BEFORE THE
COPYRIGHT ROYALTY BOARD
WASHINGTON, D.C.

In the Matter of:

Distribution of the 2004-2005
Cable Royalty Funds

Docket No.:

2007-3 CRB CD 2004-2005

REBUTTAL CASE

OF THE

CANADIAN CLAIMANTS

Canadian Claimants Group

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BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
WASHINGTON, DC

In the Matter of Distribution of the 2004-2005 Cable Royalty Funds	)	**Docket No. 2007-03 CRB CD 2004-2005**

REBUTTAL CASE OF THE

CANADIAN CLAIMANTS GROUP

The Canadian Claimants Group (CCG) hereby submits the accompanying written rebuttal testimony and exhibits in opposition to the direct case of the other claimant groups, pursuant to 37 C.F.R. 351.11 and the November 16, 2009 scheduling order of the United States Copyright Royalty Judges.

1. Rebuttal Case Testimony

The CCG submits the written rebuttal testimony and exhibits of the following four witnesses:

1) Jonda K. Martin
President
Cable Data Corporation

2) John E. Calfee, Ph.D.
Resident Scholar,
American Enterprise Institute

3) Gary T. Ford, Ph.D.
Professor Emeritus of Marketing
Kogod School of Business
American University
Washington, D.C.

4) Brian T. Ratchford, Ph.D.
Charles and Nancy Davidson Professor of Marketing
University of Texas at Dallas

2. Summary of Evidence

The CCG's rebuttal evidence is directed primarily at the testimony of Linda M. McLaughlin, James M. Trautman, Arthur C. Gruen, George S. Ford, and Joel Waldfogel.

Jonda Martin's testimony (Tab 1) describes the two methodologies she used in the production of data and reports supplied to CCG for use in this rebuttal case. Specifically, Ms. Martin describes a "Min-Max" analysis of Base Rate royalties paid for Canadian distant signals, and a 3.75% Fund reallocation analysis for systems carrying Canadian distant signals. Ms. Martin's testimony and methodologies are offered to assist the rebuttal testimony of CCG witness John Calfee, especially in his discussion of Mr. Trautman's Bortz Study. The evidence rebuts the assertion that the sliding scale used to determine Base Rate royalties means that any allocation of royalties to signals or signal types by CDC is arbitrary. Her analyses are also offered to rebut witnesses' testimony that, because the cable system operators' designation of the signal for payment of 3.75% fees may under certain conditions be arbitrary, any allocation based on these royalties is also arbitrary.

John Calfee's testimony (Tab 2) addresses the various studies offered in these proceedings that purport to measure the relative value of the CCG programming. In particular, Dr. Calfee focuses on the economic implausibility of the Bortz Survey results and the inability of that tool to measure the value of CCG programming. Dr. Calfee finds that the flaws of Bortz and the other studies reinforce the conclusion that actual cable operator decision-making and valuation, captured in the form of the fee generation methodology, is the most appropriate data for measuring the relative value of CCG programming.

In addition, Dr. Calfee attaches as an appendix to his testimony his written rebuttal testimony from the 2000-2003 Cable Royalty Distribution Proceeding, which addressed the three main points in Ms. McLaughlin's testimony in that proceeding: (1) he rebuts the contention that the compulsory licensing system for distant signal fees is completely arbitrary; (2) he shows that there is a relationship between distant signal carriage fees and relative value; and (3) he refutes the contention that there is no value for Canadian distant signals carried by systems paying the minimum fee. Because Ms. McLaughlin's prior testimony was admitted into the record of this proceeding, it is appropriate for Dr. Calfee to incorporate his rebuttal testimony.

Gary Ford's testimony (Tab 3) is an analysis of the Bortz Survey and its applicability to determining a royalty share for the CCG. Dr. Ford analyzes the Bortz sample and the survey questionnaire itself. He concludes that both the sample and the survey instrument result in bias that prevents the survey from accurately measuring the value of the content of small claimants, particularly the value of Canadian signals.

Finally, *Brian Ratchford's* testimony (Tab 4) analyzes the cable subscriber studies conducted by Arthur Gruen. His analysis shows that the studies' sampling methodology was wholly inadequate for capturing information about the value of CCG programming on distant signals. Even had an adequate sample been conducted, the survey design was inherently unable to capture the value of CCG programming and, in fact, may have little relevance to determining the relative market value of any claimant group's programming.

3. Theory of Our Case

As in the prior three cable royalty distribution proceedings, our case centers on the premise that the only reliable measure of the value of CCG programming is use of the Ford/Ringold study to apportion the royalties paid by cable system operators for Canadian distant signals. In this proceeding, the Judges have heard testimony about a variety of methods to allocate royalties to the CCG. In this rebuttal phase, the CCG will provide evidence and testimony showing that these methodologies are not merely flawed, but wholly unequal to the task, further reinforcing the conclusion that the CCG methodology is the best tool available for awarding the CCG a fair and reasonable share of royalties. This approach combines the measure of actual cable operator behavior, evidenced by the signals they carry and royalties they pay (from CDC's Statements of Account database) as well as the cable operators' own expression of the relative value of programming on those same signals (captured in the Ford/Ringold surveys).

4. Conclusion

The Canadian Claimants Group believes that the rebuttal testimony in this proceeding supports the conclusion that the CCG methodology should be applied. The CCG respectfully requests the Copyright Royalty Judges award shares of cable royalties as follows (which have been modified from our Direct Case request to reflect adjustments to our 3.75% royalty rate allocation as discussed in the testimony of Ms. Martin and Dr. Calfee).

Year	Basic Fund	3.75% Fund
2004	2.5145%	1.6556%
2005	2.6645%	1.3645%

Dated: December 11, 2009

Respectfully Submitted,

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Rebuttal Testimony of John E. Calfee, Ph.D.

Submitted on Behalf of the Canadian Claimants Group
Docket No. 2007-3 CRB CD 2004-2005

My name is John E. Calfee. I am submitting this testimony in the Rebuttal Phase of the Copyright Royalty Judges' proceedings in the matter of the Distribution of the 2004 and 2005 Cable Royalty Funds. I offer this testimony on behalf of the Canadian Claimants Group (CCG) and not as an employee of the American Enterprise Institute, which does not take institutional positions on specific legislation, litigation, or regulatory proceedings. I have been asked to address the written and oral direct testimonies of Linda M. McLaughlin and James M. Trautman and also aspects of the testimony of Arthur C. Gruen, George S. Ford and Joel Waldfogel.

1. Qualifications

I received my Ph.D. in economics in 1980 from the University of California at Berkeley. My dissertation was on potential demand for electric vehicles. The goal of that research was to estimate consumer demand for products that were not in the marketplace. To deal with the fact that the market could not provide prices and thus could not permit consumers to reveal their valuation of competing products, I used a combination of survey research and econometric methods developed by my thesis supervisor, Daniel McFadden. My first job after receiving my Ph.D. was at the Bureau of Economics at the Federal Trade Commission, where I was a staff economist and later a Deputy Assistant Director and Special Assistant to the Director of the Bureau of Economics. At the FTC, I became familiar with interactions between government and industry and observed the ways in which government regulators took account of the preferences and interests of various parties affected by their regulations, including the role of public comments in regulatory rulemaking. When at the FTC and since then, most of my research and publications have focused on the operation of regulated markets. Among the specific topics I have written on are: The measurement of consumer demand in the absence of actual market prices (as in my electric vehicle demand work and in my research with Clifford Winston on the value of avoiding congestion when commuting); the influence of regulation on health information in food advertising and on the content of pharmaceutical advertising; the impact of price regulation on research and development, and; the interactions between the pharmaceutical industry and the Food and Drug Administration. I have also testified in hearings before the U.S. House of Representatives and the U.S. Senate, and before the Food and Drug Administration.

I have considerable experience with survey research. This experience began with my Ph.D. dissertation, in which I designed and executed a consumer survey on potential demand for electric autos. It continued while I was with the FTC, where I worked in the consumer protection division of the Bureau of Economics, often reviewing consumer surveys. I later served a term on the board of the Association for Consumer Research, and my courses on market research and consumer behavior at the University of Maryland and Boston University included sections on survey research. My 1990 rebuttal testimony in *Colorado v. the May Department Stores d/b/a May D&F* focused on consumer surveys. In 1998 in *B. Sanfield v. Finlay Fine Jewelers*, I designed a consumer survey on price advertising that was accepted and relied upon by the judge in his decision, which was favorable to my client. While at the Brookings Institution, I designed two consumer surveys. One was on a consumers' willingness-to-pay to avoid highway congestion, and the other was on willingness-to-pay for insurance versus prevention of serious harms. The results were published in a series of papers with Clifford Winston. One of the papers (in the *Review of Economies and Statistics*) described econometric methods for analyzing certain kinds of survey data. In 1997 and again in 2008, I designed surveys of oncologists on cancer drug information and prescribing.

Finally, I provided written rebuttal testimony for the CCG in the 1990-1992 and 1998-1999 Cable Royalty Distribution Proceedings, and in the 2000-2003 Copyright Royalty Board proceedings. I was not called to provide oral testimony in the 1990-1992 and 1998-1999 hearings. In the 2000-2003 proceedings, I provided both written and oral testimony.

A copy of my CV is attached as Appendix A.

2. McLaughlin Testimony

Linda McLaughlin's written direct testimony focused on adjusting the results of the Bortz survey. I discuss this in the section below on the Bortz survey results. Appended to McLaughlin's testimony, however, was her written testimony in the previous proceedings before the Copyright Royalty Judges on the allocation of 2000-2003 royalty fees. I have therefore attached as Appendix B, incorporated herein by reference, my written rebuttal from those proceedings, in which I addressed various issues raised by McLaughlin.

3. Gruen Testimony

Arthur Gruen's testimony describes the results of a constant-sum survey whose central valuation question is similar to that of the Bortz survey (discussed below). The main difference is that the Gruen survey respondents are cable *subscribers*, rather than employees of a cable system. This is the wrong population to survey in order to assess the relative value of programming categories contained in distant signals. Subscribers face a very different situation from that faced by cable operators. Except when choosing among tiers, subscribers do not actually choose which distant signals to pay for. Thus, they do not allocate their cable payments toward various programming categories and have no reason to ponder the relative value of those categories. Given that the hypothetical marketplace at issue is one in which cable operators purchase bundles of programming, the results from the Gruen survey are too distant from cable system operator decision-making to provide a basis for estimating those operators' assessment of the relative value of programming bundles. If the survey is nonetheless used for this purpose, however, one would have to address a basic problem in the Bortz survey, as discussed below.

4. George S. Ford Testimony

George S. Ford's testimony reports the results of a study assessing the relative value of various programming categories as advertising vehicles. This is of little use in assessing the relative value of distant signal programming categories. Because cable systems do not receive advertising revenues from distant signals, there is no reason to think that cable system operators assess the relative value of distant signals, including those from the CCG, according to their value as advertising vehicles. Like the Gruen survey, George Ford's study relies on data too far removed from actual cable operator decision making to provide useful information about the relative value of programming categories to cable operators.

5. The Bortz Survey

The Bortz survey of cable system operators was presented in the written testimony of James M. Trautman. Earlier versions have been used in several previous cable royalty proceedings. In the Bortz telephone surveys, cable system employees are asked to allocate a fixed sum among various programming categories, including the Canadian signals. In the 1998-1999 proceedings, I noted that the 1998 Bortz sample included only two systems that subscribed to Canadian signals, and the 1999 sample included only three. This was far too small a sample to support reliable estimates of the relative value of Canadian programming. I argued that the combination of "fee generation" with the Ford/Ringold survey of the relative value of programming on Canadian signals was far superior despite its imperfections.

The 2004 and 2005 Bortz samples contained larger subsamples of systems carrying Canadian signals. The 2004 sample included 12 systems, 11 that carried at least one Canadian distant signal along with at least one U.S. commercial distant signal, plus one system that carried only a Canadian signal. The 2005 sample included 16 systems, 13 that carried at least one Canadian distant signal along with at least one U.S. commercial distant signal, plus one system with only a Canadian signal, and two systems with only Canadian and PTV signals. In both years, the survey was not administered to systems with only Canadian and/or PTV signals.

The McLaughlin testimony provides the results of a simple adjustment of the Bortz survey to take account of the systems that were dropped from the sample. For 2004, the adjustment assumed that respondents would have allocated 100% of the constant sum to the Canadian signals, and this was combined with the rest of the Bortz survey results to obtain new estimates of the Canadian share. This increased the Canadian signal share from 0.2% to 0.5%. For 2005, the increase was from 0.3% to the range of 1.5% to 1.8%.[1]

In this proceeding, I understand that the CCG has submitted the written rebuttal testimony of Gary Ford, which addresses the Bortz survey results from the perspective of survey methodology. Therefore, in this proceeding, I am focusing my testimony on the economic reasonableness of the actual survey results. Among these results are the CCG shares just noted: 0.2% in 2004 (0.5% after the McLaughlin adjustment); and 0.3% in 2005 (1.5%-1.8% after the adjustment). Although the Bortz results make sense for most programming categories, they do not make economic sense for Canadian signals. This is apparent when one examines the results for specific cable systems. Tables 1 and 2 present basic results from the 2004 and 2005 surveys (excluding the McLaughlin adjustments).[2]

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1 The 2005 adjustment involved a range rather than a fixed number because two systems carried both PTV and Canadian signals. By first assuming that the entire allocation would go to PTV, and then assuming the opposite, a range of possibilities was generated.

2 In these tables, the Bortz systems were traced through Statement of Accounts and redacted information provided in discovery (primarily through their signal carriage) back to the actual cable system so that royalty data could be retrieved for the systems. The minimum potential savings are based on the information provided in Jonda Martin's "Min-Max" analysis which is summarized in her rebuttal testimony, combined with the amount each cable system paid in 3.75% fees for its Canadian signals, as reported on the Statement of Account data compiled by CDC and the actual Statements of Account provided through discovery. The sum of the minimum basic royalties and the 3.75% royalties (if any) paid for Canadian signals was compared to the total royalties paid by the system to determine the "Cable system's minimum potential savings as a % of total royalties." In 2004, Bortz surveyed 11 systems carrying a Canadian distant signal. Table 1 shows 10 of those systems with relevant data for the first accounting period of 2004. One was omitted because the "Min-Max" data were not available for this comparison. In 2005, Bortz surveyed 13 systems carrying a Canadian distant signal and 12 are shown in Table 2, with relevant data for the first accounting period of 2005. The thirteenth system was omitted because the signal carriage information reported by Bortz for the system did not match the signal carriage information available from CDC and therefore this respondent could not be positively identified. In both tables, only the Bortz Survey ID is presented to avoid revealing the identity of the systems. Similarly, royalty savings have been presented as a percentage to further protect the respondent's identities.

Table 1:
Basic CCG Results from the Bortz Surveys, 2004-1

From Bortz Data			Cable system's minimum potential savings as a % of total royalties	From Statements of Account	
Bortz ID	Tier	Canadian Share		Total Distant Signals	Canadian Distant Signals
319	3	0%	39%	2	1
363	4	0%	76%	8	4
301	3	0%	64%	6	1
309	4	5%	12%	20	1
374	3	5%	26%	6	1
312	3	5%	7%	6	1
426	2	5%	11%	4	1
427	2	5%	7%	5	1
314	4	5%	42%	9	1
382	3	5%	22%	8	1

Source: See Footnote 2.

