Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

SETTLING PARTIES' ERRATA
<u>TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>

Joint Sports Claimants, Commercial Television Claimants, Public Television Claimants, and Music Claimants (collectively, the "Settling Parties") hereby file these errata to their Proposed Findings of Fact and Conclusions of Law, originally filed with the Copyright Royalty Judges ("Judges") on March 17, 2010. These errata correct citations to the record, citations to law, typographical errors and chart and table headings. In addition, a small number of inadvertently omitted items have been included as originally intended by the parties. These items are listed in the table below. Settling Parties respectfully assert that these changes will not result in prejudice to the other parties. Furthermore, Settling Parties note that a copy of the corrected Proposed Findings of Fact and Conclusions of Law were provided the other parties on March 23, 2010.

Attached as Appendix 1 are lined versions of the corrected pages to the Introduction and Summary and Proposed Findings of Fact and Conclusions of Law that identify the changes inserted therein. Separately bound, complete corrected copies of the Introduction and Summary and Proposed Findings of Fact and Conclusions of Law are also submitted herewith. The cover page of the corrected version is marked **"CORRECTED"** to identify this version. The Settling Parties apologize for any inconvenience caused by these corrections.

<u>Inadvertently Omitted Items</u>

Errata	Location in Proposed Findings
"Dr. Ducey and Cornerstone" *revised to* "CTV expert witness Dr. Richard Ducey, working with Cornerstone Research,"	¶152
"reflecting both what type and how much programming was purchased," *added after* "regression"	¶157
"Mr. Seth Saltzman, who administers ASCAP's repertoire" *revised to* "Mr. Seth Saltzman, who is Senior Vice President of Member Management in the Performing Rights Group of ASCAP"	¶351
"but excluded music license fees and broadcast rights payments for Big 3 network programming" *added after* "affiliates"	¶376
"and included Big 3 network payments even though not compensable in this proceeding" *added after* "signal markets"	¶394
"testified that inclusion of the Big 3 music license fees and broadcast rights payments understates the music ratio. He" *added after* "Woodbury" *and before* "admitted"	¶402
"For the same reasons, the Devotional Claimants' 2004-05 evidence fails to provide any basis for a change in the award made by the 1990-92 CARP." *added* at the end of the paragraph.	¶673
Inadvertently omitted citations to the record have been added to the following **footnotes** in the corrected Proposed Findings of Fact	72, 316, 318, 526, 534, 692, 765, 767, 802, 997, 1001, 1027, 1035, 1192-95, 1197-99, 1245, 1317, 1328, 1333-34, 1401, 1500-01, 1506.
Inadvertently omitted citations to the Proposed Findings of Fact have been added to the following **pages** in the corrected Introduction and Summary	14, 17, 18, 20, 21, 25, 28, 31, 32, 38, 39, 41-43 45, 48, 49, 53, 56
Inadvertently omitted citations to the Proposed Findings of Fact have been added to the following **pages** in the corrected Proposed Conclusions of Law	9, 15

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Dated: March 24, 2010

CERTIFICATE OF SERVICE
Docket. No. 2007-3 CRB CD 2004-2005

I hereby certify that a copy of the foregoing Settling Parties' Errata to Proposed Findings of Fact and Conclusions of Law was sent via electronic mail and delivered via personal courier service on March 24, 2010 to the following parties:

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APPENDIX 1

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

INTRODUCTION AND SUMMARY

The purpose of this proceeding is to allocate approximately $300 million in 2004-05 Section 111 cable royalties among four claimant groups -- the Settling Parties, Program Suppliers, Canadians and Devotionals. There is no dispute that, as in the prior three Phase I proceedings, the sole distribution criterion is "relative marketplace value." *See* SP PFOF ¶¶52-~~56 *infra*.~~56. The central issue is whether the studies offered by the Settling Parties, the Program Suppliers or the Canadians (the Devotionals offered no study) provide the best estimates of that value. This issue is virtually identical to the issue that occupied the attention of the CARP in the 1998-99 distribution proceeding and produced a 20,000 page record.

The Settling Parties seek an award based upon the results of (a) the 2004-05 Bortz constant sum surveys of cable operator valuations of distant signal non-network programming, as adjusted to account for issues raised in the 1998-99 CARP Report, and (b) the 2004-05 Zarakas study of the value of music in programming, which also is intended to respond to issues raised by the 1998-99 CARP. The Settling Parties rely upon the 2004-05 Waldfogel regression analysis (and other record evidence) as providing corroboration of the 2004-05 Bortz results in the same manner that the 1998-99 CARP relied upon the comparable Rosston regression analysis to corroborate the 1998-99 Bortz results. The Settling Parties strongly oppose use of fee generation and each of the studies sponsored by Program Suppliers to determine the 2004-05 royalty awards.

For the reasons set forth below, the Settling Parties believe the record in this proceeding and applicable precedent establish that they are entitled to no less than the following 2004-05 royalty shares:[1]

Settling Parties'
Proposed 2004-05
Cable Royalty Awards

[1] *See* 17 U.S.C. § 803(a) (1) (requiring the Judges to act "on the basis" of "a written record" and "prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with [certain decisions of the Register] . . . , and decisions of the court of appeals . . ."); *National Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 772 F.2d 922, 932 (D.C. Cir. 1985) (change in prior award may be supported by evidence showing changed circumstances or evidence tending to show that past conclusions were incorrect).

Year	Basic Fund (%)	3.75% Fund (%)	Syndex Fund (%)
2004	**62.5**	**59.7**	**5.2**
2005	**61.7**	**58.8**	**4.6**

The specific calculations underlying the above awards, and proposed awards for other parties, are set forth in the Appendix. The Settling Parties have agreed among themselves on how to divide the royalty shares that the Judges allocate to them. By way of comparison, the individual awards that the Settling Parties received in the 1998-99 proceeding totaled as follows:

Settling Parties'
1998-99 Cable Royalty Awards

Year	Basic Fund (%)	3.75% Fund (%)	Syndex Fund (%)
1998	**59.2**	**57.8**	**4.0**
1999	**60.9**	**59.6**	**4.0**

As this suggests, Settling Parties believe that the record of this proceeding warrants a slight increase from the royalty awards they received in the 1998-99 proceeding.

based upon the relative values of those categories in attracting and retaining subscribers to their cable systems. *See* Bortz Study (SP. Ex. 2) at 1-2; SP PFOF ¶¶86-95, 131. The results of the Bortz surveys over twenty-five years also have remained generally consistent and have repeatedly demonstrated that time-based "tonnage" and "viewing" shares do not equate to relative market value. These results are set forth in the Bortz Study (SP Ex. 2) at 23 and are reprinted in SP PFOF ¶131.

B. The Parties Have Presented A Substantial Amount Of Evidence Over Several Distribution Proceedings In Support Of A Constant Sum Methodology In General, And The Bortz Surveys In Particular, As Providing The Best Approach To Determining Relative Market Value.

JSC and other claimants have presented evidence in the various cable royalty distribution proceedings from numerous survey experts, market researchers, economists, statisticians, valuation experts and cable industry executives concerning the Bortz constant sum surveys of cable operators. That evidence has demonstrated that the constant sum approach is the best available method for determining the relative market values of the different categories of distant signal non-network programming; the Bortz surveys meet the professional standards of reliable and valid survey research; and the Bortz survey results accord with marketplace realities. *See* SP PFOF ¶¶63-85, 96-125.

All the programming claimants (JSC, CTV, PTV, Canadians, Devotionals and Program Suppliers) have thus come to rely upon the constant sum survey approach in the Section 111 distribution proceedings. Even the Program Suppliers, for the first time in this proceeding, now support use of constant sum surveys -- although they have advocated a methodologically-deficient survey of cable subscribers rather than cable operators. All the programming claimants, with the exception of Program Suppliers and Canadians, support the Bortz constant sum surveys of cable operators in this proceeding. While the Canadians use a combination of their constant sum survey results and fee generation, their one survey that followed the Bortz approach (and compared programming on Canadian signals with programming on U.S. signals) led to results consistent with the Bortz results. *See* SP PFOF ¶¶63, 302-03, 482, 650.

C. The CRT and CARPs Increasingly Accorded Greater Weight To The Bortz Constant Sum Survey Results.

In the 1983 proceeding, the CRT listed certain concerns with the Bortz and CTV constant sum surveys that precluded the CRT from according those surveys greater weight than the Nielsen viewing data sponsored by the Program Suppliers. *See* 1983 CRT Determination, 51 Fed. Reg. at 12808-10. JSC and others sought to address those concerns in the 1989 proceeding. Based on the record in the 1989 proceeding, the CRT increased the weight that had been accorded the cable operator surveys (and decreased the weight that had been accorded the Nielsen studies) in prior proceedings. *See* 1989 CRT Determination, 57 Fed. Reg. at 15302 (referring to the "new weight" accorded the Bortz results). The CRT found the "Bortz survey to be valid, and a key part of our determination." *Id.* at 15301. Where the Bortz results were "corroborated" with other evidence, the CRT accorded those results "substantial weight." *Id.* The CRT, however, expressed certain "concerns" with the survey that "affected [its] allocation." *Id.*

In the 1990-92 proceeding, the witnesses presented by JSC and other parties sought to address the 1989 CRT's concerns. After devoting more than forty pages of its report in the 1990-92 proceeding to analyzing the Bortz and Nielsen studies, the CARP agreed that the weight accorded the Bortz surveys should be increased further (and the weight accorded the Nielsen studies should again be decreased) – although the CARP split on how much weight was appropriate.

The CARP majority found that the Bortz study is "well designed~~," 1990-92 CARP Report at 66,~~" and did not suggest any changes in the survey methodology. Report of the Copyright Arbitration Panel in Docket No. 94-3 CARP CD 90-92 at 66 (May 31, 1996) ("1990-92 CARP Report"). They also found that the Bortz survey "focused more directly than any other evidence to the issue presented: relative market value," *id.* at 65, explaining that:

> The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the

distribution proceedings have offered testimony demonstrating that the Bortz surveys are properly designed and executed. *See* SP PFOF ¶¶63-85.

In this proceeding, Mr. Trautman of Bortz Media testified that the 2004-05 Bortz surveys followed the same procedures, and met the same high standards, as the 1998-99 Bortz surveys upon which the 1998-99 CARP relied. Furthermore, Dr. Gregory Duncan of the University of California at Berkeley, a qualified expert in survey research, *see* Tr. 2502 (Duncan), determined that the conclusions of the 1998-99 CARP concerning, and those of various survey experts who have evaluated, the prior Bortz surveys apply equally to the 2004-05 Bortz surveys. Dr. Duncan explained that the 2004-05 surveys are "methodologically sound;" they are "based on sound principles and tested methods" and were "conducted in such a way that [their] results can be deemed reliable." Duncan WDT (SP Ex. 1) at 11. Dr. Duncan's testimony and other record evidence (including the testimony of Mr. Trautman of Bortz Media, who has substantial survey experience involving the cable industry) demonstrate that the 2004-05 Bortz surveys followed the same high professional standards as the 1998-99 surveys to which the 1998-99 CARP accorded determinative weight. *See* SP PFOF ¶¶~~98~~86-125.

The Program Suppliers did not present any witness to rebut Dr. Duncan's testimony supporting the Bortz survey methodology; nor did they present anyone qualified as a survey expert to testify concerning that methodology. While the Program Suppliers offered the same criticisms of the Bortz methodology that they have offered (and which were rejected) in prior proceedings (such as those relating to program categorization), they failed to provide empirical support for any of those criticisms (as instructed to do by the Register and Librarian in the 1998-99 proceeding). *See infra* pages 20-~~28~~29 (discussing criticisms); SP PFOF ¶¶267-72.

The Canadians' witnesses offered in this proceeding some of the same criticisms of the Bortz methodology that they offered in prior proceedings. As discussed below, these criticisms also are unsupported by any empirical evidence and are unfounded. While the 1998-99 CARP did not use the Bortz surveys to determine the Canadians' award, the record in this proceeding provides a stronger basis than any prior record for accepting the Bortz methodology (rather than fee generation) to set the Canadians' 2004-05 award. *See* SP PFOF ¶¶297-308, 325-36, 570-671.

In this proceeding, CTV witness Dr. Joel Waldfogel, an economist at the Wharton School, conducted a regression analysis that is analogous to the Rosston regression analysis, in which he addressed several of the concerns that had been raised about the Rosston study. The Waldfogel regression considers the distant signal purchasing behavior of cable operators in 2004-05. Because of certain arbitrary features of the royalty structure and the fact that distant signal programs are purchased in bundles, it is impossible to observe directly the relative prices paid for various categories of distant signal programming. But cable operators make economic choices when they choose particular distant signals and pay royalties for them. Dr. Waldfogel's regression analysis, using extensive data showing what programs were actually carried and what royalty fees were actually paid by each Form 3 cable operator, provides useful information about the relative values of different types of distant signal programming to cable operators in 2004-05. SP PFOF ¶¶134-170 The results of Dr. Waldfogel's study of cable operators' economic behavior, after adjustments to allow an apples-to-apples comparison, strongly corroborate the relative value shares measured by the Bortz surveys for all categories (other than the Devotionals) -- as was the case with the Rosston 1998-99 regression analysis. *See* SP PFOF ¶¶171-181; 1998-99 CARP Report at 53.

Dr. Waldfogel's comparison was as follows (SP PFOF ¶179):

Implied Royalty Shares Using All Minutes Compared to Augmented Bortz Shares 2004 – 2005

Claimant Group	Estimated Royalty Shares from Regression [1]	Augmented Bortz Share [2]	
		2004	2005
Program Suppliers	32.15%	35.40%	36.20%
Sports	38.73%	32.40%	35.50%
Commercial TV	20.20%	17.90%	14.20%
Public Broadcasting	6.01%	6.20%	6.05%
Devotional	0.00%	7.60%	6.30%
Canadian	2.92%	0.50%	1.65%

Note:
[1] To be comparable to Bortz shares, royalty shares are calculated using all WGNA minutes but omitting Low Power and
[2] Bortz shares taken from the 2009 Testimony of Linda McLaughlin. Mid-points of ranges used for Canadian and PTV.
Source: Waldfogel WDT (SP Ex. 18) at 14.

Program Suppliers' witness Dr. George Ford and Devotionals' witness Dr. Michael Salinger presented rebuttal testimony attacking the Waldfogel regression analysis. Both asserted that distant signal royalties are affected by the statutory royalty formula rather than market decisions, and that the regression study's results were imprecise and showed variation when subgroups of the data were analyzed separately. *See* SP PFOF ¶¶~~181~~182-188. The 1998-99 CARP considered similar criticisms of the Rosston regression analysis, but nonetheless found it to be "useful as a confirmatory or corroborative study" that supported reliance on the Bortz survey evidence (at least for the major program categories). 1998-99 CARP Report. at 50; *see also id.* at 48 (1998-99 shares for Canadians and Devotionals were zero). The same conclusion should apply here.

2. Homonoff/Trautman Analysis of Cable Network Marketplace.

Program Suppliers' witness Howard Homonoff, a Director in the Entertainment, Media and Communications Practice of PricewaterhouseCoopers LLP, noted that the 1998-99 CARP envisioned the hypothetical marketplace for distant signal programming as operating "'in the

Bortz surveys, *i.e.,* (1) JSC's share of distant signal market value is significantly greater than its share of time or viewing; (2) Program Suppliers' share of distant signal market value is significantly less than its share of time or viewing; and (3) JSC and Program Suppliers' shares of distant signal market value are approximately the same. *See* SP PFOF ¶¶191-200, 475-81.

For example, following its conversion from the most widely-carried distant signal to a cable network, TBS entered into marketplace negotiations with Major League Baseball for the right to televise the games of the Atlanta Braves outside their home territory. The prices that TBS paid for programming following its conversion provide perhaps the clearest indication of the relative market value of at least the JSC and Program Suppliers programming on superstations with nationwide cable carriage (such as WGN).

TBS paid $175 million (or over *24%* of TBS' 2004-05 programming budget) for just the rights to televise the Braves in 2004-05; the remainder of that programming budget went for the production of those Braves' telecasts and rights payments to the Braves, the rights to televise some other JSC (NCAA) events, and Program Suppliers' programming. TBS allocated more than 24% of its programming budget to the Braves telecasts, notwithstanding that those telecasts accounted for only about *2.5%* of TBS' total broadcast hours and about *2.5%* of the viewing minutes generated by all TBS programming. That allocation -- which market-negotiated license fees substantially in excess of time and viewing shares -- is fully consistent with the results of the Bortz surveys. And, of course, it is squarely inconsistent with the results of the Dr. George Ford study sponsored by Program Suppliers. As Mr. Trautman explained, the Ford formula would have resulted in TBS paying 4.25% in 2004 and 3.51% in 2005 -- rather than the over 24% that it actually paid to televise the Braves games. *See* SP PFOF ¶¶192-~~94.~~94, 477-478.

MLB on TBS Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (Braves)*	2.67%	2.60%	4.25%	24.08%
Program Suppliers/Other	97.33%	97.40%	95.75%	75.92%
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (Braves)*	2.47%	2.42%	3.51%	24.65%
Program Suppliers/Other	97.53%	97.58%	96.49%	75.35%
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production cost.

Sources: Trautman WRT (SP Ex. 57) at 5.

Likewise, JSC telecasts amounted to only about 0.5% - 0.7% of the 2004-05 telecast hours on the top 25 cable networks examined by Mr. Homonoff, and they generated only about *1.4%-1.7%* of the 2004-05 time that households spent viewing those networks. Yet, the cable networks paid, in marketplace transactions, between *17%* and *20%* of their programming budgets to telecast that JSC programming -- more than ten times the JSC viewing share and more than twenty-five times the JSC tonnage share. Again, that result is fully consistent with the results of the Bortz surveys (and wholly inconsistent with the results of the Ford study which would have predicted a JSC share of only 2.8% in 2004 and 2.05% in 2005). *See* SP PFOF ¶¶196-~~200.~~200, 480-81.

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Viewing Minute Method)

	2004-05	
	JSC	**PS**
1. Number of Distant Signal Viewing Minutes	838,907	8,633,838
2. Cable Network Expenditures Per Viewing Minute	$0.013	$0.001
3. Projected Distant Signal Market Value (1*2)	$10,906	$8,634
4. Share of Relative Value	55.8%	44.2%

*

Source: Trautman WRT (SP Ex. 57) at 14.

3. Changed Circumstances.

CTV witness Dr. Richard Ducey presented information and data showing that despite changes in the cable industry as a whole between 1998-99 and 2004-05, there were no substantial changes in the distant signal marketplace during that time, especially as compared with changes that had occurred leading up to 1998-99. *See* SP PFOF ¶¶~~201-215.~~202-216. His conclusions regarding his distant signal data analyses were confirmed by the testimony of Judith Meyka (a senior cable programming executive and the only witness in this proceeding who actually worked for an MSO during the years 2004-05) and Mr. Trautman (who has over two decades of experience working with the cable and television programming industries). *See* SP PFOF ¶¶~~-99,131, 231.~~99, 131-33, 201, 230. In light of this testimony, one would expect to see, as the evidence showed, no significant changes in relative values reported by the Bortz results between 1998-99 and 2004-05. *See* SP PFOF ¶¶131-133.

To the extent there were changes in the distant signal marketplace, they are adequately reflected in the Bortz survey results. For example, Ms. McLaughlin demonstrated that the demand for distant PTV programming (as reflected in PTV's share of the number of subscribers receiving distant PTV signals ("subscriber instances")) increased slightly between 1998-99 and

2004-05. Indeed, the relative increase in PTV's share of subscriber instances between 1998-99 and 2004-05 was greater than that experienced by the Canadians between 1998-99 and 2000-03 -- an increase that the Judges found to be a "significant" changed circumstance supporting an increase in the Canadians' 2000-03 award over its 1998-99 award. *See* Distribution Order in Doc. No. 2008-2 CRB CD 2000-2003 at 34 (March 3, 2010) ("2000-03 Distribution Order"). PTV's Bortz share also rose slightly during that time period. Likewise, Dr. Ducey showed that cable systems were importing a relatively greater percentage of nearby distant signals in 2004-05 than in 1998-99 -- a fact that would suggest an increase in the relative value of station-produced programming. CTV's average Bortz share also rose slightly between 1998-99 and 2004-05. *See* SP PFOF ¶¶~~212-215, 216-220, 220.~~213-221.

Program Suppliers' witness John Mansell implied that JSC's share in Bortz should have declined because the number of games from some of JSC's members on some of JSC's broadcast stations declined. But Mr. Mansell failed to compare JSC's share of the distant signal marketplace in 1998-99 to its share of that marketplace in 2004-05. Dr. Ducey made that comparison and found that JSC's share was virtually the same (4.9% in 1998-99 and 4.6% in 2004-05) -- while Program Suppliers' time share declined from 60% in 1998-99 to 50% in 2004-05. *See* SP Ex. 8; SP PFOF ¶¶ ~~226-228.~~225-227, 232, 564-69. Such tonnage comparisons say nothing about the relative value of JSC programming. *See, e.g.,* Tr. 1701-06 (Mansell) (discussing significant rise in ESPN's rights payment to MLB notwithstanding a decrease in the amount of MLB telecasts over ESPN). Nevertheless, both the average JSC and PS Bortz shares have declined slightly between 1998-99 and 2004-05. *See* Bortz Report (SP Ex. 2) at 23; SP PFOF ¶132. Clearly the Bortz results have been sensitive to the minor change circumstances reflected by the record of this proceeding.

III. None Of The Theoretical Criticisms Of The Bortz Surveys, As Repeated In This Proceeding By Program Suppliers And Canadians, Supports According Less Weight To The 2004-05 Bortz Results Than The CARP Accorded The 1998-99 Bortz Results.

For over twenty-five years, Program Suppliers have been making the same criticisms of the Bortz survey -- that, in effect, the Bortz survey questions should have been written differently; that the Bortz respondents could not have understood or provided meaningful answers to the questions that were asked; and that the Bortz results do not say anything about relative market value. But Program Suppliers have never once offered anything more than theoretical criticisms unsupported by empirical evidence demonstrating that these criticisms have any factual basis. Program Suppliers have had more than enough time to come forward with hard evidence rather than speculation. None of the Program Suppliers' criticisms of the Bortz surveys (or those of the Canadians) -- all of which repeat criticisms raised and dealt with in prior proceedings -- should be accorded any weight in this proceeding. *See* SP PFOF ¶¶267-308.

A. Program Suppliers Have Failed To Provide Any Empirical Support For Their Unfounded Claim That 2004-05 Bortz Respondents Were Confused As To The Programming They Were Valuing. Nor Have Program Suppliers Demonstrated That, If There Were Any Such Confusion, It Materially Affected The Results Of The 2004-05 Bortz Surveys.

As noted above, the Program Suppliers presented in this proceeding no witness qualified as a survey expert to criticize the Bortz study; nor did they present anyone with experience as a cable operator to suggest that cable operators would not have been able to provide meaningful responses to the Bortz survey or that the Bortz survey results do not make sense. Nevertheless, they raised the same criticism ~~that~~ that they have raised in every proceeding going back to 1978, where the first constant sum survey was introduced. Although they phrase it in several different ways, their central criticism is that a Bortz survey respondent may not have understood completely which programming was included in each of the categories the respondent was asked to value -- *e.g.,* that Program Suppliers failed to receive credit for particular programs (such as fishing or bowling telecasts) or that respondents valued ineligible broadcast network or cable network programming (notwithstanding that they were repeatedly told not to do so by the Bortz survey interviewers).[2]

[2] In the 1989 proceeding the CRT summarized certain of the testimony on this same issue as follows: "Dr. Rubin argued that the program categories established by Bortz did not directly comport with the program categories as defined by the Tribunal. . . . Dr. Rubin believed the category labels should have been augmented with descriptions of familiar programs in each category. . . . Program Suppliers argued that the lack of more detailed explanations cost them a number of programs that they believe the typical respondent assigned to other categories, such as . . . wrestling and auto racing (often recorded syndicated series, but probably thought of as 'sports'). . . . However, NAB witness Richard Ducey believed that respondents had a 'dominant impression' of what each category contained, and any misimpressions were likely to be a 'wash.'" ~~CRT,~~ 1989 CRT Determination, 57 Fed. Reg. at 15295 (citations omitted).

Neither the Program Suppliers nor any other party in this proceeding or any other distribution proceeding has ever presented evidence that any of the Bortz respondents was in fact confused about what programming falls within each category -- or even more importantly, that if there was any such confusion, it had any material effect upon the survey results or biased them with respect to one party or another. Indeed, the record supports the contrary conclusion. *See* SP PFOF ¶¶¶270.

In the 1998-99 proceeding, Program Suppliers also argued that Bortz respondents were confused about what programming comes within each category. They pointed to the testimony of one JSC witness -- a cable operator who supposedly miscategorized two programs when questioned by the CARP -- as "conclusively demonstrating, in Program Suppliers' view, that miscategorization of programs by respondents to Bortz Media surveys is considerable and invalidates the results." 1998-99 Librarian Order, 69 Fed. Reg. at 3615. The Register and Librarian rejected that argument for two reasons that apply equally in this proceeding:

> First, *the Panel was not presented with evidence that demonstrated sufficiently widespread miscategorization of programs by Bortz Media respondents that would likely affect the survey results*. Mr. Egan's responses to Arbitrator Young reflect only how he might respond and were offered by someone who could not recall if he had ever completed a Bortz Media survey. Second, and more importantly, the Bortz Media surveys do not question cable operators as to individual programs, but rather question them as to the value they attach to categories of programs. See Trautman Tr. at 324-25 (Respondent are "not thinking about each and every program that is aired on that signal. They are thinking about the general categories of program."). *If Program Suppliers pointed to evidence that demonstrated that Bortz Media respondents misapprehended entire categories of programs when assigning them value, then the Panel might have been required to address such contentions*. That is not the case here . . . .

Id. at 3615 (emphasis added).

As this makes clear, it is simply not enough for the Program Suppliers to show that, for example, there are other programs that Program Suppliers consider to be "sports" besides those within the JSC claim, such as the *Babe Winkelman Fishing Show* on WGN-TV -- and then argue that Bortz respondents may have been thinking about those programs rather than the Chicago

B. Dr. Ford's Criticisms Of The 2004-05 Bortz Surveys Are Based Upon The Same Theoretical Constructs That Have Been Thoroughly Vetted And Rejected In Prior Proceedings And That Have No Empirical Basis.

Similarly, in rebuttal, Program Suppliers' Dr. George Ford resurrected age-old criticisms of the Bortz surveys -- certain of which focus on whether the Bortz results reflect market value and one of which focuses upon the amounts of programming being valued. None of these criticisms provides a basis for according less weight to the 2004-05 Bortz studies than the CARP accorded the 1998-99 Bortz studies.

1. Market Value/Supply Side.

According to Dr. Ford, the Bortz survey measures only cable operator willingness-to-pay and not the amounts that cable operators would actually pay in a free market. (Of course, his own viewing/advertising cost analysis says absolutely nothing about cable operator valuations of any sort (*see infra pages* 41-50)). In Dr. Ford's view, the Bortz results cannot be translated into market values unless the demand curves for all program types are linear and the demand elasticities are the same at the selected quantities -- a situation he considers "implausible." Dr. Ford further argues that valuations based upon willingness to pay will give way when sellers deal with multiple competing buyers ("Tom, Dick and Harry") and sell exclusively to only one of them (even though the nature of the realities of the cable marketplace are that such programming is not sold exclusively). *See* George Ford WRT (PS Ex. 16) at 10; SP PFOF ¶¶286-96.

Dr. Ford's rebuttal testimony seeks to rekindle a debate about what has been called "supply side" considerations that began in the 1983 proceeding and continued throughout the 1998-99 proceeding. Dr. Ford follows in the footsteps of Dr. Stanley Besen, the only other economist to carry the torch for the Program Suppliers on this issue. Dr. Ford repeats (without developing or advancing) the same theoretical arguments that Dr. Besen first began making

Dr. Ford also argues that because the interviewer does not tell the respondent cable operator the "quantities" (presumably the aggregate program time) of distant signal program categories they carried, the respondents may have valued programming they did not carry. Again, this is the same criticism leveled by Dr. Besen at the start of the supply side debate. *See* 1983 CRT Determination, 51 Fed. Reg. at 12795 ("Besen found it critical in ascertaining how much cable operators would pay for different program types to know the amount of supply of different programs and whether the supplier was willing to sell dearly, cheaply, or offer the programs for nothing").

The only basis that Dr. Ford asserts for his program quantity argument in this proceeding is Mr. Trautman's testimony that he could not confirm that two of the over 300 respondents to the 2004-05 surveys actually carried sports on their distant signals because the programming information was not available (although he could confirm that they did carry sports in subsequent years). If these two respondents are removed from the sample pool, the 2004-05 survey results are virtually unchanged. *See* Bortz Report (SP Ex. 2) at 39-40; Tr. 158-62 (Trautman). *See* SP PFOF ¶¶294-96; 502-15.

Dr. Ford and the Program Suppliers had access to all of the data underlying the 2004-05 Bortz surveys as well as the detailed program listings for over six months. They have not come forward with any evidence that any of the Bortz respondents may have valued programming they did not carry -- other than to rely upon the two questionable incidents that were discussed in the Bortz Report. Dr. Ford also fails to present evidence that not providing respondents with an estimate of program category "quantity" results in survey responses that are biased against Program Suppliers. Moreover, as the testimony regarding the use of "program examples" in the Gruen subscriber survey illustrates, the evidence suggests there may be significant response biases associated with providing selected information to survey respondents. *See* SP PFOF ¶¶ 294-96.

In the 1998-99 proceeding, Mr. Trautman testified that he could not confirm that one Bortz respondent who accorded some value to sports actually carried distant signal sports (and that another respondent for which he could not confirm sports carriage valued sports at zero). The 1998-99 CARP concluded that the appropriate remedy in such a situation is simply to remove the valuations of the respondent at issue. *See* 1998-99 CARP Report at 20-21; SP PFOF ¶¶294-96. As noted above, doing so has no material impact upon the 2004-05 Bortz survey results.

C. The Canadians' Criticisms Of The Bortz Study, Which Are Belied By The Very Constant Sum Surveys The Canadians Themselves Have Conducted, Do Not Overcome The Fact That This Is The Strongest Record Ever On Which To Rely Upon The Bortz Constant Sum Surveys Rather Than Fee Generation To Determine The Canadians' Award.

As noted above, the original Bortz survey did not seek to provide any valuation of the Canadians' (or Devotionals') programming. The CRT criticized Bortz for not including the Canadians (and Devotionals), and Bortz Media responded to that criticism by revising its survey to ask about the programming on Canadian distant signals (as well as Devotional programming). Ever since, the Canadians have criticized the Bortz surveys, while the Devotionals have become strong supporters of those surveys.

In this proceeding the Canadians have again offered the same witnesses to make the same criticisms of the Bortz surveys that they have made in prior proceedings. Dr. Gary Ford, for example, has again complained about the use of a popularity "warm-up" question and a stratified sample based upon the amount of royalties paid. But the Canadians, like the Program Suppliers, have failed to provide any empirical basis for their criticisms, *i.e.*, that conducting a survey without the popularity question and stratified random sampling would produce a higher result for the Canadians. The evidence is, in fact, to the contrary. When the Canadians conducted a 1992 constant sum survey using the Bortz format (comparing U.S. programming to programming on Canadian signals) -- but without the popularity question and random sampling -- the result they obtained for the Canadian category were virtually identical to the Bortz result. *See* Tr. 3017-3018 (Ford) (Gary Ford); *see* SP PFOF ¶303. The Canadians discontinued conducting their survey with that format and instead relied upon fee generation to determine the relative values of Canadian signals versus U.S. signals (while relying upon a constant sum survey to determine the relative values of the programming within Canadian signals).

The Settling Parties explain below why the Canadian criticisms of the 2004-05 Bortz survey should not be accorded any weight. *See* SP PFOF ¶¶297-308. However, as also

A. The 2004-05 Bortz Survey Results Can And Should Be Adjusted To Provide Royalty Shares For PTV And The Canadians.

1. The PTV Award.

After examining all of the evidence in the record, the 1998-99 CARP decided to award PTV its 1990-92 royalty share rather than its Bortz share. The 1998-99 CARP explained its reason not to tie the PTV award to the Bortz results as follows:

> The Panel's primary concern about the Bortz survey turns on [the survey's] treatment of PTV. We find that the Bortz survey results understate the relative value of PTV. The major bias to the detriment of PTV is the Bortz treatment of cable systems that carried only PTV as distant signals. If a cable system carried PTV only as a distant signal, it was removed from the Bortz sample. On the other hand, if the system carried only one or more commercial distant signals, and no PTV distant signals, it was included in the Bortz survey and PTV was automatically assigned a zero.

1998-99 CARP Report at 22-23. The same situation pertains to the Canadians since Bortz Media did not interview any cable systems that carried Canadian signals as their only distant signals.

As Mr. Trautman explained, the intent of the Bortz survey is to provide comparisons of multiple program categories; where a cable system carries only one such category (*i.e.*, only a PTV signal or only a Canadian signal), no such comparison may be made. He recognized, however, that it would be appropriate to adjust the results of the Bortz survey to deal with these PTV-only and Canadian-only systems. *See* Bortz Report (SP Ex. 2) at 8-9 & 40-41; Tr. 108 (Trautman). Indeed, he presented such adjustments in the 1998-99 CARP proceeding (as did other parties), but the CARP did not accept them. *See* 1998-99 CARP Report at 26-29. In this proceeding, PTV has sponsored the testimony of Ms. Linda McLaughlin who provided a new analysis to deal with the PTV- and Canadian-only systems. Her analysis attempts to meet concerns that were expressed with the proposed adjustments in the 1998-99 proceeding. *See* SP PFOF ¶¶309-324, 330.

The Settling Parties believe that the Judges should adopt Ms. McLaughlin's adjustment to the 2004-05 Bortz results -- as well as the further adjustment proposed by Canadian witness Gary Ford to deal with his concern that, as a result of a "clerical error," one large system carrying only a distant Canadian signal was not included in the Bortz survey. No party has provided any substantive basis for contesting that these adjustments should not be adopted. See SP PFOF ¶¶318-324 With these adjustments (and the one additional adjustment discussed below), the PTV and Canadian 2004-05 royalty shares (like the shares for JSC, CTV and Program Suppliers) should be tied directly to the 2004-05 Bortz results.

2. The Canadians' Award.

The 1998-99 CARP determined that it would not rely upon the 1998-99 Bortz surveys to set the Canadians' 1998-99 award. Instead, "despite our expressed concerns respecting fee generation," it tied the Canadians' award to the "fee generation" of distant Canadian signals, as adjusted by (1) the results of Dr. Ringold's constant sum surveys of cable operators and (2) the awards to other parties. *See* 1998-99 CARP Report at 72-75. The 1998-99 CARP declined to use the Bortz results for the Canadians saying only that the survey was not "designed" to include the Canadians and did not provide "statistically significant results" for the Canadians. *See* 1998-99 CARP Report at 31 n.13. The Panel acknowledged, however, that "fee generation does not reach the level of robustness and reliability of the Bortz study." *Id.* at 64.

In the 2000-03 proceeding, the Judges concluded that the Canadians' fee generation approach had been "sufficiently vetted" in the 1990-92 and 1998-99 proceedings, and should be accorded deference as one method – rather than the sole method or best method – for determining the Canadians' share. 2000-03 Distribution Order at 25-26. The Judges went on to state, however, that:

> It very well may be that there are other methods or other evidence that best represent *the* relative marketplace value of Canadian Claimants' programming as well as the programming of other groups. . . The Judges, therefore, 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.

The record of this proceeding provides the strongest support ever for using the Bortz survey results (rather than fee generation) to set the Canadians' award. Historically, only an insignificant percentage of cable systems that carried Canadian distant signal were included in the Bortz surveys. For example, in 1998, only 2 of 66 systems that carried distant Canadian signals were included in the Bortz survey and in 1999 only 3 of 62 systems were included. In stark contrast, in 2004, 11 (18%) of the 61 total Form 3 cable systems that carried distant Canadian signals responded to the Bortz survey; in 2005, the comparable numbers are 13 (25.5%) of 51 systems. With the McLaughlin and Gary Ford adjustments discussed above, the 2004 Bortz survey results are attributable to 13 (21.3%) of the 61 systems with distant Canadian signals; the 2005 results reflect 16 (31.4%) of 51 systems. *See* SP PFOF ¶326.

For the two-year period (2004-05), the Bortz results thus provide the valuations of approximately 29 respondents -- close to the number that the Canadians' own expert (Dr. Ford) considered to be sufficient to support reliable estimates for a given year. *See* Tr. 3030 (Gary Ford) (32 respondents would be a sufficient sample size). The Canadians themselves have urged the Judges to rely upon results where fewer respondents valued Canadian programming than those who valued Canadian programming in the 2004-05 Bortz surveys. *See* SP PFOF ¶327. Furthermore, the results of the 2004-05 Bortz surveys concerning Canadian valuations are consistent with the result of Bortz surveys conducted over 25-years. *See* Bortz Report (SP Ex. 2) at 23; SP PFOF ¶¶131-133. As the Canadians own expert (Dr. Ford) has acknowledged, given all the facts, the Canadians are entitled to only a very small share of royalties. *See* Tr. 3025-3026 (George Ford). The share estimated by the Bortz survey, as adjusted by the PTV and Canadian witnesses, is consistent with the facts surrounding the Canadians and avoids the substantial problems in relying upon fee generation.

Indeed, the Settling Parties believe that the 2004-05 Bortz survey results provide a much better estimate of the relative market value of Canadian signals than is reflected in fee generation -- a method which the Judges recognized may be "rough," "crude" and "wobbly" and which produces awards that, for various reasons, are "*not* representative of *the* relative marketplace value of [Canadian] programming." CRJ 2000-03 Distribution Order at 17, 27; *see also* SP PFOF ¶¶ 594-649 (summarizing record evidence as to why fee generation does not reflect relative marketplace value). Accordingly, on the basis of this more complete record, the Judges

B. The 2004-05 Bortz Results Reflect A Ceiling For The Program Suppliers' (And Devotionals') Awards Given Their Increased Licensing Of Programming Outside Section 111 To WGN-TV, The Most Widely Carried Distant Signal.

During 2004-05, WGN was the most widely carried distant signal. Nearly 50% of the Form 3 cable systems that carried a commercial U.S. distant signal in 2004-05 carried WGN as their only distant signal, while approximately 70% of Form 3 systems carried WGN as one of their distant signals. The record shows that a substantial portion of the programming on distant signal WGN in 2004-05 was non-compensable because it was not transmitted simultaneously over both the satellite-delivered version of WGN that was actually carried by cable operators (on a distant signal basis) and the WGN broadcast signal available as a local signal in the Chicago market. The amount of non-compensable programming on WGN in 2004-05 increased to over 70% from about 50% in 1998-99. The vast bulk of this non-compensable programming consisted of programming within the Program Suppliers category (91.4% in 2004 and 92.4% in 2005) and Devotionals category (8% in 2004 and 7.6% in 2005). In 2004-05, over 78% of the Program Suppliers programming and 90% of the Devotional programming on distant signal WGN was non-compensable. *See* SP PFOF ¶¶¶224. As this suggests, both Program Suppliers and Devotionals increasingly made their programming available to WGN outside the Section 111 compulsory license.

As Mr. Trautman testified, it is likely that some portion of the value that the Bortz respondents attached to the Program Suppliers' and Devotionals' categories (in 1998-99 and 2004-05) was attributable to this non-compensable programming. *See* Bortz Report (SP Ex. 2) at 41. Ms. McLaughlin testified to the same effect. *See* McLaughlin WDT (SP Ex. 6) at 9; SP PFOF ¶345. The 1998-99 CARP recognized that it may be conceptually proper to adjust the Bortz results to account for the non-compensable programming on WGN. However, it did not believe that the particular adjustments presented to it were appropriate. It rejected a proposed adjustment that (1) assumed that all the non-compensable programming was in the Program Suppliers category and (2) adjusted shares *pro rata* based solely on the proportion of hours of compensable programming. 1998-99 CARP Report at 26-28.

V. The Evidence Establishes that the Relative Value of Music Is 5.2% of the 2004 Cable Royalty Fund and 4.6% of the 2005 Cable Royalty Fund

Music is a *program element*, not a *program category*. The Music Claimants, Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC") are performing rights organizations ("PROs") that license the non-dramatic public performances of musical works on behalf of their songwriter, composer. and music publisher members and affiliates. *See* SP PFOF ¶¶14, 349. Music Claimants represent every songwriter, composer, and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming. *See* SP PFOF ¶¶14-17.

The use of music in local television programming is sophisticated and varied, ranging from background music (when the musical work underscores the focus in a program) to feature (when the musical work is the focus of the audience's attention, such as on *American Idol)* to theme music (the signature music identifying the show). *See* SP PFOF ¶¶14. There is substantial qualitative evidence from the leading television and film music supervisor Alexandra Patsavas and from Seth Saltzman that music's contribution to the overall television entertainment experience has increased over the past ten years. *See* SP PFOF ¶¶351-63. There is substantial evidence of more sophisticated use of music in television dramatic series with a resulting increase in viewer impact and entertainment value. *See* SP PFOF ¶¶360-61. With special reference to the distant signal market, the fact that *American Idol*, a music-intensive program that was among the most highly watched across the nation, appeared as compensable programming in 2004-05 time supports the view that music adds substantial value to the programming at issue in this proceeding. *See* SP PFOF ¶¶¶354. American Idol has been the most highly rated non-sports program on television since its inception. *See* SP PFOF ¶¶354.

Because music runs throughout all programming types, it differs in kind from the program categories represented by the other claimant groups in this proceeding. *See* SP PFOF ¶¶¶349. Bortz has not designed its surveys to measure the value of the music within the different categories of distant signal non-network programming, and, similarly, none of the methodologies presented by the other claimants to value their respective shares should be used to determine Music's share. Accordingly, it is necessary to look to other record evidence to determine that value. Historically, the Copyright Royalty Judges' predecessors have taken the music share "off the top," adjusting the shares of the program categories proportionately to account for Music's award. 1998-99 CARP Report at 89. The Settling Parties believe that the same approach should be followed here, *i.e.*, each of the claimants' Bortz shares should be reduced proportionally by the Music share.

A. The 2004-05 Zarakas Study, Provides the Best Most Accurate and Reliable Available Evidence of the Relative Value of the Music in the Distant Signal Non-Network Programming that Cable Systems Retransmitted in 2004-05.

In this proceeding, the Music Claimants presented the testimony of Mr. William P. Zarakas, an economist and expert in the valuation of assets and businesses in the communications and media industries. Mr. Zarakas used a market-comparable methodology to analyze the value of music as compared to the value of overall value of the compensable copyrighted programming included in the distant retransmission of over-the-air broadcast signals. *See* SP PFOF ¶¶373-92. Mr. Zarakas' analysis built upon a model considered by the 1998-1999 CARP in which an estimate of the relative value of music was derived through creating a "music ratio" that calculated music license fees in the local over-the-air television market as a percentage of the sum of (a) music license fees and (b) broadcast rights payments. *See* SP PFOF ~~375.~~¶375; 1998-99 CARP Report 85-87.. While accepting this music ratio concept as a "floor" (ultimately adopting an award almost twice the music ratio presented in that proceeding), the 1998-1999 CARP was concerned that the ratio included Big 3 network fees and rights payments, even though Big 3 network programming is non-compensable under section 111, and that the presence of such data artificially decreased Music's share. *See* SP PFOF ¶¶375-~~76.~~76, 396; 1998-99 CARP Report at 86-87. In addition, the 1998-1999 CARP noted that an unadjusted ratio of music license fees to broadcast rights payments would not reflect the differences between the local and distant signal markets. *See* SP PFOF ~~¶¶375.~~¶375; 1998-99 CARP Report at 86-87.

