or not, they are paying for these signals in the same way they're paying for a host of cable networks that they may or may not watch. But the respondents do know how they value different program categories. They're familiar with the program categories and the question is their attitude about their valuation of program categories that come from a different market.[306]

186. Dr. Gruen oversaw the process, as Mr. Wilkofsky shaped the survey, Dr. Frankel handled the statistical work (drawing the sample, specifying the survey methodology, calculating weights and performing statistical calculations), Ms. Kessler provided program category definitions and sample programs, and Dr. Rubin was involved in wording the questionnaire.[307]

187. Dr. Gruen and his group conducted a field test, a pilot study and then a full study, selecting systems in the continental United States. They targeted 1500 as the number of interviews.

188. In the Gruen Survey questionnaire, under Program Supplier category, Dr. Gruen had series, movies and specials, and nonteam sports. The other categories were News and

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[303] Tr. 1841-1842 (Gruen).

[304] Tr. 1849-1851 (Gruen).

[305] Tr. 1847, 1858-1860, 1868-1869, 1884 (Gruen).

[306] Tr. 1887 (Gruen).

[307] Tr. 1818-1819 (Gruen).

Community Events, Devotional, Live Team Sports, Public TV, Canadian Claimant Groups and Other.[308] If a system had only a PTV or only a Canadian signal, Dr. Gruen gave full credit (100%) relative valuation, to those categories.[309] This was consistent with the results in the pilot study, where PTV or CCG content was credited with 100% of the valuation.[310]

189. The Gruen Survey provided a) "constant reminders to the respondents that the programming that we're considering appears on certain stations that come out of the markets," i.e. distant signals; b) examples of different genres within each category; and c) included a nonteam sports category.[311]

190. Based on the Gruen Survey, the results for the categories of programming were weighted and normalized (to take into account virtual interviews for systems with only PTV or CCG signals), as follows:

Normalized Distant Signal Relative Values (Percent)[312]

Category	2004	2005
Program Suppliers		
Series	21.18	20.76
Movies and Specials	20.04	19.29
Non-Team Sports	7.68	6.57
Program Supplier Total	48.90	46.62
News and Community Events	15.51	19.51
Devotional Programs	7.38	8.19
Live Team Sports	17.82	17.10
PBS*	9.62	6.82
Canadians**	0.77	1.77
Total* **	100.00	100.01

*In 2005, this is the average of values that range from 6.49 to 7.16

[308] Tr. 1831 (Gruen).

[309] Tr. 1832-1833 (Gruen).

[310] Tr. 1839-1840 (Gruen).

[311] Tr. 1834-1835 (Gruen).

[312] Dr. Arthur Gruen (PS Exhibit 8) at 23.

**In 2005, this is the average of values that range from 1.44 to 2.10

***May not equal 100.00 percent due to rounding.

191. On cross examination, while Dr. Gruen acknowledged that the Gruen Survey did not give instructions to exclude noncompensable programming on WGN. He stated that there is "no way of knowing what, specifically, anyone included in - in coming up with their valuation." He did not believe an adjustment for noncompensable content on WGN was necessary, because "there's really no way of knowing what they – what respondents took into account and to the extent they may have taken into account noncompensable programming. There's really no way of knowing whether that would have added to the value of programming suppliers or detracted from the value or played no role in that value."[313]

192. Regarding program examples used in the Gruen Survey, Dr. Gruen acknowledged that particular programs referenced in the survey were not carried by WGN, but he did not believe it mattered, as they were used to "provide examples of programs so people would understand the category." [314]

193. Dr. Gruen made no attempt to value the distant signals per se, as he indicated "that is what Dr. Ford is doing."[315] While he acknowledged under questioning from Judge Wisniewski regarding "inferior goods," that the Gruen Survey $10 valuation allocation "was far more significant than what the actual compensation of these distant signals would be" in a typical cable bill, he was "not sure whether that would affect the relative values. It would certainly affect the absolute value."[316]

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[313] Tr. 1915-1917 (Gruen).

[314] Tr. 1926-1927 (Gruen).

[315] Tr. 1936 (Gruen).

[316] Tr. 1935-1938 (Gruen).

194. In the rebuttal phase, Dr. Gruen submitted testimony responsive to the request of Judge Roberts to break out data for systems with one distant signal, compared to those with multiple distant signals.[317] His raw survey results evidenced subscriber values for Devotional content ranging from 5.69-8.48 (2004) and 7.18-8.09 (2005), with higher values applicable where fewer distant signals are retransmitted.[318]

7. Criticism of the Gruen Survey

195. On rebuttal, Jeffrey Berman, Vice President of C&R research and an expert in survey research involving cable subscribers,[319] criticized the Gruen Survey program examples as "inaccurate and misleading," specifically because certain program examples were not carried on WGN.[320]

196. Mr. Berman also questioned whether the Gruen Survey relied on "unqualified respondents" because there was no requirement that the respondent be familiar with the programming on the distant signal.[321] He also criticized the Gruen Survey's failure to record gender, a "very important demographic variable."[322]

197. Gregory Duncan, a principal of the Brattle Group and an expert in survey design and validation,[323] and an expert economist in network industries,[324] testified that the Gruen Survey did not comport with good survey practices because a) it targeted the wrong population – cable

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[317] Arthur Gruen, W.R.T. (PS Exhibit 12).

[318] Id. at 4.

[319] Tr. 2428-2431 (Berman).

[320] Tr. 2434 (Berman).

[321] Tr. 2436-2437 (Berman).

[322] Tr. 2440, 2438-2442 (Berman).

[323] Tr. 2502 (Duncan)

[324] Tr. 2527 (Duncan).

subscribers, not cable operators,[325] b) it did not qualify survey respondents to determine if they had program preferences,[326] c) it focused attention on particular programs ("anchoring problem"),[327] d) its "time frame wasn't clear,"[328] e) the use of the word "you" to describe an individual or household was unclear,[329] and f) the non-response rate could lead to bias.[330]

198. CCG expert, Dr. John Calfee, testified that the Gruen Survey measured the wrong population: "In my opinion, the subscribers are simply the wrong population from which to draw a sample given that the purpose is to learn about the preferences of cable system operators."[331]

199. Also on rebuttal, CCG expert, Dr. Brian Ratchford, Professor of Marketing at the University of Texas at Dallas and an expert in survey research and survey design,[332] questioned whether the Gruen Survey accurately portrayed the value of Canadian distant signals.[333]

200. Dr. Ratchford criticized the Gruen Survey because a) the respondents were not qualified as to whether they actually viewed the signals, b) there were survey questionnaire issues (head of household, gender, whether current behavior) and c) there were sampling and response rate issues.[334]

8. Dr. Salinger's Comments on The Gruen Survey

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[325] Tr. 2530-2531 (Duncan)

[326] Tr. 2533-2534 (Duncan).

[327] Tr. 2540 (Duncan).

[328] Tr. 2542 (Duncan).

[329] Tr. 2543-2544 (Duncan).

[330] Tr. 2544-2547 (Duncan).

[331] Tr. 3057 (Calfee).

[332] Tr. 3146 (Ratchford).

[333] Tr. 3163 (Ratchford).

[334] Tr. 3163-3167 (Ratchford); Brian Ratchford, W.R.T. (CDN-R-6) at 4-17.

201. Devotional expert, Dr. Michael Salinger, testified that while he continues to believe the Bortz Survey is the best direct evidence for allocating funds, "the evidence in the Gruen survey about the way cable subscribers value the programming, I found to be evidence that corroborates the Bortz survey."[335]

202. Dr. Salinger elaborated, that the Gruen Survey asked questions similar to the Bortz Suvey, with some differences in the details of the survey, but with "one big difference … how the question is frame with respect to sports."[336] Dr. Salinger noted:

> … there's an attempt … in the Gruen study to distinguish between team sports and non-team sports. And I understand that the question asks specifically about team sports, but there was some issue as to what was understood. If you look at the results of the studies, at the value – what the cable operators say creates value for them, and if you look at the results of the Gruen study and what … the cable subscribers say is value to them, they're actually not that far apart, particularly if you think that … Gruen was right about what was understood about the distinction between team sports and non-team sports.[337]

203. Dr. Salinger concluded that the Gruen Survey corroborates the opinion of cable operators regarding the value of programming, because what is important to subscribers "is an important input, or you would expect it to be an important input, into what the cable operators value."[338]

204. Even though the Gruen Survey accords a higher value to Devotional programming, Dr. Salinger said that he would use Gruen as corroboration, not replacement of Bortz, in allocating shares – "it should reassure us that the Bortz … results from the Bortz survey are telling us something about the relative market value of the different programming."[339]

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[335] Tr. 2787 (Salinger).

[336] Tr. 2820 (Salinger).

[337] Tr. 2820-2821 (Salinger).

[338] Tr. 2821 (Salinger).

[339] Tr. 2822 (Salinger).