Table 2:
Basic CCG Results from the Bortz Surveys, 2005-1

From Bortz Data			Cable system's minimum potential savings as a % of total royalties	From Statements of Account	
Bortz ID	Tier	Canadian Share		Total Distant Signals	Canadian Distant Signals
632	4	1%	21%	23	3
653	3	2%	61%	8	1
694	2	5%	39%	2	1
578	3	5%	52%	8	1
641	3	5%	37%	8	1
573	3	10%	49%	5	3
566	3	10%	48%	8	1
567	1	10%	25%	4	1
673	3	10%	39%	2	1
574	3	20%	7%	6	1
671	2	0%	49%	6	2
612	1	0%	31%	5	1

Source: See Footnote 2.

In 2004, the number of distant signals carried by these 10 systems (in Table 1) ranged from 2 to 23 (most were between 2 and 8). Three systems, carrying 2, 6, and 8 signals, all allocated 0% to Canadian signals. The other systems all allocated only 5%. Thus system 319, for example, carried only two signals (one Canadian), yet allocated 100% of value to the non-Canadian signal and 0% to the Canadian signal.

The 2005 results were similar. For system 694, which carried only two distant signals (one Canadian), the Canadian signal was allocated only 5%. System 673, also with two distant signals (one Canadian), allocated just 10% to the Canadian signal. For systems 671 and 612, the allocation was 0%. In only one of the 12 systems was the percentage greater than 10% and in no case was it greater than 20%. One might expect the CCG percentage to be smallest where there are several distant signals, but there seems to be little relationship between the number of signals and the CCG share. For example, the percentage was 5% for systems 694 and 641, which had 2 and 8 distant signals, respectively.

Why are so many Bortz allocations so low for Canadian signals? One possibility is that the allocations actually reflect relative value. This defies basic economics, however. Recall that the Bortz survey attempted to assess the value of all the content on the Canadian signal and that these signals must be paid for. Systems were free to drop Canadian signals if their value was not worth its cost. The exact amount paid – which could be saved by dropping the signal -- depends on the total number of DSEs carried by the system, the number of Canadian signals, where the Canadian signal(s) is assumed to fit into the order of signals carried, whether it is carried throughout the system or only part of the system, and whether the cable system reports it as paying a 3.75% fee. When a system imported two distant signals with a DSE value of 1.0, such as WGN plus a Canadian signal (a common situation), or carried signals with a DSE value of more than 2.0, it paid a fee of 0.956% of its gross receipts for the first signal, 0.630% for the second through fourth signal, and 0.296% for each additional signal (in period 2005-2, the fees were increased to 1.013%, 0.668%, and 0.314%, respectively of gross receipts). Tables 1 and 2 indicate the *minimum* percentage of carriage fees that each system could have saved by dropping the Canadian signal or signals. This is calculated by assuming the Canadian signal was the last signal added; an assumption that substantially underestimates the actual savings because there is no reason to think that the Canadian signal is always treated by the system as the last signal to be added.[3]

The data in Tables 1 and 2 enable us to examine the plausibility of the survey results. In 2004, for example, system 319 valued the Canadian signal at 0%, but it could have saved at least 39% of carriage fees by dropping this signal and keeping the other one. System 314, with one Canadian signal, valued it at 5% and could have saved at least 42% of its fees by dropping that signal. In 2005, system 694, with two distant signals could have saved at least 39% by dropping the Canadian signal – valued at 5% – while still keeping the other distant signal. Some of these potential savings are quite large because the cable systems paid 3.75% fees to carry the Canadian signal or signals.

Tables 1 and 2 reveal other similar examples. In each case, it makes no sense for the system to retain a signal whose reported value according to the Bortz survey is almost trivial compared to its costs. Indeed, there seem to be few if any systems in which the Canadian signal allocation bears a reasonable economic relationship to the fees actually paid for distant signals. I think we can reject the hypothesis that the Bortz survey provides even a very rough estimate of the relative value of Canadian signals, let alone the Canadian content on those signals.

An alternative explanation for the Bortz results for Canadian signals lies in the survey's design. When respondents perform the fixed-sum exercise, they are asked to remove Canadian-specific content from basic program categories like movies and sports, and are then asked to consider that content to be part of the Canadian signal. In addition, respondents are asked to assess the relative value of movies, sports, and so on, but to do so only for the content that actually arrives from a group of distant signals. They must also distinguish between "network" and "non-network" programming. Further, they must perform another mental exclusion, this time excluding the same types of programming that arrive from cable stations such as TBS or USA. There seems to be little reason to think that respondents were successful in this difficult task. Far more likely is that they simply allocated shares to the various programming categories according to the general "big picture" content of those categories.

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3 As noted earlier the minimum amount saved by dropping the Canadian distant signal(s) is based in part on the "Min-Max" analysis done by Cable Data Corporation along with the reported amounts paid for the Canadian signal(s) at the 3.75% rate. Again, actual fees are not shown to protect the identity of the Bortz respondents.

Such an allocation left nothing or only a trivial amount for all the programming on an entire distant Canadian signal. Essentially this same point was emphasized in the Gruen testimony at p. 5 and especially at p. 26: "As Bortz survey respondents get into the rhythm of the questionnaire, when thinking of program categories, it may be natural for them to focus on a program type as known by the general population, rather than to focus on the program categories at issue in this proceeding as they apply only to specific distant television signals." This would explain why Canadian signal allocations are irrationally low (in the sense of being irreconcilable with the fact that the Canadian signals had to be paid for) and are relatively constant even as the number of distant signals varies. At the same time, the use of general program categories seems to explain why the Bortz study may be useful for large categories like sports, movies and series, and local commercial television programming.

Further evidence of the Bortz study's deficiencies lies in the extraordinary effects of the McLaughlin adjustments, which should have had a minor effect because they added only one system to the 11 systems with Canadian signal carriage that were surveyed in 2004, and only 3 to the 13 systems surveyed in 2005. The problem of confusion among program categories could not exist in this adjustment because the allocations were performed manually (usually set at 100%). Adding that single unconfused observation to the 2005 sample more than doubled the estimated relative value (from 0.2% to 0.5%). Adding those three observations to the 2005 sample increased estimated relative value more than five-fold (from 0.3% to 1.5%-1.8%). That such small additions to the sample would have such large effects makes sense only if the sample results to which they were added were artificially low.

In my opinion, the Bortz survey does not provide plausible estimates of the CCG shares and should not be used for allocating fees to the CCG.

6. Various Estimates of Relative Value

Several expert reports have provided estimates of relative value for program content from the CCG and other claimants. The basic results are presented in Tables 3 and 4, below. Note that the results reported by the Bortz, McLaughlin and Gruen studies for the "Canadian" share are actually attempts to measure the value of all the programming on the distant Canadian signals, while George Ford and Joel Waldfogel try to measure the value of just the CCG programming on the Canadian signals. Thus, the numbers offered by Bortz, McLaughlin and Gruen would need to be reduced even further (for example, by application of the Ringold Study results) to reach the purported value of CCG programming using those three methodologies.

Table 3

Estimated Relative Values of CCG Shares, 2004

Study	Bortz Survey	McLaughlin Adjustment of Bortz	Gruen Subscriber Study	G.S. Ford Advertising Study	Waldfogel Regression Analysis
Program suppliers	36.5%	35.4%	48.9%	68.3%	24.7%
Joint Sports	33.5%	32.4%	17.8%	13.8%	42.4%
Commercial TV	18.4%	17.9%	15.5%	6.5%	22.9%
Public TV	3.5%	6.2%	9.6%	8.2%	6.8%
Devotional	7.8%	7.6%	7.4%	1.2%	0%
Canadian	0.2%	0.5%	0.8%	1.9%	3.3%
Total*	99.9%	100.0%	100.0%	99.9%	100.0%

*Total may not be exactly 100% due to rounding.

Source: **Bortz Survey**: JSC 04-05 Ex. 1, p. 14, Table II-1 - Distant Signal Programming Valuation Studies, 2004-05; **McLaughlin**: Testimony of Linda McLaughlin, June 1, 2009, corrected Sep. 30, 2009, p. 11, Chart 4 – Augmented Bortz Survey: Relative Value of Distant Signal Programming, By Category; **Gruen**: Testimony of Arthur C. Gruen, Ph.D., June 1, 2009, corrected Sept. 28, 2009, p. 23, Table 3 – Normalized Distant Signal Relative Values (Percent) ; **G.S. Ford**: Testimony of George S. Ford, June 1, 2009, corrected July 30, 2009, p. 39, Table 6 – Relative Market Values Based on Marketplace Evidence, Relative Market Value (%); **Waldfogel**: Statement of Joel Waldfogel, June 1, 2009, p. 15, Table 5 – Royalty Share Allocation Form 3 Cable Systems with Positive DSE 2004-2005, Using Compensable Minutes.

Table 4

Estimated Relative Values of CCG Shares, 2005

Study	**Bortz Survey**	**McLaughlin Adjustment of Bortz**	**Gruen Subscriber Study**	**G.S. Ford Advertising Study**	**Waldfogel Regression Analysis**
Program suppliers	37.6%	36.2%	46.6%	75.7%	24.7%
Joint Sports	36.9%	35.5%	17.1%	9.0%	42.4%
Commercial TV	14.8%	14.2%	19.5%	9.5%	22.9%
Public TV	3.7%	5.9-6.2%	6.8%	4.0%	6.8%
Devotional	6.6%	6.2%	8.2%	0.4%	0%
Canadian	0.3%	1.5-1.8%	1.8%	1.4%	3.3%
Total*	99.9%	100.0%	100.0%	100.0%	100.0%

*Total may not be exactly 100% due to rounding.

Source: **Bortz Survey**: JSC 04-05 Ex. 1, p. 14, Table II-1 - Distant Signal Programming Valuation Studies, 2004-05; **McLaughlin**: Testimony of Linda McLaughlin, June 1, 2009, corrected Sept. 30, 2009, p. 11, Chart 4 – Augmented Bortz Survey: Relative Value of Distant Signal Programming, By Category; **Gruen**: Testimony of Arthur C. Gruen, Ph.D., June 1, 2009, corrected Sept. 28, 2009, p. 23, Table 3 – Normalized Distant Signal Relative Values (Percent) (Note: In 2005, this is the average of values that range from 1.44 to 2.10); **G.S. Ford**: Testimony of George S. Ford, June 1, 2009, corrected July 30, 2009, p. 39, Table 6 – Relative Market Values Based on Marketplace Evidence, Relative Market Value (%); **Waldfogel**: Statement of Joel Waldfogel, June 1, 2009, p. 15, Table 5 – Royalty Share Allocation Form 3 Cable Systems with Positive DSE 2004-2005, Using Compensable Minutes.

It is apparent that the results are highly diverse for most categories. In 2004, Program suppliers' shares range from 24.7% to 68.3%. Joint sports results vary from 13.8% to 42.4%, and Commercial TV, from 6.5% to 22.9%. For the CCG, the range is from 0.2% to 3.3%. Clearly, the diversity in estimates overwhelms the small share that is bound to be associated with a niche offering such as the CCG signals. More importantly, much of the diversity arises from the fact that the various studies do not all attempt to measure the same thing. As I have explained, the Gruen estimates should not be used because they reflect the views of subscribers rather than cable system operators, and the George S. Ford estimates should not be used because they measure the value of distant signals as advertising vehicles, which plays little, if any, role in cable system operators' evaluation of distant signals. The Bortz survey appears sound in its treatments of major program categories but has clearly provided useless results for the CCG programming value for reasons explained at length, above.

The econometric study of Joel Waldfogel, sponsored by Commercial Television addresses the right object (the value of distant signals to cable system operators) and does so in a reasonable way. It is similar in design to the Rosston study offered in the 1998-1999 Cable Royalty Distribution Proceedings.[4] Based upon a statistical examination, I criticized the Rosston study as providing negligible information about the value of the CCG content. I have not examined the Waldfogel study, but if it has surmounted the problems of the Rosston study, it should provide useful information on the CCG share.

There remains the fee generation method, which I described in some detail in my 2000-2003 testimony (which again, has been attached as an appendix to this testimony) and which was adopted by the CARP in awarding fees for the CCG content in the 1990-1992 and 1998-1999 proceedings. The fee generation approach, unlike the Bortz survey (as applied to the CCG content), directly reflects the basic economic process in which cable system operators decide which, if any, distant signals to purchase from a wide selection of hundreds of signals, all while paying attention to the costs and benefits of adding such signals. This transaction is a fundamental piece of economic information relevant to the core issue in these proceedings and should be the starting point for any attempt to allocate the CCG royalties. As I described in my 2000-2003 testimony, the fee generation method is not significantly compromised by the minimum fee requirement, the designation of DSE values, the sliding fee schedule for multiple signal carriage, or the designation of 3.5% signals. It remains a reasonably reliable and accurate means for allocating the CCG share of copyright royalties. In particular, the fee generation approach clearly supplies far more accurate information about the relative value of the CCG signals than do the Bortz survey results.

7. Conclusions

Except for the fee generation data provided in the testimony by Jonda Martin of CDC, none of the expert reports on relative value have provided plausible measures for the relative value of Canadian signals. The Gruen study surveyed subscribers instead of cable system

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[4] Testimony of Gregory L. Rosston (submitted in 1998-1999 Cable Royalty Distribution Proceedings), at 16 and Appendix B.

operators. The George S. Ford study examined the value of distant signals as advertising vehicles, which is not how distant signals are used by cable systems. The Bortz study did not provide economically plausible results for Canadian signals, probably because respondents failed to exclude the CCG programming from the program categories themselves. The fee generation method, on the other hand, directly reflects economic decisions made by cable system operators, and its results are economically reasonable.

Declaration of John E. Calfee

2004-2005 Cable Royalty Distribution Proceeding
Docket No. 2007-03 CRB CD 2004-2005

I, John E. Calfee, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and correct.

Dec. 9, 2009
Date

John E. Calfee
John E. Calfee

An Evaluation of the 2004 and 2005 Bortz Studies
And the Methodology Used by Linda McLaughlin to Augment the Bortz Survey
Regarding the Value of Programming on Canadian Distant Signals

by

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Prepared for:

Canadian Claimants Group
2004-2005 Cable Copyright Royalty Distribution Proceedings
December 2009

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This written report is submitted on behalf of the Canadian Claimants Group to rebut the 2004 and 2005 Bortz Surveys and the adjustments to those Surveys proposed by Linda McLaughlin.

I. Qualifications and Background.

I am Emeritus Professor of Marketing at the Kogod School of Business at American University, where formerly, I was Chair and Professor of Marketing. I was also Chair and Associate Professor of Marketing in the College of Business and Management at the University of Maryland at College Park and Visiting Professor in the Department of Applied Economics at Catholic University of Leuven, Belgium.

During my academic career, I taught undergraduate and MBA courses in Marketing Research and Doctoral Seminars on Research Methodology, as well as Marketing Management, Consumer Behavior and other courses. The Marketing Research and Research Methods courses I have taught include material on survey research design, questionnaire design, sampling, content analysis, statistical methods and other topics. I supervised the research design, questionnaire design, sampling procedures, content analysis, statistical analysis and final reports of over a hundred surveys completed in the Marketing Research courses I have taught.

In addition to the surveys I supervised as a professor, I have also designed and conducted surveys for both my academic research and litigation. I have published over forty academic articles and papers, the vast majority of which involve surveys that I and my co-authors designed, conducted and analyzed. In addition, in a litigation context, I have designed, conducted, analyzed and prepared expert reports on dozens of surveys and have evaluated the survey research efforts of others in trademark, false advertising and antitrust matters.

My research has been published in the *Journal of Consumer Research, Journal of Marketing, Journal of Public Policy and Marketing, Journal of Marketing Research* and other journals, books and proceedings. In 1997, I was listed as one of the "best researchers in marketing" in the article "The Best Researchers in Marketing," published in the *Marketing Educator* (Summer).