Mr. Zarakas designed his study to meet each of the 1998-1999 CARP's concerns by: (1) obtaining reliable and complete data on market-negotiated blanket music license fees and television broadcast rights payments; (2) calculating music ratios for different categories of television stations, such as Independent stations or network affiliates, in the over-the-air broadcast market; and (3) focusing his analysis on the distant signal market by weighting the music ratios to reflect the relative importance of the stations retransmitted by cable systems in the distant signal market. *See* SP PFOF ¶¶377-90. He concluding that the relative value of music was 5.2% in 2004 and 4.6% in 2005. *See* SP PFOF ¶¶391-92.

Mr. Zarakas' analysis was not only objective and reasonable but also conservative. Where he could not locate broadcast rights payment data for non-Big 3 network programming, Mr. Zarakas used programming expenses data for those networks, which had the effect of decreasing the music ratio. *See* SP PFOF ¶¶385-89. When confronted with a choice to use cash or amortized broadcast rights payments by the local stations, he chose amortized expenses because they included "the value of booked barter arrangements" and yielded "a more conservative calculation of the Music Ratio because it results in a larger denominator than would use of the cash approach." *See* SP PFOF ¶¶¶387. To be comprehensive in calculating the music ratio denominator, Mr. Zarakas also included "the broadcast expenses that would be paid to the local stations for programs they produce themselves (*i.e.*, the broadcast value of locally produced programming)," an item that was not part of 1998-1999 music ratio analysis. *See* SP PFOF ¶¶¶390. Moreover, because Mr. Zarakas' estimate of locally-produced programming value scales linearly with the estimate of non-Big 3 network payments, using programming expenses to (over-) estimate network payments necessarily overestimates the locally-produced value as well. *See* SP PFOF ¶¶¶390. Finally, without challenge from other record evidence, Mr. Zarakas noted that his music ratio is likely understated because "in the local broadcast market, stations and networks pay premiums for the rights to broadcast programs on an exclusive basis;" however, "exclusivity premiums likely would not be paid in the distant market where content is transmitted over many cable systems on a non-exclusive basis." *See* SP PFOF ¶¶392.

B. Program Suppliers' Criticisms of the Zarakas Study Are Unfounded.

In response to Mr. Zarakas' study, Program Suppliers presented the rebuttal testimony of Dr. John R. Woodbury, who asserted that Music's share should be set far below any share Music has received since the inception of the cable compulsory license. See SP PFOF ¶393 While Dr. Woodbury conceptually endorsed Mr. Zarakas' music ratio approach, he criticized Mr. Zarakas' use of the blanket license fees to represent the value of music license fees to the local television stations, Mr. Zarakas' weighting of the stations by distant signal subscriber instances, and Mr.

Zarakas' treatment of WGN America – a station with no network programming – as an Independent station. *See* SP PFOF ¶¶394, 410-13. None of these criticisms have merit. *See* SP PFOF ¶410

1. Blanket License Fees Are the Proper Measure of the Music Fees that Would Be Paid by the Cable Operators.

Dr. Woodbury's objection to the use of the negotiated blanket fees to represent total music license payments is misplaced. Music Claimants presented unrebutted evidence from Mr. Michael O'Neill, Senior Vice President Licensing at BMI, that without a statutory cable license, each of the performing rights organizations would negotiate a blanket license with cable operators for all music contained in programming on stations retransmitted by distant signal. *See* SP PFOF ~~*See* SP PFOF~~ ~~¶¶~~¶372-381. That type of agreement is consistent with the blanket licenses the PROs have previously negotiated with the cable operators. Moreover, the use of blanket license fees is appropriate because the blanket license offers users a more efficient product at a lower price than a large number of direct licenses would offer to cable operators. ~~*See* SP PFOF~~ *See* SP PFOF ¶382. Thus, the negotiated blanket license fees are the proper measure of music license fees to be included in the music ratio.

Moreover, using blanket fees is superior to Dr. Woodbury's proposal to include only payments by the stations to the PROs, which indefensibly ignores the amounts paid by local television stations for direct licenses that are entered into by stations to reduce ASCAP or BMI license fees under per program licenses. *See* ~~SP PFOF *See*~~ SP PFOF ¶404. Approximately 30% of local stations take per program licenses and reduce their blanket license fee payments through direct licensing. *See* SP PFOF ~~¶¶~~¶377. Therefore, using only the PRO receipts in the music ratio to represent total music license fees paid by the stations would considerably undervalue the Music Claimants' share because PRO receipts alone are incomplete without the direct license fees. *See* SP PFOF ~~¶¶~~¶404. In addition, although no specific evidence of the amount of direct license fee payments is available, the facts that only a minority of stations take a per program license, coupled with the testimony that some stations switch between blanket and per program licenses, and that on occasion some have paid more under the per program license, all suggest any aggregate dollar savings earned by stations from their blanket license fees is not significant enough to offset Mr. Zarakas' otherwise conservative calculation of the music ratio. *See* SP

PFOF ~~*See* SP PFOF ¶¶.~~¶¶377, 382. Moreover, although Dr. Woodbury suggested that the combined amount of music license payments to the PROs and direct license fees was less than the negotiated blanket fee, he was unable to quantify the amount of any difference and, therefore, he could not offer any opinion as to the total amount of music license fees paid by local television stations. *See* SP PFOF ~~¶¶377, 382.~~¶410. Certainly, Dr. Woodbury did no empirical analysis, and could offer no empirical evidence, to show that blanket license fees overstate to any material or measurable degree the total music license fees paid by the local stations. *See* SP PFOF ~~¶¶~~¶410.

2. Mr. Zarakas's Weighting by Station Type Was Necessary to Create a Music Ratio for the Distant Signal Market.

Dr. Woodbury's criticism of the station-type weighting employed by Mr. Zarakas falls flat for three reasons. First, Mr. Zarakas' weighting scheme specifically addresses the 1998-1999 CARP's concern that any music ratio must reflect the numerous differences between the local television and distant signal markets. *See* SP PFOF ¶376 By weighting the distant signal half-years for stations received by subscribers, Mr. Zarakas accounted for the distant signals that cable systems actually chose to transmit in the 2004-2005 period in a manner that appropriately accounts for differences in subscribership between small and large cable systems. *See* SP PFOF ~~¶¶~~¶391.

Second, Dr. Woodbury conceded that some type of weighting to adjust the music ratio to the distant signal market is appropriate (although, in his proposed music ratio, he did no weighting). *See* SP PFOF ~~¶¶~~¶412. He testified without explanation that viewership, rather than subscriber access, would provide a better weighting scheme to apply to the over-the-air music ratios of the individual station groups, but, by his own admission, Dr. Woodbury performed no viewership analysis to offer alternative weights, despite the fact that Program Suppliers had access to viewership data in the distant market. *See* SP PFOF ¶¶411-12. And Dr. Woodbury also did not explain why a viewership weighting scheme would be applicable to a music ratio approach that uses the relative value of rights payments applicable to a station's programming, when the overwhelming evidence in this proceeding is that the subscription cable market is not driven by viewership data like the local market. *See* SP PFOF ~~¶¶~~¶412. In fact, Dr. Woodbury did not calculate any weighted music ratio at all. *See* SP PFOF ¶412. By failing to weight at all, Dr. Woodbury repeated the error noted by the CARP in the 1998-1999 proceeding,[4] where the CARP held that the goal of the Section 111 distribution proceeding was to find relative market value in the hypothetical distant signal market, not the local over-the-air market.[5] *See* SP PFOF ¶400; 1998-1999 CARP Report at 10-13, 85.

Third, Dr. Woodbury's complaint that Mr. Zarakas treated WGN America as an Independent station, rather than as a WB affiliate, is unfounded. WGN America, as a national superstation feed, does not contain any WB network programming. *See* SP PFOF ~~¶¶~~¶413. All WB programming on the local WGN station feed is substituted out and replaced by other programming. *See* SP PFOF ¶¶391, 413-14. WGN America is thus, by definition (including Dr. Woodbury's own definition), an Independent station, and was appropriately classified as such by Mr. Zarakas. *See* SP PFOF ~~¶¶~~¶391. Moreover, the suggestion that WGN was classified as an Independent station to increase the music ratio is unsupported. Indeed, the music ratio for Independent stations was below the average for all other stations, so, all else equal, the inclusion of WGN America as an Independent had the effect of decreasing the overall music share relative to all the other stations retransmitted as distant signals. *See* SP PFOF ¶412, 392. Indeed, weighting WGN America as a WB affiliate, considering the substantial rights payments made by the WB network for programming that is not carried as a distant signal by WGN America, would artificially decrease the music ratio. *See* SP PFOF ~~¶¶412, 392~~¶391.

C. Program Suppliers' Alternative Study Is Deficient in Design and Execution.

Dr. Woodbury presented an alternative music ratio study that did nothing to address the concerns of the CARP in the 1998-1999 proceeding and skewed the results of the study to drive down the music percentage by: (1) including network fees and rights payments for ABC, NBC, and CBS (the Big 3 ~~Networks~~networks); (2) failing to make any weighting adjustment to his calculation based on which television stations were actually retransmitted distantly and in what degree; (3) including the cost of direct music licenses in the denominator of his ratios (added to broadcast rights payments), but failing to include direct music license fees in his numerators; (4) including music license fees and broadcast rights payments for non-commercial stations in his denominators, but failing to include music license fees for those same stations in his numerators;

[4] ~~1998-1999 CARP Report at 85.~~

[5] ~~1998-1999 CARP Report at 10-13.~~

and 5) failing to amend his study results, despite learning that the U.S. Census Bureau survey data he relied upon for his study had been revised and corrected in a manner that would increase the Music Claimants' calculated share. *See* SP PFOF ¶¶401-408. Put simply, Dr. Woodbury's testimony and study — inaccurate, incomplete, and unreliable — should be given no weight by the Judges.

VI. None Of The Studies Offered By Program Suppliers Provides Any Reliable Evidence Of Relative Marketplace Value And None Of These Studies Should Be Used In Determining The Claimants' Awards.

For over twenty years the Program Suppliers argued that their custom Nielsen viewing study (which purported to reflect the relative amount of time that cable households spent watching the different types of distant signal programming) represented the best measure of relative market value. However, after WTBS converted from a distant signal to a cable network in 1998, Program Suppliers' share of distant signal viewing time declined dramatically. Accordingly, Program Suppliers rethought their historical reliance upon Nielsen viewing shares and argued for the first time that an adjusted version of their viewing numbers (adjusted by "avidity" as determined by Dr. Gruen) better reflected relative marketplace values. The 1998-99 CARP disagreed, concluding that the viewing study did not address the "criterion of relevance" – relative market value – and that Dr. Gruen's proposed adjustments suffered from several "fatal flaws" that precluded Program Suppliers' approach from being useful. 1998-99 CARP Report at 38-39, 42-44. The Register, Librarian and Court of Appeals affirmed the CARP's rejection of the Gruen adjusted viewing study. *See* 1998-99 Librarian's Order, 69 Fed. Reg. at 3614, *aff'd Program Suppliers v. Librarian*, 409 F.3d at 395.

In this proceeding, the Program Suppliers have reaffirmed that the raw Nielsen viewing minutes upon which they once relied do not reflect relative marketplace value. That point was echoed by the sponsor of the Nielsen study, Paul Lindstrom of Nielsen. Tr. 1988-89 (Lindstrom); *accord* Tr. 2229, 2230, 2231 (Ford) ("viewership is not value")~~.~~; *See* SP PFOF ¶539. The Program Suppliers have now presented, through Dr. George Ford, a new study that attempts to adjust the Nielsen viewing minutes by local broadcast advertising rates. And Dr. Gruen has returned with a new study -- a constant sum survey of cable subscribers. Neither of the Program Suppliers' studies provides any reliable evidence of relative marketplace value; it would be clear error to use either of these studies to determine the claimants' 2004-05 awards.

A. The Ford Analysis Of Nielsen Viewing Minutes Is Fatally Flawed In Concept And Execution.

The 1998-99 CARP awarded Program Suppliers slightly less than 40% of the 1998 and 1999 royalty funds, consistent with the 1998-99 Bortz results. Dr. Ford has devised a new study which purports to show that Program Suppliers should receive over 70% of the 2004-05 funds -- about $90 million more than they would receive under the percentage shares adopted by the 1998-99 CARP (or under the 2004-05 Bortz studies). Program Suppliers have never in the thirty-year history of the distribution proceedings received more than their viewing share, as reflected in their custom Nielsen study (and have routinely received significantly less). Nevertheless, Dr. Ford has found a way to accord Program Suppliers 14 percentage points ($21 million) more than their 2004 custom viewing share and 7 percentage points ($10.5 million) more than their 2005 custom viewing share. Ford WDT (PS Ex. 11) at 39 (Table 6 Corrected); *see* SP PFOF ¶¶~~423-443.~~416-436.

To support his dramatic reworking of royalty shares, Dr. Ford must create a hypothetical marketplace that is quite different from the one that the 1998-99 CARP envisioned. Dr. Ford is uncertain about whether broadcasters or cable operators would purchase the distant signal programming in his hypothetical marketplace and whether it would make any difference. *See* Tr. 2183-84 (Ford) ("[I]t could be the cable operator; it could be the broadcaster"); *id.* at 2181 (same). However, he predicates his study upon the novel theory that each distant signal in this hypothetical marketplace would operate as if it were a new station, such as a low power television station ("LPTV") that had constructed a tower in the cable community; this hypothetical broadcast station would transmit the same programming from that tower that it transmits in the home market where it operates a full-power station; it would transmit those programs on an exclusive basis in the distant cable community; it would derive revenues in that distant cable community *solely* by selling advertising; and it would compensate copyright owners *solely* in proportion to the ad revenues it received. *See* SP PFOF ¶¶~~429-435.~~422-428. Dr. Ford contends that the relative amounts copyright owners would receive in this hypothetical marketplace are based on broadcast market advertising revenues, which he derives based not on direct data but through a set of mathematical calculations in which he multiplies each claimant's share of viewing minutes from the Program Suppliers' custom viewing study by theoretical local-market broadcast station advertising rates ("CPM"s) that he calculates separately for each program category based on a series of different assumptions for the different categories. *See* SP PFOF ¶¶~~436-443.~~429-436.

Under questioning from the Judges, Dr. Ford explained that his reason for proposing an advertising-based approach for determining relative market value in this proceeding was that he "assumed himself into the data flow," meaning that he found a different market – local broadcast advertising – in which data were available, and simply assumed that relative values in the cable distant signal market would be revealed through those data. *See* Tr. 2123, 2192 (Ford); *see* SP PFOF ¶¶~~2123, 2192.~~422-426.

For several reasons, Dr. Ford's adjusted viewing study cannot be used to allocate the 2004-05 royalties that cable operators paid to retransmit distant signal programming.

1. Dr. Ford's Approach Is Inconsistent With The Congressional Intent Underlying Section 111 And Applicable Judicial Precedent

Dr. Ford's proposed approach is predicated on the untenable premise that cable operators are wholly irrelevant to the question of relative market value. There is absolutely nothing in Dr. Ford's analysis that takes account of how cable operators value the different types of distant signal programming. *See* Tr. 2189 (Ford) ("The cable system is irrelevant to the analysis"); *see* SP PFOF ¶¶~~430-432.~~422-428. That view is squarely inconsistent with the legislative purpose underlying Section 111 and with applicable precedent.

Congress recognized that cable operators that retransmit distant signal non-network broadcast programming should pay the creators of that programming. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Admin News 5659, 5704. But Congress thought that negotiations between cable systems and copyright owners would be unduly burdensome. Accordingly, Congress adopted a compulsory license permitting retransmission of distant signal non-network broadcast programming under specified conditions. As part of this system, Congress established the CRT (and ultimately the Judges) to "operate as a substitute for direct negotiations (which were thought to be impractical) among *cable operators* and copyright owners . . . ." *CBN v. CRT,* 720 F.2d at 1306 (emphasis added); *accord NCTA v. CRT,* 724 F.2d 176, 185-186 (D.C. Cir. 1983). Although Congress deferred to the CRT and it successors in deciding how the cable royalties should be allocated, the statute and accompanying legislative history (as the Court of Appeals has recognized) plainly contemplate that the purpose of the endeavor is to determine what *cable operators* would have paid copyright owners for the right to retransmit distant signal programming. Dr. Ford's approach ignores this legislative purpose and adopts a "proxy" market that assumes away the very cable systems that Congress and the Court of Appeals envisioned as the "buyers" in the relevant market.

Unlike Dr. Ford, the 1998-99 CARP properly focused upon how the cable operator values the different types of distant signal non-network programming. *See* 1998-99 CARP Report at 52. That approach is inconsistent with the policy underlying Section 111 and applicable judicial precedent.

2. Dr. Ford's Approach Improperly Relies Upon Advertising Revenues That Neither Cable Operators Nor Broadcasters Receive From Distant Signal Programming.

Dr. Ford's analysis is based on the assumption that the entire economic value of the programming at issue here derives from advertising revenues alone. Tr. 2200 (Ford); *see* SP PFOF ¶¶~~434, 451,~~421, 427-29, 435, 447, 453, 460. But the Section 111 royalties being distributed in this proceeding are derived from cable operator *subscription revenues*, *not advertising revenues*. *See* 17 U.S.C. § 111(d)(3) (tying royalty payment to revenues received from "gross receipts" from subscribers not advertising revenues); *Cablevision Systems Development Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 603 (D.C. Cir. 1988) (The Copyright Act "allows the copyright owners of distant non-network programs to receive a portion of the fees paid to the cable systems by subscribers"). Dr. Ford's misguided focus upon advertising revenues, rather than the cable operators' subscription revenues which are the basis of the Section 111 royalties, is contrary to the statutory scheme and unsupportable as a matter of economic logic and marketplace realities.

The Copyright Act prohibits cable operators from inserting advertising into the distant signal non-network programming they retransmit pursuant to the Section 111 compulsory license. 17 U.S.C. § 111(c)(3). Consequently, the relative values that cable operators attach to the different types of distant signal non-network programming they retransmit have nothing to do with advertising revenues. Value relates solely to the ability of that programming to attract and to retain subscribers -- the value measured by the Bortz surveys. As the 1998-99 CARP properly noted, "The value of distant signals to [cable operators] is in attracting and retaining subscribers, and not contributing to supplemental advertising revenue." 1998-99 CARP Report at 38. *See also id.* at ~~39.~~ 39 ("The principal economic value of distant signal programming to cable operators is instead measured by the extent to which the programming helps attract and retain subscribers and thus maintain or increase subscription revenues") (citations omitted).

Dr. Ford theorizes that in a marketplace absent compulsory licensing, cable operators would be allowed to insert advertising. *See* SP PFOF ¶¶~~461, 466.~~454, 459. That is squarely inconsistent with the conclusion that the 1998-99 CARP reached. *See* 1998-99 CARP Report at 13 n.6 ("We note here that unlike PS . . . the Panel does not assume that, in the hypothetical free market, [cable operators] would insert and sell advertisements on retransmitted distant signals as proscribed under the statutory license. . . . no persuasive evidence suggests that they would."). The record in this proceeding unequivocally supports the conclusion of the 1998-99 CARP. As CTV rebuttal witnesses Dr. Gregory Crawford and Greg Stone explained, there are numerous reasons, based on the ways in which advertising time is sold in both the local broadcast and local cable markets, why the hypothetical distant signal market in the absence of a compulsory license would not depend on advertising sales. These include the facts, confirmed as well by Program Suppliers' Nielsen witness Paul Lindstrom and by Dr. Ford's own underlying data, that the viewing to distant signals within individual cable systems and the viewing to LPTV stations is so limited that it is often not even reported in the local market book ratings that broadcast stations use to sell advertising, and that the purchasers of spot time on local stations have no incentive to split their buys among small stations and cable systems that serve only part of the market they are seeking to reach. *See* SP PFOF ~~464-466.~~¶¶453-59.

Indeed, nothing in the current law prohibits broadcasters from attempting to gain additional advertising revenue from the retransmission of their signals to distant communities.

As the record in this proceeding demonstrates, broadcasters are simply not able to do so. *See* SP PFOF ¶ 459; Tr. 979, 988-92, 999 (Fritz); Tr. 2123 (Ford); *accord*, 1998-99 CARP Report at 12 ("Broadcasters would be indifferent respecting distant retransmission because distant carriage does not enhance their advertising revenues") (citations omitted); *see* SP PFOF ¶~~466.~~459. Program Suppliers have failed to adduce any evidence to the contrary. To the extent (if at all) any broadcaster were able to enhance its advertising revenues based upon the carriage of its signal into a distant market, such revenues would presumably already be reflected in the license fees program suppliers already receive. Those revenues, however, are wholly distinct from the royalties that must be allocated in this proceeding, which have nothing to do with advertising.

Program Suppliers have presented no persuasive evidence that cable operators would likely derive revenues, much less all of their revenues as Dr. Ford assumes, from inserting advertising on distant signals in the hypothetical marketplace. Moreover, the programming that cable operators actually retransmitted during 2004-05 (and that is the subject of this proceeding) was retransmitted without cable operators being allowed to insert commercials. This proceeding calls upon the Judges to determine the relative value of that programming, not programming where commercials may have been (but plainly were not) inserted. *See* Ford W.R.T. at 8-9 (must value the programming actually retransmitted pursuant to Section 111 even though in a free market a different mix of that programming might have been purchased by cable operators)~~.~~; SP PFOF ¶459. Thus, even if Dr. Ford's assumptions about advertising in the hypothetical market were not incorrect for the reasons described above and in the testimony of expert and knowledgeable witnesses in this proceeding, they would be irrelevant to the question at hand.

3. Dr. Ford Has Analyzed The Wrong Market.

Even if Dr. Ford's reliance on an advertising revenue-based market analysis were not otherwise inconsistent with the structure and intent of the compulsory license and the evidence in this proceeding, his approach, as explained by CTV rebuttal witness Dr. Greg Crawford, is fundamentally flawed from an economics perspective because it uses the wrong market. The profit maximizing market objectives as well as the economic outcomes are fundamentally different in the broadcast and cable markets, and the differences result in different types of programming being valued in the two markets. As Dr. Crawford's independent empirical research has confirmed, the program types that most contribute to profitability in the cable market are special interest or niche programs as opposed to general interest programs, the opposite of the value proposition in the broadcast advertising market. Hence, Dr. Ford's analysis, which is based on applying "prices" for different program categories that he derives from local broadcast advertising market data, takes the irrelevant viewing numbers and makes them even more misleading as a measure of relative value in the cable distant signal market. *See* SP PFOF ¶¶~~446-458.~~438-451.

Wholly apart from the fundamental conceptual flaws in his approach, Dr. Ford's "hypothetical market" is flatly inconsistent with the realities of the actual broadcast station marketplace, as explained by both Dr. Crawford and CTV rebuttal witness Gregory Stone, an experienced broadcaster. The purchaser in Dr. Ford's hypothetical market would be either a new limited-signal broadcast station or the cable system itself. Cable operators, of course, are already completely free to engage in the kinds of program-by-program purchases Dr. Ford hypothesizes, but they do not do so, because they prefer to buy channels. And the "new" stations Dr. Ford hypothesizes already exist today, in the form of LPTV stations. As Mr. Stone's testimony shows, LPTV stations serving cable communities cannot and do not command advertising rates or revenues anything like those Dr. Ford assumes, and cannot and do not purchase anything like the kinds of programs the actual distant signals provide. The market evidence thus flatly contradicts Dr. Ford's hypothetical market premise. *See* SP PFOF ~~464-466.~~¶¶457-459.

4. Dr. Ford's Share Calculations Are Based On Erroneous Data and Assumptions.

Even if Dr. Ford's approach were not inconsistent with the statutory scheme and fundamentally flawed as a matter of economic analysis, his "relative value" share calculations are completely unusable because they use erroneous data and assumptions. First, the viewing minutes share numbers reported in the MPAA custom viewing study presented in this proceeding are erroneous because of a number of data analysis errors made by Nielsen, several of which produced inexplicable and very large increases in the total distant signal viewing and the Program Suppliers' relative viewing share between 2004 and 2005. *See* SP PFOF ~~481, 551-558.~~¶¶474, 544-551.

Furthermore, Dr. Ford's creation of a set of "prices" for the various program categories is rife with erroneous assumptions. First, he assigns "prices" based on advertising data from the U.S. local commercial television market to three out of six categories for which such data is simply inapplicable. For PTV, which sells no advertising because of its non-commercial nature, he makes assumptions that contributions are like advertising but also that the average CPM, which he applies fully to Program Suppliers programming, should be cut by two-thirds for PTV. For Devotionals, he assigns the average CPM even though Devotional programmers sell no advertising in their programs. And he applies the average CPM to Canadian station programming even though he used no advertising data at all for Canadian broadcast markets. *See* SP PFOF ¶¶~~439-441.~~432-434.

For the remaining "prices," a key to the increase in the Program Suppliers' share that results from his calculations is that he adjusts the CPM-based "price" for CTV programming downwards, based on a number of assumptions. But the assumptions by which he seeks to justify the manipulations of the CPM rates for CTV, which have the effect of reducing the "price" he assumed for CTV programming and increasing the relative "price" for Program Suppliers programming, were demonstrably false and based on fundamental misunderstandings about how the local broadcast advertising market actually works, as demonstrated both by his own underlying data and by Mr. Stone's expert testimony. His decision not to credit CTV programming with Prime Time CPMs was wrong both because he mistakenly assumed that CTV programming did not air during Prime Time, and because he credited all other categories with those CPMs even though their higher levels are driven by local advertising sales during network programming, which are non-compensable in these proceedings. Contrary to Dr. Ford's apparently uninformed assumptions, the evidence shows that CPMs for station-produced news programs are typically higher, not lower, than the CPMs for entertainment programs. *See* SP PFOF ¶¶~~436-438, 467-468.~~429-431, 460-461.

Even if he had managed to derive an appropriate set of advertising-based "prices" for programs in the broadcast advertising marketplace, of course, those prices would not reflect the full value of the programs in the cable market or the advertising marketplace. In rebuttal, JSC witness Mr. Trautman applied Dr. Ford's approach to sports programming carried on various cable networks (TBS, TNT, and the Top 25 cable networks). Using program expenditures for

JSC programming as a guide for the value of such programming, Mr. Trautman determined that sports programming on those networks was six to eight times more valuable than was shown using the Ford model. *See* SP PFOF ¶¶~~482-488.~~475-481.

Dr. Ford's approach using CPM rates also ignores the substantial additional value that programming may bring to broadcasters and cable networks beyond advertising revenue for a particular program. Sports programs, for example, are often used as "hooks" to sell packages of advertising on multiple programs, and reliance on CPM rates for a particular event ignores the fact that the sports program may have been the reason why an advertiser for a non-sports program agreed to pay the CPM for that non-sports program. And because of the value of sports programming, which Dr. Ford recognized was different than most other programs (Tr. 2231 (Ford)), sports programming is often used as a "tent pole" by programmers to attract viewers and cycle them to other programs. Dr. Ford's analysis ignores these real-world elements of value and relies instead on an artificial measurement that specifically understates the value of sports programming. *See* SP PFOF ¶¶~~469-480.~~462-474.

5. Nothing In The Record Corroborates Dr. Ford's Results Or Demonstrates That His Study Is Reliable. To The Contrary, The Record Establishes That Dr. Ford's Approach Is Wholly Inconsistent With Marketplace Evidence.

The only witness in these proceedings to support use of the Ford approach is Dr. Ford himself. Every other witness who addressed the issue concluded that Ford study does not provide any useful information on relative marketplace value. *See* Tr. 229-30, 255-56 (Crandall); Tr. 2344-45 (Crawford); Tr. 2786-88 (Salinger); Tr. 3060-61 (Calfee); Tr. 2700-01 (Trautman); Tr. 2607-09 (Desser); *see* SP PFOF ¶¶~~445-488.~~438-481.

Furthermore, Program Suppliers are offering the Ford approach for the first time in these proceedings, and Ford's study examines only the two years involved in this proceeding. There is simply no historical basis for comparing the results that Ford reaches for 2004-05 with any other time period to determine whether the results are reliable. That fact alone militates against reliance upon the Ford study as a distribution methodology. *See* 1998-99 CARP Report at 50, 48 (refusing to adopt the Rosston regression analysis as a "methodology for independently determining relative value" in part because "the lack of any historical bases for assessing reliability is of concern"); *id.* at 88 ("Unlike the Bortz survey, the Schinck approach is not time-tested. Similar approaches have not been adopted, or even presented for litigation scrutiny, for over 20 years. Unlike reliance on 'tried and true' methodologies such as the Bortz survey, this Panel is loath to slash drastically an award based upon such untested methodologies"). The concern over reliability is particularly significant here given that, as Dr. Ford acknowledged (Tr. 2286 (Ford)), there is a "significant difference" in his results for the years 2004 and 2005. *See* SP PFOF ¶¶~~481-554-557.~~474, 547-550.

In addition, Program Suppliers have not presented any evidence to corroborate the results of the Ford study. Indeed, the Gruen cable subscriber study reflects a valuation for Program Suppliers that is more than 20 percentage points lower than the valuation for Program Suppliers in the Ford study (even if one improperly credits Program Suppliers with the full value of their "other sports" category). No Program Suppliers' witness (other than Dr. Ford) even references the Ford study.

B. The Gruen Cable Subscriber Surveys Are Methodologically Deficient And Do Not Show How The Section 111 Royalties Would Be Allocated In A Free Market Absent Compulsory Licensing.

Dr. Gruen's testimony makes clear that his cable subscriber surveys do not reflect relative market value. As noted above, he offered an adjusted viewing study in the 1998-99 proceeding to show how the "Section 111 copyright payments would be distributed among the different programming categories if the respective values of the different programming categories were established in a marketplace setting." Tr. 1841 (Gruen). But he repeatedly disavowed the suggestion that his subscriber study was intended to serve the same purpose in this proceeding. *See* Tr. 1840-47 (Gruen); *accord* Tr. 2294 (Ford) (Gruen survey does not reflect "market valuation"). Gruen would say only that, if surveys are to be used, the Judges should use a survey of cable subscribers rather than operators. *See* Tr. 1836-37 (Gruen).

Dr. Gruen, however, has it backwards. While a cable operator's valuations of programming may be derived from subscriber valuations, in the final analysis it is the cable operator's valuation (and not the subscriber's) that determines the relative amounts that program owners receive. As Dr. Crawford explained, even if a subscriber survey collected the appropriate information about subscriber preferences (which he explains Dr. Gruen's survey did not), a profit maximizing cable operator would extract greater value from programming which subscriber preferences were "negatively correlated" with the system's other program offerings than from programming for which a subscriber survey simply reported the highest average preference. *See* SP PFOF ¶¶452, 532-34. And thus it is the operator survey, and not the subscriber survey, that should be used to determine relative market value.

In any event, the 2004-05 Gruen subscriber surveys are seriously flawed and afford no proper basis for determining any claimant's royalty share in this proceeding. JSC presented the testimony of two witnesses (Jeffrey Berman of C&R Research and Dr. Gregory Duncan of Berkeley), both of whom were qualified as experts in survey research, to discuss these flaws; the Canadians presented a third survey research expert (Dr. Ratchford) to do the same. Their testimony demonstrates that the Gruen surveys do not comport with the relevant professional standards, including those set forth in the Federal Judicial Center's *Reference Guide on Survey Research.* But rather than simply provide expert opinion criticizing the Gruen surveys, JSC also commissioned a pilot study from C&R Research (which has conducted numerous cable subscriber surveys for the cable industry) to assess whether those criticisms have any empirical basis. That pilot study demonstrates that the Settling Parties' criticisms of the Program Suppliers' cable subscriber surveys have a sound factual underpinning -- unlike Program Suppliers' criticisms of the Bortz cable operators surveys which are based on pure speculation and conjecture. Among other things, the pilot study confirms that the Gruen surveys obtained meaningless responses on program valuations because they provided their respondents with examples of programs that were not televised by the distant signals that the respondents received. Indeed, over half of the respondents to the pilot study identified such program examples (those not televised by their distant signals) as the programming they were valuing -- which is precisely why Bortz has resisted using such examples despite Program Suppliers' repeated insistence over many years that it do so. *See* SP PFOF ¶¶482-~~91.~~530.

One additional point should be emphasized. The Gruen surveys are not the first cable subscriber surveys to be offered in the distribution proceedings. In the 1983 distribution proceeding, CTV sponsored a constant sum cable subscriber study that was challenged by various parties including Program Suppliers. The CRT expressed concerns about the study because of its low response rate (under 33%) and overrepresentation of females (60%) who accorded significantly lower valuations to sports than did males (20% vs 33%). *See* 1983 CRT Determination, 51 Fed. Reg. at 12810 & 12799. Incredibly, and contrary to all basic tenets of survey research, Dr. Gruen did not provide the Judges with any information about the response rate of his cable subscriber surveys, instead offering a meaningless "cooperation" rate. Furthermore, while he collected a variety of demographic information about the respondents, he did not obtain or provide any information about the gender of the survey respondents. *See* SP PFOF ¶¶492-501.

The lack of this basic information (response rate and gender of respondents) -- which is routinely included in reports of professionally-conducted consumer surveys -- precludes the parties and the Judges from determining whether the Program Suppliers' surveys have responded to the basic concerns raised about the last cable subscriber survey introduced in the cable royalty distribution proceedings. Furthermore, Dr. Duncan and Mr. Berman both emphasized the importance of collecting this information in order to determine the representativeness of a survey sample, and neither Dr. Duncan or Mr. Berman could ever recall a consumer survey where such information was not provided. Consequently, the Program Suppliers have failed to show that the respondents to the Gruen Survey are representative of the cable universe. On this basis alone, the Judges should not accord any weight to the Gruen subscriber surveys. *See* SP PFOF ¶¶492-501.

Even if the survey had been properly implemented, however, it should not be used as a direct measure of relative market value, for the reasons Dr. Crawford explained. From the perspective of the economic principles that drive the profitability of a cable system that sells bundled programming, the greatest value is in niche programming for which preferences are negatively correlated with the system's other program offerings. Dr. Gruen's survey failed to ask a qualifying question about whether the respondent valued distant signal programming at all, and thus failed to collect fundamentally meaningful information about the respondents' relative preferences. But it also failed to collect information about the respondents' relative preferences for their systems' other program offerings, which would have been necessary in order to derive meaningful information about the relative value of the distant signal program types to cable operators in terms of maximizing their profits through attracting and retaining subscribers with the programming bundles they offer. *See* SP PFOF ¶¶452, 516-22.

VII. The Devotional Claimants Have Provided No Persuasive Evidence To Justify A Change In Their Prior Litigated Award, And Other Evidence Supports The Continuation Of That Award.

In the 1998-99 proceeding, the CARP reviewed all the record evidence to determine whether particular claimants' awards should be lower or higher than their Bortz shares. Based upon that review, the JSC, CTV and Program Suppliers' shares were set slightly below their Bortz shares (but at the same relative level as Bortz) while PTV and the Canadians received more than their Bortz shares. The 1998-99 CARP did not consider how the Devotionals' share should relate to the 1998-99 Bortz results because the Devotionals chose not to participate in that proceeding and thus they made no showing as to how their award should relate to their Bortz share. Instead, they agreed to accept their 1990-92 litigated award, which was set below their 1990-92 litigated Bortz share, and to sit on the sidelines while others litigated over the significance of the 1998-99 Bortz results.

In the 1990-92 proceeding, the Devotionals had sought an award equal to their 1990-92 Bortz share. The 1990-1992 CARP, however, found that the Devotionals' evidence in support of their claim was "anecdotal or individual opinions, not quantified and/or not related to the Devotionals' proportionate share of the royalty fund," and that there had been no change in circumstances since the previous cable distribution proceeding determination. 1990-92 CARP Report at 130. The CARP made an award to the Devotional Claimants of 1.25% of Basic Fund royalties per year, notwithstanding that their Bortz survey shares were 3.6%, 4.3%, and 3.9% for the respective years. 1990-92 CARP Report at 50. The Devotionals' shares were adjusted to accommodate other awards, so that their final 1990-92 awards were 1.19375% of the Basic Fund (1.19385% for 1990) and 0.90725% of the 3.75 Fund (0.9080532% for 1990). *1990-92 Librarian Decision,* 61 Fed. Reg. 55653, 55661-62 (Oct. 28, 1996). The Devotional Claimants argued on appeal that the CARP had ignored its evidence corroborating the Bortz share numbers and treated its evidence differently from that of other claimant categories, but the Librarian and the Court of Appeals affirmed the CARP's conclusions. *See 1990-92 Librarian Decision,* 61 Fed. Reg. 55653, 55666 (Oct. 28, 1996), *aff'd, NAB v. Librarian of* Congress, 146 F.3d 907, 928-29 (D.C. Cir. 1998).

In this proceeding, the Devotionals have offered no study of their own to support any award. Instead, they have sought to free-ride on the 2004-05 Bortz study and to attack the Waldfogel regression analysis that confirms the 2004-05 Bortz results for all parties except the Devotionals, claiming they are entitled to an award that is five to six percentage points (over $15 million) more than their last litigated award. To be sure, the Devotionals' Bortz share is higher in 2004-05 than in 1990-92. However, the evidence in this proceeding also shows that 90% of the Devotional programming on WGN, the most widely distributed distant signal and the subject of the relative program valuations by a majority of the Bortz survey respondents, was non-compensable. *See* SP PFOF ¶¶~~224-225, 229-230, 704.~~223-224, 228-235, 686. The Bortz results thus provide at best a ceiling for Devotionals. Given that virtually all (90%) of the distant signal Devotional programming on WGN was non-compensable, it was incumbent upon the Devotionals to come forward with compelling evidence demonstrating that the Bortz survey should nonetheless serve as a proper basis for the significant increase they are seeking. They have failed to do so. *See* SP PFOF ¶¶674-88.

In short, the Devotionals have failed to provide credible evidence of changed circumstances since 1990-92 or any credible evidence tending to show that the 1990-92 CARP's prior determination of their award at a level below their Bortz survey share was incorrect. Under the standard set forth by the Court of Appeals in *NAB v. CRT, supra* note 1, the Devotionals have failed to establish that they should receive an award higher than their 1990-92 award.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

PROPOSED FINDINGS OF FACT

I. The Parties

A. Definition of Phase I Parties and Program Categories

1. In its 1979 Cable Royalty Distribution Determination, the CRT announced, after having heard the comments of the parties to the proceeding,[1] that it would conduct the royalty distribution in two phases.[2] In Phase I it would determine what percentages of the 1979 royalty fund to award to seven categories, which it identified as follows: "(a) motion picture and syndicated program suppliers; (b) sports, professional and collegiate; (c) public television; (d) music; (e) commercial television; (f) commercial radio;[3] and (g) public radio."

2. A separate award was made to the Canadian Claimants in the 1979 Proceeding,[4] and in the 1980 Proceeding, the CRT formally identified it as a separate Phase I category, along with a newly determined Phase I category for Devotional Claimants.[5] Since 1980, although the descriptive names of the categories have varied somewhat, the same categories have been used by the parties and the CARPs in Phase I proceedings.[6] The parties represented in this hearing are currently known as: Program Suppliers, Joint Sports Claimants, Public Television Claimants, Music Claimants, Commercial Television Claimants, Devotional Claimants, and Canadian Claimants.[7]

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1 1979 C~~able Royalty Distribution~~RT Determination, 46 Fed. Reg. at 24619 ~~(May 1, 1981)~~.

2 1979 C~~able Royalty Distribution~~RT Determination, 47 Fed. Reg. at 9879 ~~(March 8, 1982)~~.

3 No royalties were awarded for Commercial Radio, and, ultimately, Phase I claims were no longer presented for that category. *See* 1990-92 Librarian Decision, ~~Distribution of 1990, 1991 and 1992 Cable Royalties,~~ 61 Fed. Reg. at 55654 ~~(October 28, 1996)~~.

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4 1979 C~~able Royalty Distribution~~RT Determination, 47 Fed. Reg. at 9879, 9894 ~~(March 8, 1982)~~.

5 1980 C~~able Royalty Distribution~~RT Determination, 47 Fed. Reg. at 24768 ~~(June 8, 1982)~~.

6 *See, e.g.*, 1989 C~~able Royalty Distribution Proceeding~~RT Determination, 57 Fed. Reg. at 15287 ~~(April 27, 1992)~~; 1990-92 Librarian Decision, 61 Fed. Reg. at 55654. ~~Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55654 (October 28, 1996)~~; 1998-99 Librarian Order~~Distribution of 1998 and 1999 Cable Royalty Funds~~, 69 Fed. Reg. at 3607 ~~(January 26, 2004)~~.

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7 Joint Motion of the Phase I Parties to Adopt Stipulation as to Claimant Group Categorization and Scope of Claims, filed October 2, 2009.

3. During the course of several early Phase I and Phase II proceedings, it occasionally became necessary for the CRT to issue rulings determining more specifically the definitions of the programs that fell within the respective Phase I categories, in order to maintain the mutually exclusive scope of those categories.[8] When the first distribution proceeding was commenced after the CARP system replaced the CRT, the parties provided a stipulation setting forth the CRT's historical Phase I category designations and category definitions, which were adopted by the CARP.[9]

4. Again for the 2004-05 Cable Royalty Distribution Proceeding, counsel for all Phase I categories participating in the proceeding[10] presented a stipulation agreeing on the following category definitions to be used in this Phase I proceeding, which repeat those previously determined by the CRT:[11]

> Program Suppliers. Syndicated series, specials and movies, other than Devotional Claimants programs as defined below.
>
> Syndicated Series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. Commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.
>
> Joint Sports Claimants. Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.

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8 *See, e.g.*, 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408, 8416 (Phase II) (March 17, 1987); Advisory Opinion, Docket No. CRT 85-4-84 CD (May 16, 1986).

9 ~~Report, 1990-1992 Cable Royalty Distribution Proceeding ("~~1990-1992 CARP Report~~")~~ at 11-12; *see-* Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims, Docket No. 94-5, CARP CD 90-92, filed February 23, 1996.

10 The parties had previously entered a settlement agreement with NPR on behalf of Non-Commercial Radio, which is not participating in this Phase I Proceeding.

11 Joint Motion of the Phase I Parties to Adopt Stipulation as to claimant Group Categorization and Scope of Claims, filed October 2, 2009.

approximately 70% of all systems carried WGN as at least one of their distant signals.[12] WGN televised more JSC events than any other broadcast station during 2004-05.[13]

6. During the years 2004-05 cable systems also retransmitted JSC programming regionally through the carriage of independent stations and network affiliates; much of that carriage was done in geographic areas relatively close to the cities where the teams played.[14] JSC programming is distinguishable from all the other programming represented in this proceeding in that all of the JSC programming is live and first run.[15] Moreover, each sporting event is unique in that no game can be substituted for another. And sporting events are generally exclusive to the station televising the event - if a cable subscriber does not have the station carrying a game available to him, there usually is no alternative means of viewing it.