205. He believes this is particular true about Devotional programming, harkening back to Dr. Waldfogel's testimony. Dr. Salinger noted that the Waldfogel Regression Analysis would give Devotional programming "zero ... [because] the coefficient was negative," even though Professor Waldfogel considered that "implausible." That Dr. Waldfogel would so reject the Bortz Survey (and Gruen Survey) results struck Dr. Salinger as dismissive of the marketplace:

> And it seems to me that, when he said that, he was perhaps showing a little bit of Ivy League snobbery, you know, in suggesting ... that it not inconceivable to him that this kind of programming was programming that consumers don't value. And, you know, I think there are people who look at this class of programming who wonder ... what the value of it is. I don't watch devotional programming, and I confess that I don't entirely get it, but what the Gruen survey seems to be saying – and it really shouldn't surprise us very much – is that there are cable customers out there who really value this programming. And that provides an explanation, I think for why the cable operators [say] ... in the Bortz survey. They say they value that programming.[340]

9. Paul Lindstrom

206. Paul Lindstrom, senior vice president with The Nielsen Company and an expert in marketing research with emphasis on television and cable audience,[341] produced estimates of the distribution of distant cable viewing for the periods 2004 and 2005 ("MPAA Special Viewing Studies").[342]

207. In producing these estimates, Mr. Lindstrom used a station sample of 180 stations using CDC distant subscriber data, coordinated with MPAA to identify counties where those signals were distant for cable compulsory royalty purposes, and then, after producing program type information, ran viewing data limited to cable households outside the local area.[343]

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[340] Tr. 2823-2824 (Salinger).

[341] Tr. 1955 (Lindstrom).

[342] Tr. 1956 (Lindstrom).

[343] Tr. 1959-1961 (Lindstrom).

208. The data Mr. Lindstrom produced is referred to "as custom analysis. It is a new slicing and dicing of existing data," out of the National People Meter (NPM) sample.[344]

209. There are approximately 10,000 households in the NPM sample. Nielsen NPM scans data from televisions sets in houscholds every 2.7 seconds and credits viewing in one minute increments, provided that successive 30 second blocks of time are matched.[345] The data is accumulated and two types of information are presented for each claimant group: first, a weighted number that shows the percent distribution of viewing minutes and second, the total quarter hours of programming, or volume of airtime, on the 180 sample stations.[346] The data is broken out by age groups. Historical data relating to viewing measured by diary samples during sweep months is provided but was not used.[347] The data also provides ratios or quintiles to divide the sample into five groups, based on the volume of viewing, from light to heavy.[348]

210. On cross examination, Mr. Lindstrom acknowledged that none of the data he presented measured the qualitative response of a cable subscriber, only when a set was tuned to a channel, and that the total of quarter hours (TQHs) is reduced by network programming and the time stations are off the air.[349] TQHs do not take into account the number of distant subscribers.[350] Mr. Lindstrom also conceded that the data is not a measure of marketplace value:

> Q. So back to the question you've been asked in prior proceedings, neither you nor The Nielsen Company is presenting the results of the MPAA special viewing studies in this proceeding as a measure of the marketplace value of distant signal programming; it that correct?

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[344] Tr. 1962 (Lindstrom).

[345] Tr. 1964 (Lindstrom).

[346] Tr. 1966-1967 (Lindstrom).

[347] Tr. 1968-1972 (Lindstrom).

[348] Tr. 1972-1974 (Lindstrom).

[349] Tr. 1978, 1981-1982 (Lindstrom).

[350] Tr. 1984 (Lindstrom).

A. Correct.[351]

211. Further, while Nielsen will weigh the 10,000 households in its NPM sample to achieve a national ratings analysis, it does not apply those weightings to the MPAA Special Viewing Studies.[352] The data reported by Lindstrom "Total Viewing Minutes," are not ratings, nor share.[353] Moreover, calculating ratings would be a complex task:

> Q. Now, could one even calculate ratings, program ratings, from the MPAA special study that you've presented here?
>
> A. One could if you wanted to go through that.
>
> Q. It would be a separate rating for each and every program in the study; is that right?
>
> A. The way the ratings are generally calculated is a function of time. And I think it probably starts getting overly complicated to go into all of the details. But the gist of it would be if there were -- and these are very rough numbers, so bear with me here -- but if there were 10,000 households in our sample and 24 hours a day, that's roughly a thousand minutes of viewing that somebody could do if they viewed for 24 hours. So that means that there were 10 million potential minutes that were there, you know. The way the ratings are generally calculated, one would look at how many minutes were actually viewed within that sample to a source, and -- and that becomes your numerator. And the denominator is how many potential minutes. So if you're looking on a 24-hour basis, you would go through, figure out how many minutes, divide it by the 10 million. Here, it's actually 365 -- 365 days of data, so it's 365 times X million in order to come up with the potential minutes. And you could go through the math. But if you were to do it as a national rating, it would be a very small percentage of the total television viewing. But one could do it. I could it if I sat here with a calculator, but . . .
>
> Q. How would you account for the fact that, for example, WGN is available in, let's just say, 6 million households -- I'm going to pick a number out of the air -- whereas another station in your study is available in 1,000 cable households? In order to be meaningful, you would have to reflect that, would you not?

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[351] Tr. 1988-1989 (Lindstrom).

[352] Tr. 1996-1999 (Lindstrom).

[353] Tr. 2012 (Lindstrom).

> A. That is all reflected, but we would be looking -- here, as you asked the question in terms of total minutes and could it be converted to ratings, those numbers could be converted into ratings to give an estimate of the proportion of -- of not all television viewing, but the equivalent of a rating, which is against all households. I don't think it's a meaningful number, but it could be done.[354]

212. Further, according to Mr. Lindstrom, many of the stations in the MPAA sample recorded zero viewing ("It would not surprise me at all" to say that one out of every four or five stations recorded no viewing), and the total viewing to all sample stations was "a small percentage ... There is not a tremendous amount of viewing that's occurring ... [t]o distant signals, yes."[355]

213. According to CTV rebuttal witness, Dr. Michael Topper, Vice President and Head of the Antitrust & Competition Practice at Cornerstone Research, viewing in the MPAA Special Viewing Study amounted to an average of 2.18 minutes a day in 2004 and 3.24 minutes a day in 2005.[356] By comparison, Nielsen reports that the average household watched 491 minutes of programming daily in 2004-2005 television seasons. Indicating these estimates are likely conservative for cable households, which typically show more viewing, Dr. Topper projects that "the total compensable distant signal weighted viewing minutes" reported by Mr. Lindstrom "represents just 0.0000584% of all viewing minutes in all Cable TV Households in 2004-2005.[357]

214. Although Mr. Lindstrom still believes that the results are a "very good estimate of the distribution of total viewing minutes,"[358] he conceded that the MPAA Special Viewing Study

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[354] Tr. 2013-2015 (Lindstrom).

[355] Tr. 2024-2028 (Lindstrom),

[356] Michael Topper, W.R.T. (SP Exhibit 49) at 4.

[357] Michael Topper, W.R.T. (SP Exhibit 49) at 5 and n.7-8.

[358] Tr. 2033 (Lindstrom).

presented in this proceeding has not been accredited by the Media Ratings Council ("MRC"), although he later explained that MRC does not accredit custom research.[359]

215. While he could not explain why Program Supplier minutes increased from 3 million in 2004 to 5.6 million in 2006 (almost a 90% increase), he did not attribute any significance to that difference: "What I'm saying is, for purposes of what we were doing, it wouldn't make a difference if it was 6 versus 3. I mean, in terms – not the 6 versus 3, but the difference between 5 versus 8 as the bottom line number; that the key is the percent distribution, which is what the estimate is."[360]

216. As to potential errors in the MPAA Special Viewing Studies, Mr. Lindstrom conceded that if a cable household in the 2004 or 2005 study also subscribed to a satellite service or switched between cable and satellite services, then the Nielsen Study "probably" included satellite viewing, rather than or in addition to cable viewing.[361] He also acknowledged that the MPAA Special Viewing Study may have counted viewing for some programs that should be treated as noncompensable in this proceeding, included network programming.[362]

10. Bruce Hoynoski

217. Bruce Hoynoski, chief research officer for media operations of The Nielsen Company, and an expert in the field of statistics with particular focus on audience measurement services,[363] described Nielsen's methodology for creating the NPM sample.[364] Mr. Hoynoski believes the

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[359] Tr. 2029-2030, 2071 (Lindstrom).

[360] Tr. 2037-2039 (Lindstrom); see also Michael Topper, W.R.T. (SP Exhibit 49) at 4.

[361] Tr. 2049 (Lindstrom); SP Exhibit 41.

[362] Tr. 2060, 2065-2067 (Lindstrom); see also Michael Topper, W.R.T. (SP Exhibit 49) at 3.

[363] Tr. 2073, 2078

[364] Bruce Hoynoski W.D.T (PS Exhibit 10).

viewing data presented by Mr. Lindstrom is "reliable;"[365] nevertheless, Mr. Hoynoski was not familiar with instructions from CDC or MPAA regarding information that should go into the study and the parameters used, nor the methodologies underlying those instructions.[366]

11. Dr. George Ford – The Advertising/Viewing Methodology

218. Dr. George Ford, chief economist of the Phoenix Center and president of Applied Economic Studies, Inc., an expert in the field of industrial economics, regulation and policy with an emphasis on communications industries, including radio and television, [367] presented his views on how the 2004 and 2005 royalties should be distributed among the parties. Dr. Ford's analysis is the centerpiece of the Program Supplier's claims in this proceeding, and are as set forth in Table 7 to his corrected Written Direct Testimony[368]:

[365] Tr. 2089 (Hoynoski).