A peer-reviewed article I published in the *Journal of Public Policy and Marketing* in November 2005 is entitled, "The Impact of the *Daubert* Decision on Survey Research Used in Litigation."[1] This article provides a comprehensive analysis of the criteria that are being used to admit or exclude surveys from trials since the U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). This article recently received the Kinnear Award signifying the best article published in the *Journal of Public Policy and Marketing* between 2003 and 2005.

I served on the Board of Directors of the Association for Consumer Research, the largest academic organization in the field of consumer behavior, for four years. I served as an Editorial Review Board member for the *Journal of Marketing* for over ten years. At present, I serve on the Editorial Review Board of the *Journal of Public Policy and Marketing* and frequently review manuscripts for the *Journal of Consumer Research, Journal of Marketing Research, Journal of Marketing* and other journals and conferences. Currently, I serve as one of four academic representatives of the American Marketing Association (the largest professional association for marketing professors) to the U.S. Census Bureau regarding planning for the 2010 Census.

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1 Ford, G. 2005. "The Impact of the *Daubert* Decision on Survey Research Used in Litigation." *Journal of Public Policy and Marketing*, 24(2): 234-252.

I have served as a Marketing Expert for the Federal Trade Commission in both consumer protection and antitrust matters. I have also served as a Marketing Expert for the Department of Justice, the Consumer Product Safety Commission and the Federal Communications Commission.

A complete copy of my resume, including a list of my publications over the last ten years and a list of the proceedings in which I have testified in the last four years is attached at Appendix A.

In 1996, during the rebuttal phase of the 1990-1992 Cable Royalty Distribution Proceedings, I provided a comprehensive written evaluation of the Bortz survey methodology in a previous CARP proceeding, entitled "An Evaluation of the 1991 and 1992 Bortz Studies With Respect to Programming on Canadian Distant Signals," Gary T. Ford ("1990-92 Ford Written Rebuttal"). I also testified orally in that proceeding.

II. Introduction and Conclusions.

The report has two primary objectives: First, it evaluates the 2004 and 2005 Bortz surveys in terms of whether they can provide a reliable estimate of imported Canadian distant signals. Second, it evaluates whether the methodology used by Linda McLaughlin on behalf of PTV to "augment" the Bortz sample results can be validly applied to estimate the value of Canadian distant signals.[2]

In my opinion, 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

[2] The complete title of the Bortz survey report is, "Cable Operator Valuation of Distant Signal Non-Network Programming: 2004-05," June 1, 2009 ("Bortz Report"). The complete title of the McLaughlin report is: "Testimony of Linda McLaughlin," September 30, 2009.

focus of the questionnaire on the unaided recall of "most popular" programming just before the key question on relative value of programming on imported distant signals has the effect of reducing the likelihood that cable operators will think about the value of niche programming to their systems.

Regarding the first point, because the cable systems that import Canadian distant signals are most likely to be in strata 1 and 2, the effect of the Bortz sample is to undersample the strata most likely to import Canadian distant signals. This issue is glaringly obvious in the Bortz sample of French-language Canadian distant signals with samples of one and two cable systems in 2004 and 2005, respectively, which imported Canadian French-language distant signals. The sample of cable systems which imported Canadian English-language is also problematic because it was weighted disproportionately to cable systems in Bortz strata 3 and 4, while the approximately two-thirds of the Cable systems that imported Canadian English-language distant signals were in strata 1 and 2. In sum, the Bortz sample of cable systems that import Canadian distant signals is both too small and unrepresentative of the underlying population.

Regarding the second point, by eliciting top-of-the-mind awareness of the most popular distant signal programming just before the relative value question, the Bortz questionnaire increases the likelihood that niche programming will not be mentioned by respondents. Because of the likelihood that respondents will strive to provide internally consistent responses and because the relative value question is a "zero sum game," the value given to niche programming is likely to be diminished by the biases introduced by the most popular programming question.

For these reasons, it is my opinion that it would not be prudent to rely on the Bortz survey results for making copyright royalty awards regarding the value of Canadian distant signals.

It is also my opinion that the "augmentation" methodology proposed by Linda

McLaughlin cannot be used to estimate the value of imported Canadian distant signals. McLaughlin "augmented" the value of programming results by adding imputed values for PTV and Canadian programming from systems that imported only PTV, Canadian or both types of signals. McLaughlin's approach assumes that the Bortz disproportionate sampling plan resulted in a sample that is representative of the underlying population of imported Canadian distant signals. The Bortz sample is not at all representative of the underlying population of cable systems that import Canadian signals because it undersamples cable systems that import Canadian distant signals in Bortz strata 1 and 2 and oversamples them in strata 3 and 4. In addition, McLaughlin's augmentation approach does nothing to cure the second problem of bias created by the Bortz questionnaire. Consequently, McLaughlin's augmentation approach cannot be applied to estimate the value of Canadian distant signals.

There are five additional sections in the report:

- Section III summarizes the objective of the Bortz studies and provides an overview of its methodology.
- Section IV provides a summary and evaluation of the strengths and weaknesses of the stratified sampling plan used and the questionnaire design in the Bortz studies for estimating the value of programming on Canadian distant signals.
- Section V summarizes my conclusions regarding the reliability of the Bortz survey regarding the value of Canadian distant signals.
- Section VI summarizes the McLaughlin methodology and evaluates whether it can be validly applied to augment the Bortz sample to estimate the value of Canadian distant signals.
- Finally, Section VII presents my conclusions that the Bortz and McLaughlin reports cannot be used to reliably estimate the value of imported Canadian distant signals.

III. Summary and Overview of the Bortz Study Objective and Methodology.

The Bortz Report states that the "cornerstone" of the Bortz approach for estimating the value of distant signals is a survey of a "random sample of cable operators [who are asked] how they would allocate a fixed budget among the different programming categories on the distant signals they actually carried in the preceding year (i.e., a 'constant sum' approach)." (Bortz Report at 1-2.) Historically, the fact finders have given great weight to the Bortz methodology regarding the Program Suppliers (PS), Joint Sports Claimants (JSC) and the commercial television broadcasters (NAB) because it is focused on, "the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers." For example, in 2003, the CARP panel stated it accepted, "the Bortz survey as an extremely robust (powerfully and reliably predictive) model for PS, JSC and NAB – for both the basic fund and the 3.75% fund." In re Distribution of 1998 & 1999 Cable Royalty Funds, No. 2001-8 CARP CD 98-99, at 31 (CARP Oct. 21, 2003) (hereinafter *1998-99 CARP Report*).

The CARP panel also concluded, however, that methodologies other than the Bortz survey would, "be relied upon to determine the relative values of PTV, Music and Canadians." *1998-99 CARP Report* at 31. Furthermore, the Bortz Report acknowledges that "it is appropriate to adjust the Bortz survey results to account for cable operators that carry only PBS and/or only Canadian distant signals (neither of which are included in our survey)."[3] (Bortz Report at 5.)

In both the 2004 and 2005 studies, Bortz and Company used the same general approach: A telephone survey asked individuals most responsible for programming decisions a series of questions concerning (a) unaided recall of the types of programming that is most popular with their subscribers, (b) unaided and aided recall of the types of programming featured in advertising, and (c) the relative values of seven categories of non-network programming measured with a 100-point constant sum scale of items representing the seven categories. Since the constant sum scale approach requires the respondent to allocate a percentage of a finite pool

[3] As is discussed subsequently, although this adjustment is necessary, it is not sufficient to fully account for the value of Canadian distant signals.

(in this case, 100 percentage points of a hypothetical programming budget) to each of the program categories, an increased valuation of one program type can only be made at the expense of another. Thus, it is assumed this is similar to "real-world" budget allocations in which a fixed set of resources must be divided among competing possible uses. The Bortz studies used the constant sum scale on programming categories (or in the case of PTV and the Canadians, entire signals) aggregated across all of the distant signals the cable system imported. Although there have been some wording changes over the years in the definitions of the constant sum scale question used to assess the value of non-network programming, the same question was used in both 2004 and 2005.[4]

As in previous years, cable systems in the 2004 and 2005 samples were selected by disproportionate stratified sampling from the population of cable systems, which were grouped into four strata based on size of royalty payments. The decision to base the disproportionate sampling plan on royalty payments has the effect of sampling relatively more cable systems from strata with large variances in royalty payments and relatively fewer cable systems with smaller variances. Because the variances are larger in strata with larger mean royalty payments, the effect of this stratification plan was to "oversample" from the larger royalty payment strata and "undersample" from the smaller strata relative to proportionate sampling from each stratum.

IV. The Affect of the Disproportionate Stratified Sampling Plan and Questionnaire Design on the Estimate of the Value of Canadian Distant Signals.

As noted above, the Bortz studies grouped cable systems into four strata by size of royalty payment and then used disproportionate sampling to minimize the variance of the estimate of royalty payments. This approach ensures a minimum sample size that is able to estimate the mean and variance of the total of royalty payments over the population of cable systems. Unfortunately, using this basis for stratifying the

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4 *See*, 1990-92 Ford Written Rebuttal.

sample is not consistent with the objective of the Bortz studies. According to Mr. Trautman's written direct testimony, for 2005, the Bortz surveys "sought to determine how cable operators valued, on a relative basis, the different categories of non-network distant signal programming that they carried in those years." (Bortz Report at 1-2.)

There is nothing per se inappropriate about using disproportionate stratified sampling in survey research. In fact, disproportionate stratified sampling allows the researcher to minimize sample size for a given level of statistical precision and confidence regarding the variable of interest. Thus, disproportionate stratified sampling is frequently used when it is difficult and/or costly to obtain sample elements. It is also used to ensure that observations will be drawn from each stratum in the population.

In the Bortz research, the variable being estimated is "relative value to your cable system of each type of programming actually broadcast by the stations I mentioned in 2004" (or 2005). Since the Bortz studies were attempting to estimate the value of programming types, ideally, stratification should have taken place as a measure of the programming types appearing on distant signals carried by cable systems. This would have ensured that the surveys included a sufficient number of observations for each type of programming regardless of the size of royalty payments. Otherwise, the researcher is not guaranteed that there will be enough observations from signals carrying each type of programming to develop valid estimates of the relative value of each type of programming on the distant signals that cable system operators buy. Essentially, the Bortz stratification plan oversampled from relatively large systems and undersampled from smaller systems, as will be shown in the following tables. Since the cable systems that imported Canadian distant signals were smaller rather than larger, the disproportionate sampling plan used in the Bortz survey actually diminished the accuracy of the estimates of the relative value of Canadian distant signal programming.

The following data in Tables 1 and 2 illustrate the problems with the way the Bortz samples were stratified. According to the Bortz study, and data produced to the Canadian Claimants Group during discovery, the 2004 and 2005 distribution of population elements and cable systems sampled was as follows:

Table 1
Sample and Population Comparisons for Bortz Data (2004)

Royalty Stratum	**Population of Form 3 Systems:**		**Respondents:**		**No. Respondents as Percentage of Stratum Size:**
(000)	#	%	#	%	%
1: $0-20,628	936	56.8	37	22.8	03.9*
2: $20,629-59,628	432	26.2	36	22.2	08.3
3: $59,629-207,129	234	14.2	69	42.6	29.5
4: $207,130+	045	02.7	20	12.3	44.4
Total	1,647	99.9%†	162	99.9%†	

Source: Bortz Report, Table A-2, p. 46; Bortz data produced in discovery.
Notes: *for example, 37/936 = 3.9%; †Result is less than 100.0% due to rounding.

Table 2
Sample and Population Comparisons for Bortz Data (2005)

Royalty Stratum	**Population of Form 3 Systems:**		**Respondents:**		**No. Respondents as Percentage of Stratum Size:**
(000)	#	%	#	%	%
1: $0-23,844	755	54.6	30	17.5	03.9*
2: $23,845-65,344	378	27.4	39	22.8	10.3
3: $65,345-239,844	210	15.2	80	46.8	38.1
4: $239,845+	039	02.8	22	12.9	56.4
Total	1,382	100.0%	171	100.0%	

Source: Bortz Report, Table A-2, p. 46; Bortz data produced in discovery.
Notes: *for example, 30/755 = 3.9%.

Table 1 shows that 56.8% of all cable systems in the 2004 Bortz study population paid royalty payments of less than $20,629 and at the other end of the size spectrum, only 2.7% of cable systems paid royalty payments of $207,130 or more. With the stratified sampling approach based on royalty payments, the Bortz survey's final sample ended up with less than 4% (37/936 = 3.9%) of the smallest cable systems compared to more than forty percent of the largest systems (20/45 = 44.4%).

Furthermore, although only 16.9% (14.2% + 2.7%) of all cable systems were in Bortz's two largest strata, 54.9% (42.6% + 12.3%) of the respondents were from those strata. The disparity in the data is larger for 2005. As is shown in Table 2, 3.9% of the systems in the smallest dollar value stratum were sampled as compared to 54.6% of those in the largest dollar value stratum. Additionally, 59.7% (46.8% + 12.9%) of the respondents came from the strata 3 and 4, although they account for 18.0% (15.2% + 2.8%) of the population.

In sum, Tables 1 and 2 show that the Bortz stratified sampling plan resulted in a relatively larger sample than would be expected by chance in the two largest strata and a relatively smaller sample in the two smallest strata. Had the 2004 sample been selected with proportionate stratified samples, approximately 57% of the sample would have been from stratum 1, 26% would have been from stratum 2, 14% would have been from stratum 3 and only 3% would have been from stratum 4. As will be shown next, the actual sampling distribution in the Bortz surveys resulted in disproportionately smaller samples of cable systems that import Canadian distant signals.

Of the 61 U.S. cable systems that imported one or more Canadian distant signals in the first accounting period of 2004, 23 cable systems paid royalties of less than $20,628; 20 paid royalties between $20,629 and $59,628; 13 paid royalties of between $59,629 and $207,129; and five paid royalties of $207,130 or more. This information is presented in Table 3, below:

Table 3
Language of Imported Canadian Signals by Bortz Strata (2004-1)

Royalty Stratum (000)	French Signals Only: # systems	Both French & English Signals # systems	English Signals Only: # systems	Total Import Canad. Signals: # systems	Distr. By Bortz Strata: %
1: $0<20,628	07	0	16	23	37.7%*
2: 20,629-59,628	06	02	12	20	32.8%
3: $59,629-207,129	03	01	09	13	21.3%
4: $207,130+	00	00	05	05	08.2%
Total	16	03	42	61	100.0%
Total %	26.2**	04.9	68.9		100.0%

Source: Cable Data Corporation; Bortz Report, Table A-2, p. 46.
Notes: *For example, 23/61 = 37.7%; **16/61 = 26.2%.

As is shown in Table 4, below, the data for 2005 are similar:

Table 4
Language of Imported Canadian Signals by Bortz Strata (2005-1)

Royalty Stratum (000)	French Signals Only: # systems	Both French & English Signals # systems	English Signals Only: # systems	Total Import Canad. Signals: # systems	Distr. By Bortz Strata: %
$0<23,844	07	01	12	20	39.2%*
23,845-65,344	04	02	09	15	29.4%
$65,345-239,844	04	01	09	14	27.5%
$239,845+	00	00	02	02	03.9%
Total	15	04	32	51	100.0%
Total %	29.4**	07.8	62.7		99.9%†

Source: Cable Data Corporation; Bortz Report, Table A-2, p. 46.
Notes: *For example, 20/51 = 39.2%; **15/51 = 29.4%; †Result is less than 100.0% due to rounding.