7. JSC programming ~~appeard~~appeared on cable systems throughout the country. In addition to regular season games, cable systems ~~retrasmitted~~retransmitted on a distant basis during the relevant years post-season telecasts of MLB and the NFL, including the MLB World Series and the NFL's Super Bowl.[16]

2. Commercial Television Claimants

8. The Commercial Television Claimants represent and are making a Phase I royalty claim for all programs produced by or for approximately 600 U.S. commercial television stations that were broadcast exclusively on those stations and retransmitted by distant cable systems during 2004 and 2005.[17] These programs generally included station-produced newscasts and public affairs shows.[18] In addition, they included news magazine and interview shows, specials, and a variety of other programs such as children's shows, sports-related programs and

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12 Trautman WRT (SP Ex. 57) at 15.

13 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 1-2.

14 Ducey WDT (SP Ex. 8) at 7-8; SP Ex. 17; Tr. 580-581.

15 Tr. 1704 (Mansell).

16 Trautman WRT (SP Ex. 57) at 17.

17 Program Category Definitions (SP Ex. 13); *See* Fritz WDT (SP Ex. 19) at 2.

18 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

entertainment programs.[19] By definition, the Commercial Television claim includes only works that were available exclusively on the originating station.[20]

9. Commercial TV programs constituted about 15.5% of all distant signal programming purchased by Form 3 cable operators in 2004-2005, in terms of the amount of distant signal program time actually made available to subscribers.[21] Live station-produced newscasts represented the great majority of this Commercial TV programming.[22] But the programs in the Commercial TV category also included a variety of other programs, including sports-related programs such as coaches' shows, pre- and post-game shows, and specials about home teams, morning shows on many stations, which mix news with interviews and informational segments, and local weather coverage.[23] The category also included public affairs shows, documentaries, and specials.[24]

10. All of the programs in the Commercial TV category share one attribute: not one of the programs was available in the cable community through any station except the distant signal being imported.[25] By contrast, syndicated programs and movies are licensed into multiple markets, and such programs carried on distant signals may already be available to cable subscribers via their local stations.[26]

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19 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

20 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 –(Fritz); Station Produced Program Examples (SP Ex. 21, 23); 1990-1992 CARP Report at 12-13.

21 Subscriber Weighted Claimant Shares (SP Ex. 15),; Distant Signal Program Time Comparison (SP Ex. 16); Tr. 565-569, 573-575 (Ducey).

22 Fritz WDT (SP Ex. 19) at 2; Station Produced Program Examples (-SP Ex. 21, 23).

23 Fritz WDT (SP Ex. 19) at 2; Tr. 968-969, 972-974 (Fritz); Station Produced Program Examples (SP Ex. 21, 23).

24 Fritz WDT (SP Ex. 19) at 2; Station Produced Program Examples (SP Ex. 21, 23).

25 By definition, programs in the Commercial TV category were broadcast only on the originating distant signal. If a program were distributed by a station to any other station, it would become a syndicated program for copyright royalty purposes. SP Ex. 13; Tr. 552-560 (Ducey); Fritz WDT (SP Ex. 19) at 2.

26 Tr. 552-560 (Ducey); Program Category Definitions (SP Ex. 13).

the focus in a program) to feature (when the musical work is the focus of the audience's attention, such as on *American Idol)* to theme music (the signature music identifying the show).[32]

15. The Music Claimants together represent the combined public performing rights of over 725,000 songwriters and music publishers and over 20 million musical works.[33] The three U.S. PROs have entered into reciprocal licensing agreements with dozens of foreign performing rights societies throughout the world, pursuant to which the Music Claimants also represent the owners of virtually all of the rest of the world's copyrighted music in this section 111 cable distribution proceeding.[34]

16. The Music Claimants represent award-winning songwriters in all genres of music, from Bruce Springsteen and Ella Fitzgerald to Willie Nelson and Shania Twain to Bob Dylan and Neil Diamond.[35] But the vast majority of songwriters and composers represented by the Music Claimants are not famous, do not win awards, and earn very modest amounts of royalties for the use of their musical works.[36] The typical songwriter receives a modest income from his or her creative efforts at writing music that is publicly performed by others.[37] These songwriters' livelihoods can depend to a large degree on the royalties distributed by their respective performing rights organization.[38]

17. Music Claimants represent every songwriter, composer, and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming.[39]

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32 O'Neill WDT (SP Ex. 26) at ~~2)~~2; Saltzman WDT (SP Ex. 25) at 10-17.

33 O'Neill WDT (SP Ex. 26) at 1.

34 Saltzman WDT (SP Ex. 25) at 4.

35 *See* Saltzman WDT (SP Ex. 25) at 4-5, App. A; O'Neill WDT (SP Ex. 26) at App. A.

36 Saltzman WDT (SP Ex. 25) at 5.

37 Saltzman WDT (SP Ex. 25) at 5.

38 Saltzman WDT (SP Ex. 25) at 5.

39 Copyright Office Final Regulations, 59 Fed. Reg. 63,025, 63,029 (Dec. 11, 1994); 1990-1992 Decision, 61 Fed. Reg. at 55655 (Oct. 28, 1996); *see also* Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed. Reg. 20,428, 20,429 (Apr. 24, 1998).

C. Program Suppliers

18. The Program Suppliers are comprised of the Motion Picture Association of America ("MPAA"), its member companies and other producers and distributors of syndicated movies, series and specials broadcast by television stations.[40] Beginning with the first royalty distribution proceeding addressing the allocation of 1978 cable royalties, MPAA has been the *de facto* Phase I representative of all Program Supplier claimants.[41]

D. Devotional Claimants

19. The Devotional Claimants are comprised of owners of syndicated programming that has "a religious theme."[42] Such programming includes telecasts of traditional church services but may include news and information programming containing a "religious perspective."[43] It is important to note that Devotional Claimant programmers generally pay to be placed on TV stations[44] and that devotional cable networks generally offer their programming to cable operators for no direct license fee.

E. Canadian Claimants

20. The Canadians are comprised of the Canadian Broadcasting Corporation, private Canadian broadcasters, and affiliated broadcast stations as well as Canadian film and television producers and distributors.[45] Canadians license their programming to other countries including the United States.[46] It is important to note that Canadian signals may only be retransmitted within the compulsory zone, a specific geographic region limited to only where the community served by the cable system is located within 150 miles from the US-Canadian border and is north

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[40] Program Supplier Written Direct Case Cover Memorandum, at 1.

[41] Kessler WDT (PS Ex. 5) at 3.

[42] *See* Stanley (WDT) (DC Ex. 1) at 1.

[43] *See* Stanley (WDT) (DC Ex. 1) at ~~1~~2 (noting that "The Christian Broadcasting Network's ministry, news and information programming brings its religious perspective to political matters and world affairs.").

[44] *See* 1990-92 CARP Report at 129.

[45] deFreitas WDT (CDN Ex. 1) at 4.

[46] *Id.*

of the 42nd parallel of latitude.[47] Moreover, Phase I claims of Canadians encompass only programming originating from Canadian television signals and does not include programming claimed by U.S. claimants.[48] A significant portion of programming that originates from Canadian signals is traditionally associated with Program Suppliers and JSC programming.[49]

II. Section 111 Compulsory License

A. Scope of License

21. Section 111 of the Copyright Act, 17 U.S.C. § 111, provides a "statutory" or "compulsory" license that allows cable systems to retransmit broadcast signals to their subscribers without having to negotiate with copyright owners of the programming and other copyrighted works on those stations. Section 111 requires cable operators to pay statutorily-prescribed royalty fees as a condition of availing themselves of the compulsory license. *Id.* § 111(d)(1). Eligible copyright owners of the programs and other works retransmitted pursuant to the Section 111 compulsory license may agree among themselves as to the allocation of those royalties. *Id.* § 111(d)(4)(A). If the copyright owners are unable to agree on such an allocation, the Judges have the authority to determine the appropriate allocations. *Id.* §§ 111(d)(4)(B), 801(b)(3)(B).

22. As long as a cable operator complies with Section 111 and applicable rules of the Federal Communications Commission, it may retransmit "local" and "distant" over-the-air broadcast stations. 17 U.S.C. § 111(c)(1). A station (or signal) is "distant" in those communities located outside the station's local market. *See id.* at § 111(f). The area of the station's "local market" is determined by reference to the FCC's cable rules, and principally comprises the signal's Designated Market Area, which is a non-overlapping geographic market consisting of all

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47 deFreitas WDT (CDN Ex. 1) at 3, CDN Ex. 1-A.~~. (noting also the compulsory zone is located S.~~

48 deFreitas WDT (CDN Ex. 1) at 2.

49 *See* deFreitas WDT (CDN Ex. 1) at 7-8 (noting that Canadian programming includes sports programs such as ~~Hockey~~hockey~~,~~ soccer and coverage of the 2004 Olympic Games as well as "special programming events" that include dramatic series).

Licensing Division of the Copyright Office.[69] CDC prepares a set of "standard" reports of SOA information as well as customized reports sought by its clients.[70] CDC is the only company that does this work.[71] Many of the parties in this proceeding rely upon CDC's data collection and reports.[72]

C. Royalty Calculation

32. For 2004-1 through 2005-1, the smallest systems (known as "Form 1" systems, which had gross receipts of $98,600 or less for each six-month period) paid a flat fee of $37 every six months for the right to carry distant signals, regardless of how many signals they carried.[73] For 2005-2, a cable system was deemed a Form 1 system if it had gross receipts of $137,100 or less for each six-month period, and these systems paid a flat fee of $52 every six months for the right to carry distant signals, regardless of how many signals they carried.

33. For 2004-1 through 2005-1, mid-size systems (known as "Form 2" systems, which had more than $98,600 and less than $379,600 in gross receipts), paid royalties of 0.5 percent of the first $189,800 in gross receipts for each six month period and 1.0 percent of gross receipts above $189,800.[74] For 2005-2, a cable system was deemed a Form 2 system if it had gross receipts greater than $137,100 and less than $527,6000, and Form 2 systems paid royalties of 0.5 percent of the first $189,800 in gross receipts for each six month period and 1.0 percent of gross receipts above $189,800.[75]

34. The largest systems, those with gross receipts of $379,600 or more in 2004-1 through 2005-1 or $527,600 or more in 2005-2, are referred to as "Form 3" systems.[76] Form 3

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[69] Martin WDT (PS Ex. 2) at 2.

[70] Martin WDT (PS Ex. 2) at 3–4.

[71] Martin WDT (PS Ex. 2) at 2.

[72] Martin WDT (PS Ex. 2) at 2; Martin WDT (SP Ex. 7) at 2~~.~~.

[73] Kessler WDT (PS Ex. 5) at 12.

[74] Kessler WDT (PS Ex. 5) at 12.

[75] Kessler WDT (PS Ex. 5) at 12–13.

[76] Kessler WDT (PS Ex. 5) at 12.

signals.[83] The Minimum Fee equals the amount that must be paid under the Base Rate Fee, described below, for the first DSE.[84] A cable system must pay the Minimum Fee whether they import no distant signals, only a fractional DSE, or 1.0 DSE.[85]

Block 1	**MINIMUM FEE:** All cable systems with semiannual gross receipts of $527,600 or more are required to pay at least the minimum fee, regardless of whether they carried any distant stations. This fee is 1.013 percent of the system's gross receipts for the accounting period. Line 1. Enter the amount of gross receipts from space K ....▶ Line 2. Multiply the amount in line 1 by .01013 Enter the result here. This is your minimum fee. ....▶ $..................

38. If the system carries one or more full DSEs worth of distant signals, the Minimum Fee is applied against whatever is due as Basic Rate Fees or 3.75% Fees.[86]

39. At the end of 1997, only 40 Form 3 systems reported no distant signals.[87] In 1998, the Minimum Fee amounts paid by systems with no distant signal carriage became a much more significant component of the cable royalty fund; the number of systems carrying no distant signals increased from 40 to 459, or about 20 percent of all Form 3 systems.[88] The number of

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83 *See* 17 U.S.C. § 111(d)(1)(B)(i); Martin WDT (SP Ex. 7) at Appendix A, pg. 5.

84 Kessler WDT (PS Ex. 5) at 18; CDN Ex. R-5 at 696 (McLaughlin).

85 Kessler WDT (PS Ex. 5) at 18, MEK-4, pg. 7; McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 7. For example, if a Form 3 cable system carries a single Canadian station on a distant basis and no other distant signals, that cable operator pays the Minimum Fee. Likewise, if, on a distant basis, a Form 3 system carries just one Educational (assigned 0.25 DSE under the compulsory licensing scheme) and one Network signal (also 0.25 DSE), the system has a total of 0.50 DSEs of distant signals, and it must pay the Minimum Fee as if it were carrying a full DSE of distant signals. Kessler WDT (PS Ex. 5) at 16, 18 (calling the Minimum Fee the base rate fee); Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

86 17 U.S.C. § 111(d)(1)(B)(i) (specifying that the Minimum Fee is "to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv)"); 37 CFR § 256.2(a)(1)(c) (clarifying that both the Base Rate Fee and the 3.75% Fee are applied against the Minimum Fee); *Cable Compulsory Licenses: Application of the 3.75% Rate*, 63 Fed. Reg. 39738, at 39739 (July 24, 1998).

87 Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

88 CDN Ex. R-5 at 701 (McLaughlin) ("it was unusual, before the conversion of TBS, for there to be stations that paid only the minimum fee"); Martin WDT (SP Ex. 7) at Appendix A, pg. 6.

42. An example of a base rate calculation for a cable system with gross receipts of $1,300,000 and 3.0 DSEs is:[96]

1st DSE at 0.956%:	($1,300,000 x .00956 x 1)	=	$12,428
2nd-3rd DSE at 0.630%:	($1,300,000 x .00630 x 2)	=	$16,380
			$28,808

c. 3.75% Fee

43. The 3.75% Fee refers to the royalty paid for the carriage of signals that a cable system could not have carried prior to June 24, 1981 — the date on which the FCC eliminated its rules restricting the number of distant signals cable systems located in different sized markets were permitted to retransmit.[97]

44. One of the FCC's distant signal rules had specified the maximum number of distant stations of a particular type that were permitted to be carried, depending on the cable system's market size.[98] If an operator is located in a market that was permitted to carry only one distant independent station and carries two independent signals (for example, a U.S. independent station and a Canadian station), then it would be required to pay the 3.75% Fee for one non-permitted signal.[99] In such cases, either signal could be identified as the permitted signal or the non-permitted signal for purposes of calculating the total royalties for the cable system.[100]

45. To calculate whether 3.75% Fees are owed, a cable system first identifies in Block 6 the "permitted" signals.[101]

96 Kessler WDT (PS Ex. 5) at 17.

97 Kessler WDT (PS Ex. 5) at 19.

98 Kessler WDT (PS Ex. 5) at 19–20~~, MEK-1~~.

99 Kessler WDT (PS Ex. 5) at 19–20.

100 Kessler WDT (PS Ex. 5) at 20.

101 Kessler WDT (PS Ex. 5) at MEK-4, pg. 13.

53. The Register and Librarian affirmed the 1990-92 CARP's decision to "emphasize[] the marketplace value criteria."[114]

54. The 1998-99 CARP agreed with the 1990-92 CARP as to the appropriate distribution standard. It concluded that: "Only one distribution criterion appears to have stood the 'test of time' and has served as the principal basis for allocating cable copyright royalties – 'relative marketplace value.'"[115] Noting that "every party to this proceeding appears to accept 'relative marketplace value' as the sole relevant criterion that should be applied by the Panel,"[116] the 1998-99 CARP accepted the 1990-92 CARP's determination that "'market value is the only logical and legal touchstone'" and that its "primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed."[117] The Register and the Librarian affirmed the 1998-99 CARP's decision to rely upon a relative marketplace value standard as the standard for distributing cable royalties.[118] The Court of Appeals did the same, stating that "[w]e detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards."[119] The Court of Appeals further stated: "While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard, the CARP made no such change. Like the 1990-92 CARP, it relied on relative market value."[120]

55. In the recent order distributing the 2000-03 cable royalty funds, the Judges observed that the 1998-99 CARP "refined the approach" taken by the 1990-92 CARP and

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114 1990-92 Librarian Determination, 61 Fed. Reg. at 55658, *aff'd Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 927-28 n.18 (D.C. Cir. 1998); *see also* Librarian's Phase II Final Determination in Doc. No. 2000-02 CARP CD 93-97, 66 Fed. Reg. 66,433, 66,445 (Dec. 26, 2001) ("The established distribution criteria, as modified, must be applied in an effort to simulate a marketplace for these programs where one does not exist because of section 111.").

115 1990-92 CARP Report at 9.

116 1990-92 CARP Report at 10 (emphasis in original) (citations omitted).

117 1998-99 CARP Report at 10 (citations omitted).

118 *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3608 *aff'd Program Suppliers v. Librarian of Congress*, 409 F.3d at 401.

119 *Program Suppliers v. Librarian of Congress*, 409 F.3d ~~395~~at~~,~~ 401.

120 *Id.* (citations omitted).

"announced that its primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed."[121] The Judges further observed that "the Librarian upheld this conclusion as well, and the Court of Appeals once again affirmed."[122]

56. Witnesses for each of the claimants have recognized that relative market value is the appropriate standard for distribution in this proceeding.[123]

B. Nature of the Hypothetical Marketplace

57. Longstanding precedent describes the task of the decision maker in cable royalty distribution proceedings as being "to simulate [relative] market valuation" in the absence of a compulsory license.[124] The 1998-99 CARP, based on evidence including opinions of expert economists, determined in detail for the first time the attributes of the "hypothetical marketplace" whose outcomes are to be simulated.[125]

58. The 1998-99 CARP held that negotiations in the hypothetical marketplace would most likely occur between individual cable operators or multiple system operators on the one hand and individual broadcast stations, as intermediaries, for the rights to retransmit entire broadcast signals.[126] In the 2004-05 proceeding, CTV rebuttal witness Dr. Gregory Crawford, an economist with extensive experience and expertise in econometric analyses of the cable television industry, agreed, explaining the industry conditions that made it likely the "seller" would be an intermediary representing an entire channel of programming.[127] He went on to explain that, given the economic incentives and based on observations of current marketplace

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121 *See* CRJ 2000-03 Distribution Order at 15.

122 *See* CRJ 2000-03 Distribution Order at 15 (citing *Program Suppliers v. Librarian of Congress,* 409 F.3d ~~395,~~at 401 (D.C. Cir. 2005)).

123 *See* Crandall WDT (SP Ex. 3); Tr. 635 (Ducey); Tr. 734 (Waldfogel); McLaughlin WDT (SP Ex. 6) at 2; Zarakas WDT (SP Ex. 27) at 3; Tr. 2819 (Salinger); Calfee WRT (CDN Ex. R-3) at 4; Tr. 2119 (Ford); Tr. 2344-2345 (Crawford).

124 1998-99 CARP Report at 8-10.

125 1998-99 CARP Report at 10-13; 1998-99 Librarian Order 69 Fed. Reg. at 3614.

126 1998-99 CARP Report at 11, 12.

127 Crawford WRT (SP Ex. 52) at 13.

behavior, the intermediary would likely be the distant signal itself rather than a new entity compiling the same channel of programming.[128]

59. The 1998-99 CARP also concluded that programming decisions in the hypothetical marketplace would continue to be made by broadcasters considering their own local market economics, and that cable operators would thus face a "fixed configuration and quantity" of distant signal programming.[129] In the 2004-05 proceeding, expert economist Joel Waldfogel confirmed, based on his prior experience and expertise, that the distant signal market is a secondary market, in which supply is fixed, as a byproduct of the prior programming decisions of the television stations.[130] Indeed, in the 2000-03 cable distribution proceedings, Linda McLaughlin, who testifies again in these proceedings on behalf of PTV, testified that the cable distant signal marketplace is a "secondary market" where "the only thing that's important is demand, not the supply. The supply already exists, so the cost of the programming is -- isn't relevant, only the demand for the programming, in this case, the demand by the cable operators."[131]

60. The 1998-99 CARP went on to conclude that, in the hypothetical marketplace, relative market value would be determined by the demand from the potential purchasers, the cable system operators.[132] In this proceeding as well, Dr. Waldfogel confirmed that "what matters in thinking about [distant signal] value" is cable operator demand.[133] Dr. Crawford explained, in response to cross-examination questions from Program Suppliers counsel, that the "relative market value of interest" would be determined in the hypothetical market by the value of distant signal programming to the cable operators in terms of attracting subscribers.[134] Indeed, testifying in support of his subscriber survey, Dr. Arthur Gruen, sponsored by the Program

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128 Crawford WRT (SP Ex. 52) at 13-14.

129 1998-99 CARP Report at 12.

130 Waldfogel WDT (SP Ex. 18) at 1-2; Tr. 750 (Waldfogel).

131 2000-03 Tr. 670, 672 (McLaughlin) (Ex. CDN-R-5).

132 1998-99 CARP Report at 12-13; 1998-99 Librarian Order at 3614.

133 Tr. 750 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 1-2; *Accord*, ~~Mclaughlin~~ McLaughlin WDT (SP Ex. 6) at 1.

134 Tr. 2405-06 (Crawford).

Suppliers, testified that "the measure of value in these proceedings has been the ability [of programming] to attract and retain subscribers."[135]

61. In this context, because the relative market value inquiry must produce an allocation of the royalties actually paid, among the owners of the programs actually carried, the simulation of the hypothetical market is constrained by the actual distant signal marketplace behavior of the cable operators.[136]

IV. Settling Parties' Approach

62. The Settling Parties seek an award based upon the results of (a) the 2004-05 Bortz constant sum surveys of cable operator valuations of distant signal non-network programming, as adjusted to account for issues addressed in the 1998-99 CARP Report, and (b) the 2004-05 Zarakas study of the value of music in programming, which also is intended to respond to issues raised by the 1998-99 CARP. The Settling Parties rely upon the 2004-05 Waldfogel regression analysis (and other record evidence) as providing corroboration of the 2004-05 Bortz results in the same manner that the 1998-99 CARP relied upon the comparable Rosston regression analysis to corroborate the 1998-99 Bortz results.

A. Bortz Constant Sum Survey of Cable Operators

1. History of Constant Sum Surveys in Distribution Proceedings

63. JSC submitted constant sum surveys of cable operators in each of the 1978, 1979, 1980, 1983, 1989, 1990-92, 1998-99 and 2004-05 cable royalty distribution proceedings. CTV and PTV submitted constant sum surveys of cable operators in the 1983 proceeding. CTV also submitted a constant sum survey of cable subscribers in the 1983 proceeding. The Canadians have submitted constant sum surveys in the 1990-92, 1998-99, 2000-03 and 2004-05 proceedings.[137]

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135 *See* Gruen WDT (PS Ex.8) at 28.

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136 *See* Tr. 2199 (Ford).

137 Claimants also have submitted cable operator surveys employing other methodologies in various distribution proceedings. *See* 1980 CRT Determination, 48 Fed. Reg. at 9556; 1983 CRT Determination, 51 Fed. Reg. at 12802-~~12~~2803.

75. The CRT recognized that Bortz & Company had taken "important steps to improve the validity and reliability" of the results of the cable operator survey and noted that "[t]he high standards of procedure that were obtained in the 1983 survey were again followed in the 1989 survey."[175] To address the concern of the CRT that the survey was conducted too long after the end of the year for which the cable operators were being surveyed, 60% of the 1989 survey was conducted 1989 and 40% in the first 10 weeks of 1990.[176] The 1989 survey also reflected a change in the key constant sum question; it asked the cable operator to allocate 100% of a fixed budget for distant signals among program types.[177] This change was made to tailor the constant sum question more closely to the function that the cable operator performs.[178] Finally, the 1989 survey included the Devotional and Canadian programming categories.[179]

76. The CRT, however, noted that "certain questions concerning the reliability of the results remain."[180] It referred to issues of program categorization, recall, respondent qualifications and the brief nature of the interview as causing the most concern.[181] However, it also referred to Dr. Besen's testimony concerning supply side considerations. The CRT said it was not "prepared to fully embrace the result of the Bortz survey" but would give those results greater weight where there was corroborating evidence.[182]

d. 1990-92 Proceeding

(i) JSC Surveys

77. In the 1990-92 distribution proceeding before the CARP, the JSC once again submitted a constant sum cable operator survey conducted by Bortz & Company. Once again, the JSC was joined by the CTV, PTV and the Devotional Claimants in supporting the

[175] *Id.* at 15300.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 15300-~~153~~01.

[182] 1989 CRT Determination, 57 Fed. Reg. at 15301-02.

interviewers who specialize in surveying professional and managerial personnel were utilized."[215] Interviewers were not told the name of the client or given any information regarding the nature of the study.[216] The research firm achieved response rates of 65% and 68% among the sampled systems for the key constant sum question in 2004 and 2005, respectively.[217] A comparison of the response rates to the 1998-99 Bortz surveys, and the 2004-05 Bortz surveys is set forth below[218]:

Response Rates to 1998-99 & 2004-05 Bortrz Surveys

Year	Response Rate to Constant Sum Question
1998	57%
1999	67%
2004	65%
2005	68%

c. Survey Questionnaires

90. Bortz designed the questionnaires for the 2004 and 2005 studies "so that respondents had the qualifications and information necessary to address the key constant sum valuation question."[219] The initial survey question "screened" potential respondents for their involvement in making decisions related to the carriage of distant signals.[220] The result of this "screening" process was "a respondent group that overwhelmingly consisted of general

215 *Id.*

216 *Id.*

217 *Id.*.

218 Bortz Report (SP Ex. 2) at 12, 48.

219 *See* Bortz Report (SP Ex. 2) at 12.

220 *See id.* at 12, 42.

94. As noted above, cable operators were asked to "assume [they] had a fixed dollar amount to spend in order to acquire all the programming actually broadcast during [the particular year] by the stations" that cable system actually carried.[229] Respondents were first instructed to write down the programming categories and to think about their relative value.[230] They were then asked to write down their estimates for each category.[231] Subsequently, the interviewer reviewed the estimates for each category with the respondent to allow for any changes upon reconsideration.[232]

95. Moreover, the 2005 Bortz survey was identical to the 2004 survey described above.[233] Furthermore, in order to focus the respondents answers, Bortz tailored each questionnaire to the actual distant signals carried by the respondent cable systems and explained to the respondents that network programming should not be factored into their answers.[234]

3. Reliability And Validity of the 2004-05 Bortz Surveys

96. For more than twenty-five years, JSC (as well as other claimants) have been presenting evidence in the various cable royalty distribution proceedings from survey experts, market researchers, economists, statisticians, valuation experts and cable industry executives concerning the reliability and validity of the Bortz constant sum surveys of cable operators.[235] Based upon that evidence, the CRT and CARPs increasingly gave greater weight to the results of the Bortz surveys.[236]

97. In the last litigated proceeding to address the issue, the 1998-99 CARP determined that the Bortz survey is "an extremely robust (powerfully and reliably predictive)

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[229] Bortz Report (SP Ex. 2) at Appendix B (Question 4a); *See also* Bortz Report (SP Ex. 2) at 12, 43-44.

[230] *See* Bortz Report (SP Ex. 2) at 44.

[231] *See id.* at 44-45.

[232] *See id.* at 45.

[233] *See* Bortz Report (SP Ex. 2) at 41-45.

[234] *See* Bortz Report (SP Ex. 2) at 12.

[235] *See* SP PFOF ¶¶ 99-125.

[236] *See* ~~History of Constant Sums Surveys, *supra*,~~SP PFOF ¶¶ 63- ~~68~~85.

model for determining relative value" and that the Bortz survey is "more reliable than any other methodology presented" for determining the relative value of Program Suppliers, JSC, and CTV.[237] The 1998-99 CARP did not suggest that any changes should be made in the Bortz surveys, concluding that the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy;"[238] it echoed the prior CARP's determination that the survey is "well designed" and answers the relevant question.[239] The Register and Librarian affirmed the CARP's reliance upon Bortz,[240] as did the Court of Appeals, which noted that it "makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme" and that "Bortz adequately measured the key criterion of relative market value."[241]

98. The 2004-05 Bortz surveys follow the same methodology as ~~did~~ the 1998-99 Bortz surveys.[242] In this proceeding, several witnesses from different disciplines testified and offered other evidence in support of the 2004-05 Bortz surveys. These witnesses offer their different perspectives as survey experts, market researchers with extensive cable industry experience, economists with such experience and an MSO programming executive. Their testimony demonstrates that the conclusions the 1998-99 CARP reached concerning the reliability and validity of the Bortz Surveys apply equally to the 2004-05 Bortz surveys.

a. James Trautman

99. James Trautman, whose testimony was sponsored by JSC, has advised cable television system operators, cable programming networks, owners of programming content and rights, and other entities with interests in the cable television industry for more than 25 years.[243] In this capacity, he has directed market research assignments addressing a wide range of issues

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237 *See* 1998-99 CARP Report at 31.

238 *Id.* at 52.

239 *Id.* at 23.

240 *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3608 *aff'd Program Suppliers v. Librarian of Congress*, 409 F.3d at 401.

241 *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402~~, (D.C. Cir. 2005)~~.

242 *See* Bortz Report (SP Ex. 2) at 28.

243 Trautman WDT (SP Ex. 2) at 1; Tr. 39-43 (Trautman)

> Q. And in terms of the reliability of your survey, what is your conclusion when you consider those -- those experiences?
>
> A. Well, our conclusion is that -- that the survey results are consistent with what we find in terms of the marketplace, both from an experiential and from an analytical point of view. And that gives us confidence that the survey results are reliable.[255]

b. Dr. Gregory Duncan

107. Dr. Gregory Duncan, an expert in survey design and validation, provided testimony about the validity and reliability of the Bortz survey.[256] Dr. Duncan has a Ph.D. in Economics and a Master's degree in ~~Statistics~~statistics.[257] His academic research is and has been in econometrics, specifically, methods for surveys and analyzing survey data.[258] He has experience designing and analyzing surveys as an industrial economist with GTE and as a consultant with Huron Consulting.[259] He has worked on hundreds of surveys, and his survey work has included survey design, sample construction, and data analysis.[260] Dr. Duncan has taught college courses on survey design and market research.[261] He currently teaches econometrics at the University of California, Berkeley, and that course includes a section on surveys.[262] He also teaches a graduate course on survey methods.[263]

108. In his written direct testimony, Dr. Duncan provides several reasons to support his conclusion that "the Bortz survey was based on sound principles and test methods and that it was conducted in such a way that its results can be deemed reliable."[264] Those reasons include:

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255 Tr. 113-15 (Trautman).

256 Tr. 2502 (Duncan); Duncan WRT (SP Ex. 54) at 9-11.

257 Duncan WRT (SP Ex. 54) at 3.

258 Duncan WRT (SP Ex. 54) at 3-4.

259 Tr. 2498-2502 (Duncan).

260 *Id.*

261 *Id.*

262 Tr. 2502 (Duncan).

263 *Id.*

264 Duncan WDT (SP Ex. 1) at 11.

113. Dr. Crandall has testified before the CRT and the CARP in the 1989, 1990-92 and 1998-99 cable distribution proceedings.[285] He was qualified in these proceedings as an expert in the economics of the broadcast and cable television industries.[286]

114. In prior cable distribution proceedings, Dr. Crandall testified on relative marketplace value, the economic criticisms leveled by Program Suppliers against Bortz surveys, and compared the Bortz surveys with other types of evidence presented in those proceedings. For example, in the 1989 proceeding, Dr. Crandall explained the economic theory underlying assessments of relative market value and concluded that "the [Bortz survey] was the best evidence of those values."[287] In the 1998-99 proceeding, Dr. Crandall "explained again the value of the Bortz survey data in showing relative market value and discussed why earlier criticisms of the survey were not well-founded."[288] Dr. Crandall's statements in support of using the 2004-05 Bortz surveys to measure relative marketplace value in the current proceedings are consistent with his testimony in earlier cable royalty proceedings.[289]

115. Dr. Crandall testified that the Bortz survey is "the best tool to answer the question presented in this proceeding."[290]

116. He further testified:

> The best evidence on how the marketplace would have allocated these royalties [absent compulsory licensing] is to be found in constant sum surveys of cable system executives who are asked how they would have allocated a fixed budget for imported distant broadcast signals.[291]

117. He explained that "[s]ince these operators would make the program purchasing decisions in the marketplace that would exist but for the compulsory copyright license, this type

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[285] Tr. 215 (Crandall).

[286] Tr. 215-16 (Crandall).

[287] Crandall WDT (SP Ex. 3) at 7.

[288] Crandall WDT (SP Ex. 3) at 7.

[289] *See id.*

[290] Crandall WDT (SP Ex. 3) at 7; *see also* Tr. 225-29 (Crandall).

[291] Crandall WDT (SP Ex. 3) at 3.

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- James P. Mooney, President and CEO of the NCTA.
- Robert Wussler, the former CEO of Superstation WTBS.
- Roger Werner, the former CEO of ESPN, Inc.

123. Ms. Meyka stated that "I agree with the statements made by these witnesses concerning the value of live sports programming to the cable operator. I also believe that the reasons given by these witnesses as to why live sports programming is valued so highly by cable operators are still relevant and equally applicable to the period 2004-2005."[301]

e. Other Expert Testimony

124. The testimony of expert witnesses, in addition to those who appeared on behalf of JSC, also support the conclusions reached by the 1998-99 CARP and witnesses who testified in prior proceedings concerning the reliability and validity of the Bortz surveys.[302]

125. The Canadians presented witnesses who generally questioned whether the Bortz results could apply to a small category like the Canadians (or Devotionals). However, they expressed no concerns about whether the Bortz results could apply to the major categories (JSC, PS and CTV).[303] Moreover, as noted above, the Canadians determined (as did Bortz) that a constant sum methodology provided a proper means to determine relative marketplace values.[304] Dr. Debra Ringold, another survey research expert who testified on behalf of the Canadians Claimants, stated that the "constant sum scaling method" is "a pretty standard technique," "utilized and evaluated and found to be a very appropriate method for economic valuation problems, " and "fairly efficient in that it's [ ] not confusing."[305] Dr. Ringold further testified in support of the constant sum methodology, stating it is "found to be predictive in some circumstances of actual purchase decisions and reflective of past purchase decisions" and "considered to be very well suited to this kind of task and very robust across contexts and has

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301 *See id.* at 8.

302 *See e.g.*, Tr. 642, 685 (Ducey); Tr. 734-35 (Waldfogel); McLaughlin WDT (SP Ex. 6) at 6-8.

303 Tr. 3074-75 (Calfee); Calfee WRT (CDN Ex. R-3) at 9.

304 *See* Tr. 3008 (Ford).

305 Tr. 1299 (Ringold).

127. The absolute confidence intervals of the above estimates are reflected in the below table:[308]

Absolute Confidence Intervals		
Category	**2004**	**2005**
Live professional and college team sports	±2.3	±2.5
Movies	1.3	1.8
Syndicated shows, series and specials	2.2	2.1
News and public affairs	1.7	1.7
Devotional and religious	0.7	0.8
PBS and all other non-commercial	0.9	0.9
Canadian	0.2	0.2

128. The table below shows the results of the Bortz constant sum surveys for 2004-05, factoring in the confidence intervals associated with the estimate for each programming category in each year.[309]

Distant Signal Programming Valuation Studies, 2004-05*

	2004	2005
Live professional and college team sports	31.2% - 35.8%	34.4% - 39.4%
Movies	16.5 - 19.1	17.4 - 21.0
Syndicated shows, series and specials	16.5 - 20.9	16.3 - 20.5
News and public affairs programs	16.7 - 20.1	13.1 - 16.5
Devotional and religious programming	7.1 - 8.5	5.8 - 7.4
PBS and all other programming on non-commercial signals	2.6 - 4.4	2.8 - 4.6
All programming on Canadian signals	0.0 - 0.4	0.1 - 0.5

*Range reflects potential values for each year based on 95% confidence interval.

129. In each of the 2004 and 2005 studies, cable operators allocated the largest percentage of their distant signal non-network programming budget to live professional and

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308 Bortz Report (SP Ex. 2) at 52, 54 (2004 & 2005 Absolute Confidence Intervals).

309 Bortz Report (SP Ex. 2) at 24 (Table III-2). Confidence intervals reflect the uncertainty surrounding a point estimate of value obtained using a sample-based survey methodology. *See* Bortz Report (SP Ex. 2) at 6, ~~fn.~~n. 8.

college team sports.[310] That category was accorded 33.5 percent of the value in 2004 and 36.9 percent in 2005.[311] The two categories represented by Program Suppliers in this proceeding, movies and syndicated shows, series and specials, ranked between second and fourth in each of the two surveys.[312] The total allocation to these two categories was 36.5 percent in 2004 and 37.6 percent in 2005, or approximately the same as the sports allocation.[313]

130. Respondents to the Bortz surveys were asked to allocate value to programming on educational stations and Canadian stations only where their systems carried such stations as distant signals.[314] Respondents at systems that carried public television distant signals allocated an average value of 11.3% to public television programming in 2005 and 10.6% in 2005.[315] For systems that carried Canadian distant signals, the average value attributed to the programming on these signals was 3.0% in 2004 and 3.8% in 2005.[316]

5. Comparison of 2004-05 Bortz Results and Results of Prior Surveys

131. This section compares the results of the 2004 and 2005 cable operator surveys to the results of surveys conducted for prior years, focusing on the surveys addressing the years 1998 and 1999 that were submitted in the most recent CARP cable proceedings. The table below demonstrates that, notwithstanding a number of changes in methodologies over the years, many in response to issues raised by the CRT, CARP, or other parties, the results have been relatively

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310 *See* Bortz Report (SP Ex. 2) at 3 (Table I-1).

311 *Id.* at 13.

312 *Id.*

313 *Id.*

314 *See* Bortz Report (SP Ex. 2) at 15.

315 ~~*Source:*~~ Bortz Report (SP Ex. 2) at 16 (Table II-2);~~ Bortz Report (SP Ex. 2) at 16.~~ In 2004, 59 of the 162 responding systems carried one or more public television distant signals and were therefore asked to assign a value to distant signal public television programming. *See* Bortz Report (SP Ex. 2) at 15. In 2005, 68 of the 171 responding systems carried one or more public television distant signals. *See id.*

316 Bortz Report (SP Ex. 2) at 16. In 2004, 11 of the 162 responding systems carried one or more Canadian distant signals and were therefore asked to assign a value to distant signal Canadian programming. ~~Bortz Report (SP Ex. 2) at 16~~*Id.* In 2005, 13 of the 171 responding systems carried one or more Canadian distant signals. *See id.* It should be noted that the comparable numbers in 1998 and 1999 were 2 of 138 and 3 of 132, respectively. *Id.*

consistent.[317] For example, since 1983, JSC programming has consistently received the highest value by cable system operators in the constant sum surveys.[318]

317 *See* Bortz Report (SP Ex. 2) at 21 (Table III-1).

318 Bortz Report (SP Ex. 2) at 21. The early (1978-1980) cable operator surveys showed movies as the most highly valued programming. ~~*Bortz Report (SP Ex. 2) at 21.*~~*Id.* The 1978 survey placed a particularly high value on movies, but it was rightly criticized for not properly informing the respondents that they were valuing the programming shown on distant signals, as opposed to cable programming services including premium movies services such as HBO and Showtime. *See id.*

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132. Focusing on how the 2004-05 Bortz Survey results compare to those from 1998-99, the below table summarizes the value ranges by programming category in 1998-99 and 2004-05, factoring in the confidence intervals associated with the estimate for each programming category in each year.[319]

Comparison of Distant Signal Programming Valuation Studies, 1998-2005*

	1998	1999	2004	2005
Live professional and college team sports	34.3% - 39.7%	35.9% - 41.9%	31.2% - 35.8%	34.4% - 39.4%
Movies	20.3 - 23.5	20.1 - 24.1	16.5 - 19.1	17.4 - 21.0
Syndicated shows, series and specials	16.2 - 19.4	14.0 - 17.2	16.5 - 20.9	16.3 - 20.5
News and public affairs programs	13.0 - 16.6	12.4 - 16.8	16.7 - 20.1	13.1 - 16.5
Devotional and religious programming	4.5 - 6.1	4.7 - 6.9	7.1 - 8.5	5.8 - 7.4
PBS and all other programming on non-commercial signals	1.9 - 3.9	1.6 - 4.2	2.6 - 4.4	2.8 - 4.6
All programming on Canadian signals	0.0 - 0.9	0.0 - 0.4	0.0 - 0.4	0.1 - 0.5

*Range reflects potential values for each year based on 95% confidence interval.

133. Confidence intervals reflect the uncertainty surrounding a point estimate of value obtained using a sample-based survey methodology.[320] The range presented therefore illustrates the range of possible "true values" that would have been obtained (in this case, with 95% confidence) if all Form III systems that carried distant signals in 2004-05 had been surveyed.[321] Moreover, the Bortz Survey is not designed as a "tracking study."[322] Rather, a unique and different sample of potential respondents is selected from the Form 3 universe each year.[323] Consequently, some variability in results from year-to-year is to be expected, based in part on

[319] Bortz Report (SP Ex. 2) at 24 (Table III-2); *see also* Bortz Report (SP Ex. 2) at 50-53 (describing the mathematical and statistical basis for the valuation estimates obtained for the key constant sum question).

[320] *See* Bortz Report (SP Ex. 2) at 24.

[321] *See id.*

[322] In a tracking study, the same group of respondents is asked the same questions over a period of time in order to monitor changes in attitudes or behavior during that time period. *See* Bortz Report (SP Ex. 2) at 21-22, ~~fn.~~n. 14.