[366] Tr. 2093 (Hoynoski).

[367] Tr. 2110 (Ford).

[368] George Ford W.D.T. (Corrected) (PS Exhibit 11) at 42, Table 7.

Table 7. Relative Market Values Based on Marketplace Evidence

(Excluding Kids 2-17)

Claimant Group	Relative Share of Volume (%)	Relative Share of Viewership (%)	Relative Price of Viewership (Base = NAB)	Relative Market Value (%)
Year 2004	A	B	C	Norm (B-C)
NAB	7.514	7.852	$1.00	6.756
Program Suppliers	53.156	57.247	$1.38	67.912
Devotional	3.995	1.037	$1.49	1.331
JSC	0.727	6.990	$2.37	14.273
PTV	30.140	25.424	$0.36	7.971
Canadian	4.468	1.449	$1.41	1.757
Sum	100	100	---	100
Year 2005				
NAB	9.969	13.081	1.00	10.878
Program Suppliers	56.350	69.038	1.29	74.198
Devotional	5,392	0.474	1.28	0.505
JSC	0.708	5.670	2.01	9 .466
PTV	22.300	10.360	0.42	3.628
Canadian	5.281	1.378	$1.16	1.325
Sum	100	100	---	100

(a) Included non-commercial adjustment

219. Dr. Ford stated that the basis for allocating royalty among claimants should be "market value," which in a broad sense, "is the price at which an item would exchange in an unregulated market with willing buyers and willing sellers."[369]

220. Dr. Ford started with the proposition that the royalty payments made by cable operators does not represent market value, "because the payment scheme is - is based on regulation or legislation rather than market interaction of buyers and sellers. *It's a compulsory license. The sellers have no say.*"[370]

221. Dr. Ford contrasts that with the broadcast television market, where all programming "was bought and sold in an unregulated market with willing buyers and willing sellers," where the factor used to determine the market value of TV programming involves broadcast stations "selling audiences."[371] He used "information on audience size, audience demographics, some day part information and some other adjustments in order to mimic the market that – where this programming is actually bought and sold."[372] Dr. Ford relied on MPAA Special Viewing Study and demographic data, and spot advertising prices provided by SQAD.

222. When asked by Judge Roberts, "what is the value of advertising to the cable operators, Dr. Ford replied:

> A. Well, the cable operators retransmit the broadcast stations in the local market as well and in the distant market …so the difference between the local market and the distant market is not based on the presence or absence of a cable operator or of the cable operator's retransmission. Okay? The cable operator retransmits a broadcast station which improves the audience size, which improves the advertising value to the broadcaster, who is the buyer of this programming. Okay. In my hypothetical market, if you want to call it that, rather than focus on the cable operator, who is not in the business of buying and selling programming

[369] Tr. 2115-2116 (Ford).

[370] Tr. 2116 (Ford). Emphasis supplied.

[371] Tr. 2116-2117 (Ford).

[372] Tr. 2118-2119 (Ford).

and certainly didn't buy and sell this programming, he just retransmits signals, just like he did in the local market. The only missing piece in the distant market is the broadcaster. So if we want to think hypothetically, then we say, let's put a broadcast tower in the distant market and have the broadcaster buy the information -- buy the programming, the same way he does it in the local market. And in that sense, we put ourselves in the data flow. We are mimicking market transactions rather than creating hypotheticals that don't allow us to do that. Okay. So as an economist, I assume myself into the data flow, into the actual transactions, which provide me information, actual market information, which allow me to establish prices and market values for the programming rather than setting myself up where I don't have that information.

JUDGE ROBERTS: With respect to the advertisers, what interests and, therefore, value do local advertisers attach to the programming shown in the distant market?

A: I don't know, but the distant market is the regulated market. ...

JUDGE ROBERTS: But you're speculating, though, aren't you, as to what the value would be to advertisers in the distant market, nevertheless?

A: I'm assuming that the value of the advertising to the programmers is --or the -- of the programming is the same as the value of programming in market transactions, which is who is watching and how many people are watching and what time of day does it appear. Okay? [373]

223. Dr. Ford went on to explain that in his hypothetical market, if a cable operator could insert commercials in programming, aside from subscriptions, it could receive revenue from advertising by selling how many people would see a commercial.[374]

224. When Judge Wisniewski asked "how close of an analogy" is the advertising analysis Dr. Ford conducted, he replied:

A. In my opinion, I take the local market and the distant market and I say, What is different, in my view? Is the difference that a cable operator is retransmitting a signal? It's not the difference. That happens in both markets. Okay? How is the value of the programming determined in the local market? It's not – it doesn't matter so much that the cable operators are retransmitting it. Okay? The cable operator is really not a participant in this process except for the fact that he retransmits, which he does anyway in the local market.

[373] Tr. 2121-2125 (Ford).

[374] Tr. 2129-2130 (Ford).

> JUDGE WISNIEWSKI: Then, are you implicitly assuming that, in fact, there is no revenue flowing to the cable operator from the broadcast or retransmission of these distant signals?
>
> A: No. There would be a subscription effect, yes, but that does not determine the value of the programming. That determines the value of the cable system. Okay? The programming -- the price that the broadcaster has actually paid for this programming is not impacted by the fact that the cable operator makes profits selling subscriptions. That doesn't affect the exchange of the program that we're talking about on a broadcast station. It is not relevant. Okay? Do you understand?
>
> JUDGE WISNIEWSKI: Yeah, I hear what you're saying.
>
> A: That's my thought.[375]

225. In developing his analysis, Dr. Ford stated market value is quantity times price. He used the MPAA Special Viewing Study data – not Nielsen ratings data[376] as the quantity of programming, and for price he used SQAD advertising data, as well as Nielsen audience data (demographics, gender, day parts).

226. He then made numerous adjustments (such as for sports based on day parts, gender and live [higher ad value], and NAB claimant programming for day parts), to calculate an average cost per thousand audience.

227. A further adjustment was made for PTV, which does not have advertising, but derives income from government and corporate sponsorship.[377]

228. Even though Devotional programming purchases airtime, he says that means

> ...in the programming market, okay, the value – market value of the devotional programming is zero, okay, because there's no – there's – no money is spent on it by purchasers or programs – programming, Okay? But I left the calculation as it was, as I presented in the table, and – and the relative market values, which are – sum to 100, are computed leaving that number in there. Okay?[378]

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[375] Tr. 2131-2132 (Ford).

[376] Tr. 2320 (Ford). ("If Nielsen had provide me ratings information, then I would have used the CPP, okay?)

[377] Tr. 2133-2146 (Ford).

[378] Tr. 2149 (Ford).

229. Dr. Ford further explained his treatment of Devotional programming, which he elaborated on in a question from Judge Wisniewski:

> A. ... I think you can make the argument in this case that whatever the market value in this other market is for Devotionals is at least as much as required to buy the time. Okay? For every minute of devotional programming, they could have played Chico and the Man and sold commercials or something like that, right? So there is an opportunity cost to the broadcaster. Okay? So let's take that opportunity cost and say, okay, in this other market, there's got to be enough profit, okay, to pay that opportunity cost. And if that's your argument, then you can legitimately use this number.[379]

230. In response to questioning from Judge Wisniewski regarding the proxy market in his hypothetical analysis and who are the buyers and sellers for the distant signal retransmissions, Dr. Ford explained:

> A: I think, if it were not regulated, the buyers and sellers would likely be either the broadcast station itself that originates the programming would allow for the insertion of locally relevant advertising in the distant market. That would probably be the cleanest solution, okay, and I think probably the most likely. You could have a situation where the cable operator buys the programming, but that doesn't happen that often in terms of the -- of -- of the purchase of programming itself. I mean, the cable industry is largely purchasing a collection of programming in the form of a channel. Okay? So that transaction doesn't tell us anything about the value of the programming. It tells us what the value of some collection of programming is that's likely to include most of the Claimants -- any one channel most of the Claimants in this proceeding, okay? So I think, if you threw out the regulation, how would the market resolve this problem? I think, in the end, it would probably resolve it by having the broadcaster allow the insertion of -- of locally relevant material into the mix. Or -- but to some extent, if you have a station that is known to be retransmitted widely, you would think -- and I don't know -- I don't have any empirical evidence on this -- but you would think that the mix of commercial would move more to a wider geographic scope; that the local car station might be bid out by GM, okay, if they knew that this wasn't just local; that this really was a wider area that this was covering. And, in fact, you can imagine there may be some uncertainty about how much retransmission there is, so you might get a little discount. So you get a lower price for a quasi-national or a regional advertisement because of some kind of

[379] Tr. 2151 (Ford).