The data in Tables 3 and 4 show the cable systems that import Canadian distant signals are predominantly in Bortz strata 1 and 2. In fact, approximately 71% of the cable systems that import Canadian distant signals are in Bortz strata 1 and 2 (*i.e.*, in 2004, 37.7% are in stratum 1 and 32.8% are in stratum 2 for a total of 70.5%). In 2005, the same total is approximately 69%. Since the Bortz sampling approach disproportionately sampled more systems from strata 3 and 4, the effect was to diminish the probability of reaching a representative sample of Canadian distant signals.

This is especially so for the French-language signals which are overwhelmingly imported by cable systems in strata 1 and 2. Specifically, in 2004, 78.9% (15 of 19) and in 2005, 74% (14 of 19) of the cable systems that imported only a French-language Canadian distant signal or both French and English Canadian distant signals were in Bortz strata 1 or 2. (*See* Tables 3 and 4.) Since the only logical explanation for paying royalty fees to import a French-language signal is to provide programming valued by a niche market segment of French speakers, a sampling plan that disproportionately misses those cable systems cannot provide accurate information about their value to the cable system. This is not a trivial matter because, in 2004 and 2005, French-language distant signals were imported by 31.1% (26.2% + 4.9%) and 37.2% (29.4% + 7.8%), respectively, of the cable systems importing a Canadian distant signal. (*See* Tables 3 and 4.) Thus, it is important to have a sufficient sample of cable systems that import French-language signals to draw any conclusions about the value of those signals.

Based on the Bortz survey data provided in discovery and Statement of Account Data provided by Cable Data Corporation, I determined that the Bortz 2004 survey sampled and interviewed only one cable system operator who imported a Canadian French-language distant signal. In 2005, the Bortz survey sampled only four and interviewed three respondents who imported a Canadian French-language distant signal. In sum, 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 imported French-language signals.[5]

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[5] By way of contrast, the 2004 Ford-Ringold survey interviewed 11 of the 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. (*Compare* Exhibit CDN-4-A, App. 6, Table 6 with Tables 3 and 4, above.)

The same point is true about the Canadian English-language distant signals. In 2004, 66.7% ((0+2+16+12)/45) and in 2005, 66.7% ((1+2+12+9)/36) of the cable systems that imported English-language Canadian distant signals were in Bortz strata 1 and 2. (*See* Tables 3 and 4.) Yet, these strata account for 45% and 40% of the ending Bortz samples in 2004 and 2005, respectively. (*See* Tables 1 and 2). Consistent with this last point, although Bortz interviewed respondents from 10 cable systems that imported Canadian English-language signals in 2004, only 3 of these were from his strata 1 and 2. In 2005, the Bortz survey interviewed 13 cable systems that imported a Canadian English-language distant signal and 4 were from his strata 1 and 2. The Bortz sample disproportionately interviewed fewer respondents from the two smallest strata, which are the strata most likely to include cable systems importing Canadian distant signals. Thus, the Bortz sample is not representative of the cable systems that import Canadian distant signals.

This latter point is important because the larger cable systems appear to import more distant signals than do the smaller ones. In 2004, the cable systems in strata 3 and 4 in the Bortz survey that imported a Canadian distant signal imported an average of 8.13 distant signals. Of these, an average of 5.63 were commercial distant signals and an average of 1.13 were Canadian distant signals. In 2005, the comparable averages were a total of 8.89 distant signals imported, of which 6.33 were commercial, and an average of 1.44 were Canadian distant signals.[6] In contrast, in 2004, the cable systems in Bortz's strata 1 and 2 that imported Canadian distant signals imported an average of 4.0 signals, of which 2.0 were commercial and 1.0 was Canadian. For 2005, the strata 1 and 2 systems imported an average of 4.25 distant signals, of which an average of 1.75 were commercial distant signals and an average of 1.25 were

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[6] In both the 2004 and 2005 samples the average number of imported distant commercial signals was inflated by single systems importing 15 and 16 signals in 2004 and 2005, respectively. If these outliers are excluded, the mean number imported distant commercial signals decreases to 4.29 in 2004 and 5.38 in 2005, and the conclusion does not change.

Canadian distant signals.

The fact that the cable systems in strata 3 and 4 that imported Canadian distant signals imported more commercial distant signals relative to those in strata 1 and 2 likely influenced their responses to question 2b in the Bortz survey. Question 2a in the Bortz survey listed all of the distant signals imported by the cable system, and then in question 2b, respondents were asked an unaided recall question about the popularity of various types of programming.[7] It is more likely that cable system operators from the strata 3 and 4 systems that import an average of over five (or six) commercial stations will recall programming that appears on the commercial stations rather than programming from the one or two Canadian imported distant signals. In other words, the "most popular programming" question concerns modal categories, *i.e.*, largest categories of subscribers.

As such, the questionnaire design causes the cable system operator to focus on programming that has the widest appeal, and it may cause the cable system operator to ignore other categories of programming that are enjoyed by smaller, but nonetheless profitable, segments of its subscribers. For example, suppose a category of programming is most "popular" with 40% of the subscribers and three other categories are most "popular" with three groups consisting of 30%, 20% and 10%, respectively, of the subscribers. The Bortz question gets respondents to reply that the first segment is the most popular, even though the other segments are important to substantial minorities of its subscribers and important to the cable system operator. The likely bias introduced by questions 2a and 2b is exacerbated by the questionnaire design because, contrary to usual practice, there was no aided recall

7 Question 2a was: "Industry data indicate that during 2004 [or 2005] your system carried the following broadcast stations from other cities." The interviewer then reads call letters, city and affiliation for each distant signal. Next, in question 2b the interviewer asked, "Thinking back to 2004 [or 2005] what types of programming broadcast by these stations, other than any national network programming from ABC, CBS and NBC, do you think were most popular with your subscribers? (DO NOT READ LIST; RECORD ALL PROGRAMMING TYPES MENTIONED)." (Bortz Report App B.)

question asking about the popularity of the various other types of programming shown on imported distant signals that respondents may have inadvertently not mentioned.[8]

The next question on the survey (question 3a) asked whether the programming on the imported distant signals was "featured" in subscriber acquisition and retention advertising. Since most respondents said "no" to this question, i.e., 87.0% in the 2004 survey and 93.0% in the 2005 survey, the vast majority of respondents go directly to question 4a, which was the key question on the Bortz survey thinking about the type of distant signal programming they had just named.

Question 4a was as follows:

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[8] As was discussed in my previous evaluation of the Bortz survey, the way in which responses to this question were coded also was indefensible. (*See generally*, 1990-92 Ford Written Rebuttal.) That is, normally, when a survey includes an open-ended question, the interviewer is required to record the verbatim response of the respondent and usually to probe (with, for example, "Anything else?") to make sure that the respondent's complete thoughts on the question have been elicited. Later, the verbatim responses of the all respondents are read and coded, by a small number of coders (who are not the interviewers) into categories of similar responses. In the Bortz survey, and absolutely contrary to accepted survey research practice, the interviewers were supplied with the following list of coded responses and allowed to code the open-ended responses by themselves: "Movies," "Live professional and college team sports," "Syndicated shows, series and specials," "News and public affairs programs," PBS and other programming broadcast by non-commercial station ____," "Devotional / religious programming," and "All programming broadcast by Canadian station ___." (Bortz Report App B.) It is definitely not accepted survey research practice to allow the interviewer to listen to the respondents' verbatim answer and then make the decision about which predefined category in which to code the response because there are usually many interviewers on a study and they are likely to have varying impressions about the meaning of responses. Additionally, there is no way to go back and independently verify whether the responses were coded correctly or not. All that one has is the interpretation of the interviewer about what the respondent meant when he/she responded to this question. There is no record of what the respondent actually said. One reason for letting interviewers do the coding is that the researcher does not really care about the answers because the question is only designed to raise the salience of programming that is likely to be mentioned in a "top of the mind" response.

"4a. Now, I would like you to estimate the relative value to your cable system of each type of programming actually broadcast by the stations I mentioned during 2004 [or 2005], other than any national network programming on ABC, CBS and NBC. That is, how much do you think each such type of programming was worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers. We are only interested in U.S. commercial station(s) ______________. U.S. non-commercial station(s) ____________________ and Canadian station(s) ______________.

I'll read all the program types that were broadcast by these stations to give you a chance to think about them; please write down the categories as I am reading them. (READ PROGRAM TYPES IN ORDER OF RANDOM SEQUENCE NUMBER.) Assume you have a fixed dollar amount to spend in order to acquire all the programming actually broadcast by these stations during 2004 [or 2005] by the stations I listed. What percentage, if any, of the fixed dollar amount would you spend for each type of programming? Please write down your estimates and make sure they add to 100 percent.

What percentage, if any, of the fixed dollar amount would you spend on (READ FIRST PROGRAM TYPE)? And what percentage, if any, would you spend on (READ NEXT PROGRAM TYPE)? (COMPLETE LIST IN THIS MANNER.)

	Percentage:
Movies broadcast during 2004 [or 2005] by the U.S. commercial Stations I listed.	_____
Live professional and college team sports broadcast during 2004 [or 2005] by the U.S. commercial stations I listed.	_____
Syndicated shows, series and specials distributed to more than one Television station and broadcast during 2004 [or 2005] by the U.S. commercial stations I listed.	_____
News and public affairs programs produced by or for any of the U.S. commercial stations I listed for broadcast during 2004 [or 2005] only by that station.	_____
PBS and all other programming broadcast during 2004 [or 2005] by U.S. commercial station ____.	_____
Devotional and religious programming broadcast during 2004 [or 2005] by the U.S. commercial stations I listed.	_____
All programming broadcast during 2004 [or 2005] by Canadian Station _____.	_____
TOTAL	_____

PERCENTAGES MUST ADD TO 100 PERCENT; PROMPT RESPONDENT IF THEY DO NOT." (Bortz Report App. B.)

It is well-known that responses to a question can be biased by the topic and/or wording of prior questions. It is also well-known that respondents attempt to provide responses that are internally consistent.[9]

Clearly, to provide internally consistent responses, respondents will state that the most popular programs are also those that have the highest relative value. Suppose instead of the questions about "most popular programming" respondents were asked a series of questions about the market segments that view the programming that is shown on each of the signals that are imported, and then were asked question 4. If respondents thought about, and were interviewed about, segments for which they provide programming, they would have been likely to have considered the value to their system of all substantive segments, and their responses to question 4 would have been different.

Alternatively, suppose the questions about "most popular programming" and "programming featured in advertising," were deleted from the questionnaire. In this case, it is also quite likely that the response to question 4a would have been different because respondents would not have been cued to certain programming categories. To the extent that it is reasonable to expect that there would have been different responses to question 4a under either or both of these scenarios, there is the likelihood that the responses to question 4a were biased by the questions that preceded it.

V. Conclusions Regarding the Reliability of the Bortz Survey for Estimating the Value of Programming on Canadian Distant Signals.

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9 According to one standard survey methodology text: "In general, respondents who have formed a judgment are unlikely to start from scratch when asked to make a second, closely related judgment; rather they will probably derive the second judgment from the implications of the first, without reconsidering the original information used to form the initial judgment." Sudman, Seymour, Norman M. Bradburn and Norbet Schwarz, *Thinking About Answers The Application of Cognitive Processes to Survey Methodology*, Jossey-Bass Publishers: San Francisco, 1996, p. 86.

The Bortz survey does not provide reliable information regarding the value of programming on Canadian distant signals for several reasons. The cable systems that import Canadian distant signals are predominantly in strata 1 and 2. The Bortz survey "undersampled" these strata, as evidenced by the under-represented French-language Canadian distant signals example cited above. This undersampling of strata 1 and 2 not only lead to over-sampling of strata 3 and 4 but, more importantly, lead to results in the Bortz survey that are both too small and unrepresentative of the underlying population.

Furthermore, the Bortz survey questionnaire focuses on the recall of "most popular" programming right before respondents are asked the key question on relative value of programming. This question created considerable bias in the survey results by reducing the likelihood that cable operators will think about the value of niche programming, especially as respondents strive to provide internally consistent responses in the "zero sum" nature of the relative value question.

Due to these significant sampling and bias issues, the Bortz survey results should not be used to establish the relative value of Canadian programming for the purpose of making copyright royalty awards.

VI. Summary and Conclusions Regarding the Validity of the McLaughlin Methodology for Augmenting the Bortz Sample to Estimate the Value of Canadian Distant Signals.

Linda McLaughlin, an economist, recalculated the Bortz survey estimates of PTV and Canadian programming on behalf of PTV. The McLaughlin analysis estimated that, had all sampled systems with distant signals been considered eligible, the Bortz survey would have valued the PTV signals as 6.2% and the Canadian signals as 0.5% in 2004 and at 5.9-6.2% and 1.5-1.8% respectively in 2005. (McLaughlin Written Direct, Chart 4, p. 11).

The McLaughlin methodology made only one adjustment to the value of programming as estimated in the Bortz survey: To include cable systems that imported only either a PTV signal, a Canadian signal or only both in the estimates of the value of programming. Since the Bortz constant sum scale methodology asked about the value of programming on commercial distant signals and about entire signals for PTV and the Canadians, the Bortz survey could not obtain estimates of programming for cable systems that did not import a commercial distant signal. McLaughlin argues that since cable systems pay for PTV and Canadian distant signals, arbitrarily excluding them from the survey has an adverse effect on PTV and the Canadians because their value is not included in the Bortz estimates. Essentially, McLaughlin "augments" the Bortz sample by adding back the estimated values for PTV and Canadian distant signals that Bortz excluded. In 2004, this resulted in adding 9 observations to the PTV sample and one to the Canadian sample. In 2005, seven systems only carried a PTV distant signal, one only carried a Canadian distant signal and two carried both.

McLaughlin's argument has some theoretic logic, but the implementation with regards to the Canadian signals is flawed because it assumes that the Bortz sample is representative of the underlying population of imported Canadian distant signals and, as previously discussed, the Bortz sample is not at all representative of the underlying population of cable systems that import Canadian French-language or English-language signals. Because the Bortz survey undersamples cable systems that import Canadian distant signals, McLaughlin's augmentation approach cannot be applied to estimate the value of Canadian distant signals.

According to CDC's compilation of carriage data for 2004, 24.6% (*i.e.*, 15 of the 61) of cable systems that imported Canadian distant signals only imported a single distant signal, and 13 of these 15 (or 86.7%) were in Bortz strata 1 and 2. According to comparable carriage data for 2005, 27.5% (14 of the 51) cable systems only imported a single distant signal, and 12 of these 14 (or 85.7%) were in Bortz strata 1 and 2. As discussed previously, because the Bortz sampling plan undersamples strata 1 and 2, it is not representative of the cable systems that (1) only import one distant signal, and (2) import that distant signal from Canada. Thus, McLaughlin's augmentation methodology cannot be applied to obtain a reliable estimate of the value of Canadian distant signals because the Bortz data under-represents the cable systems that only import a single (Canadian) distant signal.

Additionally, due to an apparent clerical error in the Bortz database, McLaughlin underestimated the "augmented" royalties estimated by her methodology. The Bortz sampling plan in 2004 omitted Comcast of Washington IV, a cable system which paid royalties on $688,245, and which should have been assigned to stratum 4 (the largest royalty stratum). Since the Bortz survey intended to interview all of the stratum 4 systems and since Comcast of Washington IV only imported one distant signal, the Canadian signal CBUT, it should have been included in McLaughlin's augmented estimate of royalties due the Canadians. If this error is corrected, the augmented Canadian royalty increases by $392,994.17 (*i.e.*, $688,256 in system royalties times 100% of value times 57.1% response rate) and the augmented Canadian percentage increases from 0.5% to 1.9% for 2004, using McLaughlin's methodology.