[323] *See* Bortz Report (SP Ex. 2) at 21-22.

a. Rationale for Regression Analysis

139. In the cable distant signal marketplace, there is little direct market information for determining the relative market value of different types of programming.[345] For example, there is no available data that provides the individual price paid for each of the retransmitted programs.[346]

140. Cable systems, however, do choose which and how many distant signals to carry in exchange for making the required royalty payments, and file Statements of Account with the Licensing Division of the Copyright Office.[347] These statements report the total royalty amount paid by the cable systems, the signals the cable systems chose to retransmit on a distant basis, and other data about the cable system.[348]

141. The information in a cable system's Statement of Account reflects marketplace decisions: what distant signals the cable system chose and how much it paid for that bundle of programming.[349] Although the statutory royalty formula applies to all Form 3 cable operators, the amount of royalties they actually pay differs across cable systems in light of their different marketplace circumstances.[350]

142. When considering whether to carry a distant signal, a cable operator seeks to maximize profits.[351] Cable systems do not earn advertising revenue from the distant signals.[352] Instead, cable systems generate revenue by attracting and retaining subscribers.[353] Distant signals increase a cable system's revenue to the extent their program helps attract or retain subscribers, who pay monthly subscriber fees to cable systems.[354] A cable operator will

345 Waldfogel WDT (SP Ex. 18) at 5.

346 Tr. 754 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5-6.

347 Martin WDT (SP Ex. 7) at 2; Tr. 757, 831 (Waldfogel).

348 Tr. 754-55 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5, ~~and~~ (Appendix 2) at 1.

349 Tr. 757 (Waldfogel).

350 Tr. 757 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 6.

351 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

352 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

353 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

354 Tr. 755-56 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3.

retransmit a distant signal only if the value of the signal, in terms of profit maximization, outweighs its cost.[355]

143. Because cable systems make carriage decisions based on profit maximization, data that show what choices they made and how much they paid allows us to learn something about the value of the distant signals.[356]

144. This is true because cable operators have freedom to make different choices about distant signals, which correlate to the royalties they pay.[357] Dr. Waldfogel testified that cable operators make "a conscious choice about what bundle of signals to bring in."[358] The cable operator cannot choose exactly how many ~~of each~~ minutes of each programming type it wants but it can pick from among the existing distant signals and their different mixes of ~~minute types~~programs.[359] There are three potential sets of economic value circumstances under the "minimum fee" feature of the royalty structure for systems that choose to carry a distant signal.[360] First, systems that attach the lowest value to distant signals pay the minimum fee and carry distant signals totaling less than 1.0 DSE.[361] Second, systems that value distant signals more highly will pay the minimum fee and carry exactly one DSE.[362] Finally, systems attaching higher value still will carry more than one DSE and make a royalty payment that is above the minimum fee.[363]

145. Although the royalty payments do not directly reveal the relative value of individual stations or programs, a multiple regression analysis, using data about actual choices made in the marketplace, can provide information about the relative values of the programming

355 Tr. 756-57 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 3, and 6.

356 Waldfogel WDT (SP Ex. 18) at 6; Tr. 757, 765 (Waldfogel).

357 Waldfogel WDT (SP Ex. 18) at 6; Tr. 831 (Waldfogel).

358 Tr. 831 (Waldfogel); *see* Tr. 2885 (Salinger).

359 Tr. 842 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 5-6; *see* Tr. 2885 (Salinger).

360 Waldfogel WDT (SP Ex. 18) at 6.

361 Waldfogel WDT (SP Ex. 18) at 6.

362 Waldfogel WDT (SP Ex. 18) at 6.

363 Waldfogel WDT (SP Ex. 18) at 6.

on the distant signals.[364] Because the royalty payment for a bundle of distant signals is the product of a percentage rate (determined by the number of DSEs carried and other factors) and the system's gross receipts for service tiers that include broadcast stations, variation across cable systems' distant signal royalty payments are affected by the number and type of distant signals chosen and system gross receipts.[365]

146. Distant signals which provide different programming from that already available from local sources would be expected to be more beneficial to a cable system.[366] Cable carriage data for 2005-2, shown in the table below, confirms that hypothesis.[367] The chart makes clear the general trend that as the markets get smaller and the number of local signals decreases, the number of distant signals imported increases.[368]

Market	Average Number of Local Stations	Average Number of Distant Signals
Top 50	16.2	1.8
Second 50	9.6	2.6
Smaller Markets	8.8	3.3
Outside All TV Markets	8.3	3.0

147. One component of the value of a distant signal is not in providing more national programming options but in providing "nearly-local" program options, such as local news from an adjacent DMA that provides locally relevant information.[369]

b. Performance of the Regression Analysis

148. The basic regression analysis seeks to measure the relative value of each program type from the relationship between the payment for the bundle and the mix of programming in

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364 Waldfogel WDT (SP Ex. 18) at 8-9; Tr. 765-66 (Waldfogel).

365 Waldfogel WDT (SP Ex. 18) at 6; Tr. 757, 768 (Waldfogel).

366 Waldfogel WDT (SP Ex. 18) at 4-5; Tr. 865-66 (Waldfogel).

367 Waldfogel WDT (SP Ex. 18) at 5.

368 Waldfogel WDT (SP Ex. 18) at 5.

369 Waldfogel WDT (SP Ex. 18) at 4-5; Fritz WDT (SP Ex. 19) at 3-5.

the bundle.[370] The amounts of programming purchased by cable operators in each of the program categories are the core independent variables, because the ultimate central question in this proceeding is the relative value of those distant signal program categories.[371]

149. Dr. Waldfogel used data for royalty payment, cable system characteristics, and minutes of programming for 4,954 cable system/accounting period observations in his regression analysis.[372]

150. Cable Data Corporation provided two types of reports for each of the four accounting periods at issue.[373] Those reports provided information about (1) the royalty paid by the cable system, (2) whether the system paid any royalties at the 3.75% royalty rate, (3) which distant signals each system carried and whether the signal was partially of fully distant, (4) the number of subscribers, (5) the number of local channels carried, (6) the total number of activated channels, and (7) which distant signals were carried by each system in each accounting period.[374]

151. Tribune Media Service's TVData Co. provided information about the programming for the 84 randomly selected days (21 days in each 6 month accounting period) that were studied.[375] The sample was a stratified random sample designed to provide equal representation of programming on different days of the week and in different months of the year, two features that affect television stations' program schedules.[376] TV Data's report included the program name, schedule, duration, and dozens of other fields of data.[377]

152. CTV expert witness Dr. Richard Ducey, ~~and~~ working with Cornerstone Research, used the raw TVData information to calculate total minutes associated with each of the Phase I categories (except Music) represented in this proceeding.[378] Dr. Ducey and Cornerstone used the

370 Waldfogel WDT (SP Ex. 18) at 6, 8; Tr. 765 (Waldfogel).

371 Tr. 734, 765-66 (Waldfogel); Waldfogel WDT (SP Ex. 18) at 6.

372 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

373 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

374 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 1.

375 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

376 Ducey WDT (SP Ex. 8) at 6; Tr. 551 (Ducey).

377 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

378 Waldfogel WDT (SP Ex. 18) at Appendix 2, p. 2; Ducey WDT (SP Ex. 8) at 5.

156. Dr. Waldfogel's regression analysis contained the following variables, which are described in Appendix 2 of SP Exhibit 18[386]:

- Eight separate variables for Minutes of Programming for the following eight categories: Program Suppliers, Sports, Commercial TV, Public Television, Devotional, Canadian, Low Power, and Mexican
- Number of Subscribers (Previous Accounting Period)
- Indicator for Minimum Payment & DSE < 1
- Indicator for Minimum Payment & DSE <= 1
- Number of Activated Channels
- Average Household Income in Designated Marketing Area
- Count of Local Channels
- Indicator for Special 3.75% Royalty Rate
- Indicator for Carriage of Partially Distant Signal
- Total Royalty Fee Paid by Cable System in Accounting Period
- Number of Observations

157. The inclusion of total minutes of the eight programming categories is an essential variable to the regression, reflecting both what type and how much programming was purchased, and shows how an additional minute of programming in each of the categories is valued.[387]

158. Number of subscribers is an important variable that reflects the size of the system.[388] The size of the system is important because the dependent variable in the regression, royalty payment, is determined in part by the cable operator's revenue which in turn correlates to the number of subscribers in the cable system.[389]

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386 Waldfogel WDT (SP Ex. 18) at 9, Appendix 2.

387 Tr. 765 (Waldfogel).

388 Tr. 768 (Waldfogel).

389 Tr. 768 (Waldfogel).

180. Later, in the rebuttal phase of the case, Dr. Gary Ford proposed an additional adjustment to Ms. McLaughlin's adjusted Bortz share for Canadians to account for an additional cable system that was omitted from the Bortz sample.[432] That adjustment resulted in a Canadian share of 1.9% for 2004.[433] Dr. Waldfogel did not consider the Ford adjustment because it was not presented until after Dr. Waldfogel's written and oral testimony, but if the Ford adjusted share for Canadians is substituted for the Augmented Bortz share that Dr. Waldfogel used in his comparison, it makes the two studies' shares even more similar.[434]

181. As Dr. Waldfogel testified, the Bortz and Waldfogel studies "are approaches that are entirely independent. . . And so coming from these very different perspectives at trying to answer this question, these are quite similar." [435] Statistical tests using the respective confidence intervals around each of the share estimates proves that the hypotheses that the regression estimated shares equal the cable operator shares.[436] The only exception is the Devotional category, for which the econometric approach of the regression analysis showed a relative value share that was significantly lower than that shown in the Bortz survey results.[437]

e. Attempts to Discredit Dr. Waldfogel's Regression Analysis Failed

182. The Devotional Claimants presented Dr. Michael Salinger, an Economics Professor at Boston University, as a rebuttal witness to address the regression study.[438] Dr. Salinger attacked the study, even though Dr. Waldfogel testified that it corroborated the Bortz survey results, which he supported,[439] because the results of the regression showed a negative or very low value for Devotional programming.[440] Dr. Salinger sought to infer from the results of

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432 Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

433 Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

434 *See* Ford WRT (CDN Ex. R-2) at 21; Tr. 3000-01 (Ford).

435 Tr. 787 (Waldfogel).

436 Tr. 788 (Waldfogel).

437 Waldfogel WDT (SP Ex. 18) at 14; Tr. 788 (Waldfogel).

438 Salinger WRT (Devo Ex. 4), at 1.

439 Tr. 2905-06 (Salinger).

440 *See* Tr. 2822-23 (Salinger).

191. JSC witness James Trautman of Bortz Media, who has substantial experience valuing television programming and was qualified as an expert in that area, also examined the cable network marketplace that Mr. Homonoff considered analogous to the distant signal marketplace. In particular, Mr. Trautman compared the license fees that various cable networks actually paid in 2004-05 for JSC and Program Supplier programming with the amount of time occupied, and viewing generated, by that programming.

192. Mr. Trautman's analysis helps corroborate several key findings of the Bortz surveys: (1) JSC's share of distant signal market value is significantly greater than its share of time or viewing; (2) Program Suppliers' share of distant signal market value is significantly less than its share of time or viewing; and (3) JSC and Program Suppliers' shares of distant signal market value are approximately the same.[469]

193. For example, following its conversion from the most widely-carried distant signal to a cable network, TBS entered into marketplace negotiations with Major League Baseball for the right to televise the games of the Atlanta Braves outside their home territory.[470] The prices that TBS paid for programming following its conversion provide perhaps the best example of the relative market value of at least the JSC and Program Suppliers programming on superstations with nationwide cable carriage (such as WGN).[471]

194. TBS paid $175 million (or over *24%* of TBS' 2004-05 programming budget) for the rights to televise the Braves in 2004-05; the remainder of that programming budget went for the production of those Braves' telecasts, the rights to televise some other JSC (NCAA) events, and Program Suppliers' programming.[472] TBS allocated more than 24% of its programming budget to the Braves telecasts, notwithstanding that those telecasts accounted for only about *2.5%* of TBS's total broadcast hours and about *2.5%* of the viewing minutes generated by all TBS programming.[473] That allocation is fully consistent with the results of the Bortz surveys.

469 *See infra*, ¶¶ ~~103~~99-~~200~~130.

470 Trautman WRT (SP Ex. 57) at 3.

471 Trautman WRT (SP Ex. 57) at 3.

472 As a result, the total listed by Mr. Trautman represents the floor for JSC programming expenditures on TBS. Trautman WRT (SP Ex. 57) at 20.

473 Trautman WRT (SP Ex. 57) at 4-5.

And, of course, it is squarely inconsistent with the results of the Dr. George Ford study sponsored by Program Suppliers (*see infra* ¶¶ 286-96~~pages——~~). As Mr. Trautman explained, the Ford formula would have resulted in MLB receiving only 4.25% in 2004 and 3.51% in 2005 (see table below).[474]

NBA on TNT Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (NBA)*	2.74%	5.37%	8.60%	46.15%
Program Suppliers/Other	~~97.26%~~	~~94.63%~~	~~91.40%~~	~~53.85%~~
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (NBA)*	2.80%	4.86%	6.96%	45.06%
Program Suppliers	~~97.20%~~	~~95.14%~~	~~93.04%~~	~~54.94%~~
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

195. Mr. Trautman conducted a similar analysis of TNT. In 2004-05, TNT paid the NBA approximately $600 million for the right to broadcast NBA basketball games.[475] TNT allocated approximately 45-56% of its programming budget for NBA telecasts even though those telecasts represented approximately 2.7-2.8% of TNT's total broadcast hours and about 4.86% of the viewing minutes generated by all TNT programming.[476] As with TBS, that allocation is entirely consistent with the results of the Bortz surveys and inconsistent with the results of Dr. Ford's study (cf. PFOF 416-437). The results of Mr. Trautman's analysis, provided in the table

474 Trautman WRT (SP Ex. 57) at 4-5.

475 Trautman WRT (SP Ex. 57) at 22.

476 Trautman WRT (SP Ex. 57) at 6-7.

programming for those categories.[484] According to the pricing data he relied on, those Top 25 networks spent approximately $400,000 per hour for JSC programming and about $32,000 per hour for Program Supplier programming.[485] JSC programming thus cost approximately twelve times more than each hour of Program Supplier programming.[486] Mr. Trautman then applied this per hour pricing data for the two program types to the distant signal marketplace. When the per-hour rights fees of these cable networks are applied to the distant signal universe, JSC and Program Suppliers receive essentially equivalent relative value shares, just as they do in the 2004-05 Bortz results (see table below).[487]

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Programming Hour Method)

	2004-05	
	JSC	**PS**
1. Percent of Distant Signal Programming Hours	4.6%	50.1%
2. Cable Network Expenditures Per Programming Hour	$396,703	$32,153
3. Time-Adjusted Expenditures (1*2)	$18,248	$16,109
4. Share of Relative Value	53.1%	46.9%

199. Mr. Trautman then computed the relative value of JSC and Program Supplier programming on Top 25 cable networks by looking at the program expenditures for each share of viewing minutes for those two categories.[488] Relying again on the program expenditures for each network and information about the viewing on those networks, Mr. Trautman concluded that the Top 25 networks spent approximately $.77 per hour (or $.013 per minute) that

484 Trautman WRT (SP Ex. 57) at 11~~,~~.

485 Trautman WRT (SP Ex. 57) at 11.

486 Trautman WRT (SP Ex. 57) at 11.

487 Trautman WRT (SP Ex. 57) at 11.

488 Trautman WRT (SP Ex. 57) at 12.

3. Changed Circumstances

a. Cable Market Analyses

(i) Changes in the cable industry and the distant signal market.

201. Ms. Meyka notes that elements of the cable industry changed including increased consolidation and the advancement of new distribution technologies.[493] However, Ms. Meyka further explains that "[t]hese innovations were of great importance to the overall growth of the cable industry, but they did not, in my opinion, significantly affect the *relative* values that the industry as a whole ascribed to the different categories of non-network programming on distant signals."[494] Furthermore, after comparing the results of the Bortz survey between 1998-99 and 2004-05, Ms. Meyka stated the following:

> [T]he general consistency between the 1998-1999 and 2004-2005 survey results accurately reflects the fact that there were no changes in the marketplace during this period that would have significantly affected the relative values of the different categories of programming on distant signals.[495]

202. The Settling Parties presented the testimony of Richard V. Ducey, an expert in research and analysis of the cable and broadcast television industries, to analyze certain trends in the cable industry and in distant signal programming between 1992 and 2005.[496] Dr. Ducey is currently the Chief Strategy Officer for BIA Advisory Services ("BAS"), which advises media and technology companies with their business planning, technology strategies, sales strategies, market research, and assessment and financial valuation.[497] Dr. Ducey has taught media research and spent seven years at the National Association of Broadcasters, where he was responsible for industry and policy research.[498]

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493 *Id.* at 6-7.

494 *Id.* at 7 (emphasis in original).

495 Meyka W~~.~~D~~.~~T~~.~~ (SP Ex. 4) at 6.

496 Ducey WDT (SP Ex. 8); Tr. 530-537 (Ducey).

497 Ducey WDT (SP Ex. 8) at 1; Tr. 530-531 (Ducey).

498 Ducey WDT (SP Ex. 8) at 1 and App. 1; Tr. 531-533 (Ducey).

percentage of distant signal incidents falling within certain distance ranges from the cable systems that carried them.[523]

214. In an extension of the distant analysis studies presented by Mr. Laurence DeFranco in the 1989, 1990-1992, and 1998-1999 proceedings, Dr. Ducey presented an analysis of the distances over which non-superstation distant signals were carried in 2004 and 2005. Dr. Ducey analyzed data from Cable Data Corporation that reported the mileage distance between each station carried as a distant signal by a Form 3 cable system and the city or other area identified by the cable system as its community.[524] To make the analysis comparable to prior years' analyses, Dr. Ducey omitted five superstations (WTBS, WGN, WWOR, WPIX, and WSBK).[525]

215. The results of Dr. Ducey's distance analysis showed a continuing increase in the "clustering" effect.[526] The percentage of distant signal incidents on Form 3 systems located within 150 miles of the station being carried was 93.3% in 2004-2 and 93.7% in 2005-2.[527] The comparable percentages for the prior proceeding's studies were 86.5% in 1989, 87.6% in 1992, and 89.2% in 1999.

216. This increase in the degree of "clustering" of distant signal carriage is relevant to the value of CTV programming in the distant signal marketplace in particular because it highlights that the kinds of programming produced by commercial television stations have greater potential appeal to cable operators and subscribers within the relatively nearby region in which they are actually carried as distant signals.[528] The actual patterns of distant carriage by cable operators, as demonstrated by the distance analyses, help provide real-world context

523 Ducey WDT (SP Ex. 8) at 7-8; SP Ex. 17; Tr. 580-581.

524 Ducey WDT (SP Ex. 8) at 7-8.

525 Ducey WDT (SP Ex. 8) at 7.

526 Ducey WDT (SP Ex. 8) at 8; Frequency Distribution Chart (SP Ex. 17); see Martin WDT (SP Ex. 7) at 2-4.

527 Ducey WDT (SP Ex. 8) at 8; Frequency Distribution Chart (SP Ex. 17).

528 Ducey WDT (SP Ex. 8) at 8; Fritz WDT (SP Ex. 19) at 3-6.

2004	--	17,172,483	--	25%
2005	--	17,023,244	--	24%

219. Dr. Richard Ducey provided evidence demonstrating that from 1998-99 to 2004-05, PTV signals increased from approximately .25 to .4 average incidents of carriage on Form 3 cable systems.[534]

220. Dr. Ducey's evidence also showed that PTV signals accounted for 14.9 percent of the distant signal program time in 1998-99 and 22.3 percent in 2004-05, representing a 7.4 percent increase.[535] PTV's share of subscriber-weighted compensable minutes was 22.26 percent for 2004-2005.[536]

~~220.~~

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(e) Basis for Adjustment to Bortz Survey Shares to Reflect Non-Compensable Programming on WGN

221. The trends identified in the general analyses of the distant signal marketplace confirm the results of the Bortz study, which also showed no significant change in relative value of the program categories represented by the claimant groups.[537] Consistent with increases in regional "clustering" and in the overall subscriber incidents for PTV stations, the point estimates in the Bortz survey results for the CTV and PTV categories showed small increases between 1998-99 and 2004-05.[538]

222. In contrast to the substantial changes between 1992 and 1998, overall distant signal carriage was essentially stable between 1998 and 1999, growing only incrementally.[539] While the number of Form 3 systems declined from 2,296 in 1999-2 to 1,265 in 2005-2, WGN,

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534 Form 3 Distant Signal Incidents By Station Type, 1990-2005 (SP Ex. 10); *see* Martin WDT (SP Ex. 7) at 2-4.

535 Distant Signal Program Time Comparison, 1992, 1998-1999, 2004-2005 (SP Ex. 16).

536 Subscriber Weighted Claimant Shares, 2004-2005 (SP Ex. 15).

537 Bortz Report (SP Ex. 2) at 24 (Table III-2).

538 Bortz Report (SP Ex. 2) at 21 (Table III-1).

539 Ducey WDT (SP Ex. 8) at 4; SP Ex. 10; Tr. 542 (Ducey).

228. Because WGN was by far the most widely carried distant signal in 2004-2005,[554] a significant decline in the amount of compensable programming on the station is also reflected in a decline in the relative amount of the affected programming category in the distant signal market as a whole.[555]

229. As can be seen in the chart below, the greatest percentages of non-compensable programming on WGNA in 2004-05 belonged to the Program Suppliers (over 78 percent non-compensable) and Devotionals (90 percent non-compensable) categories.[556]

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~~229.~~

WGNA Minutes by Claimant Category

Minutes of programming on WGN and WGNA at the same time on the same date

Period	Commercial	Devotional	Program Suppliers	Sport
2004_1	2,354	180	5,926	1,807
2004_2	2,404	180	6,090	1,329
2005_1	2,364	180	5,036	1,014
2005_2	2,836	180	4,320	982
Total	9,958	720	21,372	5,132

All WGNA programs

Period	Commercial	Devotional	Program Suppliers	Sport
2004_1	2,354	1,770	24,309	1,807
2004_2	2,404	1,800	24,467	1,569
2005_1	2,364	1,800	25,062	1,014
2005_2	2,836	1,860	24,562	982
Total	9,958	7,230	98,400	5,372

"Matched" programming as a percentage of all WGNA programming

Period	Commercial	Devotional	Program Suppliers	Sport

554 WGN was received by over 36 million subscribers in 2005. Ducey WDT (SP Ex. 8) at 7.

555 Ducey WDT (SP Ex. 8) at 7; SP Ex. 12, 15, 16; Tr. 574-575 (Ducey).

556 Ducey WDT (SP Ex. 8) at 6; SP Ex. 14; Tr. 564-563 (Ducey).

233. By contrast, the proportion of the distant signal marketplace represented by the Commercial TV program category increased from 8.8% in 1992 to 13.0% in 1998-1999 to 15.5% in 2004-2005.[562]

234. To the extent the Bortz results should be adjusted to account for the increasing proportion of non-compensable programming on WGN, the adjustment should be made to the relative values assigned to the Program Suppliers and Devotional categories.[563]

235. As part of his analysis of the relative value of distant signal program categories based on a regression against royalty payments, Dr. Waldfogel compared the implied royalty shares that resulted when all of the programming minutes on WGN were used in the share calculations rather than just the compensable programs.[564] His comparison showed that the relative share for Program Suppliers that reflects only compensable program minutes is 23.2% less than the Program Suppliers relative value share that reflects all of the programs on WGN (i.e., (32.15%-24.68%)/32.15% = 0.232).[565] No similar value ratio is possible to measure the effect of the increase in the non-compensable Devotional programming because the share calculation based on the regression analysis produced a zero value for Devotional programming.[566]

4. Other Evidence Corroborating Bortz Survey Results

a. Judith Meyka Testimony

236. As previously stated, Ms. Meyka testified that the results of the Bortz survey were "consistent with my experience."[567] Specifically, Ms. Meyka corroborated the fact that cable operators valued live sports programming more than any other category of distant signal programming.[568] Ms. Meyka also substantiates the Bortz results with regard to the other program categories stating, "these results generally align with my beliefs as to how the cable

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562 Ducey WDT (SP Ex. 8) at 7; SP Ex. 15.

563 Ducey WDT (SP Ex. 8) at 7, 9; SP Ex. 14, 15.

564 Waldfogel WDT (SP Ex. 18) at 15; *See also* Ducey WDT (SP Ex. 8) at 6; SP Ex. 14.

565 Waldfogel WDT (SP Ex. 18) at 15 Table 5.

566 Waldfogel WDT (SP Ex. 18) at 13 Table 3, 15 Table 5.

567 *See* Meyka W~~.~~D~~.~~T~~.~~ (SP Ex. 4) at 7.

568 *See supra*, ¶¶ 121 - 123; Bortz Report (SP Ex. 2) at 3 (Table I-1).

C. Response to Criticisms of the Bortz Survey

267. Constant sum surveys, conducted by Bortz Media and its predecessors, have been performed throughout the history of the cable royalty distribution proceedings. Since 1983, the basic approach and methodology have remained essentially the same.[632] Although a variety of criticisms have been leveled against the Bortz surveys (as well as other constant sum surveys) throughout the years, to the extent such criticisms could be addressed consistent with the constant sum methodology employed, Bortz Media has remained responsive to improving the design and execution of the Bortz survey."[633] Where a criticism could not be addressed by the constant sum methodology, or where the designers of the Bortz survey believed that the criticisms were inappropriate, both representatives from Bortz Media and the JSC have put forth testimony as to the reasons why the survey design was not changed to respond to those criticisms.[634] As a result of these modifications, the Bortz survey has been refined to be more closely tailored to the needs of the CRTs, the CARPs, and now the CRJs in making royalty allocations. As. Mr. Trautman states:

> In the more than twenty-five years that have followed, a continual effort to refine and improve the Bortz Media cable operator surveys has been made – giving consideration to issues raised by the CRT and CARP, as well as by other claimants. The surveys completed for 2004 and 2005 reflect the benefit of those efforts.[635]

1. Program Categorization

268. Program Suppliers have raised various criticisms, all of which have been asserted in prior proceedings, about the category descriptions and wording of the Bortz surveys. These criticisms relate to essentially the same claim: that respondents to the Bortz surveys would have

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632 *See* Bortz Report (SP Ex. 2) at 28 ("Beginning in 1983 the basic approach and methodology have remained essentially the same.").

633 *See* Bortz Report (SP Ex. 2) at 28 ("Bortz Media has made a number of refinements over the years to address concerns raised in prior proceedings.").

634 *See generally*, Response to Criticisms of the Bortz Survey, SP PFOF *infra* ¶¶ 267 - 308.

635 *See* Bortz Report (SP Ex. 2) at 28.

been confused by the category descriptions and would not have properly allocated relative values for each claimant category.[636]

a. Historical Criticisms

269. When the cable operator survey was first introduced, concerns were raised about the wording of the descriptions of the various programming categories.[637] In the 1983 study, BBC developed category definitions that improved upon those used in earlier BBDO surveys.[638] These BBC categories were retained in the 1986 through 1991 surveys except that BBC added two new categories in 1986 to 1992 surveys to represent the Devotional and Canadian Claimants.[639] While acknowledging the complexity of the task, the CRT in its 1989 Determination continued to express desire for enhanced programming definitions.[640] In

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636 Program Suppliers have raised the related criticism that the respondents were valuing broadcast or cable network programming. They first raised that criticism regarding the 1978 BBDO survey. BBDO responded by changing the wording of the question (and there was significant decline between 1978 and 1979 in the movies share). As the CRT noted in the 1979 proceeding, the "survey in this proceeding was careful to distinguish between distant signal programming and 'made for cable' programming and between network and nonnetwork sports; the study also focused only on distant signal programming that was actually imported." 1979 CRT Determination, 47 Fed. Reg. at 9882.

Bortz Media also was careful in the 2004-05 surveys ~~also~~ to direct the respondents' attention to those distant signals that the respondents actually imported. For those respondents whose systems system carried distant network stations, the respondents were reminded on three separate occasions that network programming should be excluded. First, the respondents were asked what types of programming on these distant stations, other than "national network programming from ABC, CBS, and NBC," were most popular with subscribers. Then the respondents were asked whether they feature any programming from these distant stations, other than "network programming from ABC, CBS, and NBC,." in their advertising and promotional efforts to attract and retain subscribers. When respondents were finally asked to estimate the relative value of the programming categories on these distant stations, they were expressly asked to provide values for the programming actually broadcast on these stations "other than any national network programming from ABC, CBS, and NBC." Borz Report (SP Ex. 2), App. B, Version H at 2, 3 4.

637 *See* Bortz Report (SP Ex. 2) at 30.

638 *See* Bortz Report (SP Ex. 2) at 30.

639 *See* Bortz Report (SP Ex. 2) at 30.

640 *See* 1989 CRT Determination, 57 Fed. Reg. at 15300.

> First, the Panel was not presented with evidence that demonstrated sufficiently widespread miscategorization of programs by Bortz Media respondents that would likely affect the survey results. Mr. Egan's responses to Arbitrator Young reflect only how he might respond and were offered by someone who could not recall if he had ever completed a Bortz Media survey. Second, and more importantly, the Bortz Media surveys do not question cable operators as to individual programs, but rather question them as to the value they attach to categories of programs. See Trautman Tr. at 324-25 (Respondent are "not thinking about each and every program that is aired on that signal. They are thinking about the general categories of program."). If Program Suppliers pointed to evidence that demonstrated that Bortz Media respondents misapprehended entire categories of programs when assigning them value, then the Panel might have been required to address such contentions. That is not the case here . . . .[648]

272. In this proceeding, Program Suppliers have not come forward with the type of evidence that the Register and Librarian contemplated in their 1998-99 order quoted above.

b. Kessler Study

273. In this proceeding, Program Suppliers did not present a survey expert to critique the program categories used in the Bortz surveys or otherwise address the Bortz methodology.[649] And they have not introduced any testimony from cable industry witnesses who offered either anecdotal or empirical evidence to support their claim that there was in fact confusion among the Bortz survey respondents. In earlier proceedings Program suppliers attempted to measure the value of a "minor sports" category by introducing the share of distant signal viewing minutes attributable to that category. [650] Program Suppliers have not presented any such evidence in this proceeding.

274. In rebuttal, Ms. Kessler of MPAA presented a study comparing the number of minutes of JSC programs on stations carried as distant signals in 2004-05 with other "sports"

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648 *Id.* at 3615 (emphasis added).

649 Professor Rubin discusses program categories but does not compare the categories in the Bortz Survey ~~and~~ nor offer any conclusions about the categories used there or how they should be modified (if at all).

650 *See, e.g.,* 1979 CRT Final Determination, 47 Fed. Reg. at 9881 (showing that "minor sports" received a 1% share of viewing)~~-~~.

programs. According to Ms. Kessler, these other sports included "golf, ice skating, the Olympics, wrestling, boxing, poker, fishing, hunting, bowling, volleyball, bicycle riding, gymnastics, sports talk shows, motorcycle racing, triathlons, tennis, horseracing, diving, high school sports, and the like."[651]

275. Ms. Kessler's tonnage analysis did not attempt to weight the minutes on each station by instances of carriage or subscriber reach.[652] Thus, Ms. Kessler weighed a minute on WGN, the most widely-imported distant signal in 2004-05 (carried by over 70% of the systems and as the only distant signal on about 50% of the systems),[653] ~~;~~ the same as a signal carried by a single system.[654] The only program that Ms. Kessler was able to identify in the "non-JSC" category on WGN in 2004 and 2005 was the Babe Winkelman Good Fishing Show, and Ms. Kessler could not say whether that program would have been confused with JSC or sports programming.[655]

276. Ms. Kessler failed to present any empirical evidence about how many of the programs included in the "non-JSC sports" category would have been confused with the programs in the JSC category. Ms. Kessler was unable to provide any estimate about the extent to which survey respondents would have been confused. For instance, she could not say what proportion of the minutes of non-JSC sports programs she identified as "Program Supplier" programming consisted of programs that survey respondents might confuse with JSC programming.[656] And she conceded that there would not be confusion with respect to all of those minutes.[657] Program Suppliers have never, for instance, shown that cable operators would confuse "wrestling" programs with live sporting events that do not involve pre-determined outcomes.[658]

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651 Program Category Definitions (PS Ex. 13) at 3.

652 Tr. 3253 (Kessler).

653 Trautman WRT (SP Ex. 57) at 15.

654 Tr. 3253 (Kessler).

655 Tr. 3260 (Kessler).

656 Tr. 3257 (Kessler).

657 Tr. 3257 (Kessler).

658 Tr. 2396-97 (Crawford)~~.~~.

"Nor did the CARP act unreasonably in declining to rely on Nielsen for direct evidence of viewing, as Bortz adequately measured the key criterion of relative market value...Moreover, as the CARP put it, Bortz 'subsumes *inter alia* all viewing data that a CSO might consider when assessing relative value of programming groups.'"[680]

285. Finally, Mr. Trautman testified that a person must respond affirmatively to the qualifying question in order to participate.[681] The results of the survey indicate that many of the respondents deemed most responsible for programming decisions were regional cable officials (approximately 38% in 2004 and 27.5% in 2005).[682] Thus, where individual system employees do not have programming responsibility, the survey appears to address this by requiring the interviewer to talk with someone who has that responsibility.[683]

3. Criticisms by Dr. George Ford

286. Program Suppliers' Dr. George Ford claims that the Bortz survey results do not reflect market value and fail to incorporate the amount of programming carried.

a. Supply Side/Willingness to Pay

287. Dr. Ford's chief criticism, one that Program Suppliers have raised before, is that the Bortz survey measures only willingness-to-pay and not the amounts that cable operators would actually pay in a free market.[684] In Dr. Ford's view, the Bortz results cannot be translated into market values unless the demand curves for all program types are linear and the demand elasticities are the same at the selected quantities -- a situation he considers "implausible."[685] Dr. Ford further argues that valuations based upon willingness to pay will give way when sellers deal with multiple competing buyers ("Tom, Dick and Harry") and sell exclusively to only one of them.[686]

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680 *Program Suppliers v. Librarian of Congress*, 409 F.3d at 402.

681 Tr. 65-66 (Trautman).

682 Bortz Report (SP ~~Exhibit~~ Ex. 2) at 49.

683 *Id.*

684 George Ford WRT (PS Ex. 16) at 6-8.

685 George Ford WRT (PS Ex. 16) at 7.

686 George Ford WRT (PS Ex. 16) at 10-11.

290. The 1998-99 CARP's decision rested on a number of grounds, including the lack of record evidence that factoring supply side considerations into the equation would raise or lower any one claimant's Bortz share.[691] Notwithstanding the CARP's conclusions, the Program Suppliers offer no new evidence on these points.

291. All parties in this proceeding other than Program Suppliers believe that constant sum surveys of cable operators provide reliable and valid estimates of relative market value[692]; only Program Suppliers' Dr. Ford disagrees (although Program Suppliers' other economist, Dr. Gruen, relies upon a constant sum survey to demonstrate the relative value that cable subscribers attach to programming).[693] And both Dr. Waldfogel and Dr. Crawford explained in this proceeding that because of the nature of the cable market and the distant signal market in particular, relative values would be determined by the relative demand for the programming rather than supply-side factors.[694]

292. Neither Dr. Ford nor any other witness testified that Settling Parties would receive less (and Program Suppliers would receive more) than their Bortz share if supply side considerations were taken into account.[695] For example, there is no showing that, in Dr. Ford's/Besen's terminology, the elasticities of demand for Program Suppliers' programming are different from that of the programming represented by the Settling Parties -- or that if they are different, those differences would result in the Program Suppliers' programming receiving more than their Bortz share in a free market.

293. According to Mr. Trautman, the respondents answer the survey's valuation question with their actual market experience in mind.[696] In fact, the 1998-99 CARP concluded

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691 1998-99 CARP Report at 22 (emphasis added) (citation omitted).

692 Bortz Report (SP Ex.2) at 10; McLaughlin WDT (SP Ex. 6) at 6-8; Tr. 642, 685 (Ducey); Tr. 734-35 (Waldfogel); Tr. 2905-06 (Salinger); Tr. 1299-1300 (Ringold); Tr. 3074-75 (Calfee).~~.~~

693 Gruen WDT (PS Ex. 8) at 27-28.

694 Tr. 750 (Waldfogel).

695 George Ford WRT (PS Ex. 16) at 11.

696 Bortz Report (SP Ex.2) at 33-34.

category "quantity" results in survey responses that are biased against Program Suppliers.[703] Moreover, as the testimony regarding the use of "program examples" in the Gruen subscriber survey illustrates, the evidence suggests there may be significant response biases associated with providing selected information to survey respondents. *See* SP PFOF ¶¶ 502-515.

296. In the 1998-99 proceeding, Mr. Trautman testified that he could not confirm that one Bortz respondent who accorded some value to sports actually carried distant signal sports (and that another respondent for which he could not confirm sports carriage valued sports at zero).[704] The 1998-99 CARP concluded that the appropriate remedy in such a situation is simply to remove the valuations of the respondent at issue.[705] As noted above, doing so has no material impact upon the 2004-05 Bortz survey results.[706]

4. Canadian Criticisms

a. Criticisms by Gary Ford

297. In his written rebuttal testimony, Dr. Gary T. Ford states the following:

> The Bortz survey does not provide reliable information regarding the value of programming on Canadian distant signals for two reasons. First the disproportionate stratified sampling plan "undersamples" strata 1 and 2 (the low royalty strata) and "oversamples" strata 3 and 4 (the high royalty strata). Second, the focus of the questionnaire on the unaided recall of "most popular" programming just before the key question on relative value of programming…has the effect of reducing the likelihood that cable operators will think about the value of nice programming to their systems.[707]

298. Dr. Ford further testifies that the "Bortz sampling plan, did not interview a sufficient number of cable system operators who imported French-language distant signals to draw any conclusions about the value of import French-language signals."[708] In contrast, Dr.

703 George Ford WRT (PS Ex. 16) at 10 (testimony detailing this criticism did not rely on any empirical proof of harm).

704 Bortz Report (SP Ex. 2) at 36-37.

705 *See* 1998-99 CARP Report at 20-21.

706 Bortz Report (SP Ex. 2) at 39.

707 Ford WRT (CDN Ex. R-2) at 4-5.

708 *See id.* at 13.

Ford notes, the 2004 Ford-Ringold survey, for which Canadian claimants presented results, "interviewed 11 of 19 cable system operators who imported a French-language distant signal, and the 2005 survey interviewed 11 of the 19 cable system operators who imported a French-language distant signal."[709]

299. With regard to Dr. Ford's first criticism of the Bortz survey, Bortz Media obtained responses from 11 systems that carried Canadian signals in the 2004 survey.[710] In 2005, Bortz Media obtained responses from 13 comparable signals.[711] The number of Bortz respondents who carried Canadian distant signals increased significantly from the number of similar respondents reported in the 1998-99 proceedings. For example, in 1998, only 2 of 66 systems that carried distant Canadian signals were included in the Bortz survey and in 1999, only 3 of 62 systems were included.[712] In stark contrast, in 2004, 11 (18%) of the 61 total Form 3 cable systems that carried distant Canadian signals responded to the Bortz survey; in 2005, the comparable numbers are 13 (25.5%) of 51 systems.[713] With the McLaughlin and Gary Ford adjustments discussed below, the 2004 Bortz survey results can be attributed to 13 (21.3%) of the 61 systems with distant Canadian signals; the 2005 results reflect values from 16 (31.4%) of 51 systems.[714]

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709 *See id.* at 13, ~~fn.~~n. 5.

710 *See* Tr. 3020 (Ford); *see also* Calfee WRT (CDN Ex. R-3) at 4; Bortz Report (SP Ex. 2) at 16, ~~fn.~~n. 12.

711 *See* Tr. 3020 (Ford); *see also* Calfee WRT (CDN Ex. R-3) at 4.

712 *See* Bortz Report (SP Ex. 2) at 16, ~~fn.~~n. 12; Calfee WRT (CDN Ex. R-3) at Appendix B, p. 13(noting the number of systems in 1998-99 that carried Canadian signals).

713 *See* Tr. 3020 (Ford); Ford WRT (CDN Ex. R-2) at 10. [table noting number of Bortz respondents].

714 Ford WRT (CDN Ex. R-2) at 19-21 (noting the number of additional ~~canadian~~ Canadian signals added by McLaughlin and Ford). *See also* Tr. 3020 (Ford) (discussing that there were 46 eligible systems for inclusion in the 2004 Bortz survey under the methodology constructed by Bortz Media; there were 37 in 2005. Thus, Bortz Media obtained responses from 24% of the survey eligible systems that carried Canadian signals in 2004 and 35% of the eligible systems in 2005.

300. Indeed, the number of Bortz respondents that carried distant Canadian signals in 2004 and 2005 was higher than in any of the Bortz surveys.[715] Moreover, Canadian claimants presented results based on a survey of 22 combined total respondents for French-language distant signals for 2004-05; that is less than the combined 24 cable systems represented in the adjusted Bortz universe that Dr. Ford now criticizes for "undersampling."[716]

301. When asked whether the stratification process utilized by Bortz media performance of the Bortz survey was unreasonable, Dr. Ford stated that it was a "reasonable approach."[717] He testifies as follows:

> Q. Okay. I take it that the stratification is not uncommon in survey design, is it?
>
> A. It's very common.
>
> Q. And you understand the purpose for which stratification was undertaken in this case, do you not?
>
> A. There are several purposes, and I think I understand the purpose that Mr. – why Mr. Bortz used it, yes.
>
> Q. He was trying to be certain that those royalty systems – I'm sorry, those cable systems that paid the most in royalties had the greatest chance of being interviewed; is that not correct?
>
> A. He wanted to make sure that the systems that provided the relatively larger share of royalty payments would be included in his final sample.
>
> Q. Was that an unreasonable goal or objective?
>
> A. I'm sorry?
>
> Q. Was that an unreasonable goal or objective?
>
> A. No. As I said earlier when Judge Roberts asked me about it, I think that's a reasonable approach.[718]

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715 *See* Tr. 3021 (Ford).

716 Ford WRT (CDN Ex. R-2) at 4-5,13, ~~fn.~~n. 5;

717 Tr. 3007 (Ford).

718 Tr. 3006-07 (Ford).

there is no reason to think that the Canadian signal is always treated by the system as the last signal to be added."[723]

305. Based upon his calculations, Dr. Calfee concludes that "[a]lthough the Bortz results make sense for most programming categories, they do not make economic sense for Canadian signals."[724] Dr. Calfee based this conclusion, in part, on the fact some (but not all) Bortz respondents valued Canadian programming at a level less than the amounts that he calculated as their potential savings if they dropped the distant signals.[725]

306. Dr. Calfee concedes that the numbers used as the basis of his calculations depend on several assumptions regarding the various formulas in the compulsory license statutes and do not reflect what cable systems would have actually saved in the real world.[726] Dr. Calfee also ~~ackowledges~~acknowledges that the calculations reflected in his written rebuttal statement do not represent a fair estimate of relative value of Canadian signals. He testified as follows:

> Q. Do you believe that the numbers that are here in your table 1, the fourth column, the minimum potential savings, represent a fair estimate of the relative value of Canadian signals?
>
> A. No.
>
> Q. Do you think it's too low?
>
> A. I'm not sure that we can infer relative value directly from these numbers.
>
> Q. But the Bortz survey, of course, asked for a relative value.
>
> A. That's right.
>
> Q. And you don't believe that the numbers that you have here in column 4, the minimum potential savings, reflect relative value?

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723 Calfee WRT (CDN Ex. R-3) at 7-8.

724 Calfee WRT (CDN Ex. R-3) at 5.

725 Calfee WRT (CDN Ex. R-3) at 8.

726 Tr. 3119 (Calfee) ("Q. How is your calculation? A. My calculation is that I would assume that the total fee would decline by $6,300, because I dealt with base rate and 3.75 fees separately. Q. I see. But in fact, that's not what would happen in the real world, is it? A. In fact, it would have saved certainly more than in my calculation, yes.").

for Canadian programming if that was the only distant signal carried.[743] Ms. McLaughlin added these omitted systems back into the Bortz survey.[744]

314. Ms. McLaughlin testified that when the ten omitted systems that carried only PTV and/or Canadian distant signals are added to each year's survey, the estimated values for PTV and Canadian programming increase and the estimated values for the five other categories decrease.[745] The augmented results for 2004-05 for each of the seven programming categories are summarized in the table below.[746]

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Augmented Bortz Survey
Relative Value of Distant Signal Programming, By Bortz Category

Programming	2004 Share	2005 Share
Sports	32.4	35.5
News	17.9	14.2
Public Television	6.2	5.9 - 6.2
Syndicated	18.1	17.7
Movies	17.3	18.5
Devotional	7.6	6.3
Canadian	0.5	1.5 - 1.8

743 McLaughlin WDT (SP Ex. 6) at 8–9; Tr. 420–29 (McLaughlin).

744 McLaughlin WDT (SP Ex. 6) at 8–9; Tr. 420–29 (McLaughlin).

745 McLaughlin WDT (SP Ex. 6) at 9–12, Appendix 2; Tr. 429–33, 435 (McLaughlin).

746 McLaughlin WDT (SP Ex. 6) at 11 (Chart 4).

signals were the only distant signals carried.[760] Dr. Gruen stated that this adjustment was necessary to make the survey "more accurately reflect actual marketplace conditions."[761]

2. Canadian Adjustment

325. The 1998-99 CARP determined that it would not rely upon the Bortz Survey to set the Canadians' award. While noting its "expressed concerns respecting fee generation," the CARP nevertheless tied the Canadians' award to the "fee generation" of distant Canadian signals, as adjusted by (1) the results of Dr. Ringold's constant sum surveys of cable operators and (2) the awards to other parties.[762] The CARP declined to use the Bortz results for the Canadians, noting that the survey was not designed to include Canadians and did not produce "statistically significant results."[763] The Panel did, however, observe that "fee generation does not reach the level of robustness and reliability of the Bortz study."[764]

326. In contrast to 1998 and 1999, when the Bortz Survey included only 2 and 3 systems respectively that carried distant Canadian signals, the Bortz Survey included 11 (18%) of the 61 total Form 3 systems carrying a distant Canadian signal in 2004 and 13 (25.5%) of those systems carrying a Canadian signal in 2005.[765] When adjusted to include the omitted systems addressed in Ms. McLaughlin's analysis, the 2004 Bortz results can be attributed to 13 (21.3%) of the 61 Canadian systems while the 2005 results can be attributed to 16 (31.4%) of the 51 Canadian systems.[766] These percentages are reflected in the below table[767]:

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[760] Gruen WDT (PS Ex. 8) at 21.