> uncertainty. But, I mean, I don't know. *The compulsory license exists, so it's hard to really say what would exist without it. But -- so we have to go try to find some market evidence somewhere that we -- that we think would be relevant.*[380]

231. Dr. Ford provided a number of different responses to the question in his proxy market, who is the buyer and who is the seller. At various times he said the "buyers and sellers would likely be either the broadcast station itself that originates the programming [and] would allows for the insertion of locally relevant advertising in the distant market,"[381] or "[y]ou could have a situation where the cable operator buys the programming, but that doesn't happen that often in terms of the - of – of the purchase of programming itself,"[382] or "if you have a station that is known to be retransmitted widely you would think – and I don't know – I don't have any empirical evidence on this – but you would think that the mix of commercial would move more to a wider geographic scope,"[383] or (in response to Judge Roberts who asked if "the television broadcasters are the buyers, and the copyright owners of the program are the sellers?) "I would say that is one interpretation of it and the best interpretation of it,"[384] or "if you have a competitive market on the buyer side, you have multiple buyers of the programming"[385] or "any of the participants could in there, but if they don't outbid the broadcaster, they don't get it. Okay?"[386]

232. As to the "target market," when Judge Roberts asked if "the buyer is the cable system and the seller is the broadcaster? I believe that's what you said," Dr. Ford replied:

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[380] Tr. 2169-2171 (Ford). Emphasis supplied.

[381] Tr. 2169 (Ford),

[382] Id.

[383] Tr. 2170 (Ford).

[384] Tr. 2177-2178 (Ford).

[385] Tr. 2178 (Ford).

[386] Id.

No. I would say, in the distant market – or the target market – I guess the target market is the distant market. I think we're clear … In the distant market – in an unregulated environment, okay, I think that what you would have is the same buyer and seller, one – one possibility – and I think a likely possibility – is the same buyer and seller of the programming; it's just the guy buying the advertisement might be different. Okay? … The cable system could be a buyer or the broadcaster could be the buyer, either one….Either one, I think is legitimate. … The seller is the copyright owner again.[387]

233. Then, in follow up colloquy with Chief Judge Sledge,

CHIEF JUDGE SLEDGE: *You're not using any of the terms of economic models that we're familiar with. When you're asked questions, you give, well, this could be an example, but I'm applying it another way. You don't give us clear answers.* What is your hypothetical market?

A. The hypothetical market involves a broadcaster purchasing programming from a copyright owner.

CHIEF JUDGE SLEDGE: *What is your benchmark?*

A. The benchmark? I'm sorry. I – would you maybe rephrase that? I'm not sure I can answer that. Can you rephrase that?

CHIEF JUDGE SLEDGE: No, I can't. That is the economic model for which we have established every hypothetical market we've dealt with in proceedings since we began. And you can't tell me what you benchmark is.

A. Well, the benchmark is the transaction that occurs in actual market transactions between a purchaser of programming and the seller of programming, okay? The benchmark transaction involves using Nielsen data and advertising prices to determine the value of the programming. That's the benchmark transaction.

CHIEF JUDGE SLEDGE: What adjustments are required of your benchmark in order for it to fit the hypothetical market?

A: The calculations fit the hypothetical market because I'm trying to match that transaction that actually occurs in that hypothetical. But it's -- it's hypothetical in the sense -- only in the sense that we're applying it to the compulsory market. This isn't hypothetical in reality. This is actually a transaction. This is actually a market. Okay? Programming is bought and sold every day. Okay? So it's not -- it's only a hypothetical in its application to the distant market?

[387] Tr. 2179-2182 (Ford).

CHIEF JUDGE SLEDGE: *Programming is not bought and sold every day in the regulated market.*

A: Not in the regulated. It's never bought and sold in the regulated market, which is why we can't use it. It's never bought and sold there. I think that's the –
CHIEF JUDGE SLEDGE: Therefore, it's never bought and sold in your hypothetical market?

A: No, no. It's bought and sold –

CHIEF JUDGE SLEDGE: You just said it was.

A: No. It's -- it's -- programming -- the distant market is not the hypothetical market. The distant market is the regulated market for which we cannot determine market value. Okay? The hypothetical is the imposition of this real market moving it over there and saying what would that programming in that distant regulated market sell for in a real market. *Does that make sense?*

CHIEF JUDGE SLEDGE: *No, it doesn't.*

A: Okay.

CHIEF JUDGE SLEDGE: All right. My last real question to you is that there are no adjustments to your benchmark to fit the hypothetical market?

A: Only in the sense that the Nielsen data from the distant market is used to determine value. There are elements of what happens in the distant market that do enter the calculation.[388]

234. In a colloquy with Judge Roberts regarding Dr. Ford's hypothetical market, in which Judge Roberts stated that the hypothetical market is the market in which cable systems retransmit programming from broadcast stations without regulation, Dr. Ford stated:

A. I think that the cable system is irrelevant.

JUDGE ROBERTS: You think the cable system is irrelevant?

A. The cable system is irrelevant to the analysis.[389]

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[388] Tr. 2184-2188 (Ford). Emphasis supplied.

[389] Tr. 2189 (Ford). Emphasis supplied.

235. In response to Chief Judge Sledge's question whether there were "no adjustments to your benchmark to fit the hypothetical market," Dr. Ford replied, "Only in the sense that the Nielsen data from the distant market is used to determine value."[390]

236. In further colloquy with Judge Roberts, who noted that Dr. Ford in fact said he made adjustments for PTV and Devotional programming, Dr. Ford replied, "Public Television doesn't really have a CPM, okay, because it's - it's not a commercial entity. Okay? Devotionals don't have a CPM. They don't sell commercials."[391]

237. Under questioning from Judge Roberts, Dr. Ford conceded that he did not have data to apply to Devotional and PTV content and that his benchmark is not explanatory for those parties:

> *JUDGE ROBERTS: What you're saying, then, since there are no CPMs for the Devotional market, there are no CPMs for the Public Television market, that your benchmark, then, is not explanatory for Devotional and it's not explanatory for Public Television, and that is why you had to make an adjustment?*
>
> *A. Yes. I'm trying to convert this into what would be –*
>
> *JUDGE ROBERTS: Because you don't have actual data?*
>
> A. *Because there is no data, okay? ... talking about market value for nonmarket to resolve entities is tricky, at best, tricky, you know. And that's – that's what I'm trying.*[392]

238. On cross examination Dr. Ford clarified his assumptions for his hypothetical market; namely, that 1) his analysis is based on purchase of individual programs, not channels of programs; 2) the vast majority of economic value of the programs being purchased derives from advertising revenues, and any subscription revenues would be treated as a wash; 3) the focus is limited to the distant cable community; 4) the broadcast rights acquired would be exclusive in the distant community; and 5) the advertising value would be determined in the distant

[390] Tr. 2187-2188 (Ford).

[391] Tr. 2194-2195 (Ford).

[392] Tr. 2195-2196 (Ford). Emphasis supplied.

community, but it would be based on CPM data from which the signal is transmitted (in effect the station's local market).[393]

239. Dr. Ford also acknowledged that one of his sources for his testimony stated that with respect to distant signal retransmission by cable television systems in 2004-2005, there was zero revenue for audience sales and 100 percent for content sales.[394]

240. Dr. Ford started with the MPAA Special Viewing Study data, but did not seek out other pertinent data, such as the cost of television programming in the market, or the amount PTV spent on programming.[395]

241. Dr. Ford repeatedly acknowledged, "Viewership is not value."[396]

242. While disavowing viewing as a value measure, he nevertheless developed a "Viewing/Volume Ratio" in which the relationship of MPAA Special Viewing Study data and total quarter hours are determined.[397] This data appears in Table 7, the key chart setting forth the determinations of relative market value.[398]

243. Dr. Ford frequently refers to reliance on viewing data produced by The Nielsen Company, but he concedes that the MPAA Special Viewing Study is not share data as used in the television advertising market.[399]

244. Regarding advertising value from the MPAA Special Viewing Study, Dr. Ford made no effort to review the underlying information from the study,[400] and when questioned about the

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[393] Tr. 2199-2122 (Ford).

[394] Tr. 2220 (Ford).

[395] R. 2224-2226 (Ford).

[396] Tr. 2229, 2230, 2231 (Ford).

[397] George Ford W.D.T. (PS Exhibit 11) at 20.

[398] George Ford W.D. T. (PS Exhibit 11) at 20 and 42; compare Table 2 to Columns A & B of Table 7; Tr. 2235-2236 (Ford).

[399] Tr. 2236-2238 (Ford).

potential impact on his results of zero viewing of programming in distant markets, he concluded "it won't enter the calculations,[401] and if a majority of stations in the MPAA Special Viewing Study had little or no viewing, Dr. Ford suggested it would not affect this results, "[a] rounding error, maybe."[402]

245. In applying CPM data, Dr. Ford made adjustments and assumptions that gave different price based on day parts, which could have resulted in distortions "[o]f unknown size" in his analysis.[403]

246. Industry data provides different CPMs for cable television as well as broadcast stations. Dr. Ford did not use cable data. CATV systems are "not really in the advertising business."[404]

247. Dr. Ford acknowledged there is a "significant difference" in values for 2004 and 2005, which he attributed primarily to the relative share of viewership from the MPAA Special Viewing Study.[405]

248. Except for JSC, *despite his repeated disavowal that viewership is not value,*[406] *he agreed that viewer share is a good proxy for relative market value*: "In a pinch, you know, if you had no other information, but – except for the fact that we know, in some cases, that viewership is not value."[407] Even as he reiterates "viewership is not value," Dr. Ford argues that large deviations between viewer's share and relative market value "should be carefully scrutinized."[408]

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[400] Tr. 2247 (Ford).