Finally, as previously noted, McLaughlin's augmentation plan does not address the bias in the questionnaire that systematically underestimates the value of Canadian programming when respondents are asked about the Canadian signal. That is, the McLaughlin testimony does not consider questionnaire design biases at all.

VII. Conclusions

McLaughlin's augmentation methodology assumes the Bortz sampling plan provides a representative sample of cable systems that only import distant signals from PTV or

Canada. In 2004, the Bortz sample included a clerical error and when this error was corrected, the McLaughlin estimate of the royalties due the Canadians increased by a factor of more than three (*i.e.*, from 0.5% to 1.9%). This point illustrates the fact that having a representative sample of cable systems that import Canadian signals is crucial to both the Bortz and McLaughlin approaches for estimating the value of imported distant signals.

My analysis shows that the Bortz disproportionate sampling plan results in a sample that is not representative of the cable systems that import Canadian distant signals. I also conclude that the Bortz questionnaire design is biased against niche programming because of the way it prompts respondents to recall only the most popular programming before asking the crucial valuation programming question.

In short, neither the Bortz approach nor the McLaughlin approach can be used to obtain a reliable estimate of the actual value of Canadian distant signals to cable system operators.

Declaration of Gary T. Ford

2004-2005 Cable Royalty Distribution Proceeding
Docket No. 2007-03 CRB CD 2004-2005

I, Gary T. Ford, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and correct.

12/9/2009
Date

Gary T. Ford
Gary T. Ford

Rebuttal Testimony of Jonda K. Martin

Submitted on Behalf of the Canadian Claimants Group
Docket No. 2007-3 CRB CD 2004-2005

My name is Jonda K. Martin. I am president and owner of Cable Data Corporation (CDC), an information company based in Rockville, Maryland specializing in the collection, reporting and analysis of Statement of Account data as filed by cable and satellite systems with the Licensing Division of the U.S. Copyright Office. I have worked at CDC for over 20 years, and during this time, I have been actively involved in all operations of the business. I received a Bachelor of Science/Business Administration degree from American University in Washington, DC, with concentrations in international business and management information systems. I also received an MBA from the University of Maryland.

I have previously testified before the Copyright Arbitration Royalty Panel (CARP) regarding CDC's data collection and reports prepared for the 1998 and 1999 cable compulsory license royalties, and recently before the Copyright Royalty Judges (Judges) in connection with the proceeding to distribute the 2000 through 2003 cable royalty funds. I have also sponsored written direct testimony in this proceeding on behalf of other claimant groups but was not called to testify.

A. Purpose of Testimony.

The purpose of my rebuttal testimony is to describe the methodologies used in the production of data and reports supplied to the Canadian Claimants Group ("CCG") for use in their 2004-2005 rebuttal case. For this proceeding, the CCG has asked me to conduct two analyses on CDC's fees-generated (fees-gen) data. I believe the CCG's witness John Calfee addresses the actual application of this data to the issues in this proceeding.

This testimony covers two issues: (1) a "Min-Max" analysis of base rate royalties paid for Canadian distant signals, and (2) a 3.75% Fund reallocation analysis for systems carrying Canadian distant signals.

B. Min-Max Analysis of Base Rate Royalties Paid for Canadian Distant Signals.

The CCG requested an analysis of Canadian base rate fees-gen allocations. This analysis assesses the minimum and maximum possible fees-gen for Canadian stations and is intended by the CCG to rebut the testimony of Linda McLaughlin from the 2000-2003 proceeding, which was incorporated by reference into her testimony in this proceeding, that the sliding scale used to determine base rate royalties means that any allocation of royalties to signals or signal types by CDC is arbitrary. I believe it has also been used by Calfee in his examination of the Bortz Survey.

Cable systems pay royalties based on the total Distant Signal Equivalent (DSE) value of the stations carried. The royalties are based on a sliding rate scale, shown below in Table 1. They pay a higher rate for the first DSE, slightly less for the second through fourth DSE, and an even lower rate for any DSEs over 4.0.

Table 1
Base Rate Fee Schedule

	Distant Signal Equivalent		
	First	Second through Fourth	Fifth and Beyond
Percentage of Gross Receipts for 2004-1 through 2005-1	.956%	.630%	.296%
Percentage of Gross Receipts for 2005-2	1.013%	.668%	.314%

One of CDC's ongoing projects is to provide a means to match these royalties with individual stations to show, in effect, how much of the royalty fund was attributable to each station. CDC apportions the total royalty fees paid by an individual cable system among all the distant broadcast stations the system carries. These apportioned royalties are known as "fees-generated" or "fees-gen." CDC allocates fees-gen based on each station's DSE value, relative to the total DSE value for the system. CDC does not select which distant station is the first DSE, second DSE, etc. I explained CDC's method for allocating royalties to stations in greater detail in my prior testimony.

In conjunction with their rebuttal case, the CCG asked me to conduct a study analyzing the effect on Canadian base rate fees-gen if Canadian stations were considered the first DSE or the last DSE for each system carrying a distant Canadian station. In other words, for each distant Canadian station, calculate the maximum and minimum base rate fees-gen that could be allocated to the distant Canadian station(s) for each system and compare those results with the actual fees-gen calculated under CDC's current protocols. I performed the same analysis for the CCG in the 2000-2003 proceeding and it is my understanding that the CCG had done similar analyses on its own in two prior litigated distribution proceedings, though I have not reviewed those analyses.

This study encompassed all Form Three systems in 2004-1 through 2005-2 that were reporting and paying base royalty fees for distant Canadian stations.

The maximum fees-gen were derived by calculating fees for the Canadian stations at the first base rate. If there were two distant Canadian stations, the first would be calculated using the first base rate and the second signal at the second rate. The sum of these two calculations would represent the maximum fees possible for Canadian stations for that system.

The process to calculate the smallest possible amount of fees-gen takes into account all distant stations reported by the system by ordering the non-Canadian stations first and Canadian stations last. For example, consider a system in 2005-2 that reports two distant independent stations, one U.S. and one Canadian. The U.S. independent station's fees would be calculated at the first base rate of 1.013% of gross receipts and the Canadian station's fees would be calculated at the second base rate of .668%. In cases where the Canadian station's DSE was split between base rates, CDC would calculate each portion of the Canadian DSE at the appropriate rate. For example, if a system carries three distant network stations and one Canadian station, the three networks - each with a DSE value of .250 - would be calculated at the first base rate totaling .750 DSEs. The remaining Canadian station at 1.000 DSE would be split between the first and second base rates. Fees would be calculated using .250 of the Canadian station at the first base rate, and the remaining .750 of Canadian DSEs multiplied by the second base rate. In cases where Canadian stations are the only distant stations, the minimum, maximum, and actual fees-gen amounts are the same.

In completing my analysis, I calculated the minimum, actual, and maximum fees-generated for each system carrying a Canadian distant station. The results were subtotaled for each system and then aggregated for the year. The final results show that the actual CDC fees-generated fall between the maximum and minimum totals. Minimum totals were 95.18% and 95.72% of the actual fee gen for 2004 and 2005, respectively. Maximum totals were 105.62% and 105.07% of the actual fee gen for 2004 and 2005, respectively. The results are shown in Table 2, below:

Table 2

Min Max Analysis for Canadian Distant Signal Base Rate Royalties

Year	Minimum Canadian Base Fees	Actual CDC Canadian Fees Gen	Maximum Canadian Base Fees	Min Base Fee As % of Actual	Max Base Fees As % of Actual
2004	$ 3,253,644	$ 3,418,469	$ 3,610,509	95.18%	105.62%
2005	$ 3,674,384	$ 3,838,746	$ 4,033,266	95.72%	105.07%

For both years, I identified a few systems where the actual fees paid by the system were less than the calculated minimum or exceeded the calculated maximum. Royalties that exceeded the minimum and maximum by more than 0.75% were treated as exceptions and the systems were excluded from the totals above. There were a few systems whose actual fees were less than the minimum or exceeded the maximum but were not treated as exceptions because the differences were minor and appeared to be largely due to rounding. In the years 2004 and 2005, there were 2 systems in each year that that were treated as exceptions and excluded from the calculations above. I also calculated the results using every system - including exceptions - and those results were essentially the same as the results that excluded the exceptions. The results including the exceptions are shown in Appendix A, Table 3.

C. Analysis of "Market Quota" 3.75% Fee Reallocation.

The CCG requested that CDC conduct an analysis of cases where cable systems pay a 3.75% fee because they carry independent stations that exceed the FCC "market quota." This portion of my testimony is intended by the CCG to rebut the incorporated testimony of Linda McLaughlin that the allocation of the 3.75% royalties by CDC is arbitrary, as well as the underlying implication that a fair allocation method cannot be produced.

The criteria for inclusion in this analysis were form three systems that paid a 3.75% fee, reported at least one U.S. Independent station, and at least one Canadian station, of which one was "permitted" on a market-quota basis. In these carriage instances, it may be somewhat arbitrary as to which of the stations the cable system could indicate as "permitted" and which are not. This analysis attempts to eliminate any arbitrary effect on fees-generated by reallocating the 3.75% fees and base fees paid for these carriage instances on a proportional DSE basis. In this case, all stations are independent stations.

To understand this analysis, consider an example: A cable system carries three Independent stations, A, B and C, and reports on its Statement of Account that two, A and B, are "permitted" under the FCC market quota rules and the third Independent station, C, is carried subject to the 3.75% fee. The system would pay 2.000 DSEs worth of Base Rate royalties for the two stations deemed permitted, A and B, and 1.000 DSE worth of royalties for the third station, C, at the 3.75% rate. CDC currently allocates these royalties by allocating equal shares of the Base rate royalties to each of the two Independent stations, A and B, and allocating all of the 3.75% royalties to the third signal, C. Conceivably, however, any of the three stations could have been the 3.75% station. In this reallocation analysis, all of the fees paid for these stations are distributed evenly to show that all had an equal opportunity to be the 3.75% fee signal or one of the two base rate signals. In this case, the base rate fees paid for the 2.000 permitted DSEs and the 3.75% fee paid for 1.000 non-permitted are divided equally and reallocated to each of the three independent stations, so that stations A,B, and C, have one-third each of the base rate royalties and one-third each of the 3.75% royalties.

I applied this reallocation protocol to every qualifying U.S. and Canadian independent station in the category above. The results are shown for base, 3.75% and total royalties in Table 3:

Table 3
3.75% Fee Reallocation for Systems Carrying Canadian Distant Signals

		CDC's Standard Allocation Method			Adjusted Reallocation Method			
Year	Station Type	Total	Base Rate	3.75% Rate	Total	Base Rate	3.75% Rate	Total Difference
2004	CANADIAN	$548,811	$50,671	$498,140	$433,638	$79,828	$353,810	($115,173)
2004	US-INDEPENDENTS	$738,657	$186,041	$552,616	$853,830	$156,884	$696,946	$115,173
2005	CANADIAN	$578,505	$18,417	$560,088	$447,819	$56,544	$391,275	($130,686)
2005	US-INDEPENDENTS	$517,283	$132,037	$385,246	$647,969	$93,910	$554,059	$130,686

D. Conclusion.

Thank you for the opportunity to present the above "Min-Max" analysis of base rate royalties paid for Canadian distant signals, and the 3.75% Fund reallocation analysis for systems carrying Canadian distant signals. I hope these data and analyses are helpful in the Judges' deliberations.

Appendix A

Table 4
Min Max Analysis with All Exceptions Included

Year	Minimum Canadian Base Fees	Actual CDC Canadian Fees Gen	Maximum Canadian Base Fees	Min Base Fee As % of Actual	Max Base Fees As % of Actual
2004	$ 3,270,463	$ 3,433,707	$ 3,268,566	95.25%	105.67%
2005	$ 3,689,354	$ 3,858,125	$ 4,052,114	95.63%	105.03%

Declaration of Jonda K. Martin

2004-2005 Cable Royalty Distribution Proceeding
Docket No. 2007-03 CRB CD 2004-2005

I, Jonda K. Martin, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and correct.

Dec 9, 2009
Date

Jonda K. Martin
Jonda K. Martin

An Evaluation of the
2004 and 2005 Cable Subscriber Surveys
Originally Sponsored by Arthur C. Gruen, Ph.D.

by

Brian T. Ratchford
Charles and Nancy Davidson Professor of Marketing
University of Texas at Dallas

December 2009

My name is Brian T. Ratchford. I am submitting this testimony in the Rebuttal Phase of the Copyright Royalty Judges' proceedings in the matter of the Distribution of the 2004 and 2005 Cable Royalty Funds. I offer this testimony on behalf of the Canadian Claimants Group (CCG).

1. Background & Experience

Since 2006, I have been the Charles and Nancy Davidson Professor of Marketing at the University of Texas at Dallas. From 1999-2006, I was the Pepsico Chair in Consumer Research at the University of Maryland. From 1971-1999, I held various academic positions at the State University of New York at Buffalo. I have M.B.A. and Ph.D. degrees from the University of Rochester. I have published over 70 articles in marketing and related fields, including articles in *Marketing Science*, *Management Science*, *Journal of Consumer Research* and *Journal of Marketing Research*. I was Editor of *Marketing Science* from 1998-2002. I am currently an associate editor of the *Journal of Consumer Research* and on the editorial review boards of the *Journal of Marketing Research*, *Journal of Marketing*, *Journal of Retailing*, *Journal of Interactive Marketing*, *Journal of Public Policy and Marketing* and *Journal of Service Research*. I am on the Advisory Editorial Board of *Marketing Science*.

Most of my research involves theories and empirical analysis of consumer search for information and choice, and most of the empirical analysis employs consumer survey data. I generally collaborate on the design and implementation of the surveys. Three of my recent papers employ a technique known as conjoint analysis, which measures consumer preferences for product attributes and product bundles. Two recent collaborations with Lan Luo and P.K. Kannan that used this approach have won prestigious awards: the paper "New Product

Development under Channel Acceptance," *Marketing Science*, 26 (March/April 2007), won the Little Award for best marketing paper in an INFORMS journal in 2007; the paper "Incorporating Subjective Characteristics in Product Design and Evaluations," *Journal of Marketing Research*, 45 (April 2008) – which was based on Lan Luo's dissertation that P. K. Kannan and I supervised at the University of Maryland – won the 2009 Lehmann Award for best dissertation-based article published in the *Journal of Marketing* or *Journal of Marketing Research* in the previous two years.

I have done consulting for many years, usually on projects requiring surveys and/or data analysis. As a consultant to Inforte Corp., a research supplier to Cox Communications, I developed models to predict customer churn on the Cox Communications customer database in 2006. As a consultant to Anasight Corp., a research supplier to Knology, I developed models to predict customer churn and advertising response on the Knology database in 2007-2009. This work has given me an appreciation of the importance of customer retention in the cable industry, and a working knowledge of different pricing and promotional schemes employed in the industry to attract and retain customers.

A copy of my CV is attached hereto as Appendix A.

2. Summary and Introduction

There were two surveys of cable subscribers conducted on behalf of the Program Suppliers Claimants as described in the testimony of Arthur Gruen, dated June 1, 2009. The main question in these surveys asked subscribers to allocate $10 between 6 sets of programming types and two station types (PBS and Canadian) according to how the respondents value these types.

These data were ultimately used to calculate a weighted national average of the proportion of the $10 allocated to each of the eight categories.

My testimony will focus on the ability of these cable subscribers surveys to portray an accurate picture of the value of Canadian distant signals.[1] I offer three primary criticisms of the surveys.