[761] Gruen WDT (PS Ex. 8) at 20.

[762] 1998-99 CARP Report at 31 n.13.

[763] 1998-99 CARP Report at 31 n.13.

[764] 1998-99 CARP Report at 64.

[765] Ford WRT (CDN Ex. R-2) at 11-12; Tr. 3019-23 (Gary Ford); Bortz Report (SP Ex. 2) at 16 n. 12; Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 13 (Table 3).

[766] Ford WRT (CDN Ex. R-2) at 20-21; McLaughlin WDT (SP Ex. 6) at 9-10.

[767] *See,* Bortz Report (SP Ex. 2) at 16 n. 12 (Noting 11 respondents carried 1 or more Canadian distant signal in 2004 while 13 responding systems carried a Canadian distant signal in 2005. In 1998 and 1999 the comparable numbers were 2 and 3 respectively); Ford WRT (CDN Ex. R-2) at 11-12, 20-21 (Noting 61 Form 3 systems carried distant Canadian signals in 2004 while 51 carried such signals in 2005. Also, Ford notes that applying McLaughlin's analysis would result to adding 2 observations to the 2004

Footnote continued on next page

Percentage of Canadian Signals Captured by Bortz (as adjusted)				
	1998	**1999**	**2004**	**2005**
Form 3 Systems with Canadian Signal	66	62	61	51
Bortz Respondents with Canadian Signals	2	3	11	13
With Adjustments	-	-	13	16
% of Form 3 systems captured by Bortz (as adjusted)	3.0%	4.8%	21.3%	31.4%

327. For the two-year period (2004-05), the Bortz results provide valuations of approximately 29 respondents that carried a Canadian distant signal, which represents the highest number of any of the Bortz surveys.[768] That is close to the number of respondents that the Canadians' expert Dr. Gary Ford, considered to be sufficient to support a reliable estimate.[769] Indeed, the Canadians themselves have asked the Judges to rely on results where fewer respondents valued Canadian programming than those who valued Canadian programming in the 2004-05 Bortz Surveys.[770]

328. Dr. Ford conceded that Canadians are only entitled to a very small share of the royalties.[771] The results of the Bortz Survey in 2004-05 are consistent with the results previously

Footnote continued from previous page

Canadian sample taken by the Bortz Survey and 3 such observations in 2005); Calfee WRT (CDN Ex. R-3) at Appendix B, pg. 13 (Showing Canadian distant signal carriage for 1990-2003); Tr. 3019-23 (Gary Ford) (Noting 11 and 13 respondents with Canadian signals is the highest achieved by Bortz).

768 Tr. 3020-21 (Gary Ford) (Noting 11 Bortz respondents carried Canadian signals in 2004 while 13 carried such signals in 2005).

769 Tr. ~~3022~~3029-~~3024~~ 3030 (Gary Ford) (~~parenthetical describing how many would be needed~~Stating that 32 Bortz respondents with Canadian signals would be a sufficient sample size).

770 Gary Ford WDT (CDN Ex. R-2) at 13 n. 5. (Canadian claimants presented results on 22 respondents from the Ford-Ringold survey that carried French-language distant signals).

771 Tr. 3025-3026 (Gary Ford)

presence of JSC and Program Supplier programming on Canadian distant signals. This approach is identical to that proposed by the Canadian Claimants and adopted by the 1998-99 CARP, except that the Ringold adjustments are applied to the augmented Canadian Bortz shares rather than the Canadian "fee generation" shares, which do not reflect relative marketplace value for the reasons set forth in ¶¶ 593-649, below. The calculations and results of this adjustment are set forth below in the Appendix.

337. With all of the adjustments shown above (the PTV and Canadian adjustments), the Augmented Bortz Shares are as follows:

Augmented Bortz Survey
Relative Value of Basic Fund Distant Signal Programming,
By Claimant Group in This Proceeding,
After Ford and Ringold Adjustments,
Devotional and Music Excluded
[*see* Appendix]

Programming	2004 Share	2005 Share
Sports	34.7	38.1
News	18.8	15.0
Public Television	7.8	7.5
Settling Parties (except Music)	61.3	60.6
Program Suppliers	37.5	38.3
Canadian	1.2	1.1

3. Further Adjustments

a. Incorporation of Music and Devotional Shares

338. The shares resulting from the Bortz survey must next be adjusted to account for the relative value of Music on distant signal, non-network programming. The shares of the remaining claimant groups (except Devotional as noted below) must be reduced by the 5.2% Music share for 2004 and the 4.6% Music share for 2005, as established by the Zarakas study discussed in Section IV.E.3, ¶¶ 373-392 below.

339. In addition, for the reasons explained in ¶¶ 672-688, the Devotional share from the 1990-92 proceeding (1.19375% of Basic Fund; 0.90725% of 3.75% Fund), which already accounted for Music, must be incorporated in the final share calculations, with the remaining shares (other than Music) being reduced by the same percentage.

343. WGN was the most widely carried distant signal in 2004-05.[787] Nearly 50% of Form 3 cable systems carrying a commercial U.S. distant signal in 2004-05 carried WGN as their only distant signal, while approximately 70% of Form 3 systems carried WGN as one of their distant signals.[788] A significant percentage of the programming on distant signal WGN in 2004-05 was non-compensable because it was not transmitted simultaneously over both the satellite-delivered version of WGN and the WGN broadcast available as a local signal in the Chicago market.[789] The amount of non-compensable programming on WGN in 2004-05 increased to over 70% from about 50% in 1998-99.[790] Nearly all of this non-compensable programming consisted of programming in the Program Suppliers' category (91.4% in 2004 and 92.4% in 2005) and Devotionals category (8% in 2004 and 7.6% in 2005).[791] In 2004-05, over 78% of the Program Suppliers' programming and 90% of the Devotional programming on distant signal WGN was non-compensable.[792] These percentages are reflected in the tables below.

Percentage of Total Non-Compensable Programming on WGN

	2004	**2005**
Program Suppliers	91.4%	92.4%
Devotional Claimants	8%	7.6%
Total:	99.4%	100%

787 Trautman WRT (SP Ex. 57) at 15; Ducey WDT (SP Ex. 8) at 6.

788 Trautman WRT (SP Ex. 57) at 15, n.14.

789 Ducey WDT (SP Ex. 8) at 6.

790 Ducey WDT (SP Ex. 8) at 6.

791 WGNA Minutes by Claimant Category (SP Ex. 14).

792 Ducey WDT (SP Ex. 8) at 6.

346. The 1998-99 CARP recognized the conceptual appropriateness of a WGN adjustment, but it rejected a proposed adjustment that (1) assumed that all non-compensable programming was in the Program Suppliers category and (2) adjusted shares *pro rata* based solely on the proportion of hours of compensable programming.[798]

347. Employing the regression analysis discussed above, *see* PFOF ¶¶ 134-188, Dr. Ducey and Dr. Waldfogel have asserted a new proposed adjustment to address the WGN substitution issue. Specifically, Dr. Waldfogel calculated the change that would result from the application of the regression coefficients to all programming as opposed to just the compensable programming on distant signal WGN, in terms of the overall percentage shares resulting from his regression analysis.[799] Because these shares depend on the coefficients for the various program categories, which are essentially the relative implied prices for the different types of programs, the difference between these alternative shares reflects different relative values, not a pure program time measure.[800]

348. Based on Dr. Waldfogel's analysis, the Program Suppliers' relative share declined by *23.2%* when the non-compensable Program Suppliers programs on WGN were eliminated.[801] Based on these results, the Program Suppliers' award should be reduced by up to 23.2% from their 2004-05 Bortz survey shares.[802]

E. Music Share of 2004-05 Royalties

349. Music is a *program element*, not a *program category*.[803] "Virtually every professionally-produced television program employs copyrighted music licensed by the Music

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798 1998-99 CARP Report at 26-28.

799 *See* PFOF 175; Tr. 780-81 (Waldfogel).

800 Tr.~~*Id.* at~~ 780-81 (Waldfogel).

801 Waldfogel (SP Ex. 18) at 15.

802 Waldfogel (SP Ex. 18) at 15~~.~~; *see* PFOF 176. The specific amount of an appropriate reduction in the Program Suppliers' share would depend on how much of the value attributed by Bortz survey respondents to Program Suppliers programming categories was attributable to non-compensable programming on WGN, as to which there is no direct evidence, but it would be reasonable to expect that some portion of that value was attributed to non-compensable Program Suppliers programming.

803 O'Neill WDT (SP Ex. 26) at 2.

from the prior benchmark 4.5% award).[811] Adopting a music ratio approach that responded to the CARP's criticisms, Music Claimants presented evidence in this proceeding of a music ratio that excludes Big 3 network fees and expenses and adjusts for the differences between the over-the-air broadcast and distant signal markets. Based on this evidence, Music Claimants are entitled to a 5.2% share for 2004 and a 4.6% share for 2005.[812]

1. The Use of Music in Television Programming

351. Mr. Seth Saltzman, ~~who administers ASCAP's repertoire~~who is Senior Vice President of Member Management in the Performing Rights Group of ASCAP and has many years of experience in supporting the distribution of royalties for music performed on television, testified about the myriad ways in which music is used to enhance television programming.[813] Mr. Saltzman testified about how music is critical "to the sensory effect and story of the movie or television program."[814] Uses of music in television programming primarily include: (1) themes, such as signature tunes that immediately identify programs to viewers; (2) features, wherein musical performances "constitute the primary focus of the audience's attention" (*e.g.*, in programs such as *American Idol*); and (3) background music, which is a musical underscore that sets emotion or moves along action in a scene.[815] In the marketplace these music uses have valuable and increasingly important roles in local station programming.[816]

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811 1998- 99 CARP Report at 85-89; Zarakas WDT (SP Ex. 27) at 10-11.

812 Music Claimants' proposed award is consistent with its unbroken history of allocations of at least 4% in every litigated cable distribution proceeding, from 1978 through 1999, the last litigated proceeding. *See* 1978 Cable Royalty Distribution Determination, Docket No. CRT 79-1 (45 Fed. Reg. 63026); 1983 Cable Royalty Distribution Proceeding, Docket No. CRT 84-1-83CD (51 Fed. Reg. 4415); 1990-1992 Distribution Order, Docket No. 94-3 CARP CD-90-92 (61 Fed. Reg. 55653); 1998-1999 CARP Report (Oct. 21, 2003). The shares shown by the music ratio study are also consistent with evidence from an experienced television music placement executive affirming the increased importance of the use of music in television programming in the past ten years. *See generally* Patsavas WDT (SP Ex. 24).

813 Saltzman WDT (SP Ex. 25) at ~~10~~1, 10.

814 Saltzman WDT (SP Ex. 25) at 18.

815 Saltzman WDT (SP Ex. 25) at 10, 12-13, 15.

816 Saltzman WDT (SP Ex. 25) at 18.

the particular mix of station types retransmitted by distant signals and the stations that generally make up the entire broadcast television market.[898]

376. In this proceeding, Mr. Zarakas testified that a "music ratio" approach is "a reasonable method to calculate the value of music relative to the value of the programming of the other copyright owner claimant groups," provided that the data used for such a calculation "capture comprehensively and accurately the values to be used to calculate the music ratio for distant signals."[899] As a result, in a two step process, Mr. Zarakas sought to address the concerns raised by the 1998-1999 CARP. First, he methodically obtained relevant data inputs and calculated adjusted music ratios for each different category of television stations in the over-the-air local broadcast market, such as Independent stations or network affiliates, but excluded music license fees and broadcast rights payments for Big 3 network programming.[900] Second, he weighted these music ratios using distant signal subscriber instances for each of these different categories of television stations to reflect the relative importance of the various stations actually carried by cable system operators and received by subscribers as distant signals during 2004 and 2005.[901]

a. The Data Used to Create the Music Ratio for This Proceeding

(i) Blanket Music License Fees

377. There are two data sources that provide information concerning local television music license fees for 2004 and 2005 that can be used as the numerator of a music ratio.[902] The first is the local television music blanket license fee data provided by the PROs and utilized by Mr. Zarakas.[903] These data identify the blanket license fees negotiated and agreed to by the TMLC and each PRO for all local stations in the broadcast market for their local (*i.e.*, non-Big 3

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[898] Zarakas WDT (SP Ex. 27) at 10.

[899] Zarakas WDT (SP Ex. 27) at 3.

[900] Zarakas WDT (SP Ex. 27) at 11-25.

[901] Zarakas WDT (SP Ex. 27) at 25-31.

[902] Zarakas WDT (SP Ex. 27) at 13.

[903] Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43 (Zarakas).

network) programming.[904] The blanket license fees are therefore a negotiated benchmark fee valuation by the television stations themselves for blanket license rights to the PROs' entire catalogs, are the most comprehensive, accurate data in the record, and are the only data that values all music use in local broadcast markets.[905] The second set of data (which were provided by the PROs in discovery and used by Dr. Woodbury in his unadjusted study) is comprised of the music license fee expenditures made by the broadcast stations to the PROs.[906] The total license fees paid to PROs are somewhat lower each year than the annual blanket license fees because about 30% of stations opt for the per program licenses from BMI and ASCAP.[907] Under per program licenses, stations can choose to obtain rights to a substantial portion of their music through direct licenses and accordingly lower their fee payments to ASCAP and BMI.[908] These payment data are flawed for purposes of use in this proceeding because they fail to include any amount paid by per program stations (or their program providers) to composers and publishers for direct licenses.[909] There is no publicly available data that identifies the amount paid by local stations for direct licenses.[910] Those fees are not disclosed to the PROs by their members and affiliates.[911]

378. For several reasons, Mr. Zarakas chose to use blanket music license fees in the numerator of a music ratio for this proceeding.[912]

904 Tr. 1142-43 (Zarakas).

905 Zarakas WDT (SP Ex~~h~~. 27) at 13-14.

906 Zarakas WDT (SP Ex. 27) at 14; Tr. 3291-95 (Woodbury).

907 O'Neill WDT (SP Ex. 26) at 5-6; Tr. 1104-05 (O'Neill) (indicating that approximately 300 to 350 of the more than 1,300 broadcast stations have a per program licenses).

908 O'Neill WDT (SP Ex. 26) at 5-6; Tr. 1104-05 (O'Neill). SESAC had only a blanket license in 2004 and 2005. Tr. 1107 (O'Neill).

909 Zarakas WDT (SP Ex. 27) at 13.

910 O'Neill WDT (SP Ex. 26) at 6; Tr. 1089, 1106 (O'Neill); Tr. 1143-44, 1160-61 (Zarakas) ("[T]hese are private transactions. . . . There's no . . . public information on them.").

911 Tr. 1089, 1101, 1106 (O'Neill): The PROs "receive notification [from their members or affiliates] if they direct or source license, but they redact the amounts that they . . . pay."

912 Zarakas WDT (SP Ex. 27) at 13.

379. First, blanket license fees represent market-based prices that the Music Claimants negotiated with the local television stations for the right to perform publicly all music in the Music Claimants' repertoires_during 2004 and 2005.[913] Because these were arms-length negotiated blanket license fees, they are an accurate and reliable measure of the market price of music licenses in the local over-the-air broadcast market and provide strong evidence of the value of the music licenses to the local broadcast stations.[914]

380. Second, blanket music license fees are the only available measures of total market-based prices.[915] In stark contrast, music license payments by the local broadcast stations to the PROs alone necessarily understate the total amount of music license fees paid by these television stations because they exclude station payments for direct licenses with composers and music publishers.[916] That the direct licenses exist is not in doubt; the PROs receive copies of the direct licenses, but the financial terms are redacted on the copies provided to the PROs.[917]

381. Third, absent the compulsory license, the PROs would negotiate licenses directly with the cable system operators.[918] The cable systems currently license only on a blanket, not a per program basis, and they would be unlikely to enter into direct licensing transactions necessary to take full advantage of a per program license.[919] Therefore, the blanket license fees provide the proper benchmark because the cable system would most likely acquire blanket licenses from the PROs for this music in an open market.[920]

382. Finally, while there is no empirical ~~n~~or quantitative evidence as to the amount paid by the stations in direct license fees, Mr. O'Neill testified that he was aware of instances in

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913 Tr. 1086 (O'Neill); Zarakas WDT (SP Ex. 27) at 13; Tr. 1160 (Zarakas).

914 Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43, 1160 (Zarakas).

915 Zarakas WDT (SP Ex. 27) at 13; Tr. 1142-43 (Zarakas).

916 Zarakas WDT (SP Ex. 27) at 14; *see also* Tr. 3295, 3318-19 (Woodbury) ("[M]y numerator, the music rights fees, . . . does not include the direct license fee payments. And to that extent, there will be an underestimate in my ratio.").

917 Tr. 1101 (O'Neill).

918 Tr. 1093-94 (O'Neill).

919 O'Neill WDT (SP Ex. 26) at 9.

920 O'Neill WDT (SP Ex. 26) at 9.

TMLC allocation protocol.[926] The breakdown of blanket license fees by stations type is as follows from his report:[927]

Table 2
2004 and 2005 Blanket Music License Fees – Numerator

	Blanket Music License Fees ($Millions)	
	2004	2005
Big-3 Networks		
ABC Affiliates	$37.71	$34.40
CBS Affiliates	$37.87	$36.24
NBC Affiliates	$38.82	$36.32
Non Big-3 Networks		
FOX Affiliates	$34.56	$34.09
UPN Affiliates	$13.88	$11.86
WB Affiliates	$17.24	$16.85
Other*	$14.51	$15.16
Independents	$6.22	$6.81
Total	$200.8	$191.7

*Off-air and small stations are included in the "Other" category

Sources: ASCAP, BMI, SESAC

(ii) Calculation of Broadcast Rights Components

385. Total broadcast rights payments, excluding those for Big 3 network programming, were included in the denominator of the music ratio for each category of television station, *e.g.*,

926 Tr. 1144-45 (Zarakas) ("I've assigned an affiliation, either a network affiliation or an independent designation, for each station, and I've just summed up the allocations that were made by the TMLC."). As Mr. Zarakas further explained: "The TMLC allocates the aggregate blanket license fee among stations in accordance with a methodology it devised to produce each station's annual blanket license fee. For example, in the case of BMI's Local Television Station Music Performance Blanket License, the industry wide blanket music license fee is allocated among television markets based on the three-year average of US television households in that market. The top-25 markets are over-weighted to reflect that a household in a big city has more value than a household in a small town. The portion of the blanket music license fee allocated to a particular market is further allocated among stations in that market based on viewership in 30-minute increments during the hours of 9am to 12pm during the "sweeps" month for the three previous years." This includes an exclusion for prime time viewing audiences for Big 3 network affiliates. Zarakas WDT (SP Ex. 27) at 15, ~~fn.~~n.22.

927 Zarakas WDT (SP Ex. 27) at 15, Table 2.

ABC affiliate, NBC affiliate, FOX affiliate, Independent.[928] The broadcast rights portion of the music ratio denominator consisted of three components: (1) local television stations broadcast rights payments for non-network programming; (2) an estimate of broadcast rights payments for non-Big 3 network programming, and (3) an estimate of the broadcast rights payments that would be paid to the local stations for programs they produce themselves (*i.e.*, the broadcast value of locally-produced programming).[929]

(a) Broadcast Rights Payments Made by Local Television Stations.

386. The Television Financial Report is published annually by NAB and Broadcast Cable Financial Management Association (the "NAB Survey").[930] The NAB Survey provides data on station "revenues and various expenditures, including how much stations spend for broadcast rights."[931] This data is presented in the form of average expenditures made by each station type, either network affiliate or Independent, on broadcast rights payments.[932] Mr. Zarakas separately sorted the television stations by their affiliation with various networks (including non-Big 3 networks) or as "Independent."[933] He then calculated the total expenditures made by television stations on broadcast rights for 2004 and 2005 by multiplying the average expenditure per station type by the number of commercial television stations in each category.[934]

387. The NAB Survey provides broadcast rights data on both a cash and an amortized accrual basis.[935] Mr. Zarakas chose to use the amortized broadcast rights payments data because it includes the value of booked barter arrangements and yields a more conservative calculation of

928 Zarakas WDT (SP Ex. 27) at 16.

929 Zarakas WDT (SP Ex. 27) at 16; Tr, 1141-42 (Zarakas).

930 Tr. 1145 (Zarakas).

931 Tr. 1145 (Zarakas).

932 Zarakas WDT (SP Ex. 27) at 16-17.

933 Zarakas WDT (SP Ex. 27) at 16; Tr, 1141-42 (Zarakas).

934 Tr. 1146 (Zarakas) Zarakas WDT (SP Ex. 27) at 17.

935 Zarakas WDT (SP Ex. 27) at 17, ~~fn.~~n.25.

the music ratio because it results in a larger denominator than under the cash approach.[936] Mr. Zarakas' calculations ~~are set forth herein~~ from Table 3 of his report are set forth below.[937]

Table 3
Total Station Broadcast Rights Payments

		Average Station Broadcast Rights Payments		Number of Stations		Station Broadcast Rights Payments	
		2004 [a]	2005 [b]	2004 [c]	2005 [d]	2004 [e]	2005 [f]
[1]	All	$1,698,272	$1,702,840	1,187	1,192	$2,015,848,864	$2,029,785,280
[2]	ABC Affiliates	$2,100,520	$2,290,689	195	195	$409,601,400	$446,684,355
[3]	CBS Affiliates	$1,222,075	$1,151,584	193	193	$235,860,475	$222,255,712
[4]	NBC Affiliates	$1,128,155	$1,170,914	195	194	$219,990,225	$227,157,316
[5]	FOX Affiliates	$1,519,649	$1,161,136	165	166	$250,742,085	$192,748,576
[6]	UPN Affiliates	$2,094,220	$2,749,883	80	79	$167,537,600	$217,240,757
[7]	WB Affiliates	$5,900,565	$5,633,831	81	83	$477,945,765	$467,607,973
[8]	Independents	$2,178,891	$2,521,584	57	58	$124,196,787	$146,251,872
[9]	Other	$588,120	$490,351	221	224	$129,974,527	$109,838,719

Sources:
[1-8]: [a]: NAB, *2005 Television Financial Report*
[b]: NAB, *2006 Television Financial Report*
[c], [d]: M Street data (provided by BMI)
[e] = [a] x [c]
[f] = [b] x [d]
[9]: [a] = [e]/[c]
[b] = [f]/[d]
[c], [d]: [1] - sum([2] thru [8])
[e],[f] = [1] - sum([2] thru [8])

(b) Broadcast Rights Payments for Non-Big 3 Network Programming.

388. Although the network programming on the Big 3 networks is not compensable under section 111, network programming on FOX, WB, UPN and other networks is

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936 Zarakas WDT (SP Ex. 27) at 17, ~~fn.~~ n.25: "Amortized broadcast rights in this case refers to the accounting of payments under a accrual method and also includes the value of booked barter arrangements. Bartered programming is the booked advertising revenue in exchange for syndicated programming. Broadcast rights payments were also reported on a cash basis, which reflects the actual dollar amounts paid for broadcast rights. Cash payments were slightly less than the amortized broadcast rights; in 2004, cash payments were approximately $1.65 million per station on average and such payments were $1.66 million per station on average in 2005."

937 Zarakas WDT (SP Ex. 27) at 17 Table 3.

based on distant signal subscriber instances,[955] next calculated un-weighted music ratios for each of the television categories in the local over-the-air broadcast television market, and last applied the distant signal weights to the un-weighted ratios to form an aggregate distant signal ratio.[956] In carrying out this calculation, Mr. Zarakas recognized that, in contrast with the local over-the-air broadcast market, the national distant signal market for subscription cable television is dominated by WGN America, an independent station that does not retransmit any network programming and accounts for approximately half of the distant signal subscriber instances.[957]

392. The result of Mr. Zarakas' calculation is a weighted music ratio of 5.2% for 2004 and 4.6% for 2005 as set forth below, in Table 12 from his written direct testimony.[958]

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955 Zarakas WDT (SP Ex. 27) at 26-29; Tr. 1153-55 (Zarakas).

956 Zarakas WDT (SP Ex. 27) at 29-31.

957 Zarakas WDT (SP Ex. 27) at 28, ~~fn.~~n.30. As Mr. Zarakas explained, "WGN transmits two types of signals: one for its local market in Chicago (WGN-TV, channel 9, in Chicago, Illinois) and one designated for distant carriage (WGN America, formerly known as Superstation WGN). In 2004 and 2005, WGN was affiliated with WB in its local broadcasts. However, WGN America's transmissions did not (and do not) include programming from WB because the network was (and is) available in most markets around the country."

958 Zarakas WDT (SP Ex. 27) at 31 Table 12. Mr. Zarakas' calculations also likely understate Music's value because "they fail to account for the fact that content retransmitted in the distant signal market is on a non-exclusive basis and thus overstated by broadcast rights payments in the local over-the-air market, which are for the right to exclusive broadcasts." Zarakas WDT (SP Ex. 27) at 31. As Mr. Zarakas noted, "in the local broadcast market, stations and networks pay premiums for the rights to broadcast programs on an exclusive basis;" however, "exclusivity premiums likely would not be paid in the distant market where content is transmitted over many cable systems on a non-exclusive basis." Zarakas WDT (SP Ex. 27) at 31.

Table 12
Calculation of Weighted Ratio

	2004			2005		
	Unweighted Ratio	Weight	Weighted Ratio	Unweighted Ratio	Weight	Weighted Ratio
ABC Affiliates	7.2%	6.8%	0.50%	6.1%	5.9%	0.36%
CBS Affiliates	11.9%	6.6%	0.80%	12.1%	6.0%	0.73%
NBC Affiliates	13.0%	7.5%	1.00%	11.9%	6.7%	0.80%
FOX Affiliates	1.3%	4.2%	0.10%	1.2%	3.5%	0.04%
UPN Affiliates	3.0%	5.3%	0.20%	2.2%	5.0%	0.11%
WB Affiliates	1.4%	6.2%	0.10%	1.4%	5.7%	0.08%
Independents	4.1%	60.8%	2.50%	3.8%	64.9%	2.47%
Other	1.8%	2.5%	0.00%	1.9%	2.3%	0.04%
Weighted Ratio/Total	3.1%	100%	5.2%	2.8%	100%	4.6%

Source: Tables 10 & 11

4. Testimony of Dr. John Woodbury.

a. Flaws in Woodbury Analysis.

393. Program Suppliers presented the rebuttal testimony of Dr. John R. Woodbury, who asserted that Music Claimants' share should be set at 2.04% of the 2004 cable royalty fund and 1.94% of the 2005 cable royalty fund, substantially below the share Music Claimants have received in every litigated proceeding since the inception of the cable compulsory license.[959]

394. Dr. Woodbury endorsed a music ratio approach, opining that music's share should be determined using a method similar to that sponsored by Dr. George Schink in the 1998-1999 cable distribution proceeding.[960] Dr. Woodbury, however, failed to make any adjustment in response to the concerns raised in the 1998-99 CARP Report that Dr. Schink's approach did not account for the differences between the over-the-air and distant signal markets and included Big 3 network payments even though not compensable in this proceeding, which resulted in his music ratio understating music's value in the distant signal market.[961] Moreover, Dr. Woodbury

959 Woodbury WRT (PS Ex. 14); 1998-99 CARP Report at 89; 1983 CRT Determination, 51 Fed. Reg. at 4415.

960 Tr. 3309 (Woodbury); 1998-99 CARP Report at 89.

961 Tr. 3311-12 (Woodbury).

selected data inputs for his unadjusted ratio that systematically lower the music ratio, even in comparison to Dr. Schink's calculation.[962]

395. Dr. Schink's analysis was derived from the U.S. Census Bureau's 1998 Annual Survey of Communication Services, which separately reported: (1) the amount of music license fees paid by the U.S. commercial television industry, including the Big 3 networks; and (2) the combined amount of these music license fees and the broadcast rights payments for the U.S. commercial television industry.[963] In the 1998-1999 proceeding, Dr. Schink proposed a value for music based on the ratio of these two figures.[964]

396. Dr. Schink's data included music license fees and broadcast rights payments for the Big 3 networks, even though Big 3 network programming is not compensable under section 111.[965] In addition, Dr. Schink did not make any weighting adjustment to his calculation based on which television stations were actually retransmitted as distant signals and in what degree.[966] The 1998-1999 CARP found Dr. Schink's analysis "worthy of some weight in determining the relative weight of Music," but recognized Dr. Schink's analysis only as a *floor* for determining Music's share "in the absence of better measures."[967] As a result, the 1998-1999 CARP awarded Music, 4.0%, substantially more than the 2.33% calculated under the Schink methodology.[968]

397. For 2004 and 2005, the U.S. Census Bureau did not publish comparable data to that used by Dr. Schink in the 1998-1999 proceeding.[969] Specifically, starting in 1999, the U.S. Census Bureau combined the Annual Survey of Communication Services with another survey,

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962 Tr. 3294-95, 3312, 3320-22, 3333 (Woodbury).

963 The music license fee and broadcast rights payment data Dr. Schink used from the Annual Survey of Communication Services was only for "taxable firms." Zarakas WDT (SP Ex. 27) at 10-11, ~~fn.~~ n.13.

964 Tr. 3309-10, 3316-17, 3323 (Woodbury).

965 Tr. 3312 (Woodbury).

966 Tr. 3312, 3347-48 (Woodbury).

967 1998-99 CARP Report at 82-89; Woodbury WRT (PS Ex. 14) at 5; Tr. 3311 (Woodbury); Zarakas WDT (SP Ex. 27) at 10.

968 Tr. 3312 (Woodbury); 1998-99 CARP Report at 89.

969 Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~ n.17; Tr. 1170-72 (Zarakas).

with the merged product being the Service Annual Survey.[970] The Service Annual Survey does not report data in the same manner that the Annual Survey of Communication Services did.[971] As Mr. Zarakas explained: (1) "the Service Annual Survey provides an aggregate number for the sum of music license fees and broadcast rights payments, instead of individual numbers for the two components as was the case in the Annual Survey of Communication Services;" and (2) "the Service Annual Survey also aggregates data for taxable and tax-exempt firms into a single number for all firms."[972]

398. Due to the changes in the Census Bureau's surveys, Dr. Woodbury's data inputs differed significantly from those used by Dr. Schink.[973] First, whereas the 1998 survey provided a single data source for Dr. Schink's music ratio, the 2004 and 2005 surveys did not have separate music license fee data,[974] which resulted in Dr. Woodbury including only the license fees paid by to the PROs in the numerator .[975] Second, the numerator and denominator of the 1998 music ratio both included the same value for the music license fees.[976] In contrast, the numerator of Dr. Woodbury's music ratio included only music license fees paid to the PROs and did not include any value for direct license fees paid for music,[977] while Dr. Woodbury's denominator included all music license fee payments, including direct payments.[978] Third, the denominator of the 1998 music ratio included only commercial broadcast rights payments,[979] but

[970] Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17. The Service Annual Surveys for 2005 and 2006 report data from 2004 and 2005 respectively. A revised amount for 2004 also appears in the 2006 Service Annual Survey, the one expressly employed by Dr. Woodbury in his testimony to calculate music ratios. Tr. 3292, 3324-25, 3329-30 (Zarakas).

[971] Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17; Tr. 1171-72 (Zarakas).

[972] Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17.

[973] Tr. 3324-25 (Woodbury); Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17.

[974] Tr. 1170-71 (Zarakas); *see* PS Ex. 5X (Table 3.3); SP Ex. 63 at 72 (Table 3.6.4).

[975] Tr. 3343 (Woodbury).

[976] Tr. 1173 (Zarakas); Woodbury WRT (PS Ex. 14) at 5.

[977] Tr. 3291, 3295 (Woodbury).

[978] Tr. 3335-38 (Woodbury).

[979] Zarakas WDT (SP Ex. 27) at 10, 13, ~~fn.~~n.17; Tr. 1179 (Zarakas).

the denominator of Dr. Woodbury's music ratio included broadcast rights payments for both commercial and non-commercial stations.[980]

399. For his music ratio denominators, Dr. Woodbury used 2004 and 2005 estimates for rights payments provided in the 2006 Service Annual Survey,[981] even though prior to the submission of his written testimony, he knew that the 2007 Service Annual Survey had published a downward revision of the rights payments estimates.[982] This revision necessarily increased any calculated music ratios.[983] Despite being aware that his underlying denominator data had been revised downward, Dr. Woodbury did not update his calculation accordingly, choosing instead to rely on erroneous data that overstated his denominator by approximately $800 million in 2004 and $1.1 billion in $2005, thus understating his music ratio.[984]

(i) The 1998-99 CARP's Concerns with Dr. Schink's Analysis.

400. The 1998-1999 CARP found that Dr. Schink's calculation should only be used as "a floor figure for purposes of determining Music's award."[985] Specifically, the 1998-1999 CARP Report noted two principal factors that prevented it from adopting Dr. Schink's methodology.[986] First, Dr. Schink's methodology did not account for any of the substantial differences between the local market and the distant signal market.[987] Second, Dr. Schink's methodology included data from the Big 3 networks, which the CARP found "may have the effect of somewhat artificially decreasing the percentage of music license fees compared to

980 Tr. 3344 (Woodbury).

981 Tr. 3292, 3324 (Woodbury); Woodbury WDT (PS Ex. 14) at 6, ~~fn.~~n.14.

982 Tr. 3326-30 (Woodbury); *see* SP Ex. 63 at 72 (Table 3.6.4).

983 Tr. 3326-30 (Woodbury); *see* SP Ex. 63 at 72 (Table 3.6.4).

984 Tr. 3325, 3330, 3334-35 (Woodbury).

985 1998-1999 CARP Report at 85-87 (emphasis in original).

986 1998-1999 CARP Report at 85-87.

987 1998-1999 CARP Report at 85.

broadcast rights expenses."[988] Dr. Woodbury's calculation fails to address either of the CARP's concerns.[989]

401. First, Dr. Woodbury failed to weight his music ratio calculation in any manner to translate his calculation using over-the-air broadcast market data into a calculation to estimate relative market value in the distant signal market.[990] And although he criticized Mr. Zarakas' weighting scheme (*see infra* ¶~~Par. ,~~391~~—~~),[991] Dr. Woodbury did not even attempt to apply a different weighting scheme than Mr. Zarakas, even for the music ratios that Mr. Zarakas calculated for the over-the-air broadcast market.[992]

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402. Second, Dr. Woodbury testified that inclusion of the Big 3 music license fees and broadcast rights payments understates the music ratio. He admitted that calculating music ratios using data that includes the Big 3 network music license fees and the substantial Big 3 network broadcast rights payments, neither of which are for programming that is compensable in this proceeding, was a criticism of the CARP and understates ~~the~~ his music ratios.[993] ~~Also~~And, Dr. Woodbury never attempted to justify the inclusion of the Big 3 network rights payments in his calculation.[994] In sum, Dr. Woodbury simply repeated the type of calculations that Dr. Schink made in the 1998-99 proceeding that led the CARP to deem Dr. Schink's calculation a floor.[995]

(ii) Dr. Woodbury Systematically Understates Music's Value

403. Beyond his failure to modify his analysis to respond to the CARP's concerns with Dr. Schink's analysis, Dr. Woodbury's calculation introduced a number of additional fundamental flaws that even further understate Music's award.[996] Namely, Dr. Woodbury

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988 1998-1999 CARP Report at 87.

989 Tr. 3310-12, 3318 (Woodbury).

990 Tr. 3347 (Woodbury); Woodbury WDT (PS Ex. 14) at 8-9.

991 Tr. 3287, 3321, 3349 (Woodbury).

992 Woodbury WDT (PS Ex. 14) at 7-9; Tr. 3347-49 (Woodbury).

993 Woodbury WDT (PS Ex. 14) at 2, ~~fn.~~n.2; Tr. 3311-12 (Woodbury).

994 Tr. 3312, 3340 (Woodbury).

995 Tr. 3309-10, 3311-12, 3323, 3324, 3345 (Woodbury).

996 Tr. 3294-95, 3312, 3333, 3338 (Woodbury).

cherry-picked data for his calculation that systematically yields an inaccurate and understated music ratio, even compared to Dr. Schink's methodology using the 1998 U.S. Census Bureau survey described above.[997] Indeed, Dr. Woodbury repeatedly admitted that the Music share should be higher than he calculated for numerous reasons.[998]

(a) The Woodbury Numerator Does Not Include Direct License Payments Made by Local Television Stations.

404. In the numerator of his music ratio, Dr. Woodbury used only the license fee payments received by the PROs.[999] Dr. Woodbury conceded that his use of the PRO receipts understates the amounts paid by the local stations for music licenses because the payments to the PROs do not include direct license fee payments that broadcast stations pay for music rights.[1000] Approximately 30% of stations on a per program license[1001] pay direct license fees for the music on programs covered under a per program license in order to reduce their total music license payments to the PROs to an amount below the blanket license fee amounts.[1002] This means they are either paying direct license fees not accounted for by Dr. Woodbury,[1003] or they are not saving money off the blanket license fees.[1004] Dr. Woodbury admitted that by using only payments received by the PROs, he understated his music ratio.[1005]

(b) The Music Fees in the Woodbury Denominator Include Direct License Payments.

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997 Woodbury WDT (PS Ex. 14) at 6; Tr. 3312, 3323-24 (Woodbury); *see infra* ¶¶394-400.

998 Woodbury WRT (PS Ex. 14) at 6; Tr. 3294, 3295, 3333, 3338 (Woodbury).

999 Tr. 3317 (Woodbury); Tr. WDT (PS Ex. 14) at 6.

1000 Tr. 3295 (Woodbury).

1001 Tr. 1104-05 (O'Neill); Tr. 3319-21 (Woodbury); *see infra* ¶ 371.

1002 O'Neill WDT (SP Ex. 26) at 7; Tr. 1086, 1105 (O'Neill).

1003 Tr. 3318 (Woodbury).

1004 Tr. 1127-28 (O'Neill).

1005 Woodbury WRT (PS Ex. 14) at 6; Tr. 3295 (Woodbury).

405. Dr. Woodbury also understates the music ratio because his denominator includes direct license fee payments, even though his numerator does not.[1006] As set forth above, Dr. Woodbury's numerator consists of the music license payments to the PROs only.[1007] In contrast, the U.S. Census Bureau data that Dr. Woodbury uses for his denominator aggregates, in one number reported per year, all music license fee payments by television stations – including direct payments to composers, song writers, and publishers – plus all broadcast rights payments.[1008] As a result, Dr. Woodbury's calculation includes different music license fee data in the numerator and denominator.[1009] Dr. Woodbury admitted that his denominator is not consistent with the numerator with respect to the value of the music license fees in that the denominator includes a larger universe of music license fees.[1010] Thus, for that reason too, Dr. Woodbury has understated his music ratio.[1011]

(c) The Denominator Includes Broadcast Rights Payments for Non-Commercial Stations.

406. The U.S. Census Bureau data used by Dr. Woodbury also does not separate out broadcast rights payments by commercial and non-commercial stations.[1012] As a result, Dr. Woodbury's denominator contains payments by both commercial and non-commercial stations.[1013] The numerator of his calculation, however, only contains music license fees paid by commercial stations.[1014] Dr. Woodbury conceded that he did not use payments from precisely the same set of stations in the numerator as he did in the denominator.[1015] Dr. Woodbury also admitted that by including commercial and non-commercial stations in his denominator and only

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1006 Tr. 3335-38 (Woodbury).

1007 Tr. 3317 (Woodbury).

1008 Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17.

1009 Tr. 3317, 3323 (Woodbury).

1010 R. 3323, 3324, 3337-38 (Woodbury).

1011 Tr. 3338 (Woodbury).

1012 Zarakas WDT (SP Ex. 27) at 13, ~~fn.~~n.17.

1013 Tr. 3344 (Woodbury).

1014 Tr. 3344 (Woodbury).

1015 Tr. 3345-46 (Woodbury).

"justification for using subscriber instances to weigh station types;" and (3) the treatment of "WGN as an independent rather than a WB affiliate for purposes of assigning a percentage music royalty due to the carriage of WGN."[1024]

(i) Lack of Empirical Support for Claims

410. Dr. Woodbury's statement that use of the blanket license fee overestimates the actual payments made by stations and networks is not quantified, cannot be quantified, and is unsupported by any empirical evidence.[1025] Dr. Woodbury also made no independent effort to determine the actual amount of music license fees paid by the stations and, in particular, the actual amount paid for direct licenses, which are not included in his calculation.[1026] Moreover, Dr. Woodbury performed no empirical analysis of the frequency of direct licensing by local television stations during the relevant time frame, despite his speculation that the frequency was low; in contrast, the only factual evidence of record on this point, Mr. O'Neill's testimony, indicates the frequency of direct licensing for stations that are on a per program license is high.[1027] Thus, overall, no empirical evidence of record supports his contention that Mr. Zarakas' use of the blanket license fee overestimates the actual payments made by stations and networks.[1028] Accordingly, Dr. Woodbury acknowledged that he cannot testify as to the "extent of overstatement" and whether it is even "1, 2 or 4 percent,"[1029] highlighting that the record contains absolutely no empirical support for Dr. Woodbury's speculation that the blanket fee for the local stations overestimates the local station music license fees.[1030] Finally, Dr. Woodbury never challenged or attempted to rebut Mr. Zarakas' expert testimony, supported by Mr.

1024 Woodbury WRT (PS Ex. 14) 5, 7-8.

1025 Tr. 3286, 3289, 3322-23 (Woodbury); O'Neill WDT (SP Ex. 26) at 6; Tr. 1089, 1101, 1106 (O'Neill); Tr. 1143-44, 1160-61 (Zarakas).

1026 Tr. 3317-3318 (Woodbury).

1027 Tr. 1104-05 (O'Neill); *see also* ~~*supra* Par. 6~~*infra* ¶ 371; *cf.* Tr. 3316 (Woodbury) (Q: "[A] per program station typically obtains both a per program license and direct licenses, correct?"; A: "I don't know if that's typically true, but I understand that that may happen frequently."-).