[401] Tr. 2251 (Ford).

[402] Tr. 2252 (Ford).

[403] Tr. 2264 (Ford).

[404] Tr. 2282 (Ford).

[405] Tr. 2286-2287 (Ford); George Ford (PS Exhibit 11) at 39, Table 6.

[406] See n. 414 *supra*.

[407] Tr. 2289 (Ford).

[408] George Ford W.D.T. (PS Exhibit 11) at 41.

249. With respect to Devotional programming, Dr. Ford focused on whether the programming "was bought and sold in the market. I found no evidence to support that. The – the donations to the devotional programming – any charitable donation is not a market value, but if the donation is used to buy time in a market setting, then the amount that is required to buy that time would be market value."[409]

250. Regarding his research on valuation of devotional programming, although Dr. Ford testified he cited "books" and "some Internet searches," other than citation to the prior CRT decision, he identified no source material in written or oral testimony, and acknowledged that his research was not from 2004.[410]

251. In addressing a hypothetical question regarding the value of a program or series that cost $20 million to produce and generated $74 million in advertising, Dr. Ford stated that he rejects any marketplace value for content based on cost ("the cost is not important"), but rather relies for value on advertising revenues ("the $74 million is the relevant number, okay? ... That's the market value of it. Yes. That's what it gets sold for in the market.").[411]

252. Even though Dr. Ford agreed that the donations received by Devotional Claimants bears on the relative value of the programming in the marketplace ("Yes. That's exactly the calculation that's in the testimony. The 74 is what's reported here [indicated], not the 20."[412]), in response to the question, "Have you made an effort to evaluate the universe of Devotional Claimants" respecting donations they receive, he replied "No."[413]

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[409] Tr. 2307-2308 (Ford).

[410] Tr. 2307-2309 (Ford), George Ford W.D.T. (PS Exhibit 11) passim.

[411] Tr. 2311 (Ford).

[412] Tr. 2313 (Ford).

[413] Tr. 2314 (Ford).

253. While further conceding that the value of devotional content is not "zero" ("In this case, does devotional have value? Sure."[414]), for his analysis he only credits devotional content with "that opportunity cost," the payment made by Devotional Claimants to buy time from broadcasters. Nevertheless, his analysis does not attempt to provide any specifics about such opportunity cost.[415]

254. As an alternative approach, Dr. Ford advises, "If the Judges choose to continue to base relative market values on subscriber attitudes obtained from a survey, the Program Suppliers' new survey of subscribers provides better evidence of actual subscriber valuations than does a survey of non-subscribers, a cleaner assessment of what attracts and retains subscribers."[416]

255. Dr. Ford indicates that if survey evidence is to be considered, then the Gruen Survey is preferable to the Bortz Survey. Nevertheless, he dismisses the Gruen Survey's 8% share for Devotional Claimants: "The survey approach also gives Devotionals about an 8% relative market value, which is plainly excessive under a market value standard." [417] He bases this opinion on his advertising study, as he is unaware of any empirical evidence from the Gruen Survey that substantiates that opinion.[418]

12. Criticism of the Ford Advertising/Viewing Methodology

256. Other expert witnesses criticized Dr. Ford's methodological conceptions. Dr. Gregory Crawford, Professor of Economics at the University of Warwick in the United Kingdom, an

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[414] Tr. 2315 (Ford).

[415] George Ford W.D.T. (PS Exhibit 11) passim.

[416] George Ford W.D.T. (PS Exhibit 11) at 46.

[417] George Ford W.D.T. (PS Exhibit 11) at 48.

[418] Tr. 2317 (Ford).

expert economist with experience in the economic analysis of television programming markets, specifically including cable television programming markets,[419] testified:

> Dr. Ford looks at the wrong market. So Dr. Ford's analysis approach is based exclusively on outcomes in the advertising market. Distant broadcast signals, however, are carried in order to generate subscriber payments to cable television systems. This difference between advertising-supported broadcasting and pay-supported cable has a material effect on the relative market values such that using Dr. Ford's approach would lead to incorrect results....
>
> Well, fundamentally, because distant signals are supported in a pay-supported environment, and these effects are the effects that matter, that you're more likely to see special interest programming, particularly if there's greater willingness to pay, in a pay-supported environment as compared to an advertising-supported environment, and that effect is reinforced with this potential bundling effect.[420]

257. Greg Stone, CEO of Greg Stone Media Consulting, and former major market television management executive with Cox Television, explained how television stations use rating to sell advertising and challenged Dr. Ford's hypothetical market thesis, that a local broadcaster would sell advertising in a distant cable market.[421] Mr. Stone compared Dr. Ford's hypothetical market to the low power television ("LPTV") and indicated "[i]n the real world," Dr. Ford's hypotheses would not work out for a cable system or LPTV station seeking to acquire programming and sell ads.[422]

258. Edward Desser, President of Desser Sports Media and an expert on licensing of sports telecasts,[423] testified that Dr. Ford's reliance principally on advertising revenue ignores

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[419] Tr. 2343 (Crawford)

[420] Tr. 2345, 2362 (Crawford).

[421] Greg Stone, W.R.T. (SP Exhibit 50) at 2.

[422] Greg Stone, W.R.T. (SP Exhibit 50) at 3.

[423] Tr. 2592 (Desser).

"subscriber revenues ...the larger source of revenues to programming networks"[424] resulting in the advertising revenue value factor being "[i]nflated on the entertainment side."[425]

259. Regarding distant signals, Mr. Desser explained "if you're a cable operator, an MVPD [Multichannel Video Programming Distributor], your sole source or revenue related to carriage of that distant signal is from subscription fees that your subscribers pay. It has nothing to do with advertising that may appear in that signal."[426]

260. In rebuttal to Dr. Ford and Mr. Homonoff, James Trautman described an analysis he performed of the expenditure and viewing data for 25 cable networks that Mr. Homonoff had selected. Mr. Trautman contrasted estimated results for PS/Other and JSC programming on TBS and TNT and concluded that Dr. Ford's approach would have greatly undervalued sports programming.[427] He concluded that the Ford model "does not predict the value of marketplace transactions effectively," and the Homonoff model does not "really attempt to estimate a value in the distant signal marketplace," so that neither were a more accurate measure of relative marketplace value than the Bortz Survey.[428]

261. CCG expert John Calfee also testified that Dr. Ford's study had little value: "I don't think that is very relevant to the purpose of these proceedings, which is to uncover the preferences of cable system operators, and that's because cable systems derive very little of their revenues from advertising. So their interest is not in attracting advertisers, but in attracting subscribers. I don't think the Ford study gets to that."[429]

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[424] Tr. 2608 (Desser).

[425] Tr. 2614 (Desser).

[426] Tr. 2620 (Desser).

[427] James Trautman, W.R.T. (SP Exhibit 57) at 3-9.

[428] Tr. 2700-2702 (Trautman).

[429] Tr. 3061 (Calfee).

262. Devotional Claimants' expert, Dr. Michael Salinger, rejected the notion that advertising values on television stations can serve as a proxy for cable compulsory royalties:

> Cable operators do not sell advertising on retransmitted broadcast signals. Thus the value of programming to advertisers does not determine the value cable operators received from the programming on distant signals they retransmit. ... Because the value advertisers get from programming is so different from the value cable operators get, transactions between copyright owners and advertisers are not comparable to transactions between copyright owners and cable operators. This lack of comparability is the fundamental flaw in using Dr. Ford's analysis as a foundation for allocating copyright royalties.[430]

[430] Salinger W.R.T. (DC Exhibit 4) at 37-38.

DEVOTIONAL CLAIMANTS
PROPOSED CONCLUSIONS OF LAW

I. OVERVIEW AND CONCLUSIONS REGARDING METHODOLOGIES

1. This proceeding involves the allocation of shares of cable compulsory royalties collected in 2004 and 2005 among several claimant groups organized into four parties. The parties are The Settling Parties ("SP" composed of Joint Sports Claimants ["JSC"], Commercial Television Claimants [CTV], Public Television Claimants [PTV] and Music Claimants [Music]), Program Suppliers [PS], Devotional Claimants [DC] and Canadian Claimants Group [CCG].

2. The standard for allocation of shares to which all parties agree is "relative marketplace value."

3. The royalties are paid by cable systems on a compulsory basis pursuant to a statutory formula that relies on system revenues and carriage of distant signals without regard to the specific makeup of the signal content.

4. The share of each claimant groups must be determined based on record evidence, pursuant to a formula or methodology that is predicated upon relevant data and reliable economic analysis.