The first criticism is that no survey questions addressed whether, and to what extent, respondents actually viewed distant signals carried by their cable systems during the time period covering the royalty payments in question. This has two effects: (1) non-viewers cannot respond accurately to the survey questions; and, (2) non-viewers are given the same weight in the survey value calculations although they are unlikely to value the stations in question as much as viewers. As explained below, this equal weighting creates a downward bias in the Canadian share of value for a given cable system. This matters because cable systems cater to market segments; thus, systems will carry a station if a segment values it enough to make doing so profitable for the cable system. Therefore, it is the valuation of this segment of users, and not the average valuation of all customers, that is relevant.

The second criticism is that the framing of the survey questions works against the proportion of value allocated to the Canadian signals. This is especially true if all viewer types – ranging from non-users to those who view a distant signal all the time – are given equal weight in the value calculations. Likewise, the design of the questionnaire tends to create response errors, which will be discussed in more detail below.

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[1] The CCG's claim is limited to only the Canadian programming, and not the U.S. team sports and movies and syndicated series, appearing on Canadian distant signals. The Gruen survey purports to capture the value of the entire Canadian signal.

A third criticism relates to sampling and non-response. I will show that response rates are actually much lower than portrayed in Gruen's testimony. Moreover, the sample size of respondents in areas covered by the Canadian signals is not large enough to provide reliable information about viewers of these signals. This is especially true because it is likely that only a fraction of the respondents in these areas are actually viewers of the Canadian signals. For example, the 2005 survey sampled only 31 respondents with access to Canadian distant signals, 16 of which were subscribers to cable systems where the Canadian stations were carried in only a small portion of the system. Similarly, the 2004 survey sampled only 55 respondents with access to Canadian distant signals. I will expand on these issues and explain my conclusions in the following sections.

3. Qualifying Respondents as Viewers

There are no questions in the Gruen survey aimed at determining whether and to what extent respondents actually view the programming on the distant signals provided by their cable systems, or even whether they are aware of the signals and their program offerings. Given the likelihood, described below, that many respondents had little or no experience with the stations in the survey, their responses become difficult to interpret, let alone useful as the basis for valuing Canadian programming.

Existing evidence indicates that the average household limited its TV viewing to 17 channels around the time of the surveys, and that only 20-30 percent of subscribers accounted for 60-80 percent of total viewing for most program networks at this time.[2] At the same time, the

[2] Federal Communications Commission, Media Bureau, *Report on the Packaging and Sale of Video Programming Services to the Public*, rel. Nov. 18, 2004, at 48.

average cable system had approximately 70 channels in their basic and expanded basic tiers, and 84 percent of all cable subscribers subscribed to both tiers.[3] Thus, at the time of the surveys, consumers tended to specialize their viewing among roughly a quarter of the available channels and, because all viewers did not focus their viewing on all the same channels, the majority of channels tended to attract a relatively small share of all subscribers. As a consequence, it seems unlikely that all survey respondents would have a great deal of experience with the programming on distant signals, and it is quite possible that some had never viewed the programming or even been aware of the signals.

Interpreting survey responses is further complicated because the surveys failed to define or require a specific set of criteria on which respondents rely when answering the valuation questions. As a result, even truthful responses could have been based on criteria other than viewership or familiarity with the programs cited in the survey as examples of program types.

As an example, take the question about series programs, which stated:

> 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 [STATION] from [CITY].
>
> Of the TEN dollars, what is the value to you, if any, of all **series** programs shown on the station for this category? (Gruen Written Direct, App. D, at 61 (emphasis in original).)

Given the framing of the question, the respondent is forced to allocate the $10 between categories, but can base this decision on any criterion. There is nothing in a truthful answer that required the respondent to have watched a program in the category on that station. A respondent who liked the programs in question could have allocated most or all of the $10 to that category in the hope that the station will carry that program type.

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3 Federal Communications Commission, *Report on Cable Industry Prices*, rel. December 27, 2006, at 10 and 14.

Further compounding the survey's deficiency on this point, the question about the Canadian station required a much greater degree of familiarity. The question for the Canadian stations was as follows:

> This category includes programs such as *Back of the House, Canada Now* and *Magic School Bus* shown only on [STATION(S)] from [CITY(IES)].
>
> Of the TEN dollars, what is the value to you, if any, of all **programs shown on Canadian stations**? (Gruen Written Direct, App. D, at 63 (emphasis in original).)

Back of the House is a comedy that was aired for only one 30-minute episode in 2004, and was not shown at all in 2005. *Canada Now* is a weekday news program produced by the CBC network. *Magic School Bus* is a children's program that had 28 hours of re-runs on CBC in 2004, and was not shown at all in 2005.[4] These programs would be unfamiliar to non-viewers of Canadian television. Indeed, since *Back of the House and Magic School Bus* were not shown at all in 2005, and only infrequently in 2004, such programs may not even have been familiar to *frequent* viewers of Canadian television.

Respondents, many of whom are likely unfamiliar with the programs provided as examples of Canadian television, would have no basis for making an allocation of points to the Canadian stations. However, because of their likely familiarity with the program types listed as examples for the other programming categories, even if they never viewed the stations airing the programming, those types of programming with well known shows as examples would have gained an advantage in attracting points. Again, there was nothing in the wording of the survey questions which required these program types to be actually viewed on the distant signal in question.

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4 Information on the programs in the question on Canadian television is contained in a document entitled "MPAA Cable Op Survey Canadian Titles Detail" supplied to me by the Canadian Broadcasting Corporation.

Differences across respondents in viewing distant signal programming create implications for the proper way to calculate the basic results of the study – implications which are ignored or improperly accounted for by the Gruen study. Most notably, as illustrated below, the allocation rule used in the Gruen study assigns the same weight to all responses in a market area, improperly diluting valuations by small segments of very committed viewers.

One would expect to see differences in the *overall* valuation of the stations across respondents: not all respondents are likely to have exactly the same $10 monthly valuation of all distant signals on their cable system. However, in the Gruen study, the share of each programming type in a given market is calculated as a simple average of the *proportion* of dollars allocated to each program type across all respondents. All respondents within a single cable system are implicitly assumed to place *the same overall valuation* on distant signals. Yet, depending on their level of viewing and the overall strength of their preferences for the program offerings on those distant signals, one would expect to see differences in overall valuations across those respondents. Those with the highest valuation should receive most of the weight in the calculations.

A hypothetical example will illustrate the problem. Suppose Respondent A watched a movie on distant station XXXX three years ago, and therefore truthfully allocates $10 to the movie. However, she places no value on station XXXX: if the cable system dropped it she would not be worse off. By contrast, Respondent B watches local news twice a day on distant station XXXX, and nothing else. This respondent allocates the entirety of her $10 to local news. Unlike Respondent A, Respondent B relies on station XXXX to keep up with news of her former hometown, and therefore values the distant station to the point where she would not subscribe to the cable service if it were not available.

The Gruen study would assign equal weight to both respondents, and therefore conclude that movies and local news on the station are both valued at 50%. However, because Respondent A does not care whether station XXXX is retained by the cable system whereas Respondent B bases her entire decision to subscribe to the cable system on the carriage of station XXXX, a better allocation would be 100% to local news. In summary, by assigning the same weight to all responses in a market area, the allocation rule used in the Gruen study works against small segments of very committed viewers: it works against the 20-30 percent of subscribers who are likely to account for 60-80 percent of total viewing noted above.

This failure is a major issue for Canadian stations (and PBS stations) included in the surveys. The majority of respondents are likely to be non-users or light users, and therefore allocate no dollars, or a small amount, to these stations. Those who are committed to the station may allocate a high proportion of their $10 budget to it, but constitute a small share of the surveys' respondents. Averaging the different groups will create a small overall share, and fail to adequately represent the strong preferences of those who actually watch the station and value it.

Finally, this last point serves to further highlight the difference between the perspective of cable subscribers and cable operators. Cable subscribers' assessment of the value of programming is limited to knowledge about only those segments of available programming that actually interest them. In contrast, cable operators are attempting to select and value signals according to their utility in appealing to as many of those segments as possible.

4. Questionnaire Problems

There are a number of questionnaire design issues that are likely to affect the quality of the data in general and the responses about Canadian stations in particular.

- Only one respondent is asked to answer for the entire household, regardless of whether that respondent is familiar with the viewing behavior or preferences of other household members. Specifically, the instructions indicate that $10 is to be allocated according to "how valuable you feel each program category was in your own home." Approximately two-thirds of the households in the surveys had two or more members. Households typically have several TV sets located in different parts of the home. These sets may be viewed at the same time by different household members. In this case, it is unlikely that the respondent would know exactly what the other members are viewing at a given time. Similarly, the respondent may do something else (work, shop, prepare dinner), while other members of the household are watching TV. Again, it is unlikely in this case that the respondent would know what the others were watching. Thus, there is a question about how well the respondent knows the viewing behavior of other household members and, more importantly, the strength of preferences of other household members.
- Though viewing behavior is likely to be related to gender, there is no question in the survey asking the gender of the respondent. If one gender is represented more frequently than another in the surveys, and members of that gender skew responses toward providing their own preferences, the results will be biased. For example, if females are more prevalent among respondents, the results are likely to be biased in favor of programs watched predominately by females. Unfortunately, since the gender of respondents is not available, there is no way to check for such biases in the survey data.
- Though the surveys are meant to apply to royalty proceedings for 2004 and 2005, they took place more than a year after the royalties in question were incurred. Moreover, there

is no reference to any specific time period anywhere in the questionnaire. Behavior may have changed during this interim.

- As noted above, many respondents will likely have limited or no experience with the distant signals and their programming, requiring them to respond to the $10 allocation question based on other criteria. The promised $25 payment gives them ample incentive to provide some response. The result is that many respondents may have supplied data of questionable validity. There is abundant research establishing evidence that respondents to a survey will answer questions even though they have no knowledge of the information sought in the question.[5] The obvious solution to the problem would have been to qualify respondents by asking whether they view the distant signal stations in the survey, or at least asking a question referring to extent of viewership. This is in line with the recommendation of Churchill and Iacobucci to ask such filter questions to determine the ability of the respondent to answer accurately.[6]
- Many respondents may not be familiar with the distant stations covered in the survey or the precise program type definitions, making the $10 dollar allocation exercise difficult. Constant sum scales of the type employed in the surveys are useful for determining relative importance, but can be taxing for respondents because of the large number of

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5 As noted in a leading marketing research text "most questions will get answers but the real concern is whether the answers mean anything." (Gilbert A. Churchill and Dawn Iacobucci, *Marketing Research: Methodological Foundations*, 8 ed. New York: Harcourt College Publishers 2002, at 323.) There are many examples of studies that asked questions on fictitious issues and obtained responses. *See e.g.,* Daniel T. Seymour, "Numbers Don't Lie—Do They?" Business Horizons 27 (November/December 1984), at 36-37; Del I. Hawkins and Kenneth A. Coney, "Uninformed Response Error in Survey Research," *Journal of Marketing Research*, 18 (August 1981), at 370-374.

6 Gilbert A. Churchill and Dawn Iacobucci, *Marketing Research: Methodological Foundations*, 8 ed. New York: Harcourt College Publishers 2002, at 324.

comparisons involved.[7] The complexity might lead respondents to use a subset of dimensions, especially when the categories are not independent.[8] Given that category definitions are likely to present some ambiguity to respondents, lack of independence is an issue in the Gruen surveys. For example, the distinction between live team sports and non-team sports in the surveys, which appears to be an artifact of royalty proceedings, is likely to be fuzzy to many respondents. Another possible source of overlap is that PBS and Canadian stations offer programs in many of the listed program categories.[9] Lack of consumer experience with the program definitions, the inclusion of programs and stations in the same allocation exercise, and the need to make comparisons across eight categories are all likely to make it difficult to respond to the central allocation question, and is likely to trigger response errors.

In sum, there are a number of design aspects of the surveys that invite response error: (1) respondents are unlikely to have complete knowledge of the viewing behavior or preferences of others in their household; (2) a skew of responses toward preferences of one gender is possible, as gender is unknown and impossible to measure and correct for possible bias; (3) respondents are likely to be unfamiliar with the distant stations in question, and; (4) respondents are likely to be unfamiliar with the distinctions between program categories that are employed in the surveys.

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7 Naresh Malhotra, *Marketing Research: An Applied Orientation*, Englewood Cliffs, N.J.: Prentice Hall 1993, at 287.

8 Hanjoon Lee, Linda Delene, Mary Anne Bunda and Chankon Kim, "Methods of Measuring Health-Care Service Quality," *Journal of Business Research*, 48 (2000), at 236.

9 Because different stations are referred to in the survey between program types and PBS and Canadian stations, the categories are actually mutually exclusive. But respondents are likely to have trouble making the distinction in the context of a phone survey when they have no prior background with questions of this type.

5. Sampling

While the sampling design for the Gruen study was rigorous, there is a strong possibility that non-response bias, combined with the small sample size of Canadian stations and respondents, may have skewed the composition of the sample to the detriment of the CCG.

In his written testimony about the 2004 survey, Gruen indicated that "of 1,497 respondents who were known to be qualified for the survey, only 10 refused to do so and only 48 were unavailable to complete the survey." (Gruen Written Direct at 16.) Similarly, in his testimony about the 2005 survey, Gruen indicated that only one respondent who was known to be qualified to take the survey refused to do so, and only 15 were not available to complete the survey. (*Id.* at 18.)

Given the condition "known to be qualified to complete the survey," these statements are probably correct. However, they do not provide a complete picture of non-response to the surveys. In Table 1, below, I tabulated a summary of the disposition of the calls in the survey obtained from two spreadsheets that provided this information. As shown in the table, there were 5,267 refusals prior to qualification in 2004 and 1,065 in 2005. There were another 1,805 "do not call" refusals in 2004 and 1,284 in 2005. There were also 1,429 instances of non-contact due to language barriers in 2004 and 1,027 in 2005. Finally, there were 29,849 cases where there was no answer on 7 attempts in 2004 and 12,317 cases in 2005. Thus, Gruen's testimony may give a misleading picture of non-response, and there is possible bias that might result from this.

Table 1
Gruen Survey Calling Statistics

Category	Survey 2004	Survey 2005
Completed Interview	1439	1510
Disqualified		
Did not have cable TV in home 2004	3672	3145
Respondent reports incorrect cable TV provider	2138	1671
DK/RF/NA at Q6 or Q7 series	4	1
Over Quota	6	0
Total Disqualified	5820	4817
Refusals		
R1 Initial Refusal (soft)	0	0
R2 2nd Refusal (hard)	5267	1065
R3 "Do not call" refusal	1805	1284
Q1 Qualified Refusal/Terminated	0	0
Q2 2nd time Qualified Refusal/Terminated	10	1
Total Refusals	7082	2350
Could Not Contact		
NV Not available during study	48	15
BC Blocked call/Privacy manager	50	1235
LB Language barrier	1429	1027
N1 Max Attempt Met (7 Attempts)	29849	12317
Total Could Not Contact	31376	14594
Bad Numbers		
DC Disconnect	30078	25457
FX Fax Machine/Computer Tone	4057	2508
GB Business/Residential number	4150	3711
DU Duplicate number	10	5
WN Wrong Number	0	8
Total Bad Number	38295	31689
Total Sample Used	84012	54960

Source: Program Suppliers responses to discovery: ps_15588.xls (2004), ps_15597.xls (2005).