1028 Tr. 3319-20, 3323 (Woodbury).

1029 Tr. 3323 (Woodbury).

1030 Tr. 3322-23 (Woodbury).

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O'Neill's factual testimony, that the blanket license fee represents an actual, negotiated market price for a license to all the music used in programming broadcast by the local and non-Big 3 network stations in over-the-air television markets, just as the Big 3 network and Univision blanket licenses represent the actual, negotiated market price for a license to all the music used in that network programming.[1031]

(ii) Use of Subscriber Instances

411. Dr. Woodbury contends that Mr. Zarakas' use of subscriber information to account for a difference between the local market and the distant signal market is meaningless because "[t]here is absolutely no reason to believe that there is any one-to-one relationship between the actual viewership of distant signals and the number of subscribers having access to those distant signals."[1032] However, Dr. Woodbury admitted that Mr. Zarakas never testified to a relationship between viewership and subscriber access.[1033] In fact, Mr. Zarakas used subscriber instances so that the music ratios "would reflect accurately the mix of programming on stations transmitted in the distant signal market as opposed to the programming on stations aired in the local broadcast market."[1034] Mr. Zarakas' weighting scheme thus asserted that the relative value of music in the distant signal market was calculated using music ratios for stations that cable systems actually chose to transmit as distant signals and to which subscribers actually had access in the relevant 2004-2005 period.[1035]

412. Generally, Dr. Woodbury acknowledges that it is appropriate to weight the music ratio to take into account the differences between the local television market and the distant signal market.[1036] Dr. Woodbury suggested as "an alternative" to Mr. Zarakas' weighting

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1031 Zarakas WDT (SP Ex. 27) at 11-12, 14-15; O'Neill WDT (SP Ex. 26) at 5; Tr. 1142-43, 1160, 1190 (Zarakas) ("[T]he blanket license fee is not a rack rate that you negotiate down from. It is an actual negotiated rate, and it's an indicator of market value in that regard."); Tr. 1086, 1107 (O'Neill).

1032 Woodbury WRT (PS Ex. 14) at 7.

1033 Tr. 3348 (Woodbury).

1034 Zarakas WDT (SP Ex. 27) at 12.

1035 Zarakas WDT (SP Ex. 27) at 12; Woodbury WDT (PS Ex. 14) at 7-8; Tr. 1153-55 (Zarakas); *see ~~supra~~ infra* ¶~~Par.~~ ~~362~~391.

1036 Tr. 3348 (Woodbury)

415. Indeed, both Mr. Zarakas and Dr. Woodbury define an Independent station as one not affiliated with a network, and WGN America fits that definition.[1047] Thus, Mr. Zarakas treatment of WGN as an Independent is appropriate because WGN America was never a WB affiliate.[1048] And therefore classifying WGN America as an Independent station in the distant signal market is merely saying what WGN America is, as Mr. Zarakas did for all the other stations in the weighting scheme.[1049]

V. Program Suppliers' Approach

A. The Ford Local Broadcast Market Advertising Approach

1. Dr. Ford's Study

416. In the 1998-99 proceeding, Program Suppliers offered an approach for determining royalty shares, presented through Dr. Gruen, that took the results of their custom viewing study and made a series of adjustments that had the effect of increasing their share.[~~807~~1050] The CARP found that viewing measures do not address the "criterion of relevance" – relative market value – and that Dr. Gruen's proposed adjustments to them suffered from "fatal flaws" that precluded Program Suppliers' approach from being useful.[~~808~~1051]

417. In the 2004-05 proceeding, Program Suppliers again offer an approach, this time presented through Dr. Ford, that essentially takes the results of their viewing study and makes a series of adjustments that have the effect of increasing their share.[~~809~~1052] Remarkably, Dr. Ford even presents the very same erroneous "viewing to time" calculation that the CARP rejected

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1047 Zarakas WDT (SP Ex. 27) at 5, 28, ~~fn.~~n.30; Woodbury WDT (PS Ex. 14) at 8; Tr. 3351 (Woodbury).

1048 Zarakas WDT (SP Ex. 27) at 28 n.30; Tr. 1193 (Zarakas).

1049 Zarakas WDT (SP Ex. 27) at 28, 28 n.30.

~~807 1998-99 CARP Report at 34-35.~~

1050 1998-99 CARP Report at 34-35.

~~808 1998-99 CARP Report at 38-39, 42-44.~~

1051 1998-99 CARP Report at 38-39, 42-44.

~~809 Tr. 2227-28 (Ford).~~

1052 Tr. 2227-28 (Ford).

when it was offered by Dr. Gruen in the 1998-99 proceeding and the CRT rejected when it was offered by Program Suppliers witness Mr. Cooper in the 1989 proceeding.[~~810~~1053]

418. The quantitative evidence on which Program Suppliers rely in this proceeding to establish a basis for determining relative market value is a study performed and presented by an economist, George S. Ford.[1054]

419. The purpose of Dr. Ford's testimony on behalf of the Program Suppliers "to propose how the Copyright Royalty Judges ('CRJs') should allocate the 2004 and 2005 royalties among the competing Phase I program categories."[1055]

420. Dr. Ford testified that he thought the standard for allocating royalty payments in this proceeding is relative market value.[1056] He defined market value for the purposes of these proceedings as "the price at which the programming that appears on these distant signals would exchange in a market setting with willing buyers, willing sellers and no regulations."[1057]

421. To determine the relative market value of distant signal programming, Dr. Ford assumes that programming would be valued in the same way it is in the advertising-supported local broadcast market.[1058] He creates prices that would supposedly be earned for advertising sales for the various distant signal program categories on the basis of "cost per thousand viewers" or "CPM" data from local TV advertising markets, which he adjusts based on assumptions about the demographic profile of different programming categories and the time of day at which the different programming supposedly airs.[1059] For the volume component of his

~~810 Ford WDT (PS Ex. 11) at 20, Table 1, 39, Table 6, 42, Table 7; Tr. 2234-36 (Ford); See 1998-99 CARP Report at 43.~~

1053 Ford WDT (PS Ex. 11) at 20 (Table 1), 39 (Table 6), 42 (Table 7); Tr. 2234-36 (Ford); *See* 1998-99 CARP Report at 43.

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1054 Ford WDT (PS Ex. 11) at 1.

1055 Ford WDT (PS Ex. 11) at 3.

1056 Ford WDT (PS Ex. 11) at 4; Tr. 2119 (Ford).

1057 Tr. 2116 (Ford).

1058 *See* Ford WDT (PS Ex. 11) at 5-6, 11-12.

1059 *See* Ford WDT (PS Ex. 11) at 18-31.

his analysis.[1095] He proposed that an adjustment should be made to reduce the Devotional share to zero to reflect the fact that Devotional programmers purchase time on commercial broadcast stations to air their programs.[1096]

c. Dr. Ford's Calculation of Relative Shares

435. After determining an advertising-based relative price for each of the program categories, Dr. Ford then multiplied that price by the relative share of viewing measured in the MPAA Custom Viewing Study to arrive at his estimated relative market value for each program category.[1097] His approach results in a proposed share for Program Suppliers of 68.283% for 2004 and 74.961% for 2005.[1098] The difference is attributable principally to a difference in the Program Suppliers' viewing share as reported in the MPAA Custom Viewing Study.[1099]

436. Dr. Ford observes that "with the exception of JSC, viewer share provides a reasonably good proxy for relative market value, at least among the more commercially viable program categories."[1100] He also testifies that "[g]iven the standard of relative market value, exceedingly large deviations between the viewer share and relative market value should be carefully scrutinized."[1101]

d. Dr. Ford's "Hybrid" Approach

437. Dr. Ford also suggests a "Hybrid Approach," which consists of splitting the difference between the shares presented by Dr. Ford and those presented by Dr. Gruen's subscriber survey.[1102] This approach would result in a reduction in Program Suppliers' share and increases in the shares for JSC, CTV, and PTV.[1103] Dr. Ford states that the approach would be

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1095 Ford WDT (PS Ex. 11) at 35, 39 Table 6.

1096 Ford WDT (PS Ex. 11) at 34; Tr. 2148-49 (Ford); *see* Johansen WDT (Devo Ex. 2) at 4.

1097 Ford WDT (PS Ex. 11) at 37-39 and Table 6; Tr. 2154-55 (Ford).

1098 Ford WDT (PS Ex. 11) at 39 Table 6 (CORRECTED); Tr. 2286 (Ford) (agreeing that difference in relative market shares in 2004 and 2005 was a "significant difference").

1099 Tr. 2287-88 (Ford).

1100 Ford WDT (PS Ex. 11) at 40.

1101 Ford WDT (PS Ex. 11) at 41.

1102 Ford WDT (PS Ex. 11) at 49-50.

1103 Ford WDT (PS Ex. 11) at 50, 39 Table 6, 48 Table 8.

"conceptually plausible" because it "would acknowledge dual sources of value for distantly retransmitted television programming – advertising and subscription."[1104] He concludes, however, that because the programs air on broadcast stations and the broadcast market is driven by advertising revenues, it would be more "accurate" to ignore value derived from subscriber revenues and base the relative market allocations exclusively on his local broadcast market advertising approach.[1105]

2. Problems With Dr. Ford's Study

438. The Settling Parties presented several rebuttal witnesses who provided expert opinions and other evidence demonstrating problems with the approach, implementation, and assumptions of Dr. Ford's study.[1106]

a. Using the Local Broadcasting Market as a Proxy for the Relative Value of Distant Signal Programming Carried by Cable Systems

(i) Using Advertising Data Instead of Focusing on Maintaining and Attracting Subscribers

439. Dr. Gregory S. Crawford presented rebuttal testimony for CTV on behalf of the Settling Parties.[1107] Dr. Crawford testified as an expert economist with experience in the analysis of television programming markets, specifically including cable television programming markets.[1108]

440. Dr. Crawford received his PhD in Economics from Stanford University.[1109] He has taught economics at Duke University and the University of Arizona, and is currently a Professor of Economics at the University of Warwick in the United Kingdom.[1110] In 2007-08,

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1104 Ford WDT (PS Ex. 11) at 50.

1105 Ford WDT (PS Ex. 11) at 50.

1106 *See e.g.,* Tr. 2344-45 (Crawford), ~~Tr. 2786-88 (Salinger), Tr. 3060 (Calfee),~~ Tr. 2700-01 (Trautman), Tr. 2607-09 (Desser); *see also* Tr. 229-230~~, 255-256~~ (Crandall).

1107 Crawford WRT (SP Ex. 52) at 2; Tr. 2337 (Crawford).

1108 Tr. 2343 (Crawford).

1109 Crawford WRT (SP Ex. 52) at 1, Tr. 2338 (Crawford).

1110 Crawford WRT (SP Ex. 52) at App.1, p.1, Tr. 2338-39 (Crawford).

(ii) Assessment of Dr. Ford's Hypothetical Market in Light of Economic Realities of the Marketplace

453. Dr. Ford's hypothetical marketplace would take the assumed form of a broadcast station serving only the cable community currently transmitting a distant signal, which would purchase the same programs as are on the distant signal, based on revenues it would receive from local advertising sales.[1144]

454. Dr. Ford recognized that such broadcast stations do not currently exist, characterizing them as the "missing piece" in the distant market.[1145] To resolve this issue, Dr. Ford assumes that instead of distant signals being re-transmitted to cable systems, the distant broadcast station would set up a tower in the cable community where its programming is currently being retransmitted and insert local advertising as a means of obtaining revenue in that market.[1146] For instance, with respect to WGN in Chicago, the most widely carried distant signal, Dr. Ford's model assumes that if WGN is carried in a city such as Birmingham, Alabama, in the absence of a compulsory license, WGN would put a "tower" in Birmingham and substitute local advertisements targeted at Birmingham residents.[1147] Dr. Ford characterized this is as the "most likely" scenario, though he acknowledged that cable operators might purchase the programming instead of the newly built broadcast station.[1148] Dr. Ford noted that stations with wider distribution might also move toward more nationally-based advertising, though he conceded he had no empirical evidence that this would happen.[1149]

455. Dr. Ford was somewhat equivocal in his description of the structure of his hypothetical market, noting that with respect to the "demand side" of the market, it was his "guess" that the buyer would be a broadcast station like WGN selling local advertising in Birmingham.[1150] Dr. Ford presented no empirical evidence to substantiate his theory that in the

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1144 Ford WDT (PS Ex. 11) at 10 n. 10, Tr. 2200-06 (Ford).

1145 _Tr. at 2122 (Ford).

1146 _Tr. at 2123 (Ford).

1147 _Tr. at 2127 (Ford).

1148 _Tr. at 2169-70 (Ford).

1149 _Tr. at 2170 (Ford).

1150 Tr. 2182 (Ford).

Broadcasting & Executive Producer.[1175] During his time with the NBA, Mr. Desser was primarily responsible for the valuation and negotiation of the league's media rights agreement with various cable and broadcast networks, including TNT, as well as arrangements with most major cable MSOs and all satellite operators (Dire~~e~~cTV, PrimeStar and Echostar).[1176]

464. Mr. Desser explained that sports programs provide additional elements of value to the stations that carry them. These additional elements of value to the stations carrying sports programming include: (1) promotional value of carrying sports programming; (2) the halo effect/prestige from carrying such programming; (3) the increased ability to package advertising for sports with non-sports programming; (4) the ability to use sports programming to create an audience flow to ~~otther~~other programming.[1177] Indeed, because sports programming carries these additional elements of value, that programming is often used as a "loss leader" for the networks that carry them·[1178]

465. Mr. Desser explained that sports are highly promotable because sports leagues and teams are well known and have much beloved brands.[1179] Because the leagues and teams are "household names" built over generations, their names and logos can be efficiently used to promote tune-in and association due to their ability to "stand out and grab attention."[1180]

466. Because there is considerable prestige resulting from an association with sports, Mr. Desser also explained that networks that carry sports programming often receive a "halo effect." The reason, Mr. Desser noted, is that "[s]ports fans' affection for their sports can rub off on those who are associated."[1181] According to Mr. Desser, the branding value from carrying sports programming is completely ignored in the Ford analysis.

1175 *Id.*

1176 Desser WRT (SP Ex. 55) at 2.

1177 *Id.* at 4.

1178 *Id.*

1179 *Id.*

1180 *Id.*

1181 *Id.*

467. Mr. Desser also points out that Ford's analysis fails to address the fact that sports programming is often used as a "hook" to sell packages of advertising in multiple programs.[1182] Networks in some instances may package commercial time in a sports event with advertising in adjacent programming and other programming on the network or cable system.[1183] Mr. Desser explained that even if the portion of the package price allocated to sports programming is higher than the price for other types of programming, one still must account for the fact that without the sports programming, the other ads may not have ever been sold.[1184]

468. Another element of the value of sports programming is its ability to be used as a "tent pole" to attract viewers and cycle them into other programs that are either promoted in the sports event, or which precede or follow it.[1185] In this way, value created by the presence of the sports programming is reflected in the sales of other programming.

469. Sports programming is different than other programs because it typically carries less risk. Mr. Desser noted that most shows that are developed fail and of the handful that survive, even fewer shows become "hits."[1186] While the success of a particular team may vary over time, sports TV programming overall is consistent and predictable in performance.[1187] Consequently, there is less risk associated with sports than many other forms of entertainment programming.[1188] That track record of success enhances the value of sports programming as compared to other entertainment programs, and that value is not reflected in the Ford model.[1189]

470. Mr. Desser also pointed out how sports programming is used to drive penetration of programming networks.[1190] Examples include the ~~The~~ Fox Television Network, which was launched harnessing the NFL Sunday afternoon package. Similarly, the NFL and NBA were

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[1182] Desser WRT (SP Ex. 55) at 5.

[1183] *Id.*

[1184] *Id.*

[1185] *Id.*

[1186] *Id.*

[1187] Desser WRT (SP Ex. 55) at 5.

[1188] *Id.*

[1189] *Id.*

[1190] *Id.*

used to successfully launch TNT, widely considered one of the most successful network launches in cable TV history.[1191] And Superstation penetration was driven by the presence of the MLB Atlanta Braves and NBA Hawks games on WTBS and the Chicago Cubs, White Sox and Bulls on WGN.[1192]

471. Sports programming is also used to influence the selection of multi-video providers by consumers without regard to any advertising that might be sold in the process.[1193] The NFL's Sunday Ticket package, long a fixture on DIRECTV, has aided the growth of this platform against cable. The same is true of the NCAA's Mega March Madness package. The cable industry was recently outbid by DIRECTV for the NASCAR multi-car camera package in order to further improve its competitive position. Each of these are examples of the unique power and value of sports programming in the cable industry, completely ignored by the Ford analysis.[1194]

472. Because it is compelling and topical, sports is typically consumed live, and not TIVO'ed, or downloaded to be seen later.[1195] Indeed, John Mansell, who testified on behalf of the acknowledged that live sports are "unique" because in comparison to nonsports programming, sports is a "one-time event" that is not like other programs "which can be time shifted . . . and videotaped and seen at another time."[1196] In contrast, entertainment programming is not only available on a first run basis, but then also in re-runs, syndication, cable network runs, and via web site streaming, iTunes downloads, and DVDs. Because such programming is often viewed on a delayed or recorded basis, subscribers can "fast forward" through the commercials without stopping to watch the ads.[1197] Ford's analysis in no way addresses this growing

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1191 Desser WRT (SP Ex. 55) at 5.

1192 *Id.* at 6.

1193 *Id.*

1194 *Id.*

1195 Desser WRT (SP Ex. 55) at 7.

1196 Tr. 1704 (Mansell).

1197 Desser WRT (SP Ex. 55) at 7.

phenomenon which disproportionately affects the programming offered by the Program Suppliers.[1198]

473. Sports is often viewed in groups, such as in bars, restaurants, airports, college dorms, health clubs, typically unmeasured by Nielsen, and therefore not truly reflected in the Ford analysis.[1199]

c. **Problems With Dr. Ford's Share Calculations**

474. Dr. Ford calculates what he believes to be the most accurate relative market value shares by multiplying his adjusted advertising "price" numbers by the viewing share numbers reported in the MPAA Custom Viewing Study.[1200] In rebuttal, CTV presented the testimony of Dr. Michael D. Topper, an economist and Vice President of Cornerstone Research.[1201] Dr. Topper reviewed the data underlying the MPAA Custom Viewing Study for possible errors, and discovered a number of errors that affected the relative shares reported for the various program categories.[1202] In performing the study for MPAA, Nielsen (1) failed to delete viewing in both 2004 and 2005 for a range of non-compensable syndicated programs on WGN that should have been deleted pursuant to the "Syndex processing" step, (2) failed to delete viewing in 2005 to a number of widely viewed non-compensable network programs, (3) failed to delete a large amount of viewing in 2005 to Rochester broadcast stations that occurred within the stations' local market and should have been deleted from the distant signal viewing totals, and (4) miscategorized viewing to WGN News at Noon and WGN News at Nine as Program Suppliers viewing rather than CTV viewing.[1203] These errors would tend to increase the viewing share reported for 2005 as opposed to 2004, and the viewing shares reported for the Program Suppliers category, in the MPAA Custom Viewing Study.[1204] In addition, Nielsen's failure to account for different station types in weighting the viewing from its sample stations produced a misleading

[1198] *Id.*

[1199] *Id.*

[1200] Ford WDT (PS Ex. 11) at 37-39 and Table 6; Tr. 2154-55 (Ford).

[1201] Topper WRT (SP Ex. 49) at 1.

[1202] Topper WRT (SP Ex. 49) at 2.

[1203] Topper WRT (SP Ex. 49) at 3-4 and App. 2 & 3.

[1204] *See* Tr. 2051-2062, 2066-67 (Lindstrom).

programming.[1226] However, TNT actually committed nearly one- half of its total programming budget to the NBA in these two years.[1227]

NBA on TNT Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (NBA)*	2.74%	5.37%	8.60%	46.15%
Program Suppliers/Other	~~97.26%~~	~~94.63%~~	~~91.40%~~	~~53.85%~~
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (NBA)*	2.80%	4.86%	6.96%	45.06%
Program Suppliers	~~97.20%~~	~~95.14%~~	~~93.04%~~	~~54.94%~~
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

480. Mr. Trautman also applied Ford's analysis to the same "Top 25" Cable Networks analyzed in the testimony of Howard Homonoff.[1228] MLB, NBA, NFL and NHL programming accounted for 0.7% of the total programming hours on his ~~top~~ Top 25 cable networks in 2004 and 0.6% of the total programming hours in 2005.[1229] Relying upon SNL Kagan data, Mr. Trautman determined that that MLB, NBA, NFL and NHL programming accounted for 1.7% of the 2004 (and 1.4% of the 2005) total time that cable and satellite households spent viewing the programming on the Top 25 cable networks.[1230] Relying upon SNL Kagan data (and information for TBS supplied by Major League Baseball), Mr. Trautman determined that the

1226 *Id.*

1227 *Id.*

1228 Trautman WRT (SP Ex. 57) at 8.

1229 *Id.*

1230 *Id.*

~~top~~ Top 25 cable networks spent approximately 20% of their 2004 programming budget (and 17% of their 2005 programming budget) in order to obtain the rights to MLB, NBA, NFL and NHL programming.[1231] In contrast, the Ford formula suggests that the comparable amounts would be 2.8% and 2.1%.[1232]

JSC on Top 25 Valuation Comparison

	Share of Time (%)	Share of Viewing (%)	Estimated Share of Market Value: Ford Analysis (%)	Actual Share of Market Value (%)
2004				
JSC (MLB, NBA, NFL, NHL)*	0.72%	1.71%	2.80%	20.12%
Program Suppliers/Other	~~99.28%~~	~~98.29%~~	~~97.20%~~	~~79.88%~~
Total	100.00%	100.00%	100.00%	100.00%
2005				
JSC (MLB, NBA, NFL, NHL)*	0.55%	1.41%	2.05%	17.35%
Program Suppliers/Other	~~99.45%~~	~~98.59%~~	~~97.95%~~	~~82.65%~~
Total	100.00%	100.00%	100.00%	100.00%

*Actual prices for JSC programming exclude production costs and therefore should be viewed as conservative.

481. Mr. Trautman observed that the actual ratios for sports programs carried on the ~~top~~ Top 25 cable networks were likely understated due to Mr. Homonoff's failure to account for regional sports networks (RSNs).[1233] RSNs collectively reach a very high percentage of cable subscribers and would certainly be considered among the "Top 25" cable networks carried by any individual cable system.[1234] SNL Kagan reported that Fox Sports Net, which represents a collection of several RSNs owned by the same company, had programming expenditures of nearly $2.4 billion in 2004-05, second only to ESPN and over $1 billion more than any other

1231 *Id.*

1232 *Id.*

1233 Trautman WRT (SP Ex. 57) at 8, n.6.

1234 *Id.*

cable network.[1235] Most of these expenditures were used to acquire and/or produce JSC programming.[1236] Therefore, by excluding RSNs, the ratios presented in Table 3 and Figure 3 understate the true value of JSC programming in the cable network marketplace.[1237]

B. Gruen Constant Sum Surveys of Cable Subscribers

482. Program Suppliers introduced their own constant sum survey sponsored by Dr. Arthur Gruen (hereinafter "the Gruen Surveys"). Rather than surveying cable operators, however, the Gruen Surveys targeted cable subscribers.[1238] Specifically, the survey asked cable subscribers to allocate a hypothetical budget of $10 among various program categories.[1239] Subscribers were asked about the following program categories: "Live Team Sports," "News and Community Events," "PBS Programs," "Series," "Movies and Specials," "Devotional Programs," "Non-Team Sports," and "Programs on Canadian Stations."

483. The Gruen Surveys instructed respondents to value the programming shown only on a particular distant signal or set of signals carried by the cable system to which they subscribe.[1240] The survey questions did not, however, attempt to ascertain whether the individual respondents had any knowledge or familiarity with the programming shown on the distant signals about which they were being asked.[1241] When subscribers were asked to value the various program categories shown on these distant signals using the ten dollar constant sum, they were provided with "examples" of such programs, including specific titles of shows such as "*American Idol*," "*The Oprah Winfrey Show*," or "*Seinfeld*" along with movies like "*Star Wars*" or "*Independence Day*." The examples were provided regardless of whether the programs cited as examples were actually televised by any of the distant signals carried by the subscriber's cable system.[1242]

1235 *Id.*

1236 *Id.*

1237 *Id.*

1238 Gruen WDT (PS Ex. 8) at 6.

1239 Gruen WDT (PS Ex. 8) at 8.

1240 Gruen WDT (PS Ex. 8) at 8.

1241 Tr. 1917-1919 (Gruen).

1242 Tr. 1922-1925 (Gruen).

484. Approximately 1500 people were surveyed each year. Neither Dr. Gruen nor any of the other witnesses who testified in support of the survey provided any evidence about the total number of people who were contacted or who refused to participate in the survey.[1243] Those who agreed to complete the survey were eligible for a $25 participation payment.[1244]

485. The Settling Parties introduced a number of criticisms of the Gruen Surveys. Most of the criticisms relate to the design and administration of those surveys. In addition, however, Settling Parties have challenged the premise that cable subscribers are an appropriate target group given the fact that copyrighted programming is actually supplied to cable operators.

1. Survey Design and Administration

486. Settling Parties raised a number of issues related to the survey design and execution. Dr. Gregory Duncan, an expert in survey methodology and design whose credentials are discussed in detail above,[1245] analyzed the Gruen Surveys and noted a number of significant defects. He then evaluated those defects against the standards for survey evidence referenced in the *Scientific Reference Manual* published by the Federal Judicial Center. In addition, the Settling Parties introduced expert testimony from Mr. Jeffery Berman, a senior partner and executive vice president at C&R Research in Chicago, Illinois, a full-service custom marketing research company.[1246]

487. Mr. Berman earned an MBA from the University of Chicago.[1247] He is an experienced survey researcher who has specialized in survey research in the cable and entertainment industry.[1248] He has nearly thirty years of experience surveying cable subscribers.[1249] Since joining C&R Research over 25 years ago, he has been in charge of all research C&R conducts in the cable television and entertainment industries.[1250] Prior to his work

1243 Tr. 1867-68 (Gruen).

1244 Gruen WDT (PS Ex. 8) at 66.

1245 *See* Reliability And Validity of the 2004-05 Bortz Surveys, *supra* ~~¶ —.~~¶¶ 96-125.

1246 Tr. 2426 (Berman).

1247 Berman WRT (SP Ex. 53) at 3.

1248 Tr. 2426-27 (Berman).

1249 Berman WRT (SP Ex. 53) at 2-3.

1250 Berman WRT (SP Ex. 53) at 2-3.

a tool used to determine whether there is non-response bias in the survey results.[1266] Non-response bias occurs when a lack of response to a survey is not distributed randomly across an entire target population.[1267] If a particular group is disproportionately affected by its lack of response, a survey that attempts to target the general population may become biased and unreliable.[1268] In the 1983 proceeding, the Copyright Royalty Tribunal concluded that a response rate of 27% was too low to be reliable.[1269] The CRT also expressed reservations about a subscriber survey with a response rate of 33%.[1270]

493. Dr. Gruen did not calculate a response rate.[1271] Dr. Frankel, who constructed the sampling plan, also did not include a response rate in his testimony.[1272] Instead, Dr. Gruen reported a "cooperation" rate which represented the number of people who participated in the qualification process and who then agreed to complete the remainder of the survey.[1273] While approximately 1500 people agreed to respond to the survey, Program Suppliers introduced no evidence about how many people were contacted and/or refused to participate in either of the years the Gruen Surveys ~~was~~ were conducted. According to Dr. Ratchford's analysis of the discovery documents, he estimates that there were thousands of initial refusals in each survey year along with many more attempted contacts that went unanswered.[1274]

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(percent of those who were contacted and agreed to participate) times the completion rate (the percent of those who actually completed the survey after agreeing to participate. Ratchford WRT (~~CCG Ex. 6~~CDN Ex. 6) at 14. *See also*, Duncan WRT (SP Ex. 54) at 10.

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1266 Duncan WRT (SP Ex. 54) at 10.

1267 Duncan WRT (SP Ex. 54) at 9-10. (citing Shari Seidman Diamond, "Reference Guide on Survey Research," *Reference Manual on Scientific Evidence,* pp. 229-276 (2d ed. 2000) ("Reference Manual").

1268 Duncan WRT (SP Ex. 54) at 10.

1269 1983 CRT Determination, 51 Fed. Reg. at 12809.

1270 1983 CRT Determination, 51 Fed. Reg. at 12810.

1271 Tr. 1867 (Gruen).

1272 *Id.*

1273 Gruen WDT (PS Ex. 8) at 18-19.

1274 Ratchford WRT (~~CCG Ex. 6~~CDN Ex. 6) at 13-15.

494. Dr. Duncan provided testimony about the importance of obtaining a response rate when evaluating survey results.[1275] Dr. Duncan stated that in order to determine whether there was any non-response bias, it is important to collect accurate information on survey response rates. Bruce Hoynoski, appearing on behalf of Program Suppliers in support of their Nielsen Viewing Study, agreed that "response rates are an important fact in evaluating survey evidence."[1276] Dr. Duncan stated that in a typical survey, the response rate is always given.[1277] Dr. Duncan testified that the "cooperation" rate reported by Dr. Gruen is not a standard measurement and cannot be used to measure non-response bias.[1278] According to Dr. Duncan, the absence of a useful response rate makes it impossible to determine whether the sample for the subscriber survey is representative of the target population.[1279]

495. Though none of the Program Suppliers' witnesses testified about the actual response rate, the CCG's survey expert, Dr. Brian Ratchford, attempted to compute the response rate from the discovery materials underlying the survey.[1280] According to Dr. Ratchford's calculations, the response rate for the survey was 15.83% in 2004 and 27.17% in 2005.[1281]

b. Gender of Respondents

496. The Gruen Surveys collected specific demographic information, such as the marital status, age, income, and education of the respondents.[1282] Dr. Gruen used some of that information to help him analyze the results of his surveys. But the Gruen Surveys did not collect any information concerning the gender of the respondents.[1283]

497. The Scientific Reference Manual published by the Federal Judiciary notes that "[t]he survey report should contain a description of the target population, a description of the

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1275 Tr. 2502 (Duncan); Duncan WRT (SP Ex. 54) at 9-11.

1276 Tr. 2094 (Hoynoski).

1277 Tr. 2547 (Duncan).

1278 Tr. 2546 (Duncan); Duncan WRT (SP Ex. 54) at 10.

1279 Duncan WRT (SP Ex. 54) at 11.

1280 Ratchford WRT (~~CCG Ex. 6~~CDN Ex. 6) at 12-14.

1281 Ratchford WRT (~~CCG Ex. 6~~CDN Ex. 6) at 13-15.

1282 Gruen WDT (PS Ex. 8) at 45-47; Tr. 1852-53 (Gruen).

1283 Tr. 1860 (Gruen).

While males gave sports a value of $33 (out of $100), female respondents only gave sports programming a value of $20.[1295] The CRT rejected ~~a~~the cable subscriber survey in part because of reservations the tribunal had with respect to the male-female ratio in the survey sample.[1296] According to Professor Duncan, in the absence of gender information, one cannot determine what the male-female ratio was here and whether the survey sample was representative of the larger cable universe.[1297]

500. ~~Unlike the Gruen Survey,~~ Mr. Berman's pilot study deviated from the Gruen Surveys by recording the gender of the respondent. Of the 110 respondents to the survey, approximately 56% were female and 61% were 55 years or older. Women comprised 52% of the cable universe in 2004-05 and those 55 and older comprised only about 30% of the cable universe during that time period. Age did not result in a significant difference in terms of how respondents evaluated Live Team Sports and Series. There was, however, a significant difference in responses by gender, as women valued Series programs much more highly than Live Team Sports while males valued Live Team Sports more highly than programs in the Series category:

Pilot Study -- Value By Gender[1298]

Programming Categories	Males	Females
News & Community Events	$1.51	$1.38
Series	1.50	2.73
Devotional Programming	0.84	1.14
Movies & Specials	2.01	2.09
Live Team Sports	2.91	1.58
Non-Team Sports	0.81	0.81

501. Though Mr. Berman noted that the sample size was too small to project these numbers to the universe, he concluded that the difference in average values between men and

1295 *Id.*

1296 1983 CRT Determination at 12799, 12810.

1297 Duncan WRT (SP Ex. 54) at 9.

1298 Berman WRT (SP Ex. 53) at 11.

women was a statistically significant one.[1299] Such disparities can be adjusted but only if the gender of the sample population is known, which is not the case in the Gruen Surveys because that information was not recorded.[1300]

c. Use of Program Examples

502. Both Dr. Duncan and Mr. Berman testified that using program examples was inappropriate and lead to misleading results.[1301] The Gruen Surveys identified the distant signal(s) that each respondent's cable system carried for the time period in question and the program categories on those signals for which relative valuations were sought.[1302] The Gruen Surveys also provided "examples" of specific program titles included within each category. The identity of the distant signal(s) and the program category definitions (along with the examples) appeared three times in the survey: first, as "Descriptive Information;" then in asking about the popularity of various program categories; and finally, when asking respondents to provide valuations for each program category as part of the constant sum question. [1303]

503. For the "Series" category, the survey stated described the category as:

> SERIES PROGRAMS: This category includes sitcoms such as *Seinfeld*, dramas such as *Star Trek: Enterprise*, reality shows such as *American Idol*, game shows such as *Jeopardy*, and talk shows such as the *Oprah Winfrey Show* shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR CITIES OF ORIGIN).[1304]

504. Similarly, for the "movies and specials" category, the survey described the category as:

> MOVIES AND SPECIALS: These include feature films, Movies of the Week, and specials shown only on (INSERT DISTANT SIGNAL STATION CALL LETTER(S) from INSERT CITY OR

1299 Berman WRT (SP Ex. 53) at 10; Tr. 2490 (Berman).

1300 Berman WRT (SP Ex. 53) at 10; Ratchford WRT (~~CCG 6~~CDN Ex. 6) at 9.

1301 Berman WRT (SP Ex. 53) at 6-7; Duncan WRT (SP Ex. 54) at 7-8.

1302 Gruen WDT (PS Ex. 8) at 13.

1303 Gruen WDT (PS Ex. 8) at 31, 51 (Appendix B, D).

1304 Gruen WDT (PS Ex. 8) at. at 33, 35, and 41 (Appendix B).

509. Mr. Berman noted that the way the examples were described in the survey, a respondent could reasonably interpret the question as representing that these program titles were actually carried on the distant signal even though many were not.[1311] According to Mr. Berman, the use of the examples was particularly problematic with respect to WGN, the most widely carried distant signal in 2004 and 2005.[1312] During that time period, nearly half of the Form 3 cable systems that carried a distant commercial signal carried WGN as their only distant signal, while approximately 70% of all Form 3 cable systems carried WGN as one of their distant signals.[1313] In 2004, approximately 47% of respondents to the Gruen Surveys received WGN as their only distant station; that number was approximately 52% in 2005.[1314] Approximately half of the respondents to the Gruen Survey would have been provided with a string of program examples in the "Series" category like "Seinfeld," "American Idol," "Jeopardy," "Star Trek Enterprise" and "*the Oprah Winfrey Show*" and titles in the "Movies" category like "Lethal Weapon 3"and "Independence Day" even though none of those movies or shows were actually carried by WGN in 2004 or 2005.[1315] In fact, the survey's sponsor, Dr. Gruen, could not say whether the program examples that were used were even representative of the programming carried on WGN.[1316]

510. Besides the JSC telecasts, some of the actual television programs which were regularly broadcast "full signal"[1317] on WGN in 2004-05 included:

1311 Tr. 2434 (Berman); Berman WRT (SP Ex. 53) at 6-7.

1312 Tr. 2434 (Berman).

1313 Trautman WRT (SP Ex. 57) at 15 n. 14.

1314 Berman WRT (SP Ex. 53) at 6.

1315 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 2.

1316 Tr. 1923-26 (Gruen).

1317 As explained in Section IV.D.4. of the PFOF, only programming shown "full signal" on WGN is eligible for compensation under the Copyright Act. When Dr. Gruen was asked about how this issue should be addressed with respect to his survey results, he indicated that he was aware of the fact that some WGN programming is not compensable and that survey respondents would not be able to draw such a distinction in valuing programming on WGN. Tr. 1915-16 (Gruen). But when asked whether an adjustment should be made to address this issue, Dr. Gruen said he did not believe an adjustment was

Footnote continued on next page

Will & Grace	5:30 PM (daily)
Street Smarts	12:30 AM (daily)
Home Improvement	3:00 AM (daily)
Matlock	3:30 AM (daily)
Beastmaster	11:00 AM (weekend)
Soul Train	12:00 PM (weekend)
The Fresh Prince of Bel-Air	12:00 PM (weekend)
Mutant X	3:30 PM (weekend)
Andromeda	4:30 PM (weekend)
Maximum Exposure	1:30 AM (weekend)[1318]

None of these programs were used as examples in the Gruen Surveys.[1319]

511. Similarly, respondents to the Gruen Survey were provided with examples of "non-team sports" like "NASCAR auto racing" and "professional wrestling" which also were not carried on WGN.[1320] The only other examples of non-team sports referenced in the Gruen Survey were pre-game and post-game shows surrounding sports broadcasts; although there were some of these programs on WGN, they were produced by that station and therefore properly belonged in the Commercial Television Category, not the Program Suppliers.[1321] The same was true for Devotional Programs, like the "Joel Osteen Ministry," which was not broadcast on WGN.[1322] According to Mr. Berman, the danger of wording questions in this manner is that respondents will be encouraged to associate the examples with the distant station and value the programming

Footnote continued from previous page

necessary "because there's really no way of knowing what [the respondents] took into account . . . ." *Id.* at 1916-17.

1318 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010~~PS & SP Stipulation~~ at 2-3.

1319 Gruen WDT (PS Ex. 8) at Appendix B, D.

1320 *Id.*; *see also* Tr. 2436 (Berman); Tr. 3259-60 (Kessler).

1321 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010 at 3.

1322 Tr. 2436 (Berman).

on that station based on programs not actually carried by that station.[1323] In Mr. Berman's view, the use of such examples is inappropriate and biases the results of the survey.[1324]

512. Mr. Berman tested this criticism in his pilot study by asking survey respondents, at the end of the survey, which programs they viewed on WGN. Mr. Berman's survey used nearly all of the same program examples used in the Gruen Surveys. All of the respondents to the Berman Pilot Study received WGN as their only distant signal.[1325] As with the Gruen Surveys, many of the listed programs were not broadcast by WGN.[1326] Nonetheless, when asked which programs the respondents watched on WGN, nearly half of the respondents identified the programs used as examples in the survey even though they were not carried by WGN.[1327] Examples of programs that respondents purported to have watched on WGN despite the fact that those programs were not carried on WGN included:

Program Examples Respondents Mistakenly Claimed to Have Watched on WGN[1328]	**Number of Respondents**	**Claimant Category**
Oprah	21	Program Supplier
Seinfeld	17	Program Supplier
American Idol	13	Program Supplier
NASCAR	9	Program Supplier
Jeopardy	6	Program Supplier
Joel Osteen	5	Devotionals
Wrestling	4	Program Supplier

513. The three most commonly cited program titles were the series programs "*Oprah,*" "*Seinfeld,*" and "*American Idol,*" all of which belong in the Program Supplier category.[1329] A number of respondents also indicated that they had watched programs used as examples in the

1323 Tr. 2434 (Berman).

1324 Berman WRT (SP Ex. 53) at 6-7.

1325 Berman WRT (SP Ex. 53) at 4.

1326 Tr. 2435-36 (Berman).

1327 Berman WRT (SP Ex. 53) at 7.

1328 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B).

1329 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B).

"non-team sports" category such as NASCAR and wrestling even though WGN did not broadcast either type of program.[1330] And those numbers do not include generic responses such as "car racing" even though there is no evidence that any auto racing was retransmitted by WGN in 2004-05.[1331] Some respondents also listed team sports which were not actually shown on WGN.[1332]

514. Overall, approximately 56 of the 89 people who provided an example of a program they watched on WGN listed one of the survey examples even though that program was not carried by WGN.[1333] Most of these programs would have been available from sources other than distant signals.[1334]

515. Survey questions should be framed in a non-leading manner.[1335] According to Mr. Berman, the use of these programming examples violated this principle by causing respondents to focus on programs carried outside the distant signal universe. In his experience, and based on the results of his pilot study, it is very likely that respondents to the Gruen Surveys incorporated the value of programming shown on other cable networks when they attempted to value the programming shown on their distant signals.[1336]

d. Qualification of Survey Respondents

516. Another criticism raised by the Settling Parties related to the qualifications of some of the subscribers who responded to the survey. The Reference Manual on Scientific Evidence provides that "[i]in a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey."[1337] Professor Duncan noted that the Gruen Surveys failed to determine whether any of the respondents: (a) were familiar with the programming carried on their distant signals; (b) had

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1330 Tr. 2436 (Berman).

1331 Tr. 3259-60.

1332 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B); Tr. 1925-26 (Gruen).

1333 Berman WRT (SP Ex. 53) at 19.1-19.3 (Appendix B).

1334 Berman WRT (SP Ex. 53) at 7.

1335 Berman WRT (SP Ex. 53) at 8.

1336 Berman WRT (SP Ex. 53) at 7.

1337 Duncan WRT (SP Ex. 54) at 6 (citing Reference Manual at p. 247).

ever watched any of the programming on the distant signals (frequently or ever); and (c) had assigned any value to that programming in terms of their reason for subscribing to cable. According to Professor Duncan, by failing to exclude respondents in any of these categories, the Gruen Surveys virtually ensure that some portion of the respondent pool will not be qualified to provide meaningful answers.[1338] And in the opinion of Professor Duncan, the inclusion of guesses and conjectures among carefully considered and knowledgeable answers renders the overall results unreliable.[1339]

517. Mr. Berman also expressed concern about whether respondents were qualified to participate in the survey. "[E]ffective survey research requires survey respondents to be knowledgeable so that they are able to answer the questions being asked."[1340] The Gruen Surveys did not ask respondents whether they were familiar with the programming carried on their distant signals.[1341] Respondents were not even asked whether they received the distant signal.[1342] Indeed, respondents to the survey were not even asked whether they had ever heard of the distant signals.[1343] The only qualification to participate in the survey was that the respondent have subscribed to the cable system receiving the distant signal.[1344] So even if a respondent had no interest, no familiarity, and had never watched any of the signals being asked about, they would be asked to provide program valuations as part of the Gruen Surveys.[1345]

518. The average cable subscriber only watches 12 to 15 channels even though they may receive 100 or more.[1346] But there is no way from the Gruen Surveys to determine whether any of the distant signals that respondents were asked to provide values for were one of the 12-

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1338 Duncan WRT (SP Ex. 54) at 6-7.

1339 Duncan WRT (SP Ex. 54) at 7.

1340 Rubin WDT (PS Ex. 4) at 4.

1341 Tr. 1887-88 (Gruen).

1342 Tr. 1835-36 (Gruen).

1343 Tr. 1885 (Gruen).

1344 Tr. 1885 (Gruen).

1345 Tr. 1885-86 (Gruen).

1346 Tr. 1889 (Gruen).

15 signals watched by the respondents.[1347] Though a field test and pilot study were conducted before the Gruen Surveys w~~as~~ere fully implemented[1348], neither Dr. Gruen nor Professor Rubin mentioned any follow up questions or discussions with respondents to test whether they were in fact knowledgeable about the subject matter about which they were being asked.[1349]

519. According to Mr. Berman, the failure to establish that the survey respondents were in some way knowledgeable about the programming means that some of the responses were from unqualified respondents. [1350] Thus, in the view of Mr. Berman, the survey did not constitute "effective survey research" because respondents were not necessarily knowledgeable about the issues they were asked to address in the survey.[1351]

520. A similar criticism was raised by Dr. Crawford, an expert economist with experience in the analysis of cable television programming markets. First, it failed to establish whether the respondents, who were asked for their views on the relative value of different distant signal programming categories, valued any distant signal programming at all.[1352] According to Dr. Crawford, a person that has never seen a particular distant signal or lacks any familiarity with its programming cannot provide relevant information when asked to allocate a constant sum. [1353]

521. The concern about respondent qualifications was also raised by Professor Brian Ratchford on behalf of the CCG. Dr. Ratchford pointed out that because the Gruen Surveys do~~es~~ not ask respondents whether and to what extent they ever viewed programs on distant signals or even whether they were aware of the signals and the programming carried on those signals, the

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[1347] Tr. 1890 (Gruen).