5. In the course of the proceeding, the parties presented six separate formulas or methodologies upon which the allocate shares. They are the following:

    a. The Bortz Survey, introduced and sponsored by JSC on behalf of SP, is a survey of cable operators, who are asked to allocate funds among claimants based on a constant sum methodology. The Bortz Survey is supported by SP, including JSC, CTV, PTV

(with an adjustment), Music (although the Bortz Survey does not purport to measure Music's share), and Devotional Claimants.

b. The Waldfogel Regression Analysis, introduced and sponsored by CTV on behalf of SP, purports to corroborate the Bortz Survey results, by establishing a value for minutes of programming in all categories (except Music) based on regression analysis of particularly selected cable system data.

c. The Gruen Survey, introduced and supported by PS, is a survey of cable subscribers, who are asked to allocate funds among claimants based on a constant sum methodology. The Gruen Survey does not propose to measure Music's share.

d. The Ford Viewing-Advertising Analysis, introduced and supported by PS, utilizes i) the MPAA Special Viewing Studies , which incorporate data from The Nielsen Company, and ii) advertising data associated with local broadcast station sales rates. This analysis attempts to establish a hypothetical market value for the categories of programming, except Music.

e. The Music Ratio, introduced by Music, is a formula that determines the relationship between the cost of music license fees as a fraction of all copyrighted license fees associated with syndicated programming.

f. Fee Generation, supported by CCG, is a formula to determine the Canadian share based on amount of money that cable systems pay for the carriage of Canadian signals. The CCG methodology also establishes a division of shares between CCG-represented Canadian station content and U.S.-represented (JSC and PS) Canadian station content.

6. The Bortz Survey and Fee Generation formula were presented and used as a basis for allocation of funds in prior copyright royalty distribution proceedings. The Waldfogel Regression Analysis was derived from Dr. Rosston's Regression Analysis, which was presented in the 1998-1999 proceeding, but deemed suspect and of limited utility. The Gruen Survey and the Ford Viewing-Advertising Study are new in this proceeding, although the MPAA Special Viewing Studies have long been a staple of the royalty distribution proceedings. A variation of the Music Ratio was presented in the 1998-1999 proceeding.

7. Of the six formulas presented, only the Bortz Survey serves as a useful benchmark for allocation of royalties in this proceeding. The Judges determined in the 2000-2003 proceeding that fee generation was *a* methodology for determining the CCG share, but its utility has been materially challenged in this case. The arguments in support of this conclusion will be discussed in the following section, followed by an evaluation of the claims of each of the parties.

8. **The Bortz Survey**. The Bortz Survey has been used by JSC in prior proceedings. In the 1998-99 distribution proceeding, the CARP relied on the Bortz Survey and "thus allocated awards based on Bortz except where it found specific problems with Bortz's methodology." *Program Suppliers v. Librarian of Congress,* 409 F.3d 395, 400 (DC Cir 2005).

9. The methodology, which has not changed for this proceeding, involves a series of questions posed to a representative sample of cable operators involved in the programming decisions for their system, asking the operators how they would allocate money spent for the acquisition of programs from the claimant program categories in this proceeding, except for Music.

10. The Bortz Survey begins with a well-reasoned hypothesis, that the cable operators who buy programming are the right group from whom to solicit views regarding the value of each category of programming.

11. The distant signal marketplace is a mature market, and these cable executives are familiar with the content of programming on the distant signals they import.

12. The data collection uses a constant sum methodology, which is an accepted and reliable method for determining relative valuation.

13. The Bortz questions are open ended and probative, and the method of collecting data meets industry standards.

14. The error rates are within acceptable levels to permit administrative reliance of the results.

15. The Bortz Survey draws a close nexus between the royalties paid with the demand for programming by cable operators.

16. The Bortz Survey excludes consideration of signals that contain only PTV and/or CCG content. Such exclusion may prejudice the results with respect to those parties.

17. The adjustments advanced by Linda McLaughlin on behalf of PTV lack foundation. Ms. McLaughlin's adjustments lack data or analysis regarding the impact her adjustments introduce to the error rates for the other claims. Therefore, the Bortz Adjustment advocated by PTV is not acceptable.

18. The Bortz Survey also excludes results when a Canadian signal is the only distantly retransmitted signal, or when it is paired only with a PTV station. CCG also questioned the distribution of systems in the Bortz Survey, suggesting that the Bortz methodology is biased

in favor of larger systems, which disproportionately prejudices CCG content, because such content is likely to be carried on small systems. The solution offered by CCG is that to get a larger representation of Canadian signals, the Bortz Survey would need to increase the number of systems from approximately 250 to almost 950. There is no evidence in CCG's criticism that the large increase in systems surveyed would result in any different results.

19. While the shares of PTV and CCG merit some adjustment, the Bortz Survey is the best evidence in this proceeding for allocation of shares.

20. **The Waldfogel Regression Analysis**. The Waldfogel Regression Analysis is an econometric analysis, which uses as the dependant variable the cable operator royalty payments and, as independent variables, the number of minutes of programming from each claimant group (except Music), as well as cable system data, including number of subscribers from previous accounting period, number of activated channels, average household income in DMA, count of local channels and totally royalty fee paid by cable systems.

21. The Waldfogel Regression Analysis is primarily a time-based analysis.

22. As established by the critiques of Dr. Michael Salinger and Dr. George Ford, the coefficients in the Waldfogel Regression Analysis are very imprecise, resulting in wide disparities in valuations between for 2004 and 2005 for the same party.

23. Applying the imputed values based on imprecise coefficients results in very unstable and unreliable results. For example, the discrepancy between 2004 and 2005 for Program Suppliers was -71% (dropping from 35.4% in 2004 to 10.2% in 2005). The discrepancy for PTV was 7303% (0.2% in 2004 to 12.9% in 2005), 127% for CTV (12.9% in 2004 to 29.2% in 2005) and -38% for CTV (4.1% in 2004 and 2.5% in 2005). The only forecast that was

nearly precise was for JSC (-5% from 47.4% [2004] to 45.1% [2005]). There was no useful data for Devotional Claimants.

24. The range of potential valuation for all claimants was so broad as to provide no useful guidance.

25. The instability across the two years of this proceeding was contrary to the stated position SP, which argued that there were no material changes in the marketplace since 1999 to support a finding of changed circumstances. If the Judges were to rely upon the Waldfogel Regression Analysis, there would be no expectation of consistent results from year to year.

26. Furthermore, Dr. Waldfogel's analysis suffered from the impact of omitted variables (such as data regarding relevant cable networks on cable systems) that might have assisted in explaining the results.

27. Dr. Salinger also established that the Waldfogel Regression Analysis does not explain what Dr. Waldfogel believed it did. Rather than providing useful insight into the relative value of claimant categories based on minutes or time on distant signals, the Waldfogel Regression Analysis is a poor substitute for the royalty formula, measuring distant signal equivalents and numbers of subscribers.

28. In the 1998-1999 CARP proceeding, CTV introduced the Rosston Regression Analysis. Dr. Waldfogel indicated his analysis was derived from Dr. Rosston's. In the 1998-99 proceeding, the CARP concluded that Dr. Rosston's regression analyses was unstable and subject to unacceptable variability (wide coefficient levels). The Waldfogel Regression Analysis suggests that these flaws may be inherent in the methodology and it cannot be relied upon as a tool for share allocation.

29. **The Gruen Survey**. The Gruen Survey is introduced for the first time in this proceeding. The methodology involves a series of questions posed to a representative sample of cable subscribers, asking these subscribers how they value the categories of programming in this proceeding.

30. The Gruen Survey begins with the hypothesis that cable operators rely on cable subscribers for program preferences and thus, a survey of cable subscribers is more suited to answering the ultimate question regarding the relative marketplace value of the claimant categories.

31. However, expert witnesses established that cable operators and cable subscribers may have different interests in the selection of programming that can result in different determinations of relative marketplace value.

32. Furthermore, it is the cable operator, not the cable subscriber, who is responsible for the selection of distant signals to carry on a system, and it is the cable operator, not the cable subscriber, who negotiates with copyright owners for right to carry other programming.

33. Therefore, while a properly designed and executed survey of cable subscribers may provide useful information that can corroborate the Bortz Survey results or assist in modest adjustment of those results, cable operators remain the appropriate group to survey.

34. The Bortz Survey is superior methodology to the Gruen Survey in answering the essential question in this proceeding.

35. As a new survey, the Gruen Survey demonstrated a number of design flaws that limited the extent to which the results can be relied upon. In particular, the use of particular program examples, the failure to record and evaluate gender, and the failure to qualify whether

answers were for an individual or household, may have biased or impacted on results in a ways not evaluated. As a result, the Gruen Survey cannot be used as a basis for determining relative marketplace value; however, its results may provide corroborative support for other evidence, such as the Bortz Survey, and may be useful in making limited adjustments to the Bortz Survey results.

36. In the future, with design changes, the Gruen Survey may provide even more useful information to help inform allocation of shares.

37. **The Ford Advertising-Viewing Methodology**. The Ford Advertising-Viewing Methodology has not been presented in prior distribution proceedings; however, the MPAA Viewing Study was material evidence in many earlier CRT and CARP decisions.

38. As was recognized by the CARP and Librarian in the 1998-1999 decision, the MPAA Viewing Study was not as focused as the Bortz Survey in relative market value, and the decision to place limited primary reliance on Bortz Survey was the continuation of a trend dating back a number of years.