A standard way of calculating response rates would be as the product of (contact/working numbers) x (cooperate/contact) x (completion/eligible).[10] Gruen measures only the last of these - completion/eligible. (Gruen Written Direct at 16.) Table 2, below, summarizes the survey statistics in Table 1 to provide a more complete picture of response rates to the surveys. This indicates that contact rates (the ratio of contacts to working numbers) were 31.37 percent in 2004 and 37.29 percent in 2005. The table also indicates that cooperation rates (one minus the ratio of refusals to contacts) were 50.62 percent in 2004 and 72.92 percent in 2005. Because those who could not be contacted or who refused could be different from the final respondents, it is important to measure their numbers. Multiplying the contact rate by the cooperation rate by the completion rate gives a response rate of 15.83% in 2004 and 27.17 % in 2004.

[10] *See e.g.*, Dr. John B. Horrigan, "Peer Review of Nielsen's 'How People Get News and Information' Survey Pursuant to FCC Rulemaking MB Docket No. 06-121," www.fcc.gov/mb/peer_review/prstudy1.pdf. Dr. Horrigan is Associate Director for Research, Pew Internet & American Life Project.

Table 2
Survey Response Summary

	Survey 2004	Survey 2005
Total Sample Used (1)	84012	54960
Total Bad Number (2)	38295	31689
Working Numbers (3 = 1-2)	45717	23271
Working Rate (3/1)	54.42%	42.34%
Total Could Not Contact (4)	31376	14594
Contacted (5 = 3 -4)	14341	8677
Contact Rate (5/3)	31.37%	37.29%
Total Refusals (6)	7082	2350
Cooperate (7 = 5-6)	7259	6327
Cooperation Rate (7/5)	50.62%	72.92%
No cable/ wrong provider/over quota (8)	5816	4816
Eligible (9 = 7-8)	1443	1511
Eligibility Rate (9/7)	19.88%	23.88%
Interrupted or Over Quota (10)	4	1
Completed Interviews (11 = 9-10)	1439	1510
Completion Rate (11/9)	99.72%	99.93%
Response = Contact Rate*Cooperation Rate*Completion Rate	15.83%	27.17%

Source: Program Suppliers responses to discovery: ps_15588.xls (2004), ps_15597.xls (2005).

The calculations in Table 2 follow a standard method for estimating response rates. An implicit assumption in the calculations is that the same proportion of non-contacts and refusals would be eligible for the surveys as those who indicated a willingness to cooperate. Because response rates vary with the characteristics of respondents, the topic and length of the survey, difficulty of responding to it, and the skill of the interviewers, it is hard to say whether the response rates indicated in Table 2 are abnormally high or low.[11] The sampling design for the study was rigorous. However, there is still plenty of room for bias due to non-response, defined as systematic differences in response between how non-respondents would have responded, and the actual responses.

There is evidence that non-response skewed the demographic composition of the sample. Appendix H of the Gruen testimony indicates that the 50+ age group was over-represented in the surveys, indicating that the surveys were more successful at reaching the older group. While this issue of over-representation of the 50+ group can be corrected by weighting, what we do not know is the extent to which non-respondents in each age group would have given different answers than the respondents.

The representation of respondents with access (let alone knowledge) of Canadian distant stations in the surveys is sparse. In 2004, five systems carrying Canadian distant signals out of a population of 60 systems were selected for surveys, and four of these were surveyed while one was treated as "virtual" because the system's only distant signal was Canadian. In 2005, four systems carrying Canadian distant signals out of a population of 49 systems were selected for surveys, and two of these were surveyed while the other two were treated as "virtual." There were a total of 55 survey respondents in communities served by systems with a Canadian distant signal in 2004, and there were 31 such survey respondents in 2005. However, 16 of the 31 responses to the 2005 survey were subscribers to a system where the three Canadian stations

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11 In Dr. John B. Horrigan's, "Peer Review of Nielsen's 'How People Get News and Information' Survey Pursuant to FCC Rulemaking MB Docket No. 06-121," www.fcc.gov/mb/peer_review/prstudy1.pdf, Dr. Horrigan notes that response rates to surveys commissioned by the Pew Internet & American Life Project typically vary from 25 percent to 30 percent. Since these surveys are directed at a representative sample of the U.S. population, and relate to media, they might be regarded as comparable in audience and content to the Gruen survey. This suggests that the response rate to Gruen's 2004 survey was relatively low, and response to the 2005 survey was more or less in line with expectations.

were only carried in a very small portion of the system. Given the remote possibility that these subscribers even receive the distant Canadian signals, it is hard to conceive that they could provide an accurate picture of the value of the Canadian stations. Therefore, there are only 15 effective responses that include a full Canadian distant signal in the 2005 survey. These come from only one cable system. Especially given the fact that the number of viewers of the relevant Canadian programs is likely to be a fraction of those sampled, these sample sizes become too small to allow inferences about the whole population of viewers of these programs.

6. Conclusions

I have outlined a number of reasons why the Gruen survey does not portray an accurate picture of the value of Canadian distant signals. The most important of these are:

- Respondents were not qualified as viewers of the stations in question, which creates the possibility that many responses to the allocation question were based on criteria other than the actual valuation of the programs and stations in question.
- Respondents were all implicitly assumed to value the stations in the survey equally, whether they were viewers or not. One would expect viewers to have a higher valuation than non-viewers, and frequent viewers to have a higher valuation than sporadic or occasional viewers.
- Survey questions required respondents to have knowledge that they may not possess, including the viewing behavior and preferences of others in their household. Survey questions also required knowledge of program categories that respondents may not grasp. The surveys also make an implicit assumption that preferences did not change in the year since the relevant royalty period.

- Though not necessarily outside the normal range for phone surveys, possible non-response error is present to a greater degree than Gruen's original report may imply.
- The sample sizes of Canadian stations and respondents are too small to allow firm conclusions to be drawn.

Declaration of Brian T. Ratchford

2004-2005 Cable Royalty Distribution Proceeding
Docket No. 2007-03 CRB CD 2004-2005

I, Brian T. Ratchford, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and correct.

12/9/09
Date

Brian T. Ratchford
Brian T. Ratchford

CERTIFICATE OF SERVICE

I, Eugene Benick, hereby certify that on this 11th day of December, 2009, a copy of the foregoing **Rebuttal Case of the Canadian Claimant Group** was sent by FED EX next day delivery to out-of-area counsel and by courier to all others:

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9. Xing Pan, Venkatesh Shankar and Brian T. Ratchford, "Price Competition Between Pure Play vs. Bricks-and-Clicks e-Tailers: Analytical Model and Empirical Analysis," of Advances in Applied Microeconomics: The Economics of the Internet and E-Commerce, Vol. 11 (Oxford, UK, Elsevier Science Ltd., 2002), pp. 29-61.

10. Xing Pan, Venkatesh Shankar, and Brian Ratchford, " The Evolution of Price Dispersion in Internet Retail Markets" Advances in Applied Microeconomics: Organizing the New Industrial Economy, Vol. 12 (Oxford, UK, Elsevier Science Ltd., 2003), pp. 85-106.

11. Brian T. Ratchford, Myung-Soo Lee and Debabrata Talukdar, "Consumer Use of the Internet in Search for Automobiles: Literature Review, a Conceptual Framework, and an Empirical Investigation," Review of Marketing Research, Vol. 2 (Armonk, N.Y., M.E. Sharpe, 2005).

12. Koukova, Nevena T., P. K. Kannan, and Brian T. Ratchford, "Bundling and Unbundling of Electronic Content," in Electronic Commerce and the Digital Economy, Advances in Management Information Systems Series, Michael J. Shaw, Ed. (Armonk, N.Y., M.E. Sharpe, 2006).

13. Brian T. Ratchford, "Consumer Search and Pricing" Handbook on Research on Pricing, ed. Vithala Rao, (Northampton, MA: Edward Elgar, 2009), 91-107.

Books Edited

1. Arun K. Jain, Christian Pinson, and Brian T. Ratchford, eds., Marketing Research: Applications and Problems (John Wiley and Sons, England, 1982).

Refereed Papers Published in Conference Proceedings

1. Brian T. Ratchford and Alan Andreasen, "A Study of Consumer Perceptions of Decisions," in Scott Ward and Peter Wright, eds., Advances in Consumer Research, Vol. 1 (Urbana: Association for Consumer Research, 1974), pp. 334-345.

2. Brian T. Ratchford, "A Simple Technique for Measuring Differences in Product Quality," in Thomas V. Greer, ed., 1973 Combined Proceedings (Chicago: American Marketing Association, 1974), pp. 356-359.

3. Michael Etgar and Brian T. Ratchford, "Marketing Management and Marketing Concept: Their Conflict in Non-Profit Organizations," in Ronald C. Curhan, ed., 1974 Combined Proceedings (Chicago: American Marketing Association, 1975), pp. 258-261.

4. Gary T. Ford and Brian T. Ratchford, "Public Policy, The Sherman Act, and the IBM Anti-Trust Case," in Edward M. Mazze, ed., 1975 Combined Proceedings (Chicago: American Marketing Association, 1976), pp. 593-596.

5. Brian T. Ratchford, "Banning Unsafe Products: A Framework for Policy Analysis," in Barnett Greenberg and Danny Bellinger, eds., 1977 Combined Proceedings (Chicago: American Marketing Association, 1977), pp. 362-365.

6. Brian T. Ratchford and Piet Van den Abeele, "Attitudes, Perceptions and the Marketing of Mass Transit," Proceedings, The Fifth International Research Conference in Marketing (Gordes, France, 1978), pp. 47-62.

7. Brian T. Ratchford and Manoj K. Agarwal, "The Value of Information on Automobile Characteristics," in Neil Beckwith, et al., eds., 1979 Educators' Conference Proceedings (Chicago: American Marketing Association, 1979), pp. 200-204.

8. Brian T. Ratchford and W. Fred Van Raaij, "The Relation Between Information Acquisition Strategy and Monetary Losses due to Incorrect Choices," in Richard P. Bagozzi, et al., eds., Marketing in the 80's: Challenges and Changes (Chicago: American Marketing Association, 1980), pp. 168-171.

9. Brian T. Ratchford, "The Flow of Capital Services and Productivity of Capital of Retail Food Stores," in R. Lusch, et.al., eds., 1985 Educators' Conference Proceedings (Chicago American Marketing Association, 1985), pp. 223-228.

10. Brian T. Ratchford and Pola Gupta, "On Measuring the Informational Efficiency of Consumer Markets," in Advances in Consumer Research, Vol. 14 (Provo, UT: Association for Consumer Research, 1987), pp. 309-313.

11. Brian T. Ratchford and Richard Vaughn, "On The Relationship Between Motives and Purchase Decisions: Some Empirical Approaches," in Advances in Consumer Research, Vol. 16 (Provo, UT: Association for Consumer Research, 1989), pp. 293-299.

Invited Papers Published in Conference Proceedings

1. Brian T. Ratchford, "An Attribute Approach to Measuring Differences in Product Quality," Proceedings, American Institute for Decision Sciences Northeast Regional Meeting (Kingston, Rhode Island, 1973), pp. 82-85.

2. Manoj K. Agarwal and Brian T. Ratchford, "A Comparison of Alternative Approaches to Forecasting Brand Choice," in David B. Montgomery and Dick R. Wittink, eds., Proceedings of the First ORSA/TIMS Special Interest Conference on Market Measurement and Analysis, MSI Report No. 80-13 (Cambridge, Massachusetts: Marketing Science Institute), pp. 102-119.

3. Brian T. Ratchford, "Economic Approaches to the Study of Market Structure and Their Implications for Marketing Analysis," in Alan Shocker and R. Srivastava, eds., Analytic Approaches to Product and Marketing Planning: The

Second Conference (Cambridge, Massachusetts: Marketing Science Institute, 1983), pp. 60-78.

4. George H. Haines, Jr. and Brian T. Ratchford, "A Theory of How Intransitive People Make Decisions," in Fred Zufryden, ed., Advances and Practices of Marketing Science 1983 (Providence, RI: The Institute of Management Science, 1984), pp. 101-114.

Book Reviews Published

1. Brian T. Ratchford, "Review of Harvey Leibenstein: Beyond Economic Man: A New Foundation for Microeconomics," Journal of Consumer Policy, Vol. 2, No. 4 (1978), pp. 364-367.

Papers in Review Process

1. Dinesh Gauri, Debabrata Talukdar and Brian T. Ratchford, "Do Loss Leader Promotions Affect Store Profits? An Empirical Investigation for Grocery Industry," Journal of Marketing Research, revision invited.

2. Xing Pan, Brian T. Ratchford and Venkatesh Shankar, "Drivers of Price Dispersion among E-Tailers during the Boom, Shakeout, Restructuring, and Mature Periods of e-Commerce," Journal of Marketing Research, submitted.

3. Ernan Haruvy, Brian T. Ratchford and Yu Tian, "The Importance of Store Assortment to Time Constrained Consumers," International Journal of Research in Marketing, submitted.

Grants

1. Brian T. Ratchford and George H. Haines, Jr., "Approaches to Forecasting the Demand for New Goods: Modeling the Nature of Underlying Behavior in Markets," National Science Foundation, 9/15/82 to 2/29/84, $48949.

2. K. Sridhar Moorthy, Brian T. Ratchford and Debabrata Talukdar, "Consumer Information Search Revisited: Theory and Empirical Analysis." Marketing Science Institute, February, 1993, $2200.

3. Pepsico Corporation, "Forecasting Project," 2001-2002, $35000 to R.H. Smith School of Business, University of Maryland.

TEACHING

Courses Taught

Marketing Management, Marketing Research, Consumer Behavior, Distribution Strategy, Channels and Retailing, Product and Promotion Management, Marketing Engineering, Microeconomics, Statistics, various Ph.D. Seminars on special topics.

Dissertations Supervised

Committee Chairman: Manoj Agarwal, "Prediction of Consumer Choice and Demand Forecasting: A Comparison of Alternative Approaches," SUNY Buffalo, 1978.

Committee Chairman: Gary Young, "An Experimental Investigation of the Effects of Power Lawn Mower Safety Standards," SUNY Buffalo, 1981.

Committee Chairman: Guy Gessner, "A Study of Advertising Regulations in the Market for Legal Services," SUNY Buffalo, 1983.

Committee Chairman: Barry Rosen, "A Field Experiment to Test the Applicability of Involvement Theory to the Segmentation of Markets for Social Goods," SUNY Buffalo, 1984.

Committee Chairman: Glenn Stoops, "An Aggregate Level Analysis of the Effects of Retailing Mix Variables on Retail Store Patronage," SUNY Buffalo, 1984.

Committee Chairman: Siva Balasubramanian, "The Processing of Verbal/ Nonverbal Content in Television Advertisements: A Theory and Its Empirical Investigation," SUNY Buffalo, 1986.

Committee Chairman: Narasimhan Srinivasan, "A Causal Model of External Search for Information for Durables: A Particular Investigation in the Case of New Automobiles," SUNY Buffalo 1987.

Committee Chairman: Pola Gupta, "A Model of Estimation of Informational Efficiency for New Automobiles," SUNY Buffalo, 1988.

Committee Chairman, Ben Liu, "An Integrated Model of Bargaining Behavior and Outcomes," SUNY Buffalo, 1991.

Committee Chairman, Chung-Koo Kim, "An Empirical Study of Marketing Competition In A Car Market: An Econometric and Time Series Approach," SUNY Buffalo, 1991.

Committee Chairman, Myung Soo Lee, "Consumer Search and Choice Patterns and New Automobile Brand and Dealer Choice," SUNY Buffalo, 1992.

Committee Chairman, Pamela Grimm, "Determinants of Brand Preference," SUNY Buffalo, April 1993.