[1348] Gruen WDT (PS Ex. 8) at 7. The field test involved two markets and twenty-five respondents. *Id.* Dr. Gruen testified that this was a large enough sample to give [the survey designers] a sense of how respondents would react to the questionnaire." *Id.* Dr. Gruen and his associates subsequently conducted a pilot test that involved 150 respondents. *Id.* at 10**.**

[1349] *See generally* Gruen WDT (PS Ex. 8) at 31, 51 (Appendix B, D).; Rubin WDT (PS Ex. 4) at 9-12.

[1350] Berman WRT (SP Ex. 53) at 8.

[1351] Berman WRT (SP Ex. 53) at 8.

[1352] Crawford WRT (SP Ex. 52) at 15, Tr. 2364-65 (Crawford).

[1353] Crawford WRT (SP Ex. 52) at 15.

responses to the survey are difficult to interpret.[1354] Dr. Ratchford noted that the majority of channels tend to attract a relatively small share of all subscribers, so it is unlikely that all survey respondents would have had significant experience with the programming on distant signals.[1355] Dr. Ratchford also explained that because respondents were given $25 payments, they had ample incentive to provide some response.[1356]

522. Mr. Berman's pilot study also attempted to assess the qualifications of the survey respondents to see whether the survey was likely to include responses from individuals unfamiliar with the programming carried on their distant signals. Each respondent was asked about the frequency with which they watched their distant signal (WGN).[1357] The following results were obtained:

Pilot Study -- Frequency with Which Viewers Watched WGN in Preceding Year[1358]	
Frequently	32.7
Occasionally	36.4
Rarely	20.0
Never	8.2
Don't know	2.7

523. Mr. Berman also noted that because respondents may have mistakenly believed that certain programming was carried on WGN because of the use of the program examples, that mistake could have also influenced their assessment of how often they had watched WGN.[1359] Because over half of the respondents who listed examples of programs they watched on WGN listed the titles that were not broadcast by that station but which were used as examples in the survey, Mr. Berman concluded that the use of the survey examples in the pilot study most likely tainted the responses of those who claimed to have watched WGN.[1360] Mr. Berman could not put

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1354 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 4.

1355 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 5.

1356 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 10.

1357 Berman WRT (SP Ex. 53) (Appendix C) at 26.

1358 Berman WRT (SP Ex. 53) at 9.

1359 Tr. 2473-4 (Berman); Berman WRT (SP Ex. 53) at 9.

1360 Berman WRT (SP Ex. 53) at 9.

an exact number on the number of unqualified respondents in the Gruen Surveys but was confident that at least 30% (and likely more) of the respondents to his survey were unfamiliar with the programming on WGN.[1361] In his view, that supported his concern that the results of the Gruen Surveys were diluted by the inclusion of a number of respondents who were not qualified to assign program valuations.[1362]

e. Wording of Questions

524. Both Professor Duncan and Mr. Berman raised two other issues about the wording of the questions in the Gruen Surveys.[1363] The first issue concerned valuations in multi-person households. The Gruen Surveys w~~as~~ere intended to provide "household" values for survey respondents.[1364] Approximately two-thirds of the households in the surveys had two or more respondents.[1365] Dr. Ratchford, on behalf of the CCG, criticized this approach, noting that many respondents may not be familiar with the viewing behavior of other household members or be able to accurately assess the strength of their preferences.[1366] Even if respondents are capable of providing accurate valuations of household members, however, Settling Parties raised an issue about whether the survey design unintentionally caused respondents in multi-person households to provide individual valuations.[1367]

525. Rather than consistently asking the respondent to provide responses for "the household," the Gruen Surveys used a mix of different language which may have confused respondents about whether they were to answer for themselves or everyone in their home. In the section entitled "Program Value," the instructions first say that "[w]e are now going to ask you a few questions on how you value the program categories shown [on the distant stations at issue]."[1368] Before asking subscribers to provide values for programming, the Gruen Surveys

1361 Tr. 2474-5 (Berman).

1362 Tr. 2475 (Berman).

1363 Duncan WRT (SP Ex. 54) at 8; Berman WRT (SP Ex. 53) at 11-12.

1364 Tr. 1863 (Gruen).

1365 Ratchford WRT (CDN Ex. 6~~CCG 6~~) at 9.

1366 Ratchford WRT (CDN Ex. 6~~CCG 6~~) at 9.

1367 Duncan WRT (SP Ex. 54) at 8; Berman WRT (SP Ex. 53) at 11-12.

1368 Gruen WDT (PS Ex. 8) at 40 (Appendix B) (emphasis added).

f. Failure to Measure Intensity of Interest

531. Dr. Ratchford also criticized the Gruen Surveys for failing to weight survey responses by intensity of interest. According to Dr. Ratchford, by assigning the same weight to all responses, the Gruen Surveys improperly dilute~~s~~ the values of small segments of very committed viewers.[1393] Some subscribers he noted, value programming so highly that it influences their decision as to whether or not to subscribe to a particular cable service. Others may be relatively indifferent.[1394] Averaging those two groups results in small overall share and may obscure the strong preferences of those subscribers who place a very high value on such programming.[1395]

2. Reliance Upon Cable Subscribers Versus Operators

532. One of the problems Settling Parties raised with respect to the Gruen Surveys is that ~~it~~they focus~~es~~ on cable subscribers rather than cable operators. The Reference Manual for Scientific Evidence published by the Federal Judicial Center provides that if the population surveyed is not the one whose perceptions the survey is intended to represent, then the survey itself is irrelevant.[1396] Professor Duncan criticized the Gruen Surveys for asking valuation questions of cable subscribers even though the ultimate question faced in these proceedings is the value cable operators ascribe to distant signal programming.[1397]Even if the Gruen Surveys had been able to accurately measure the valuations of cable subscribers, those values would be only one factor in the cable operator's own value of the programming televised on distant signals.

533. Professor Duncan, an economist with expertise in network industries, whose credentials are discussed *infra* PFOF ¶107, noted that other economic forces play an important role in determining the relative amounts that cable operators would pay for different categories of programming carried on distant signals.[1398] The other economic forces that play a role in the

1393 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 7.

1394 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 7-8.

1395 Ratchford WRT (CDN Ex. 6~~CCG-6~~) at 8.

1396 Duncan WRT (SP Ex. 54) at 6-7.

1397 Duncan WRT (SP Ex. 54) at 4-5.

1398 Duncan WRT (SP Ex. 54) at 5-6.

relative amounts cable operators would be willing to pay for different categories of programming include: (1) amount and type of local programming available; (2) market penetration by competitors; (3) monthly subscription fees and their relationship to the valuation of all program categories; and (4) network costs, which may differ by operator. Those network costs may include local fees, bandwidth limitations, maintenance expenses, depreciation, and any other factors that are not uniform across operators.[1399]

534. Dr. George Ford, who testified on behalf of Program Suppliers and discussed the possibility of using a "subscriber" survey as part of a "hybrid" valuation model, has acknowledged in prior research that cable operators face different economic forces than their subscribers and do not always act in lockstep with their wishes. Specifically, in an article about the effects of "bundling" various program networks, Dr. Ford and his co-authors observed that MPVDs "do not create their tiers of programming solely by reference to what subscribers want to watch (or not want to watch)--an MVPD establishes tiers in order to maximize profits."[1400] Dr. Ford agreed that cable operators sometimes bundle programming in ways that do not match the preferences of their subscribers, noting that this sometimes happens "because of outside influences."[1401] Dr. Ford also conceded that these "outside influences" may increase profits for cable operators.[1402]

535. Professor Duncan noted that in his experience conducting research about enterprise customers, his market research group would have never surveyed the customers of the enterprise.[1403] Professor Duncan observed that the best way to measure the values of a cable operator or any other enterprise is to ask them directly.[1404]

1399 Duncan WRT (SP Ex. 54) at 6.

1400 A La Carte and "Family Tiers" as a Response to a Market Defect in the Multichannel Video Programming Market (SP Ex. 48) at 37.

1401 Tr. 2298-2299 (Ford); *see* ¶¶ 447-49, 452, *supra*.

1402 Tr. 2298-2299 (Ford).

1403 Tr. 2531 (Duncan).

1404 Tr. 2532 (Duncan).

marketplace value of distant signal programming.[1414] Dr. Ford agreed that viewership is not equal to value and that the MPAA Custom Viewing Study does not present numbers that represent a measure of marketplace value of distant signal programming.[1415]

540. In the 1998-99 proceeding, Program Suppliers for the first time, in "a significant departure from past proceedings," did not propose using the raw numbers resulting from the Custom Viewing Study as the basis for setting the royalty shares.[1416] Instead, it proposed using the viewing numbers as adjusted by a series of steps presented by Dr. Gruen.[1417] In this proceeding, Program Suppliers seek allocations of the royalty funds based on the raw numbers resulting from the 2004-05 Custom Viewing Study as adjusted by a series of steps presented by Dr. Ford.[1418]

a. The Study

541. The MPAA Custom Viewing Study analyzes People Meter viewing data that were collected for a different purpose.[1419] Although the data from People Meter households are ordinarily weighted to make sure they are representative of the national television viewing audience, those weights are not used in the MPAA Custom Viewing Study.[1420] A sample of distant signals is selected, and viewing is only supposed to be counted in the MPAA study if it occurs to one of the selected stations in a meter sample households where the station would be a distant signal.[1421]

542. Programs are categorized into the claimant categories by Nielsen, based in significant part on the categorizations it made in prior years' studies.[1422] For WGN, Nielsen

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1414 Tr. 1988-89 (Lindstrom).

1415 Tr. 2229-31 (Ford) ("To try to defend viewship as value to me is hopeless, because it's not. Viewership is not value. Different viewership has different value.").

1416 1998-99 CARP Report at 32.

1417 1998-99 CARP Report at 32, 34-44.

1418 *See Supra*, ¶¶ 416-419, 435.

1419 Tr. 1962-63, 1998 (Lindstrom).

1420 Tr. 1997-98 (Lindstrom).

1421 Lindstrom WDT (PS Ex. 9) at 4-5.

1422 Tr. 1961-62 (Lindstrom).

with an estimate of the relative value cable operators would place on Program Supplier programming in either 2004 or 2005.[1464]

556. Mr. Homonoff first looked at the total number of networks carrying Program Supplier programming, and in his judgment, 37 of the Top 50 cable programming networks carried programming he considered to be "Programming Supplier/Entertainment" programming.[1465] That included networks like TNT, which as Mr. Trautman testified, spent approximately 45-56% of its programming budget on JSC programming.[1466] Mr. Homonoff's analysis of the Top 50 networks also focused on subscriber reach, so it necessarily omitted RSNs. Those RSNs collectively reach a very high percentage of cable subscribers.[1467] Mr. Homonoff also made no effort to value the programming carried on those networks.

557. Mr. Homonoff then looked at the gross tonnage of programming on the Top 25 cable networks (as determined by subscriber reach) by looking at a sample of program weeks in each year.[1468] Mr. Homonoff then attempted to determine the total quantity of programming shown on those channels for programming in the News, Sports, and Program Supplier categories.[1469] Mr. Homonoff did not look at the licensing fees paid for this programming or attempt to place a relative value on this programming time.[1470]

558. Finally, Mr. Homonoff looked at the distribution of program expenditures among the Top 50 cable networks. He acknowledged that ESPN, a network that carries a substantial amount of JSC programming, was by far the most expensive network based on the license fee charged for each subscriber.[1471] But according to Mr. Homonoff, the license fees for program networks in the Program Supplier category –which again included networks like TNT which devoted nearly half of its budget to JSC programming – averaged approximately $6.85 per

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1464 Tr. 1760-61 (Homonoff).

1465 Homonoff WDT (PS Ex. 7) at 15.

1466 Trautman WRT (SP Ex. 57) at 15.

1467 Trautman WRT (SP Ex. 57) at 8, n.6 and 29.

1468 Homonoff WDT (PS Ex. 7) at 19.

1469 Homonoff WDT (PS Ex. 7) at 19.

1470 Tr. 1762-63 (Homonoff).

1471 Homonoff WDT (PS Ex. 7) at 22.

hour of the JSC programming that they televised in 2004 and 2005 compared to $32,000 per hour for each hour of the Program Suppliers' programming that they televised during those same years.[1481] In other words, each hour of that JSC programming on the top 25 cable networks cost approximately twelve times more on average than each hour of Program Suppliers' programming on those networks.[1482]

561. When Mr. Trautman applied those same per-hour valuations to the relative amounts of JSC and Program Suppliers' programming on distant signals during 2004-05, he found that the programming had approximately the same value even though Program Suppliers' programming-.~~[1483] And they had the same value using this metric even though Program Supplier programming~~ occupied substantially more telecast time than did JSC programming.-[1484]

Comparison of Distant Signal Relative Market Value: 2004-05
(Expenditures Per Programming Hour Method)

	2004-05	
	JSC	PS
1. Percent of Distant Signal Programming Hours	4.6%	50.1%
2. Cable Network Expenditures Per Programming Hour	$396,703	$32,153
3. Time-Adjusted Expenditures (1*2)	$18,248	$16,109
4. Share of Relative Value	53.1%	46.9%

Sources: Trautman WRT (SP Ex. 57) at 11.

562. Mr. Trautman then looked at the amount of program viewing on those same Top 25 cable networks included in Mr. Homonoff's analysis.[1485] He noted that those networks spent nearly $2.9 billion in 2004 and 2005 to acquire the rights to televise JSC (MLB, NBA, NFL

1481 Trautman WRT (SP Ex. 57) at 11.

1482 Trautman WRT (SP Ex. 57) at 11.

~~1483 Trautman WRT (SP Ex. 57) at 11.~~

1484 Trautman WRT (SP Ex. 57) at 11.

1485 Trautman WRT (SP Ex. 57) at 12.

and NHL) programming; those license fees amounted to \$0.77 for each hour (or \$0.013 per each minute) that households spent viewing the JSC programming on the top 25 cable networks.[1486] In contrast, the Top 25 cable networks spent approximately \$12.6 billion in 2004 and 2005 to acquire the rights to televise Program Suppliers' programming; those license fees amounted to approximately \$0.056 for each hour (or \$0.001 per each minute) that households spent viewing the Program Suppliers programming on the top 25 cable networks).[1487] In other words, each viewing minute of JSC programming on Mr. Homonoff s Top 25 cable networks cost on average 13 times more than each viewing minute of Program Suppliers' programming on those networks in 2004 and 2005.[1488]

563. Mr. Trautman then applied these same per-viewing minute valuations to the viewing minutes attributed to JSC and Program Suppliers' programming on distant signals in 2004 and 2005.-[1489] He concluded that using this metric, the JSC programming on distant signals in 2004-05 had approximately the same value as the Program Suppliers programming on distant signals during those years -notwithstanding that cable subscribers spent substantially more time viewing Program Suppliers programming than JSC programming on distant signals.-[1490]

1486 Trautman WRT (SP Ex. 57) at 12.

1487 Trautman WRT (SP Ex. 57) at 12.

1488 Trautman WRT (SP Ex. 57) at 12-13.

1489 Trautman WRT (SP Ex. 57) at 13.

1490 Trautman WRT (SP Ex. 57) at 13.

that programming.[1494] Though Mr. Mansell relied heavily in his analysis on the sheer quantity of games broadcast per station, he never compared the actual volume of JSC broadcasts in 1998-99 to 2004-05. Dr. Ducey did, however, make such a comparison, and he found that JSC's share of programming time was virtually the same (4.9% in 1998-99 and 4.6% in 2004-05) – while Program Suppliers' time share declined from 60% in 1998-99 to 50% in 2004-05.[1495] Similarly, while Mr. Mansell noted that the number of MLB games broadcast on WGN declined somewhat from 1998-99 to 2004-05, he did not compare that to the relative decline in compensable programming for Program Supplier programming.[1496] The number of movies broadcast full signal on WGN, for instance, declined from 556 to 252 from 1998-99 to 2004-05.[1497] In contrast, telecasts of Cubs, White Sox and Bulls games accounted for approximately 12% of WGN's full signal program time in both 1998-99 and 2004-05.[1498] In 2004 and 2005, WGN, the most widely carried distant signal, televised a greater number of MLB and NBA games (combined) than any other broadcast television station in the country.[1499]

566. Mr. Mansell also failed to introduce any evidence about the relative value of the games being broadcast in 2004-05 compared to 1998-99. ESPN, for instance, paid an increased rights fee during this time period for the right to broadcast MLB games even though its contract called for fewer games to be broadcast.[1500] In connection with the new MLB contract that resulted in increased revenue for ESPN despite the "significant decline" in the number of games being shown on the network, Mansell published in the September 30, 2005 edition of Media Sports Business, written by Mansell, that "[n]aysayers forecasting the market cannot sustain

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1494 Tr. 1723 (Mansell).

1495 Ducey WDT (SP Ex. 8) at 7.

1496 Tr. 676 (Mansell).

1497 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010~~PS & SP Stipulation~~ (SP. Ex. 51) at 2.

1498 Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010~~PS & SP Stipulation~~ (SP. Ex. 51) at 2.

1499 *See* Trautman WRT (SP Ex. 57) at 15.; Stipulation Between Settling Parties and Program Suppliers, Dated January 24, 2010~~PS & SP Stipulation~~ (SP. Ex. 51) at 2.

1500 Tr. 1701-05 (Mansell)

ever-higher national sports rights fees, continue to miss the mark." ~~in connection with a.~~[1501] Mr. Mansell also alluded to the increasing value of sports programming by noting that teams were able to establish RSNs by using broadcasts of their games and that RSNs were able to "lock up" professional sports programming by paying "very high rights fees."[1502] Mr. Mansell also noted in passing that FOX received the exclusive rights to post-season coverage in 2004-05, something it did not have in 1998-99 when it split post-season coverage with a network. Thus, there were more playoff games available on distant FOX stations in 2004-05 than in 1998-99.

567. Mr. Mansell suggests that distant signal sports programming was faced with more competition from other cable networks in 2004-05. He points to examples such as "the Golf Channel" and "Tennis Channel" as evidence of this phenomenon.[1503] Yet Mr. Mansell presents no evidence that broadcasts of golf or tennis on a cable network impact cannibalize viewers of other types of live sporting events. And neither Mr. Mansell nor any other witness in this proceeding can point to any record evidence of a professional golf or tennis event that was actually carried by a distant signal.[1504]

568. Another change Mr. Mansell points to is the increase in the number of NASCAR broadcasts. Mr. Mansell does not compare the increase in total NASCAR broadcasts to JSC broadcasts. And though there has been a gross increase in NASCAR broadcasts, such broadcasts are only available in the distant cable universe on distant FOX stations.[1505]

[1501] Tr. 1701-~~02~~ 05 (Mansell); *See also* Tr. 1692-93 (Mansell) ~~Tr. cite~~(Mansell agreed that the Cubs were a valuable property because of the national following they developed as a result of superstation distribution on WGN~~.~~").

[1502] Mansell WDT (PS Ex. 6) at 10.

[1503] Mansell WDT (PS Ex. 6) at 16.

[1504] Tr. 1696-97 (Kessler).

[1505] Questions were raised during the hearings about whether Bortz respondents would have attached value to NASCAR. No evidence was presented to show that any respondent considered NASCAR to be included in the category "live professional and college team sports. It should be noted that most NASCAR events were televised in 2004-05 on broadcast or cable networks and therefore not subject to the Section 111 compulsory license. *See* Trautman WRT (SP Ex. 57) at _16. WGN, the most widely carried distant signal, did not carry any NASCAR events, and other than distant FOX stations, there were no broadcasts of compensable NASCAR events in the distant signal universe in 2004 and 2005. *Id.* at _15-16. Approximately 15-16 percent of cable systems carried FOX as a

Footnote continued on next page

569. Finally, although Mr. Mansell talks about the number of different mediums on which sports programming was available in 2004-05, he fails to show how that differs in any way from other types of programming shown on distant signals. Though some sports programs were available on video-on-demand, the same was true for movies and syndicated programs.[1506] Indeed, Mansell conceded that there were many more options for consumers for all types of programming in 2004-05 than in 1998-99.[1507] Mansell could not say whether there were more sports relative to other programs available on the internet in 2004-05[1508] even though internet sources for programming were available for sports and entertainment programming during this time period. Mr. Mansell has not shown that the availability of new mediums for carrying programming affected sports programming more than any other type of programming.

VI. Canadian Claimants' Approach

570. The Settling Parties provided a thorough description of the Canadians' approach in its proposed findings for the 2000-2003 cable royalty distribution proceeding. We present a similar description here, revised to reflect the record of the 2004-2005 proceeding.

A. The Canadian's Methodology for Determining Their Award

571. The Canadians seek an award of royalties based on a combination of (a) the amount of royalties reported in the SOAs and allocated by CDC to Canadian signals (referred to as "fees generated" or "fees gen") and (b) the relative values cable operators assign to the Canadian and non-Canadian programming on those signals.[1509]

Footnote continued from previous page

distant broadcast station in 2004-05. *Id.* at 16. And FOX also broadcast a number of JSC programs, including Major League Baseball (regular season games of the week, the MLB All Star Game, the American and National League Division Playoff Series, the American and National League Championship Playoff Series, and the World Series), the NFL (preseason games, regular season NFC games, NFC wildcard, divisional and championship round playoff games, and the 2005 Super Bowl), and the Cotton Bowl (a NCAA football bowl game). *Id* .at 16-17. FOX spent approximately $200 million to acquire NASCAR rights in both 2004 and 2005 compared to $967 million for MLB and NFL. *Id.* at 17.

1506 Tr. 1681-83 (Mansell).

1507 Tr. 1678 (Mansell).

1508 Tr. 1682 (Mansell).

1509 Direct Case of the Canadian Claimants Group, at 5.

of attracting and retaining subscribers.[1634] Under the payment rules, however, each Canadian signal is assigned the same DSE value of 1.0.[1635]

630. Because of the sliding scale used in determining royalties, in which cable operators pay different percentages based on their total number of DSEs, it is not possible to determine a particular amount that was paid for any given distant signal.[1636]

631. The "fees gen" allocations created by CDC reflect the payment rules set forth in the Form 3 Statement of Account and the rates set forth in 17 U.S.C. § 111(d) rather than relative market value.[1637]

632. For example, two independent signals may have relative marketplace values of 75 and 25, respectively, but both signals, paid for at the statutory Base Royalty rates and analyzed by CDC, would be allocated the same "fees gen," say, 20, for each.[1638] While both are valued in excess of the "fees gen" allocated for them, the excess is large for one and small for the other.[1639] If the royalties were distributed according to relative marketplace value, the higher valued signal would receive 30 and the lower valued signal would receive 10.[1640] The higher valued signal would receive more than the "fee gen" number allocated to it while the lower valued signal receives less than its "fees gen" allocation.[1641] This example is demonstrated in the following chart:

~~632.~~

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1634 CDN Ex. R-4 at 931–32 (Calfee).

1635 Kessler WDT (PS Ex. 5) at 15.

1636 *See* McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 6.

1637 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 3; CDN Ex. R-5 at 669, 675–76 (McLaughlin); see also Waldfogel WDT (SP Ex. 18) at 5.

1638 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

1639 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4.

1640 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4; *see also* Tr. 488–89 (McLaughlin).

1641 McLaughlin WDT (SP Ex. 6) at PTV 04-05 Ex. 9, pg. 4; CDN Ex. R-5 at 676–77 (McLaughlin).

Change in Subscriber Instances

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*4,865,128*	*130,764,183*		
2000	5,254,398	133,795,743	8%	2%
2001	5,566,783	133,917,668	14%	2%
2002	5,743,710	138,170,878	18%	6%
2003	6,184,495	132,908,509	27%	2%
2004	5,374,795	137,867,895	10%	5%
2005	5,880,257	133,677,227	21%	2%

670. As Table X indicates, the number of subscriber instances for Canadian distant signals declined in 2004-2005 relative to the 2003 high point and the 2000-2003 average. In contrast, subscriber instances for all other distant signal types in 2004-2005 increased from 2003 and the 2000-2003 average.

671. Ms. de Freitas did not attempt to analyze the data or explain the trends in the data that she presented.

VII. Devotionals' Approach

672. The Devotional Claimants last participated in a cable royalty proceeding in the 1990-1992 CARP proceeding.[1717] In that case, they were awarded 1.25% of the Basic Funds, which was adjusted, in order to accommodate other awards, to 1.19385% of the 1990 Basic Fund, 1.19375% of the 1991-1992 Basic Funds, and 0.95% of the 1990-1992 3.75 Funds.[1718] The Devotional Claimants settled their claims to the 1998-1999 cable royalty funds, for a share of 1.19375% of the Basic Funds and 0.90725% of the 3.75 Funds.[1719]

673. In this proceeding, the Devotional Claimants seek a share of the Basic and 3.75 Funds of 7.8% for 2004 and 6.6% for 2005, which are the shares reported in the Bortz cable

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[1717] 1990-92 CARP Report at 131.

[1718] 1990-92 Librarian Determination at 55669.

[1719] 1990-92 CARP Report at 3 n.2, Appendix B at 8-9.

operator surveys for "Devotional and religious programming."[1720] They made the same request for an award exactly equal to their Bortz survey shares in the 1990-1992 proceeding, in which their Bortz survey shares were 3.6%, 4.3%, and 3.9% for the three years.[1721] The 1990-1992 CARP declined to grant their request, and instead made an award to the Devotional Claimants that was less than one-third of their Bortz survey shares, after finding that the Devotional Claimants' supporting evidence was "anecdotal or individual opinions, not quantified and/or not related to the Devotionals' proportionate share of the royalty fund."[1722] The CARP further found that there was no evidence of any price at which Devotional programmers sold their programming, and that there had been no change in circumstances since the previous cable distribution proceeding determination.[1723] For the same reasons, the Devotional Claimants' 2004-05 evidence fails to provide any basis for a change in the award made by the 1990-92 CARP.

A. The Devotional Claimants' 2004-05 Evidence

674. Devotional Claimants present the written testimony of Dr. Charles F. Stanley, Senior Pastor of First Baptist Church in Atlanta and founder of In Touch Ministries, a Devotional Programming producer and distributor.[1724] The testimony presents evidence of substantial growth between 1992 and 2005 in the availability of In Touch Ministries' programming via television stations, radio stations, CDs, videos, and DVDs.[1725] In Touch Ministries purchased its own cable network channel in 2007 for the distribution of its devotional programming to cable systems.[1726] Its programs aired on 435 television stations by the end of 2005.[1727] There are only about 210 television markets in the United States.[1728]

1720 Direct Case of the Devotional Claimants at 4; Tr. 1365-66 (Devo Opening Statement).

1721 1990-92 CARP Report at 50.

1722 1990-92 CARP Report at 130.

1723 1990-92 CARP Report at 130.

1724 Stanley WDT (Devo Ex. 1) at 1.

1725 Stanley WDT (Devo Ex. 1) at 4-5.

1726 Stanley WDT (Devo Ex. 1) at 3.

1727 Stanley WDT (Devo Ex. 1) at 4.

1728 *See* Tr. 2211 (Ford); Ford WDT (PS 11) at 19, footnote 32.

"remarkably consistent" terms of its size from the 1980s through the early 2000s.[1743] He presented no specific evidence about any growth in audiences to cable distant signal programming between 1990 and 2005.[1744]

684. Mr. Brown discussed his perception of the avidity of religious audiences, but in the end he agreed that his views regarding the greater avidity of religious viewers as compared with the avidity of viewers of other types of programs was based on his personal subjective opinion, and that such avidity had in any event existed since the 1980s.[1745] He could cite no objective research or authority supporting his personal opinion.[1746]

685. Mr. Brown then testified regarding social trends that in his opinion increased the avidity of religious audiences.[1747] His testimony included his observations, and citations from third parties, regarding reactions against sex and violence on television, a desire for moral and spiritual television content, the threat of Islam, distrust of the news media, and a reaction to what he called the "Hostility of Intellectual Elite toward Religious Faith."[1748] Under questioning, he conceded that the social issues he identified as affecting the avidity of the religious audience had been present for some time even before the 1990s, and that he had no quantitative evidence demonstrating that any of the issues had had an increased effect between 1990 and 2005.[1749] In any event, he did not seek to analyze the relative growth in the value of any other type of distant signal programming during the period he considered.[1750]

B. Other Evidence Regarding the Devotionals' Share

686. WGN was by far the most widely carried distant signal in 2004-05.[1751] CTV witness Richard Ducey analyzed the programming on WGN for purposes of identifying

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1743 Brown WDT (Devo Ex. 3) at 7.

1744 Brown WDT (Devo Ex. 3) at 4-7.

1745 Tr. 1427-28, 1430-31, 1491-92 (Brown).

1746 Tr. 1433-34 (Brown).

1747 —Brown WDT (Devo Ex. 3) at 8-18.

1748 Brown WDT (Devo Ex. 3) at 8-17.

1749 Tr. 1477-92 (Brown).

1750 Tr. 1476 (Brown).

1751 Ducey WDT (SP Ex. 8) at 7.

programming that was substituted on the distant signal for Syndex reasons.[1752] Such substitute programs are not eligible to receive royalties in this proceeding and were referred to by Dr. Ducey as "non-compensable."[1753] His analysis is presented in SP Exhibit 14.[1754] Of all the Devotional programs that appeared on the distant signal version of WGN, only ten percent were compensable, and ninety percent were substituted non-compensable programs.[1755]

687. CTV witness Dr. Joel Waldfogel presented the results of a regression analysis that compared the amounts of programming in the various categories that were carried on all the stations Form 3 cable operators chose to retransmit against the royalties paid by each cable system.[1756] Using all the data available, the regression analysis produced a negative coefficient for Devotional programming.[1757] The coefficient was not statistically significant, meaning that it could not be predicted with confidence that it was different from zero.[1758] Based on the standard error, there was a 29 percent probability that the Devotional coefficient was above zero.[1759] Dr. Waldfogel testified that he thought the statistically insignificant negative coefficient seemed "implausible" but "not inconceivable" in his professional opinion.[1760] Based on further analysis, Dr. Waldfogel testified that the regression analysis shares statistically corroborated all of the Bortz survey's shares except for the Devotional share, which was higher in the Bortz survey.[1761]

688. The Devotional Claimants presented Dr. Michael Salinger, an Economics Professor at Boston University, as a rebuttal witness to seek to discredit the regression study.[1762] Dr. Salinger did not present any evidence of what a proper regression coefficient for Devotional

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1752 Tr. 558-59 (Ducey).

1753 Tr. 558-59 (Ducey).

1754 SP Ex. 14; *see* Tr. 561-62 (Ducey).

1755 SP Ex. 14; *see* Tr. 564-65 (Ducey).

1756 –Waldfogel WDT (SP Ex. 18).

1757 –Waldfogel WDT (SP Ex. 18) at 11 Table 2.

1758 Waldfogel WDT (SP Ex. 18) at 12 n.12.

1759 Waldfogel WDT (SP Ex. 18) at 12 n.12.

1760 –Tr. 914-15 (Waldfogel).

1761 –Tr. 784-88 (Waldfogel).

1762 –Salinger WRT (Devo Ex. 4), at 1.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

PROPOSED CONCLUSIONS OF LAW

> Indeed, it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme. . . . Bortz adequately measured the key criterion of relative market value.

Program Suppliers v. Librarian of Congress, 409 F.3d 395, 401 (D.C. Cir. 2005) (*"Program Suppliers v. Librarian*"); *see also id.* at 402 ("While due process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard . . . the CARP made no such change. Like the 1990-92 CARP, it relied on relative market value"). All of the parties in this proceeding accept relative marketplace value as the proper standard for allocating the royalties at issue. *See* SP PFOF ¶¶49-58.

7. The 1998-99 CARP described the nature of the marketplace in which the claimants' programming would be valued as follows:

> The upshot of this likely marketplace structure is that, absent a compulsory license, the distant signal retransmission market would not be fundamentally different than under the compulsory license. Broadcasters (unlike cable networks) would likely continue to make programming decisions based on their own broadcast market needs. They would make programming decisions calculated to attract viewers in order to maximize advertising revenue — irrespective of any possibility that their signals might be subsequently retransmitted as distant signals. See id. at 7. Broadcasters would be indifferent respecting distant retransmission because distant carriage does not enhance their advertising revenues. Accordingly, in the hypothetical market with no compulsory license, CSOs would, as they do now, face a fixed configuration and quantity of distant signal programming. The supply curve for each type of programming would remain vertical — the supply of programming remains the same, irrespective of the price. The consequence of the hypothetical marketplace structure that we envisage is that it is the "demand side" that will determine relative values of each type of programming.

1998-99 CARP Report at 12-13. The record in this proceeding supports, and nothing in the record warrants a departure from, the above conclusion. *See* SP PFOF ¶¶57-61, 189, 444-~~59,~~459, 482-531.

IV. The Programming Studies At Issue

8. As in the 1998-99 CARP proceeding, the central issue in this proceeding is which of several competing studies provides the best evidence of the relative market value of the different categories of programming represented by the claimants in the relevant hypothetical marketplace. The studies at issue are:

- Constant sum surveys of cable operator 2004-05 program valuations, conducted by Bortz Media on behalf of JSC ("Bortz surveys");
- Adjustments to the Bortz survey results made by Ms. McLaughlin on behalf of PTV ("McLaughlin adjustment") and Dr. Gary Ford on behalf of the Canadians ("Ford adjustment");
- Constant sum surveys of 2004-05 cable operator valuations of programming on Canadian signals, conducted by Dr. Ringold and Dr. Gary Ford on behalf of the Canadians ("Ringold surveys");
- A regression analysis, conducted by Dr. Waldfogel on behalf of CTV ("Waldfogel study");
- An allocation of the "fees generated" by distant signals, provided by Ms. Jonda Martin of Cable Data Corporation ("CDC") on behalf of the Canadians ("CDC fee generation");
- A study of 2004-05 distant signal viewing minutes and local broadcast advertising costs performed by Dr. George Ford on behalf of Program Suppliers ("Ford study"); and
- Constant sum surveys of 2004-05 cable subscribers conducted by Dr. Gruen on behalf of Program Suppliers ("Gruen surveys").

9. Program Suppliers also presented the results of a custom study of the amount of time that cable subscribers purportedly viewed different types of distant signal programming according to data obtained from the A.C. Nielsen company ("MPAA custom viewing study"). Dr. Ford relied upon the MPAA custom viewing study in performing his analysis. However, Program Suppliers acknowledged (as they did in the 1998-99 proceeding) that they are not presenting the unadjusted viewing minute shares reflected in that study as evidence of relative market value -- notwithstanding that they had relied upon such studies in numerous past proceedings. *See* SP PFOF ¶538. The CARP considered a similar custom viewing study in the 1998-99 proceeding and properly concluded that it "does not directly address the criterion of relevance" and "cannot be used to measure directly relative value" to cable operators. 1998-99 CARP Report at 38.

A. Bortz Surveys

10. The 1998-99 CARP concluded that the "Bortz survey is clearly the best measure of relative marketplace value" and it accepted

> the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative market value for PS, JSC and NAB -- for both the Basic Fund and the 3.75% Fund. Indeed, for reasons discussed *infra,* we find that the Bortz survey is more reliable than any other methodology presented in this proceeding for determining the relative marketplace value of these three claimant groups. Bortz also establishes a Basic Fund floor . . . for PTV.

1998-99 CARP Report at 52, 31. The CARP concluded that its decision to tie the PS, JSC and CTV awards directly to the Bortz results -- and not to rely upon raw or adjusted viewing data in fashioning these awards -- was the "natural evolution of a discernible trend" where "[s]uccessive decision-makers have been according greater and greater weight to Bortz, and concomitantly lesser weight to [the] Nielsen" viewing data that had been the cornerstone of the CRT's early distribution decisions. *Id.* at 53. The 1998-99 CARP also concluded the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy." *Id.* at 52.

11. The record in this proceeding supports, and does not provide any proper basis for departing from, those ~~conclusion~~conclusions. Unlike any of the other studies presented in this proceeding, the Bortz studies have a twenty-five year track record of providing methodologically sound, fully-vetted, reliable and valid estimates of relative marketplace values. Bortz Media has continuously refined and improved its constant sum surveys in response to issues raised in these proceedings. The parties also have presented a substantial amount of evidence over several distribution proceedings (including this proceeding) in support of a constant sum methodology in general, and the Bortz surveys in particular, as providing the best approach to determining relative market value. JSC, CTV and the Canadians have each offered constant sum surveys of cable operators in distribution proceedings. In this proceeding, JSC, CTV, PTV and Devotionals support the Bortz surveys while the Canadians and the Program Suppliers have presented separate surveys that also use the constant sum methodology. *See* SP PFOF ¶¶63-85, 96-125.

12. Furthermore, the record in this proceeding demonstrates that the 2004-05 Bortz surveys are methodologically sound; they provide the best available evidence of the relative marketplace values of the programming represented by PS, JSC and CTV and, with the adjustments described below, provide the best estimates of the programming represented by PTV and the Canadians as well. The record also contains substantial evidence (including the Waldfogel study, a study of programming expenditures by cable networks, and an analysis of changed circumstances) that corroborate the 2004-05 Bortz survey results. While the Program Suppliers have leveled criticisms against the Bortz surveys, none of these criticisms is new and none is supported by any empirical evidence. None justifies according the 2004-05 Bortz surveys less weight than the CARP accorded the 1998-99 Bortz surveys. *See* SP PFOF ¶¶86-125, 131-308.

13. On two separate occasions the U.S. Court of Appeals for the DC Circuit has affirmed reliance upon cable operator constant sum surveys in allocating the cable royalty funds. In *Christian Broad. Network, Inc. v. CRT,* 720 F.2d 1295, (D.C. 1983), the Court of Appeals stated:

> Indeed, given Congress' evident intent to have the [CRT] operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, see House Report at 89, [the Court] find[s] the [CRT's] receptiveness to evidence simulating the commercial attitudes of the "buyers" in this supplanted marketplace to be more than reasonable.

Id. at 1306. Likewise, the Court of Appeals affirmed the decision of the 1998-99 CARP to accord the Bortz results determinative weight in setting the awards of the Program Suppliers, JSC and CTV, stating that the Bortz surveys "adequately measured the key criterion of relative market value." *Program Suppliers v. Librarian,* 409 F.3d at 402. The decision to accord determinative weight to the Bortz surveys is thus fully consistent with applicable precedent.

B. McLaughlin and Ford Adjustments

14. In the 1998-99 proceeding, the CARP concluded that although the Bortz survey is "an extremely robust (powerfully and reliably predictive) model for determining relative value," the results of the Bortz survey "understate the relative value of PTV" due to "the Bortz treatment

of cable systems that carried only PTV as distant signals." 1998-99 CARP Report at 22, 31. The CARP observed that "[t]he exclusion of the PTV-only systems artificially depresses the PTV Bortz score" because that is "the category of cable operators that would be expected to give the highest value to a PTV distant signal." 1998-99 CARP Report at 23. The CARP recognized, as did the 1990-92 CARP and the 1983 and 1989 CRT, that the Bortz results must be adjusted to take account of the differences in the way PTV is treated in the survey. *See* 1998-99 CARP Report at 24; 1990-92 CARP Report at 123–24; 57 Fed. Reg. at 15299–300; 51 Fed. Reg. at 12811. Consequently, the CARP concluded that the Bortz survey "establishes a relative value floor" for PTV programming. 1998-99 CARP Report at 60.

15. In this proceeding, PTV sponsored testimony from Linda McLaughlin that provided a mathematical adjustment to the Bortz study to address the fact that some cable systems carried only PTV and/or Canadian distant signals. *See* SP PFOF ¶¶309-324, ~~330..~~330. The results of this adjustment are set forth in SP PFOF ¶¶314-317 and the Appendix. Because this adjustment addresses the 1998-99 CARP's "primary concern about the Bortz survey," the Bortz survey, as adjusted, is representative of PTV's relative marketplace value.

16. The adjusted Bortz survey results are corroborated by the fact that there was "a meaningful increase in the relative growth" of PTV's programming from 1998-99 to 2004-05. 2000-03 Distribution Order at 34 (referring to Canadian growth between 1998-99 and 2000-03). PTV's percentage of distant subscriber instances of carriage increased from 10.2 percent in 1998-99 to 12.1 percent in 2004-05. *See* SP PFOF ¶217. This increase was greater than that experienced by the Canadians between 1998-99 and 2000-03 -- an increase that the Judges found to be a "significant" changed circumstance supporting an increase in Canadians' award. *See* 2000-03 Distribution Order at 34.

17. In contrast to the 1998-99 proceeding, where the CARP decided to hold PTV's award flat in part because PTV's raw Bortz share had not increased since the last proceeding, 1998-99 CARP Report at 66, in this case PTV's raw unadjusted Bortz share increased from 2.9 percent in 1998-99 to 3.6 percent in 2004-05. *See* SP PFOF ¶217. This increase is consistent with and reflective of the increase in subscriber instances and other changed circumstances. *See*

SP PFOF ¶¶217-219; *see also* 1998-99 CARP Report at 16 ("changed circumstances are embedded within methodologies that provide reliable estimates of … relative valuations").

18. The Canadians' witness Dr. Gary Ford expanded on Ms. McLaughlin's adjustment to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. The results of this adjustment are set forth in SP PFOF ¶330 and the Appendix.

C. Ringold Surveys

19. The Canadians' witnesses Drs. Debra Ringold and Gary Ford conducted a constant sum survey that estimates the value of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators. *See* SP PFOF ¶¶650-660. Dr. Ringold testified that her study showed that the average value of Canadian programming on the Canadian distant signals she studied was 60 percent during the 2004-05 time period. *See* SP PFOF ¶659. In light of that fact, it is necessary to adjust the augmented Canadian Bortz shares downward and the augmented JSC and Program Supplier Bortz shares upward to account for the presence of JSC and Program Supplier programming on Canadian distant signals. The results of this adjustment are set forth in SP PFOF ¶336 and the Appendix.

D. Waldfogel Study

20. The Waldfogel study is a regression analysis that compares the relative amounts of distant signal programs retransmitted in each of the claimant categories against the cable copyright royalties paid. The cable distant signal market is, of course, subject to regulatory constraints, and individual program category values cannot be determined by direct observation, but cable operators make economic decisions when they choose to carry the distant signals for which they pay royalties. The Waldfogel study was designed to glean as much useful information as possible from these marketplace data by applying an econometric analysis to the complete set of data about all of the distant signal programming that Form 3 cable operators actually chose to carry in 2004 and 2005 along with all of the royalties that each Form 3 cable system actually paid for those programs in 2004 and 2005. *See* SP PFOF ¶¶134-145.