39. In this proceeding, the Nielsen Company representative expressly acknowledged that "viewing is not value" for purpose of these proceedings. Tr. 1988-1989 (Lindstrom).

40. The Ford Advertising-Viewing Methodology introduced by PS is a materially flawed and unreliable study that cannot be used for allocation of shares. Most fundamentally, the benchmark chosen by this study, the buying and selling of programming in the broadcast marketplace, is not a valid proxy for the value of program to cable operators.

41. The weight of opinion of experts and the record support the conclusion that since cable systems cannot advertise on distantly retransmitted signals, use of advertising sold by local broadcasters is an unreliable benchmark for value in this proceeding.

42. Furthermore, the custom ordered viewing sample relied upon by Dr. Ford, which resulted from The Nielsen Company's "slicing and dicing" of Nielsen data pursuant to the MPAA Special Viewing Study Methodology is not peer reviewed, nor accredited.

43. There are numerous other flaws with this methodology to render it useless for purposes of establishing relative market value of the claimant categories.

44. The viewing data collected by Nielsen involves too small a sampling to be reliable.

45. Dr. Ford's analysis did not assess the impact of "zero" viewing of programs, nor the impact of as much as 20%-25% of programs receiving a zero viewing allocation. Other serious methodological flaws in the collection of data, including satellite subscribers counted as cable subscribers and households from the wrong markets being included in results, raised reasonable questions about the reliability of the viewing data results.

46. Dr. George Ford, who presented the study, failed to provide a reasoned and coherent explanation of the rationale for the study.

47. Dr. Ford's analysis was predicated upon a number of assumptions that undercut the validity of the results, including that the advertising value of programming imported from a distant market had meaning to cable operators when they delivered that signal to their subscribers. He failed to establish a reasoned connection between that thesis and the basis upon which to allocate royalties.

48. Dr. Ford used MPAA Special Viewing Study results rather than Nielsen ratings information because the latter was not made available to him.

49. Dr. Ford's analysis depended on advertising rates for programs in the local market, without determining the reliability of such rates in a distant cable market.

50. Dr. Ford made numerous adjustments, such as for day parts, gender, live sporting events, PTV and Devotional (neither of which rely on advertising); yet he failed to show what errors such adjustments might have introduced into his methodology and results.

51. Dr. Ford was confused about who he considered the buyers in the target (distant) market, whether it was cable systems or broadcasters, and went so far as to suggest the cable system was irrelevant to the analysis. Tr. 2189 (Ford).

52. **Music Ratio**. The Music Claimants value is not measured by the Bortz Survey, so Music proposes rely on the so-called "Music Ratio," a ratio of value of music license fees as a fraction of total syndicated program production costs.

53. While this ratio has probative value when the data is properly developed, the record in this proceeding fails to establish that the data has been properly developed. Music's experts relied on insufficient, and in some instances inaccurate, data to support its analysis.

54. For example, it used estimates of music license fees based on amounts negotiated by TMLC and PROs, not actual fees. Due to the fact that Music's expert was unable to obtain data on direct fees and per program license fees, he used blanket license fees as a proxy for music fees. However, the blanket fee valuation inflated the revenue for music and distorted the results of the analysis.

55. The data relied upon did not contain actual information regarding programming expenses.

56. As a result, the formula as presented required Music to make numerous assumptions and draw conclusions that complicated the analysis and made it impossible to determine the effect of errors that might be caused by each assumption or estimated data.

57. The Music Claimants' expert also made contradictory assumptions about the treatment of WGN within the formula, treating the signal alternatively as a WB network affiliate and as an independent station, without analyzing the impact of each alternating treatment on the bottom line.

58. PS introduced evidence from Dr. Woodbury who relied upon a similar approach to Dr. George Schink. In the 1998-199 CARP case, the Panel used the Schink analysis as floor for the Music share. *Final Order in Docket No. 2001-8 CARP CD 98-99*, 69 FR 3606, 3612 (Jan. 26, 2004).

59. While the Music Ratio remains a viable concept, it has not been executed sufficiently effectively to base allocation of the Music award in this proceeding.

60. **Fees Generation**. The CCG Fees Generation ("fees gen") formula is a methodology used in past proceedings. However, it came under new scrutiny in this proceeding.

61. Although the Judges recently concluded to use the fee generation as a methodology to resolve shares in the 2000-2003 proceeding, the use of the formula in that case was dictated in part as a result of stipulations entered into by the parties before the hearing commenced. As the Judges explained:

> Once again, given that we are confined to an either/or choice in this proceeding, we do not opine as to whether the 1998-99 CARP's fee generation approach, a fee generation in general, is the best means of determining *the* relative marketplace value of the Canadian Claimants' programming. We only conclude, for purposes of this proceeding, that the 1998-99 CARP's fee generation approach has been sufficiently vetted in both the 1990-92 and 1998-99 proceedings that it deserves deference. *Distribution Order In the Matter of Distribution of the 2000-2003 Cable Royalty Funds*, Docket No. 2008-CRB CD 2000-2003 (March 3, 2010) at 26.

62. In the 2000-2003 proceeding, the Judges had no alternative methodology to compare to fee generation, and thus were faced with limited record. In fact, when commenting upon the option of an award equal to the average of the1998-99 awards or fee generation, the Judges noted, "Neither of these choices can be *the* relative marketplace value for Canadian programming during 2000-2003." Id at 15.

63. In the 2000-2003 case, the Judges explained they were not offered "other methods or other evidence that best represent *the* relative marketplace value of the Canadian Claimants' programming as well as the programming of other claimant groups." Therefore the Judges stated they "do not opine as to what may be the best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings." Id. at 18.

64. In light of the fact that the Settling Parties in that case failed to meet a substantial burden of proof "that the fee generation approach is so arbitrary, so meritless, that it is without probative value with respect to determining the Canadian Claimants' royalty share," *Id.* at 24-25, the Judges accorded deference to the prior CARP decisions regarding fees gen.

65. However, in this proceeding, alternative methodologies have been presented so that fee generation as a methodology may be considered on the merits of the current record.

66. The record evidence shows that the fee generation is materially flawed. The origin of the formula comes from Cable Data Corporation ("CDC"), a private company that records data submitted to the Copyright Office in the semi-annual statements of accounts filed by cable systems. CDC developed the fees generation formula as a way of attributing fees to particular signals, but there is no statutory requirement for such attribution.

67. Over the years, the CDC formulation has been modified, but there is a fundamental problem with it, in that fees may be due from a system regardless of the distant signals it carries. In fact, the system that is responsible for the highest amount of "fees gen" value for CCG in this proceeding would be obligated to pay those royalties regardless whether the Canadian station is carried or not. Tr. 2938-2942 (Martin); SP Exhibits 58-59.

68. Neither CDC, nor CCG, made any effort to determine whether the dropping of the Canadian signal made any difference in the payments made by cable systems.

69. Moreover, the Bortz Survey and Gruen Surveys do measure the relative marketplace value for the CCG content. While there are design flaws in the Bortz Survey previously noted regarding the handling of CCG content, and the Gruen Survey in other respects, such flaws do not render these surveys without some utility in evaluating CCG's relative marketplace value.

70. The Bortz Survey share should be viewed as a floor for the value CCG content. Consideration can also be given to a limited degree to the Gruen Survey and to the fee generation methodology.

71. The CCG Ringold study shows that Canadian signals consist of approximately 60% CCG content, with the remainder split between JSC and PS. Therefore, any allocation to CCG

based on the value of Canadian content must be reduced by 40% and that share allocated to these other parties.

II. ZONE OF REASONABLENESS IN ALLOCATING SHARES

72. As set forth in the Copyright Act, the decisions of the Copyright Royalty Board shall be supported by written record. 17 U.S.C. §803(c)(3).

73. In the past, the shares of the parties have been drawn to four decimal points. The allocation of shares in this manner suggests a level of precision in the allocation of shares that is not borne out by reality.

74. The surveys and other methodologies generally make allocations in whole numbers or to the first decimal. Averaging over years can add additional decimal points, but such averaging is in itself a reflection that the results do not support wide variation between years.

75. Indeed, when a methodology calculates party share differences annually, such calculation is more an estimation of relative market value rather than a mathematically precise result. Indeed, none of the parties suggests that there is any material difference in share allocations between 2004 and 2005 that is supportable by record evidence.

76. As a result, the shares should be averaged for the two years and awarded on the basis that such averaging constitutes a finding of relative marketplace value within the "zone of reasonableness" award, as permitted by *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F. 2d 922 (D.C.Cir. 1985).

77. In addition, because the Bortz Survey constitutes the best evidence in the record, for those parties (all except Music) whose shares are measured by the Bortz Survey, the two year average range reflected by the 95% confidence levels should reflect the high and low

watermarks for the shares, adjusted to take into account the Music share and PTV and CCG adjustments based on other record evidence.

III. ALLOCATION OF SHARES AMONG THE PARTIES

78. The Settling Parties. The SP seek a share based on the Bortz Survey of approximately 60%. However, since the Bortz Survey does not allocate any share for Music and since the Bortz Survey understates the PTV share, those must be separately determined.