21. Dr. Waldfogel designed the study based on the underlying economics of the distant signal marketplace and a common sense approach to identifying the variables that would be expected to have an effect on system royalties. Dr. Waldfogel included the program categories themselves as independent variables because measuring their relative value is the only question to be answered in this case. He included other independent variables that reflected system size, the economic attributes of the cable community's market, the availability in each system of other programming sources (relative number of local signals and total channels), and a number of aspects of the cable royalty structure that would affect the total royalties (partially distant, minimum fee, and 3.75 variables). The regression resulted in coefficients that were the equivalent of unit prices for the different program categories, which, when ~~multipled~~multiplied by the relative amounts of programming actually purchased in 2004 and 2005, produced shares representing the relative values of the distant signal program categories. *See* SP PFOF ¶¶146-176.

22. Dr. Waldfogel made a close comparison between the results of his study and the results of the Bortz surveys. After making adjustments in his study's share calculations so that they covered the same scope of compensable and non-compensable programming that was covered in the Bortz surveys, and using augmented Bortz survey shares so that they include the omitted PTV-only and Canadian-only sample systems that were covered in the regression analysis, he concluded that on an apples-to-apples basis, the shares resulting from the two studies, with the exception of the Devotional shares, were very similar, and given their overlapping confidence intervals, were statistically indistinguishable. The Devotional coefficient in the regression study was negative, although statistically insignificant, and even at the top end of its confidence interval, produced a share that was significantly lower than the Bortz survey share for Devotional programming. *See* SP PFOF ¶¶177-181.

23. In the 1998-99 Proceeding, CTV presented a similar regression analysis, the results of which were somewhat volatile and imprecise, but which the 1998-99 CARP relied on as useful evidence corroborating the Bortz survey results. *See* 1998-99 CARP Report at 49-50. Dr. Waldfogel took several of the past criticisms into account in the design and evaluation of his regression study, but opposing rebuttal witnesses pointed out that its results were also imprecise and somewhat volatile. In this case as in the 1998-99 case, the regression analysis provides

strong support and corroboration for the Bortz survey results, except for the Devotional share. It finds in the economic data that resulted from the actual operation of the distant signal marketplace in 2004-05 a set of relative value shares that are substantially the same as those the cable operators themselves reported in response to the 2004-05 Bortz surveys. *See* SP PFOF ¶¶177-181.

24. In the adjustments that Dr. Waldfogel made in order to have an apples-to-apples comparison, the regression study provides a strong independent evidentiary basis corroborating the PTV and Canadian adjustments to the 2004-05 Bortz survey results that have been proposed and explained by Ms. McLaughlin and Dr. Gary Ford, and which were accepted by Mr. Trautman. In addition, the comparison provides an evidentiary relative value basis for making the "WGN Adjustment" that the 1998-99 CARP found may be conceptually proper but for which it lacked sufficient evidence. *See* 1998-99 CARP Report at 27-28. On the record of the 2004-05 proceeding, the Judges have a strong evidentiary base for reducing the Program Suppliers' Bortz survey share by up to 23.2 percent, and allocating the adjustment proportionally among the remaining programming categories. *See* SP PFOF ¶¶309-348.

E. CDC Fee Generation

25. The Canadians once again seek to rely upon "fee generation" to determine its shares in this proceeding. "Fee generation" refers to the amounts of Section 111 royalties that Cable Data Corporation ("CDC") allocates to each broadcast station carried as a distant signal under Section 111, based upon various protocols that CDC has established.

26. The CRT, prior CARPs, and the Court of Appeals have historically either rejected or pointed to flaws in using "fees gen" as a measure of relative marketplace value. *See* SP PFOF ¶¶645-649. In choosing to apply the fee generation approach in the unique circumstances of the 2000-03 proceeding, the Judges made clear that 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." 2000-03 Distribution Order at 18. The Judges also declined to decide "whether the 1998-99 CARP's fee generation approach, or fee generation in general, is the best means of determining the relative marketplace value of the Canadian Claimants' programming." 2000-03 Distribution Order at 25. Indeed, the Judges

observed that the Canadians' awards in the 2000-03 proceeding were "not representative of the relative marketplace value of their programming in this proceeding." 2000-03 Distribution Order at 17–18.

27. The Judges recognized that the relationship between fees generated and relative marketplace value may be "rough," "crude," and "wobbly," 2000-03 Distribution Order at 27, but considered themselves constrained by the parties' stipulations designed to promote the efficiency of the proceeding and by the lack of any evidentiary alternative to use the fees generated approach for the narrow purpose of determining the Canadian Claimants' share in the 2000-03 proceeding. *See* 2000-03 Distribution Order at 15, 18, 25-26. The Judges stated that they were not able to consider the "several observations" offered by expert Linda McLaughlin "as to how royalty payments under the compulsory license may be divorced from how programming would be bought and sold in the free marketplace" because the Judges were "precluded by the Joint Stipulations and the parties' presentations from considering how the free marketplace might work and what bearing that might have on relative marketplace value." 2000-03 Distribution Order at 27; *see also* SP PFOF ¶¶613-644. No such constraints exist here.

28. Ms. McLaughlin's testimony, which was not before the CARP in the 1998-99 or 1990-92 proceedings, provides several substantive criticisms of the "fees gen" methodology and plainly establishes that "fee generation" does not reflect relative marketplace value. *See* SP PFOF ¶¶613-644. As Ms. McLaughlin explained, the amounts that CDC allocates to particular signals under its "fee generation" protocols reflect a variety of factors that have nothing to do with how cable operators value (or pay for) distant signals, or how the free marketplace might work in the absence of the compulsory license. *See* SP PFOF ¶¶613-644.

29. In addition, the Canadians' own witness, Dr. Calfee, conceded, among other things, that: (1) there is an unavoidable disparity between relative values and fee allocation; (2) two signals can generate the same fees, but have a different relative value; (3) "one cannot infer, directly, [just by looking at the fees gen allocations] the relative value of . . . two signals to either the system or their subscribers;" (4) the "fees gen" methodology could produce a "spurious" result; and (5) changes in the "fees gen" numbers could result from a number of factors that have nothing to do with the relative value of programming retransmitted on distant signals, ranging

from expansion of the cable system's service area, to an improved On Demand service offering, to bundled television and Internet service offerings. *See* SP PFOF ~~597609.~~¶¶597-609. In addition, the testimony of Canadians' witness Jonda Martin demonstrated that CDC's standard fees gen allocations, "Minimum/Maximum" analysis, and "3.75%" protocols do not reflect the amount a cable operator would save if it dropped all distant signals or only one distant signal. *See* SP PFOF ¶¶610-612.

30. Finally, the Canadians' "fees gen" methodology contemplates that the Judges would apply the Canadians 2004-05 "fee generation" shares against the royalties paid by all cable systems, without regard to whether those systems had any right to retransmit Canadian broadcast signals pursuant to the Section 111 compulsory license. *See* 17 U.S.C. § 111(c)(4) (limiting the geographic region within which cable systems may retransmit Canadian signals under the Section 111 compulsory license). This would include the royalties paid by cable systems that paid only the "Minimum Fee" for the "privilege of further retransmitting" broadcast signals (17 U.S.C. § 111(d)(1)(B)(i)), even though many of those systems did not enjoy that privilege with respect to Canadian signals. The Canadians' submit no evidence that it is advisable or permissible to include the royalties by cable systems that were precluded by the terms of the Section 111 license from retransmitting Canadian signals. It is not only inadvisable for the Judges to apply the Canadians 2004-05 "fee generation" shares against the royalties paid by all cable systems, without regard to whether those systems had any right to retransmit Canadian broadcast signals pursuant to the Section 111 compulsory license, but it is deficient as a matter of law as well.

31. Unlike in the 2000-03 proceeding, the Settling Parties in this case have offered a reliable and robust "evidentiary alternative" to the fee generation approach, undertaking a similar multi-step process as proposed by the Canadians but using the Canadians' adjusted Bortz share as the starting point, rather than Canadians' relative percentage of CDC's fees generated allocation. *See* SP PFOF ¶¶62-415 and the Appendix.

32. The 1998-99 CARP declined to use the Bortz results for the Canadians saying only that the survey was not "designed" to include the Canadians and did not provide "statistically significant results" for the Canadians. *See* 1998-99 CARP Report at 31 n.13. The CARP acknowledged, however, that "fee generation does not reach the level of robustness and

reliability of the Bortz study." Id. at 64. The record of this proceeding provides the strongest support yet for using the Bortz survey results to set the Canadians' award. The number of Bortz respondents who carried distant Canadian signals in 2004-2005 and whose valuations are taken into account in the adjusted (or unadjusted) Bortz results is significantly greater than in 1998 and 1999. *See* SP PFOF ¶326. On the basis of this more complete record, the Judges should reject fee generation and rely upon the 2004-05 Bortz survey results, as adjusted, to determine the Canadians' 2004-05 award. *See* SP PFOF ¶¶325-330.

F. Ford Study

33. To support an over 30 percentage point increase over their 1998-99 share, the Program Suppliers rely on a study presented by Dr. George Ford. The Ford study follows the approach espoused by Program Suppliers in the 1998-99 proceeding, in that it starts from the base of the discredited MPAA custom study of viewing minutes and multiplies the shares of viewing minutes by a series of arbitrary adjustments to produce a larger share for Program Suppliers. As with the 1998-99 Gruen "avidity adjustment" manipulations, the Ford study suffers from fatal flaws, and provides no basis whatsoever for the allocation of royalty funds in this proceeding. *See* SP PFOF ¶¶460-~~81.~~481.

34. As expert rebuttal witnesses demonstrated, Ford's study is fundamentally flawed from an economics perspective, in that it uses data from the wrong market. Dr. Ford's explanation for using broadcast market advertising data as the basis for his analysis was that he found a market where data was available, and just assumed that the relative values would be the same. He repeatedly confirmed that cable operators were irrelevant to the question of relative value under his approach. But as Dr. Crawford explained, different kinds of programs are valuable in the broadcast advertising-supported market as contrasted with the cable market, so Dr. Ford's use of the wrong market produces the wrong relative value answers. *See* SP PFOF ¶¶422-428, 439-452.

35. Dr. Ford's approach is inconsistent with the Congressional intent underlying Section 111 and applicable judicial precedent. It improperly relies upon advertising revenues that neither cable operators nor broadcasters receive from distant signal programming. Moreover, nothing in the record corroborates Dr. Ford's results or demonstrates that his study

~~ss~~is reliable. To the contrary, the record establishes that Dr. Ford's approach is wholly inconsistent with marketplace evidence. *See* SP PFOF ~~4653-81.~~¶¶448-450, 453-481. Furthermore, Dr. Ford ~~shas~~has never before done his study and has presented results for only two years. *See* 1998-99 CARP Report at 50, 48 (refusing to adopt the Rosston regression analysis as a "methodology for independently determining relative value" in part because "the lack of any historical bases for assessing reliability is of concern"); *id.* at 88 ("Unlike the Bortz survey, the Schinck approach is not time-tested. Similar approaches have not been adopted, or even presented for litigation scrutiny, for over 20 years. Unlike reliance on 'tried and true' methodologies such as the Bortz survey, this Panel is loath to slash drastically an award based upon such untested methodologies"). The concern over reliability is particularly significant here given that, as Dr. Ford acknowledged, there is a "significant difference" in his results for the years 2004 and 2005. *See* SP PFOF ~~474, 547~~¶¶435, 544-550.

36. Moreover, having "assumed himself into the data flow" of the broadcast market, Dr. Ford proceeded to adjust those very data in ways that were flatly inconsistent with the realities of the actual broadcast market. These erroneous adjustments had the effect of further increasing the Program Suppliers share under the Ford approach. And Dr. Ford's share calculations were then based on the MPAA Custom Viewing Study shares, which besides being irrelevant to relative market value were erroneous in ways that inflated the Program Suppliers share. Dr. Ford's study is fatally flawed in both its conception and its implementation, and provides no credible or valid evidence on which royalty allocations can properly be based. *See* SP PFOF ¶¶438-481.

G. Gruen Surveys

37. The Gruen cable subscribers do not provide any reliable basis for determining the claimants' royalty shares. These studies contain several methodological flaws, as demonstrated by a pilot study that the survey research firm C&R Research conducted. That pilot study provided an empirical basis for the criticisms that various survey experts and others leveled against the Gruen surveys. Among other things, the Gruen surveys use of examples of programs not actually received on a distant signal basis by the respondents rendered useless the valuations provided by those respondents; those valuations plainly covered programming other than the

distant signal programming at issue in this proceeding. Moreover, the failure to provide the Judges with the basic information that routinely accompanies consumer surveys -- response rates and gender of respondents -- precludes any finding that the results of these surveys are representative of the cable subscriber universe; it also precludes any assessment of whether these surveys respond to the concerns raised the last time that a cable subscriber survey was introduced in the distribution proceedings. Finally, by surveying any subscriber willing to respond -- without regard to whether they actually placed any value on, or had any familiarity with the distant signal programming, about which they were questioned, the Gruen surveys obtained meaningless information -- comparable to asking all car owners how they value the different options on a Bentley or Rolls Royce they had never driven let alone owned. ~~*See*SP~~*See* SP PFOF ¶¶57-61; 189; 444-~~59~~459; 482-531.

38. Wholly apart from the methodological deficiencies of the Gruen surveys, the surveys were conceptually problematic. The relevant issue in this proceeding concerns how cable operators, not cable subscribers, would allocate their royalty payments. The best evidence on that issue comes from cable operators themselves, not cable subscribers. And Dr. Crawford's empirical studies show that cable subscribers' preferences do not translate directly into higher cable operator profitability anyway, because of the economic effects of bundling. As the 1998-99 CARP recognized (and as the Court of Appeals affirmed), it is reasonable to conclude that the program valuations provided by cable operators who respond to the Bortz surveys take account of cable operator preferences. *See Program Suppliers v. Librarian,* 409 F.3d at 402.

V. The Music Share

A. The Music Claimants

39. Music Claimants represent every songwriter, composer and music publisher entitled to royalties under section 111 for use of their copyrighted musical works in all retransmitted non-network programming. Copyright Office Final Regulations, 59 Fed. Reg. 63,025, 63,029 (Dec. 11, 1994); 1990-1992 Decision, 61 Fed. Reg. at 55655 (Oct. 28, 1996); *see also* Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed. Reg. 20,428, 20,429 (Apr. 24, 1998). There has been an increased emphasis on music in local television programs over the past ten years. *See* SP PFOF ¶¶ 351-363. In particular,

entertainment oriented shows such as the ratings juggernaut "American Idol" have used increasingly focused on feature music. *See* SP PFOF ¶ 354.

40. Music Claimants are claimants to each of the Basic, 3.75%, and Syndex Funds. In the past, Music Claimants always received the same share of the Basic, 3.75%, and Syndex Funds in all CARP and CRT awards, and should again in this proceeding.

B. The 1998-99 CARP Report

41. The 1998-99 CARP found that the Bortz study provided meaningful indications of the relative values of sports, movies and other types of programming, but was not relevant for music because music is a program element rather than a program type. 1998-99 CARP Report at 31. The 1998-99 CARP found that an alternate methodology provided some evidence of the relative market value of music. Specifically, the CARP considered, as a "floor" for the ultimate distribution percentage set, the relative value of music based on the ratio of music license fees to the total music license and broadcast rights expenses incurred by television broadcasters in the over-the-air broadcast market (the "Unadjusted Music Ratio"). *See* SP PFOF ¶¶ 350, 374-375, 394-396, 400. Although the CARP recognized that the market for distant signal programming by cable system operators is different from the market for programming in the over-the-air broadcast market, "in the absence of better measures," the CARP found that "the broadcast television ratio of music expenses to the total broadcast rights expenses is at least one reasonable measure of Music's relative value ...." 1998-99 CARP Report at 85; *see* SP PFOF ¶¶ 350, 375-376, 394-396.

42. The 1998-99 CARP concluded that this Unadjusted Music Ratio was "worthy of some weight in determining the relative weight of Music," but also found that the inclusion of expenditures made by the Big 3 networks may artificially decrease the Unadjusted Music Ratio to a level below where it would have been if the Big 3 networks had been excluded, as they should have been. 1998-99 CARP Report at 84-86. The CARP therefore awarded Music Claimants 4% of the 1998-99 funds — nearly twice the 2.33% suggested by the unadjusted "floor" study.

C. The Zarakas Study

43. The Zarakas Study addressed the concerns of the 1998-99 CARP and is the most reliable evidence of Music's value in this proceeding. *See* SP PFOF ¶¶ 350, 364-372, 373-392, 409-415.

44. The Music Claimants' proposed share is based on the music ratio concept accepted by the CARP in the 1998-99 proceeding; however, the analysis was refined to address the CARP's concerns that the ratio reflect music's value in the distant signal market and to exclude rights payments for Big 3 network programming, which is not compensable in this proceeding. *See* SP PFOF ¶¶ 350, 373-392 Mr. William P. Zarakas, an economist and expert in the valuation of assets and businesses in the communications and media industries, designed a music valuation analysis to meet each of the 1998-99 CARP concerns. *See* SP PFOF ¶¶ 350, 373-392. Mr. Zarakas focused his detailed analysis on using data available in the over-the-air local broadcast market to estimate the relative value of music in the distant signal market. *See* SP PFOF ¶¶ 350, 364-372, 376-390. To do this, he obtained reliable data on market-negotiated blanket music license fees and television broadcast rights payments and calculated music ratios for different categories of television stations in the over-the-air local broadcast market, such as Independent stations or network affiliates. *See* SP PFOF ¶¶ 364-372, 376-390. Importantly, Mr. Zarakas used only music license fees and broadcast rights payments for non-Big 3 network, non-network, and locally produced programs. *See* SP PFOF ¶¶ 377, 383-390. He then weighted these music ratios to reflect the relative importance of the stations retransmitted by cable systems in the distant signal market in 2004 and 2005, finding aggregate music ratios that represent the relative value of music, 5.2% in 2004 and 4.6% in 2005. *See* SP PFOF ¶¶ 376, 391-392.

45. Mr. Zarakas found that the most reliable and accurate measures of the value of music license fees in the over-the-air local broadcast market are the negotiated market prices of the PRO blanket music licenses. *See* SP PFOF ¶¶ 364-372, 377-383, 410. The Music Claimants operate in the marketplace primarily through blanket licenses. *See* SP PFOF ¶¶ 365-372. A blanket license grants the privilege to a licensee to perform publicly any and all of the musical works within the repertory of the respective performing rights organization in exchange for either a flat fee or a percentage of gross receipts. *Broadcast Music, Inc. v. Columbia Broadcasting*

System, Inc., 441 U.S. 1, 5 (1979); *see* SP PFOF ¶¶ 365-366. "Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement…." *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950), quoted in *Broadcast Music, Inc. v. Columbia Broadcasting System. Sys., Inc.*, 441 U.S. at 8-9 fn.13.

46. Blanket licenses have been the only form of license in place between the PROs and the cable system operators for the limited programming that they license. *See* SP PFOF ¶ 372. Indeed, Congress itself has elected to use the compulsory blanket license concept in the cable television statutory license, as well as in other statutory licenses. *See* 17 U.S.C.§§ 111, 118 and 119. For example, in enacting the satellite carrier statutory license, the House Committee on the Judiciary stated: "Negotiation of individual copyright royalty agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the revenues produced by a single earth station are so small." H. Rep. No. 100-887, Part 1, 100th Cong., 2d Sess. (1988) at 24.

47. As observed by the U.S. Supreme Court, "[m]ost users want unplanned, rapid, and indemnified access to any and all of the repertory of the compositions…." *Broadcast. Music, Inc. v. Columbia Broadcasting. Systems, Inc., supra*, 441 U.S. at 20. Given this demand, "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided." *Id.* In this context, the Court found that, "[t]he blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of the parts; it is, to some extent, a different product." *Id.* at 21-22.

48. Based upon previous agreements between cable operators and performing rights organizations, as well as unrebutted evidence from Mr. Michael O'Neill, Senior Vice President Licensing at BMI, Mr. Zarakas reasonably concluded that without a statutory cable license, each of the performing rights organizations would offer and negotiate blanket licenses with cable operators for the public performing rights to all music contained in programming on stations retransmitted by distant signal. *See* SP PFOF ¶¶ 364-372, 377-383, 410. And the licensees

would be satisfied because the blanket license offers users a more efficient product at a lower price than a large number of direct licenses would offer to cable operators. *See* SP PFOF ¶¶ 365-366.

49. Mr. Zarakas' weighting of station types by subscriber instances is appropriate because different types of stations (Big 3 network affiliates, independent, and small network affiliates) have different music ratios in the local market and are carried in differing amounts to the subscribers in the distant signal market as compared to the local market. *See* SP PFOF ¶¶ 375-376, 391-392, 411. Thus, Mr. Zarakas' weighting analysis specifically addresses the 1998-1999 CARP's concern that any music ratio must reflect the important differences between the local television and distant signal markets. *See* SP PFOF ¶¶ 350, 375-376, 391, 394-396. Specifically, by weighting the distant signal half-years for stations received by subscribers, Mr. Zarakas accounted for the distant signals that cable systems actually chose to transmit in the 2004-2005 period in a manner that appropriately accounts for differences in subscribership between small and large cable systems. *See* 2000-03 Distribution Order at 34 (finding that increases in relative amount subscriber instances to be "significant" and corroborates increase in value of Canadian Claimants' share); *see* SP PFOF ¶¶ 376, 391, 411.

50. Mr. Zarakas' analysis was not only objective and reasonable but also generally conservative. *See* SP PFOF ¶¶ 385, 387, 389-390, 392. Music's proposed award, as a component of the Settling Parties' share, is appropriate because it falls within the "zone of reasonableness" based on the evidence presented. *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 772 F.2d 922 (D.C. Cir. 1985).

D. Woodbury Criticisms

51. The criticisms of Mr. Zarakas' analysis by Program Supplier's witness Dr. John R. Woodbury are not persuasive and should be rejected. *See* SP PFOF ¶¶ 409-415. His principal criticism of Mr. Zarakas' study concerns Mr. Zarakas' use of negotiated blanket music license fees instead of Dr. Woodbury's incomplete measure of music license fees paid only to the PROs. *See* SP PFOF ¶¶ 409-410. This objection fails for two reasons. First, the unrebutted testimony establishes that the PROs would negotiate a blanket license with the cable operators to license the music contained in programming carried on stations transmitted as distant signals. *See* SP

PFOF ¶¶ 364-372, 377-383, 410-412. Second, using only PRO receipts from the stations, as Dr. Woodbury proposes, fails to include any value for direct license payments made by the stations and thus severely undervalues the music license fees at issue. *See* SP PFOF ¶¶ 367-372, 377-383, 398, 404-405, 410. The blanket license fee amounts used by Mr. Zarakas are the only data available that accurately and reliably reflect the negotiated marketplace value of all the music in local television programs. *See* SP PFOF ¶¶ 367-372, 377-383, 398, 404-405, 410. And Dr. Woodbury did not and could not testify with any empirical support that Mr. Zarakas' use of blanket music license fees underestimated to any measurable or material degree the total music license fee payments by the local stations. *See* SP PFOF ¶¶ 404-405, 410.

52. Dr. Woodbury's other criticisms of Mr. Zarakas' analysis were equally unsupported and worthy of no weight. Dr. Woodbury criticized Mr. Zarakas for weighting by distant signal half-years by claiming that viewership is more appropriate. *See* SP PFOF ¶¶ 401, 411-412. But Mr. Woodbury did not weight his calculation at all, and he provided no justification either to support the use of viewership data for weighting purposes or to undermine the value of using distant signal half-year weights to reflect what was carried and received by subscribers as distant signals. *See* SP PFOF ¶¶ 401, 411-412. Likewise, Mr. Zarakas accurately defines WGN America as an independent station, unaffiliated with any network, and Dr. Woodbury could provide no factual basis to assert otherwise. *See* SP PFOF ¶¶ 413-415. Indeed, WGN America is an Independent station using the very definition that Dr. Woodbury used in his testimony. *See* SP PFOF ¶¶ 413-415.

E. Woodbury's Alternative Music Valuation.

53. Dr. Woodbury's alternative music valuation does not address the concerns of the 1998-99 CARP and uses flawed data. *See* SP PFOF ¶¶ 393-408.

54. Dr. Woodbury's analysis is factually flawed beyond correction, is factually inaccurate in numerous ways, deserves no weight from the Judges as evidence, and is contrary to law. *See* SP PFOF ¶¶ 393-408. *First*, Dr. Woodbury's own music ratio analysis failed to address any of the CARP's criticisms of the 1998-1999 study by including network fees and rights payments for ABC, NBC, and CBS (the Big 3 networks), even though Big 3 network programming is non-compensable under Section 111, and by failing to make any weighting

adjustment to his calculation based on which television stations were actually retransmitted distantly and in what degree. *See* SP PFOF ¶¶ 393-402, 410. Thus, Dr Woodbury's calculation is contrary to Section 111's and the 98-99 CARP's demand that compensation only occur for compensable programming retransmitted as distant signals. 17 U.S.C. § 111(d); *see* SP PFOF ¶¶ 350, 393-402, 410.

55. *Second,* Dr. Woodbury's calculations systematically understated the music share because he used incomplete, mismatched, and inaccurate data inputs. For example, Dr. Woodbury used an incomplete, in several respects, music license fee value in the numerator. *See* SP PFOF ¶¶ 397-399, 403-408. The numerator of Dr. Woodbury's music ratio included only music license fees paid to the PROs, and he did not include any value for direct license fees paid to composers for their music which were the basis for the fee reductions to the PROs. *See* SP PFOF ¶¶ 371, 397-399, 404-405, 409-410. By contrast, the denominator of Dr. Woodbury's ratio included all music license fee payments, including direct payments. *See* SP PFOF ¶¶ 397-399, 404-405, 409-410. Similarly, although the numerator included only music license fees paid to PROs by commercial stations, the denominator of Dr. Woodbury's music ratio, sourced from the Census survey report, included broadcast rights payments for both commercial and non-commercial stations. *See* SP PFOF ¶¶ 398, 406. *Third,* Dr. Woodbury further understates even his own music ratio because he used data from a U.S. Census Bureau survey report that was revised and corrected in a way that necessarily increases music's relative value. *See* SP PFOF ¶¶ 399, 407-408.

VI. Royalty Awards

56. The above assessment of the studies offered by the parties and other record evidence support the following approach to determining the proper allocations of the 2004-05 cable royalty funds.

57. *First,* as in the 1998-99 proceeding, Program Suppliers, JSC and CTV should receive the same relative shares of the 2004-05 royalties as their relative shares in the 2004-05 Bortz cable operator surveys.

58. *Second,* as in the 1998-99 proceeding, the 2004-05 Bortz results provide a floor for the PTV award. In the 1998-99 proceeding the CARP awarded PTV the same share that it had received in the 1990-92 proceeding, the last prior proceeding where PTV's share was litigated. In this proceeding, however, as noted above, the record strongly supports basing the PTV share directly on the Bortz results, as adjusted by Ms. McLaughlin and Dr. Ford.

59. *Third,* the 1998-99 CARP determined the Canadians' award in part by multiplying (a) the fee generation of Canadian signals and (b) the results of the Ringold constant sum surveys of cable operators. With respect to the first component of the prior calculation, however, the record of this proceeding strongly supports basing the share for Canadian signals directly on the Bortz results, as adjusted by Ms. McLaughlin and Dr. Ford, rather than on fee generation, and then following the same second step as the 1998-99 CARP in determining the Canadian Claimants award .

60. *Fourth,* the 1990-92 CARP denied the Devotional Claimants an award based directly on their Bortz shares because of a lack of evidence showing that its relative market value was higher than the award it had received in the 1989 CRT proceeding. Because the Devotional Claimants have again failed to present any credible evidence that ~~there~~their relative market value in 2004-05 is any greater than in 1992-99, and because other evidence of relative value and changed ~~circumstamces~~circumstances since 1990-92 suggest that their award should be smaller than their Bortz shares, the Judges should award the Devotional Claimants the same award they received in the 1990-1992 proceeding.

61. *Finally*, the Music Claimants share should be determined in accordance with the Zarakas study. Based upon that study and other record evidence, the Music Claimants are entitled to receive 5.2% for 2004 and 4.6% for 2005. No party in this proceeding has challenged the traditional approach of taking the Music share "off the top" so that it is deducted proportionately from each of the other claimants (except Devotional Claimants, whose 1990-1992 award was adjusted to reflect the awards of other parties including Music).

62. Based upon the above approach, the 2004-05 cable royalty funds should be allocated as follows:

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

APPENDIX

APPENDIX

THE CALCULATIONS

1. The calculations for the proposed final shares of the Basic and 3.75% Funds for each year are set forth below. Because only Music and PS participate in the Syndex Fund, the Settling Parties (of which Music is a part) should receive 5.2% of the Syndex Fund for 2004 and 4.6% of the Syndex Fund for 2005, which necessarily means that PS should receive 94.8% of the Syndex Fund for 2004 and 95.4% of the Syndex Fund for 2005. *See* SP PFOF 50, 350.

2. These calculations track in significant part the logic, language and structure of the calculations set forth in Appendix B to the 1998-99 CARP Report.

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I. BASIC FUND CALCULATIONS

Step 1

3. We begin by calculating, for each year, the percentages for PS, JSC, CTV, PTV and Canadian relative to each other, derived from the Bortz survey as augmented by McLaughlin, *see* SP PFOF 309-324, as if these five claimant groups constituted 100% of the entire universe of claimant groups.

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A. 2004

4. The 2004 augmented Bortz valuation figures for these five claimants (*see* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5); SP PFOF 317, 330) are as follows:

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PS	34.40%
JSC	31.60%
CTV	17.40%
PTV[1]	7.20%
Canadian[2]	1.90%

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[1] For purposes of the Basic Fund calculations, PTV's 2004 and 2005 augmented Bortz shares are adjusted upward (and the other Bortz shares are adjusted downward) to account for PTV's non-participation in the 3.75% or Syndex funds. *See* 1998-99 CARP Op. at 26 n.10 ("The Panel agrees … that PTV's Bortz share should be adjusted upward to account for PTV's non-participation in the 3.75% or Syndex funds."); SP PFOF 317.

[2] To be conservative, we incorporate an adjustment to the Canadian share proposed by Canadian witness Gary Ford to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. *See* Gary Ford WDT (CDN Ex. R-2) at 21; SP PFOF 330. The remaining shares are adjusted pro rata.

5. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

34.40X + 31.60X + 17.40X + 7.20X + 1.90X			= 100%
	92.50X		= 100%
	X		= 1.0810811 (adjustment factor)
Restated Bortz PS	=	34.40 x 1.0810811	= 37.18919%
Restated Bortz JSC	=	31.60 x 1.0810811	= 34.16216%
Restated Bortz CTV	=	17.40 x 1.0810811	= 18.81081%
Restated Bortz PTV	=	7.20 x 1.0810811	= 7.78378%
Restated Bortz Canadian	=	1.90 x 1.0810811	= 2.05405%
			100.0%

B. 2005

6. The 2005 augmented Bortz valuation figures for these five claimants (*see* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5); SP PFOF 317, 330) are as follows:

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PS	35.80%
JSC	35.20%
CTV	14.10%
PTV	7.05%
Canadian	1.65%

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7. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

35.80X + 35.20X + 14.10X + 7.05X + 1.65X			= 100%
	93.80X		= 100%
	X		= 1.0660981 (adjustment factor)
Restated Bortz PS	=	35.80 x 1.0660981	= 38.16631%
Restated Bortz JSC	=	35.20 x 1.0660981	= 37.52665%
Restated Bortz CTV	=	14.10 x 1.0660981	= 15.03198%
Restated Bortz PTV	=	7.05 x 1.0660981	= 7.51599%
Restated Bortz Canadian	=	1.65 x 1.0660981	= 1.75906%
			100.0%

Step 2

8. We next calculate the Canadian share for each year as adjusted by the Ringold survey of Canadian, PS and JSC content for 2004 and 2005. *See* SP PFOF 331-336. The JSC and PS portions of the distant Canadian signals must also be calculated and will be added to their respective shares in Step 3.

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A. 2004

9. In 2004, carriage of distant Canadian signals equaled 2.05405% of the Basic Fund royalties. This must be apportioned to Canadian, JSC and PS using the Ringold survey for 2004 as follows[3]:

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Canadian share of Signal	2.05405% x .5993	=	1.231077%
JSC share of Signal	2.05405% x .2716	=	0.557825%
PS share of Signal	2.05405% x .1275	+	0.261866%
Other	2.05405% x .0016		0.003286%
			2.05405%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

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[3] The apportionment factors have been recalibrated to equal 1.

10. As noted above, the Ringold survey contained an "other programming" category. Though the amount is very small, for added precision, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other programming" category, as follows:

$$1.231077X + 0.557825X + 0.261866X = 2.05405\%$$

$$2.050768X = 2.05405\%$$

$$X = 1.0016024$$

Canadian share of Signal	1.231077 x 1.0016024	= 1.23305%
JSC share of Signal	0.557825 x 1.0016024	= 0.55872%
PS share of Signal	0.261866 x 1.0016024	= 0.26229%
		2.05405%

B. 2005

11. In 2005, carriage of distant Canadian signals equaled 1.75906% of the Basic Fund royalties. This must be apportioned to Canadian, JSC and PS using the Ringold survey for 2005 as follows:

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Canadian share of Signal	1.75906% x .6037	= 1.061946%
JSC share of Signal	1.75906% x .2991	= 0.526135%
PS share of Signal	1.75906% x .0956	= 0.168166%
Other	1.75906% x .0016	0.002814%
		1.75906%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

12. Again, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other" programming category, as follows:

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$$1.061946X + 0.526135X + 0.168166X = 1.75906\%$$

$$1.756247X = 1.75906$$

$$X=1.0016026$$

Canadian share of Signal	1.061946 x 1.0016026	= 1.06365%
JSC share of Signal	0.526135 x 1.0016026	= 0.52698%
PS share of Signal	0.168166 x 1.0016026	= 0.16844%
		1.75906%

Step 3

A. 2004

13. In this step, we apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.23305% (or by reducing 2.05405% by the combined PS/JSC portion) and adding 0.26229% to PS and 0.55872% to JSC.

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The results are as follows:

PS	37.45147%
JSC	34.72088%
CTV	18.81081%
PTV	7.78378%
Canadian	1.23305%
	100%

B. 2005

14. In this step we apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.06365% and adding 0.16844% to PS and 0.52698 % to JSC.

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The results are as follows:

PS	38.33475%
JSC	38.05363%
CTV	15.03198%
PTV	7.51599%
Canadian	1.06365%
	100%

Step 4

15. We now have the relative valuations of five claimant groups (PS, JSC, CTV, PTV and Canadian) expressed to represent a 100% universe. The next step is to combine this universe with the remaining claimant groups (Devotional and Music) for which final net shares have been determined. Devotional receives the same share as in the 1990-92 litigated proceeding. *See* SP PFOF 672-688. Music receives the shares determined by the Zarakas study in this proceeding. *See* SP PFOF 350. This adjustment is achieved by reducing each of the shares of PS, JSC, CTV, PTV and Canadian by 6.39375% in 2004 and 5.79375% in 2005 (the combined shares of Devotional and Music).

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The 2004 Basic Fund results are as follows:

Devotional	**1.19375% net**
PTV	**7.28611% net**
Music	**5.20000% net**
PS	**35.05692% net**
JSC	**32.50091% net**
CTV	**17.60809% net**
Canadian	**1.15421% net**
	100%

Step 5

16. Step 5 combines the shares of JSC, CTV, PTV and Music into a single Settling Parties share.

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The final 2004 Basic Fund results are as follows:

Settling Parties	**62.59512% net**
PS*	**35.05692% net**
Devotional	**1.19375% net**
Canadian	**1.15421% net**
	100%

The final 2005 Basic Fund results are as follows:

Settling Parties	**61.69050% net**
PS*	**36.11373% net**
Devotional	**1.19375% net**
Canadian	**1.00202% net**
	100%

* Note: The PS award is a *ceiling*. Settling Parties believe that the substantial (and increased) amount of non-compensable PS programming on WGN in 2004-05 provides a substantial record basis for reducing the PS award below their Bortz share. *See* SP PFOF 342-348.

II. 3.75% FUND CALCULATIONS

Step 1

17. We begin by calculating, for each year, the percentages for PS, JSC, CTV and Canadians relative to each other, derived from the Bortz survey as augmented by McLaughlin, *see* SP PFOF 309-324, as if these four claimant groups constituted 100% of the entire universe of claimant groups.

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A. 2004

18. The 2004 augmented Bortz valuation figures for these four claimants (*see* McLaughlin WDT (SP Ex. 6) at 11 (Chart 4); SP PFOF 314-317, 330) are as follows:

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PS	34.90%
JSC	32.00%
CTV	17.60%
Canadian[4]	1.90%

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[4] To be conservative, we incorporate an adjustment to the Canadian share proposed by Canadian witness Gary Ford to account for one system in 2004 that he believed was improperly excluded from the sample due to a clerical error in the Bortz database. *See* Gary Ford WDT (CDN Ex. R-2) at 21; SP PFOF 330. The remaining shares are adjusted pro rata.

19. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

34.90X + 32.00X + 17.60X + 1.90X		= 100%	
	86.40X	= 100%	
	X	= 1.1574074 (adjustment factor)	
Restated Bortz PS	=	34.90 x 1.574074	= 40.393519%
Restated Bortz JSC	=	32.00 x 1.574074	= 37.037037%
Restated Bortz CTV	=	17.60 x 1.574074	= 20.370370%
Restated Bortz Canadian	=	1.90 x 1.574074	= 2.199074%
			100.0%

B. 2005

20. The 2005 augmented Bortz valuation figures for these four claimants (*see* McLaughlin WDT (SP Ex. 6) at 11 (Chart 4); SP PFOF 314-317, 330) are as follows:

PS	36.20%
JSC	35.50%
CTV	14.20%
Canadian	1.65%

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21. To restate these valuations so that their relationship is preserved but the adjusted percentages total 100%, the following calculation is performed:

$$36.20X + 35.50X + 14.20X + 1.65X = 100\%$$

$$87.55X = 100\%$$

$$X = 1.1422045 \text{ (adjustment factor)}$$

Restated Bortz PS	=	36.20 x 1.1422045	= 41.347801%
Restated Bortz ISC	=	35.50 x 1.1422045	= 40.548258%
Restated Bortz CTV	=	14.20 x 1.1422045	= 16.219303%
Restated Bortz Canadian	=	1.65 x 1.1422045	= 1.884637%
			100.0%

Step 2

22. We next calculate the Canadian share for each year as adjusted by the Ringold survey of Canadian, PS and JSC content for 2004 and 2005. *See* SP PFOF 331-336. The JSC and PS portions of the Canadian signals must also be calculated and will be added to their respective shares in Step 3.

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A. 2004

23. In 2004, carriage of distant Canadian signals equaled 2.19907% of the 3.75% Fund royalties.[5]

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Canadian share of Signal	2.19907% x .5993	=	1.317993%
JSC share of Signal	2.19907% x .2716	=	0.597209%
PS share of Signal	2.19907% x .1275	=	0.280354%
Other	2.19907% x .0016	=	0.003518%
			2.19907%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

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[5] The apportionment factors have been recalibrated to equal 1.

24. As noted above, the Ringold survey contained an "other programming" category. Though the amount is very small, for added precision, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other programming" category as follows:

$$1.317993X + 0.597209X + 0.280354X = 2.19907\%$$

$$2.195556X = 2.19907\%$$

$$X = 1.001602$$

Canadian share of Signal	1.317993 x 1.001602	=	1.320105%
JSC share of Signal	0.597209 x 1.001602	=	0.598166%
PS share of Signal	0.280354 x 1.001602	=	0.280803%
			2.16895%

B. 2005

In 2005 carriage of distant Canadian signals equaled 1.88464%.

Canadian share of Signal	1.88464% x .6037	=	1.137756%
JSC share of Signal	1.88464% x .2991	=	0.563695%
PS share of Signal	1.88464% x .0956	=	0.180171%
Other	1.88464% x .0016	=	0.003015%
			1.88464%

(*see* Ringold WDT (CDN Ex. 4-A) at Table 1; SP PFOF 335)

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25. Again, we recalculate the Canadian, JSC and PS shares to total 100%, after excluding the "other" programming category, as follows:

$$1.137756X + 0.563695X + 0.180171X = 1.88464\%$$

$$1.881622X = 1.88464\%$$

$$X = 1.001603$$

Canadian share of Signal	1.137756 x 1.001603	=	1.139579%
JSC share of Signal	0.563695 x 1.001603	=	0.564598%
PS share of Signal	0.180171 x 1.001603	=	0.180460%
			1.88464%

Step 3

26. In this step, we add the JSC and PS portions of the Canadian signals to their respective shares, while concomitantly reducing the Canadian share of the Canadian signals by that amount.

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A. 2004

27. We apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion at 1.32011% and adding 0.28080% to PS and 0.59817% to JSC:

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PS	40.67432%
JSC	37.63520%
CTV	20.37037%
Canadian Signal	1.32011%
	100%

B. 2005

28. We apportion the Canadian signal to Canadian, PS and JSC by setting previously calculated Canadian portion of the Canadian signals at 1.13958% and adding 0.18046% to PS and 0.56460% to JSC:

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PS	41.52826%
JSC	41.11286%
CTV	16.21930%
Canadian Signal	1.13958%
	100%

Step 4

29. We now have the relative valuations of four claimant groups (PS, JSC, CTV and Canadian) expressed to represent a 100% universe. The next step is to combine this universe with the remaining claimant groups -- Devotional and Music (PTV does not participate in the 3.75% Fund). Devotional receives the same share of the 3.75% Fund as in the 1990-92 litigated proceeding. *See* SP PFOF 672-688. Music receives the shares determined by the Zarakas study in this proceeding. *See* SP PFOF 350. This final adjustment is achieved by reducing each of the shares of PS, JSC, CTV and Canadian by 6.10725% in 2004 and 5.50725 in 2005 (the combined shares of Devotional and Music).

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The 2004 3.75% Fund results are as follows:

Devotional	**0.90725% net**
Music	**5.20000% net**
PS	**38.19024% net**
JSC	**35.33673% net**
CTV	**19.12630% net**
Canadian	**1.23948% net**
	100%

The 2005 3.75% Fund results are as follows:

Devotional	**0.90725% net**
Music	**4.60000% net**
PS	**39.24120% net**
JSC	**38.84867% net**
CTV	**15.32607% net**
Canadian	**1.07682% net**
	100%

30. Because PTV does not participate in the 3.75% Fund, its share is zero for both 2004 and 2005.

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Step 5

31. Step 5 combines the shares of JSC, CTV and Music into a single Settling Parties share.

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The final 2004 3.75% Fund results are as follows:

Settling Parties	**59.66303% net**
PS*	**38.19024% net**
Devotional	**0.90725% net**
Canadian	**1.23948% net**
	100%

The final 2005 3.75% Fund results are as follows:

Settling Parties	**58.77473% net**
PS*	**39.24120% net**
Devotional	**0.90725% net**
Canadian	**1.07682% net**
	100%

* Note: The PS award is a *ceiling*. Settling Parties believe that the substantial (and increased) amount of non-compensable PS programming on WGN in 2004-05 provides a substantial record basis for reducing the PS award below their Bortz share. *See* SP PFOF 342-348.