79. First, as to **Music** Claimants, the Music Ratio as calculated by Music is not a reliable estimate of value. The data in the Music Ratio as advanced by SP tends to overstate the value of Music in each year, with an average of 4.8%. Dr. Woodbury's estimation of value is more conservative and should serve as floor in this case. The Woodbury formula sets the floor for the Music share at 2%.

80. In the 1998-99 proceeding, the Schink formula produced an estimated share based on the Music Ratio of 2.3%, which suggests a decline since then based on Dr. Woodbury's work. In the 1998-99 proceeding, Music was awarded 4%. There is no evidence of any change in circumstances that suggest that a material increase from the prior award is justified. Based on the record evidence, a Music share of 3% is within a zone of reasonableness.

81. Second, as to PTV, its Bortz share, which averages 3.6% for the two years, should be viewed as a floor for its award. PTV failed to present sufficient evidence in the record to support the adjustments recommended by Linda McLaughlin.

82. The Bortz survey shows a range for PTV of 2.6%-4.4% for 2004, and 2.8%-4.6% for 2005. Based on the Gruen Survey, where cable subscribers gave PTV a share in the 8% range, the

highest end of the Bortz range would be appropriate. The 4.4% and 4.6% (averaged at 4.5%) should be viewed as a ceiling for PTV.

83. The PTV award should be reduced to account for Music's share and set at 4.4%.

84. **Remaining SP shares**. JSC and CTV seek awards based on their Bortz shares. There is no reason to make any adjustment based on the Waldfogel Regression Analysis, Ford Advertising-Viewing Methodology or Fee Generation.

85. Although PS attempted to reduce the value of JSC's share based on the migration of sports off distant signals, no reliable quantification of such change was established.

86. Further, it is concluded that the Bortz Survey does take into account the actual availability of programming on distant channels. So that to whatever degree migration of sports off of distant signals impacted the JSC shares, the Bortz Survey has accounted for the migration of content.

87. Regarding the JSC and CTV arguments regarding the boosting of their shares and the reductions of shares for PS and Devotionals based on noncompensable content on WGN, the showings made in this proceeding do not offer any reasonable basis to make such an adjustment. The issue of noncompensable content is certainly not new in the royalty proceedings, and like the effort made in the 1998-1999 proceeding, this one too falls short.

88. As to PS, there is no way to determine that the survey respondents in Bortz did not take the blackout practices of WGN into account in registering their valuation for the program category. Bortz did not take this issue into account in framing its survey, and does not have a methodological fix for the problem, to whatever extent it might exist.

89. As was noted in the 1998-99 decision, this issue equates time with value, a concept long rejected in these proceedings.

90. As to the Devotional portion, there is even less evidence of an impact with respect to the Bortz Survey results. Mr. Trautman conceded that some respondents whose only signal is WGN gave Devotional content a "zero" value, making further reduction of shares inappropriate and unnecessary. Tr. 194-196 (Trautman).

91. The degree to which Bortz respondents may have credited JSC for non-team sports content was a contested issue. Given the nature of the Bortz questionnaire, it is possible that some respondents may have overstated their valuation for JSC rather than PS. However, the degree to which any confusion affected the survey results in not evident from the record. As long as Bortz remains the best evidence in these proceedings, clarification of that issue would be desirable in the future.

92. Based on the standard deviation ranges under the Bortz Survey, and after taking into account the Music Claimants share, the reasonable range of JSC and CTV shares are 46%-54%.

93. Collectively, SP share for the basic fund is 56%, 53.9% of the 3.75% fund and 3% of the Syndex fund.

94. **Program Suppliers**. The Program Suppliers presented evidence in support of two studies, the Ford Advertising-Viewing Methodology and the Gruen Survey. As noted, the Ford Methodology has material flaws, which make it not a useful tool for determining relative marketplace value. The MPAA Viewing Study was supplanted by the Bortz Survey in the 1998-1999 proceeding as best evidence, and nothing in this proceeding has changed that analysis.

95. Indeed, Paul Lindstrom, a highly experienced witness in royalty distribution proceedings, expressly disavowed any connection between viewing and value in this proceeding, an

important concession that removes the last barrier to the Bortz Survey's dominance as the best evidence. .

96. The Gruen Study has numerous design flaws which make it of limited utility in this proceeding. At most, it can be used as corroboration for the Bortz Survey results, with the understanding that at some point in the future, a subscriber survey may be relied upon to provide more extensive corroboration of the Bortz Survey results. As in the case of PTV and CCG, it can offer some guidance regarding the high-low range of valuation within the Bortz confidence levels.

97. After accounting for Music, PS has a Bortz share in the range of 32-40% for each year.

98. Taking into account the Music shares, PS share is 36% of the Basic Fund, 37.7% of the 3.75 fund and 97% of the Syndex fund.

99. Devotional Claimants. The Devotional Claimants did not present their own economic survey; rather, they supported the Bortz Survey. Their substantive evidence supported the fact that religious programming occupies a recognized programming niche that supports the Bortz Survey results.

100. Although the Gruen Survey has design flaws that render it of limited utility in this proceeding, because the Gruen Survey was prepared without any involvement by the Devotional Claimants, it results are noteworthy, since the Devotional Claimants achieved results similar to the Bortz Survey (7.75% compared to 7.2%, average for the two years).

101. As noted above, there is no reduction in the Bortz share based on so-called noncompensated programming on WGN.

102. The Devotional Claimants last litigated Phase I award was in the 1990-1992 proceeding, and its share was allocated primarily based on Nielsen viewing data.

103. The Devotional Claimants assert they are entitled to a substantial repositioning of share, based on the changes in its category in the Bortz Survey.

104. The historical data for the Bortz Survey, since 1992, shows a substantial increase in share for the Devotional Claimants, almost a doubling of the average Bortz shares. Devotional Claimants have increased in the Bortz Survey results by 85% since 1990-1992, and by about 30% since the 1998-1999 case, a proceeding in which they did not participate.

105. As noted by the author of the Bortz Survey, such increases represent a "disproportionate" improvement compared to the other parties. Tr. 188 (Trautman).

106. The Devotional Claimants Bortz shares average 7%, after taking Music into consideration, and a range of 5.8%-8.5% is reasonable.

107. Taking into account the Music share, Devotionals share of the basic fund is 7% and 7.3% of the 3.75% fund. Devotional Claimants seek no share of the Syndex fund.

108. Canadian Claimants. The CCG case relies on the fee generation methodology.

109. In the 2000-2003 Proceeding, the Judge concluded that fee generation was *a* methodology for allocating royalties; however, it has material flaws.

110. In the 2000-2003 Proceeding, the parties stipulated to the way in which they wished the CRB to consider the claims. The Settling Parties in that case failed to establish that fee generation was not incapable of providing any basis for allocating funds, and the CRB gave deference to the decision of the Librarian in the 1998-1999 case.

111. However, the 2000-2003 ruling does not prevent the CRB from reconsidering the relevance of fee gen as a methodology for allocating CCG's shares, or any party's share.

112. In this proceeding, unlike the 2000-2003 case, alternative methodologies were presented that offered a way to place the CCG claim in perspective.

113. Furthermore, evidence was presented, as noted above, that rendered the fee generation approach untrustworthy.

114. Despite the 2000-2003 ruling to grant deference to the methodology for purposes of that case, the record evidence in this case does not support any award based on fee gen.

115. Under the Bortz methodology, CCG shares ranged from 0-0.5%. Under the Gruen methodology, the CCG shares ranged from 0.77-1.77.

116. The CCG witnesses established there were design flaws in the Bortz survey as regards CCG content.

117. As noted above, the adjustment made to the Bortz Survey results by Linda McLaughlin lacked support of a survey design expert.

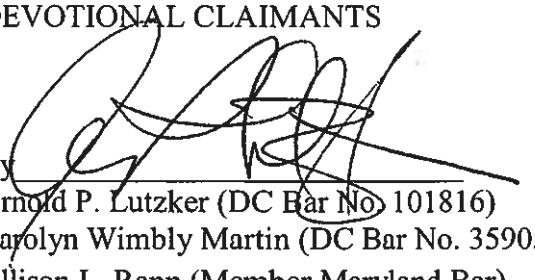
118. With the Bortz confidence range of the Bortz shares as a base and considering the Gruen Survey results, an award of 1% is reasonable for CCG for the basic and 1.1% of the 3.75% funds. CCG has no claim in the Syndex fund.

IV. SUMMARY OF FINAL ALLOCATION OF SHARES

Party	Basic	3.75	Syndex
Settling Parties	**56**	**53.9**	**3**
Program Suppliers	**36**	**37.7**	**97**
Devotional Claimants	**7**	**7.3**	**0**
Canadian Claimants	**1**	**1.1**	**0**

Respectfully Submitted,

DEVOTIONAL CLAIMANTS



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Dated: March 17, 2010

CERTIFICATE OF SERVICE

I, Arnold P. Lutzker, hereby certify that a copy of the foregoing "Devotional Claimants Proposed Findings of Fact and Conclusions of Law" was emailed and hand delivered or sent via overnight delivery postage prepaid, as indicated, this 17th day of March, 2010 to the following:

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