Committee Chairman, Uday Kumar, "A Theoretical and Empirical Analysis of Intertemporal Brand and Quantity Choice Behavior," SUNY Buffalo, November 1993.

Committee Chairman, Arindam Banerjee, "Consumer Decision Rules Regarding Quantity to be Purchased in a Promotion Intensive Environment: Implications to Retail Pricing Policies," SUNY Buffalo, December 1994.

Committee Chairman, Rajan Sambandam, "An Examination of Theoretical Issues in Consumer Satisfaction Using Prospect Theory and Consumer Purchase Motives," SUNY Buffalo, May 1995.

Committee Chairman, Pankaj Kumar, "Dynamic Hierarchical Bayesian Models of Consideration and Choice: Issues and Estimation," SUNY Buffalo, July 1997.

Committee Chairman, Peggy Choong, "An Investigation of Information Search in the Mutual Fund Industry," SUNY Buffalo, August 1997.

Committee Chairman, Amit Bhatnagar, "An Inquiry into the Determinants of Store Assortments, Retail Formats, and Patronage Patterns," SUNY Buffalo, June 1998.

Committee Chairman, Sanjog Misra, “Compensation and Selling Effort,” SUNY Buffalo, June 1999.

Co-chair (with Venkatesh Shankar), Xing Pan, “Price Dispersion and Price Competition in Online Retail Markets,” University of Maryland, August 2003.

Co-chair (with P.K. Kannan), Lan Luo, University of Maryland, May 2005.

Co-chair (with P.K. Kannan), Nevena Koukova, University of Maryland, May 2005.

Co-chair (with Andrei Strijnev), Dongling Huang, “Three Essays in Marketing,” University of Texas at Dallas, May 2008.

Chair, Jung Seek Kim, “Consumer Search for Automobiles in the Digital Era,” University of Texas at Dallas, June 2009.

Member of Dissertation Committees: Gary Ford, John Cady, Jonathan Goodrich, A-Abu-Ayyash (Geography), Robert Allen, Michael Berkowitz, Daniel Hamblin, Naresh Malhotra, Prem Purwar, Zahid Khairullah, Mark Renne, Jagdish Agrawal, Ambuj Jain, Scott Kinzey, Janice Sargent, Sanjay Putrevu, Glen Brodowsky, Dinesh Gauri all graduates of SUNY Buffalo, 1973-2007; Kristian Muller, graduate of Helsinki School of Economics, Finland, 1979; Rita Martenson, graduate of Goteborg University Sweden; Bharadhwaj Sivakumaran, Debora Thompson, Shweta Oza, Ashwin Aravindhakshan, all graduates of University of Maryland, 2002-2007; Howard Dover, Shweta Singh, Manish Gangwar, graduates of University of Texas at Dallas

Chair of Committees of current students at University of Texas at Dallas: Chao-Ying Yu, Sonika Singh, Marina Girju.

Independent Studies and Student Projects

My records show that I have supervised approximately 130 independent study/supervised research projects since 1971.

PROFESSIONAL CONTRIBUTIONS TO RESEARCH

Editor, Marketing Science, 1998-2001.
Associate Editor, Management Science, 1988-1997.
Area Editor, Marketing Science, 1988-1997.
Associate Editor, Journal of Consumer Research, 1996-1998, 2005-.
Member, Editorial Board, Journal of Consumer Research, 1980-.
Member, Editorial Board, Marketing Science, 1981-1997, 2002- .
Member, Editorial Board, Journal of Economic Psychology, 1981-1991.
Member, Editorial Board, Journal of Marketing, 1980-83, 2002-.
Member, Editorial Board, Journal of Public Policy and Marketing, 1992-99.
Member, Editorial Board, Journal of Retailing, 1992-.
Member, Editorial Board, Journal of Marketing Research, 1994-.
Member, Editorial Board, Journal of Consumer Policy, 1995-.2007
Member, Editorial Board, Journal of Service Research, 2001-.
Member, Editorial Board, Journal of Interactive Marketing, 2005-.

Have refereed manuscripts for Review of Economics and Statistics, Transportation Research, Journal of Industrial Economics, Quarterly Journal of Economics, Journal of Consumer Affairs, International Economic Review, Rand Journal of Economics, American Economic Review, Journal of Political Economy, Quantitative Marketing and Economics.

Elected Outstanding Reviewer by Marketing Science, 1985-87.
Elected Outstanding Reviewer by Journal of Consumer Research, 1990.

PROFESSIONAL ORGANIZATIONS

American Economic Association
American Marketing Association
INFORMS
Association for Consumer Research

HONORS

Lehmann Award for best dissertation-based article, Journal of Marketing Research, 2009
Finalist for Paul Green Award, Journal of Marketing Research, 2008.
Little Award for best marketing article in an INFORMS journal in 2007.
Honorable Mention, Krowe Teaching Award, University of Maryland, 2003.
3rd place in competition for best article in Journal of Retailing, 1997.
William R. Davidson award for best article in Journal of Retailing, 1996.
Outstanding Article in Journal of Public Policy and Marketing, 1995-1997.
Fellowship, European Institute for Advanced Studies in Management, Brussels,1978.
Beta Gamma Sigma, University of Rochester, 1972.
Earhart Foundation Fellowship, University of Rochester, 1968-69.
University Fellowship, University of Rochester, 1964-66.
Cum Laude graduate of Canisius College, 1964.
State Regents Scholarship, 1959-64.

UNIVERSITY SERVICE

SUNY Buffalo School of Management

Undergraduate Committee, 1973-74, 1984-86.
Library Committee, 1973-74.
MBA Committee, 1974-75.
Area Coordinator, Marketing, 1973-77.
and graduate enrollments, Fall 1974, as a policy committee assignment.
Ph.D. program Chairman, 1976-77, 1989-92.
Internship Coordinator, Marketing 1978-87.
Ph.D. Committee, 1979-81.
Faculty Advisor, Student Chapter of American Marketing Association, 1979-82.
President, SUNY Buffalo Chapter of Beta Gamma Sigma, 1979-80,
Acting Chairman, Department of Operations Analysis, 1981-1982.
Chairman, Department of Operations Analysis, 1982-1983.
MBA Program Chairman, 1986-89, 1995-1999.
Search Committee for Dean, 1990-1992, 1997-1998.
Chairman, Personnel Committee, 1992-1994.

SUNY Buffalo University-Wide

Faculty Senate Executive Committee, 1976-77.
Graduate School Executive Committee, 1976-77.
Chairman, Senate Admissions Committee, 1978-80.
Member, Subcommittee on Implementation of Springer Report, 1979-80.
Member, University Committee on Operational Processes, 1979-81, and Chairman of this committee's Task Force on Admissions and Records, 1980.
Supervised a study of perceptions and interests in MFC, which was undertaken as a student project, 1979-80.

Member, Faculty Senate Committee on Millard Fillmore College, 1982.
Member, Faculty Senate, 1983-85.
Member, Ad-hoc Committee on Statistics, 1987-89.
Member, Graduate School Executive Committee, 1990-1992.
Member, Advisory Board of WBFO (radio station run by the university), 1993-95.
Performed major market research projects for WBFO, pro bono, 1994-95, 1999.

<u>University of Maryland RH Smith School</u>

Faculty Research Grants Committee1999-2005.
Ph.D. Coordinator, Marketing, 1999-2005.

<u>University of Maryland University-Wide</u>

Elected R.H. Smith School representative to the Graduate Council.

<u>University of Texas at Dallas</u>

Faculty Senate 2006-2007
Ph.D. Program Director, 2007 – 2009
Ph.D. Coordinator, Marketing, 2007 -
University Committee on Qualifications, 2008-2009.

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EDUCATION:

Ph.D. Economics, 1980, University of California, Berkeley
M.A. International Relations, 1969, U. of Chicago
B.A. Mathematics, 1963, Rice U., Houston, Texas

PROFESSIONAL AFFILIATIONS:

American Association for the Advancement of Science
American Marketing Association
American Public Health Association
Association for Consumer Research (Director, 1988-90)
Journal of Public Policy and Marketing (editorial review board, 1992-1999, 2002-present)

EMPLOYMENT:

January 1995 - present: Resident Scholar, American Enterprise Institute.
July 1994 - December 1994: Adjunct Scholar, American Enterprise Institute.
July 1993 - June 1994: Visiting Senior Fellow, Brookings Institution, Washington, D.C.
August 1990 - June 1993: Associate Professor of Marketing, Graduate School of Management, Boston University
Fall 1986 - June 1990: Assistant Professor of Marketing in the College of Business, University of Maryland.
Sept. 1980 - February 1987 (part-time after Sept. 1986): Special Assistant to the Director, Bureau of Economics, Federal Trade Commission (previously Deputy Assistant Director and Staff Economist)
Sept. 1975 - Sept. 1980: Graduate study, part-time teaching, U. California, Berkeley
Oct. 1969 - Sept. 1975: Pacific Telephone and Telegraph, San Francisco, CA (statistical consulting, computer programming and operations).

AMERICAN ENTERPRISE INSTITUTE PAPERS:

John E. Calfee (2009) "What Do Vitamins and Fish Oil Tell Us about Drug Research?,"Aug. 6, available at http://www.american.com/archive/2009/august/what-do-vitamins-and-fish-oil-tell-us-about-drug-research.

John E. Calfee (2009) "And Now, a Few Words about Antivirals for Pandemic Flu," *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., June. Available at http://www.aei.org/outlook/100040.

John E. Calfee (2009) "What Can the European Union Do to Sharpen Its Innovative Edge in Pharmaceuticals?," from remarks at an event sponsored by Friends of Europe, Brussels, Mar. 16, 2009.

John E. Calfee and and Elizabeth DuPré (2009) "Learning a Little About Drug Companies from *The Lancet*," *The American*, March 26, available at www.american.com/archive/2009/march-2009/learning-a-little-about-drug-companies-from-the-lancet.

John E. Calfee (2009) "A Troubling Supreme Judgement," (on *Wyeth v. Levine*) *The American*, March 6, available at www.american.com/archive/2009/a-troubling-supreme-judgment/article_print.

John E. Calfee (2008) "When Patents are Not Enough: Data Exclusivity for Follow-on Biolgics," *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., October. [Also submitted to the Federal Trade Commission in connection with its inquiry in follow-on biologics and competition.]

John E. Calfee (2008) "His Brilliant Career," *The American*, Nov.-Dec., p. 96-101. Available (with a different title) at http://www.american.com/archive/2008/november-december-magazine/medicines-miracle-man

John E. Calfee (2008) "FDA Preemption and Patient Welfare in *Wyeth v. Levine*," *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., October.

John E. Calfee (2008) "The Indispensable Industry," *The American*, May-June.

John E. Calfee (2007) "Reform Without Reason: What's Wrong with the FDA Amendments Act of 2007," *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., September 2007.

John E. Calfee (2007) “Facing Realities on Follow-on Biologics,” *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., April 2007.

John E. Calfee (2007) “The Golden Age of Medical Innovation,” *The American*, March-April.

John E. Calfee, Mario Villarreal, and Elizabeth DuPré (2006) “An Exploratory Analysis of Pharmaceutical Price Disparities and their Implications Among Six Developed Nations,” AEI-Brookings Joint Center, March 28.

John E. Calfee (2006) “Playing Catch-up: The FDA, Science, and Drug Regulation,” *Health Policy Outlook*, American Enterprise Institute, Washington, D.C., March 2006.

John E. Calfee (2006) “A Representative Survey of M.S. Patients on Attitudes toward the Benefits and Risks of Drug Therapy,” AEI-Brookings Joint Center, March 28.

Calfee, John E. (2005) “The Vioxx Fallout,” *AEI Health Policy Outlook*, Sept.-Oct. 2005.

Calfee, John E., and Scott Gottlieb (2004) “Putting Markets to Work in Vaccine Manufacturing,” *Health Policy Outlook*, American Enterprise Institute, November.

Joseph Antos and John E. Calfee (2004) “Of Sausage-Making and Medicare,” *Health Policy Outlook*, American Enterprise Institute, January.

Calfee, John E. (2003) “The Grim Economics of Pharmaceutical Importation,” *Health Policy Outlook*, American Enterprise Institute, November.

BOOKS:

Barfield, Claude, and John E. Calfee (2007) *Biotechnology and the Patent System: Balancing Innovation and Property Rights*. AEI Press, Washington, D.C.

John E. Calfee (2000) *Prices, Markets, and the Pharmaceutical Revolution*. AEI Press, Washington, D.C.

John E. Calfee (1997) *Fear of Persuasion: A New Perspective on Advertising and Regulation*, London: Agora; North American distribution by the American Enterprise Institute.

JOURNAL ARTICLES AND REVIEWS:

Jena, Anupam B., John E. Calfee, Edward C. Mansley, and Tomas J. Philipson (2009) "'Me-Too' Innovation in Pharmaceutical Markets," forthcoming, *Forum for Health Economics and Policy*, Berkeley Electronic Press.

John E. Calfee (2008) "It's a Strange Market," *Harvard College Economics Review*, Fall, p. 31-32.

John E. Calfee (2008) "Can Quality-Adjusted Life Year Avoidance Help in Oncology Drug Reimbursement Decisions?" *Journal of Oncology Practice*, v. 4, n. 1 (January), p. 8.

John E. Calfee (2007) "An Assessment of Direct-to-consumer Advertising of Prescription Drugs," *Clinical Pharmacology and Therapeutics*, v. 82, n. 4, p. 357-360 (October).

John E. Calfee (2007) "A Review of Richard Epstein's *Overdose: How Excessive Government Regulation Stifles Pharmaceutical Innovation*, in the *DePaul Journal of Health Care Law*, v. 10, n. 4, p. 513-522 (Spring).

John E. Calfee and Elizabeth DuPré (2006) "The Emerging Market Dynamics of Targeted Therapeutics," *Health Affairs*, v. 25, n. 5, p. 1302-1308 (Sep.-Oct.).

John E. Calfee (2005) Review of Marcia Angell, *The Truth about the Drug Companies* and Jerome Kassirer, *On The Take: How Medicine's Complicity with Big Business Can Endanger Your Health*, *Journal of Public Policy and Marketing*, v. 24, n. 2 (Fall), p. 307-310.

John E. Calfee (2005) Review of Campos' *The Obesity Myth*, Critser's *Fat Land*, and Nestle's *Food Politics*, *Journal of Public Policy and Marketing*, v. 24, n. 1, p. 174-177 (Spring).

John E. Calfee (2005) Review of Marcia Angell, *The Truth about the Drug Companies*, in *Chemical and Engineering News*, v. 83, n. 5, p. 42-43 (Jan. 31).

John E. Calfee and Roger Bate (2004) "Pharmaceuticals and the Worldwide HIV Epidemic: Can a Stakeholder Model Work?," *Journal of Public Policy and Marketing*, v. 23, n. 2 (Fall), p. 140-152.

John E. Calfee (2004) Review of Merrill Goozner, "The $800 Million Pill: The Truth Behind the Cost of New Drugs," *Nature*, v. 429, p. 807 (June 24).

Janet Hoek, Philip Gendall and John Calfee (2004) "Direct to Consumer Advertising of Prescription Medicines in the United States and New Zealand: An Analysis of Regulatory Approaches and Consumer Responses," *International Journal of Advertising*, v. 23, p. 197-227.

John E. Calfee (2003) "What Do We Know About Direct-To-Consumer Advertising Of Prescription Drugs?," *Health Affairs*, p. W3 116-119 (web exclusive), Feb. 26.

John E. Calfee, Clifford Winston, and Randolph Stempksi (2002) "Direct-to-Consumer Advertising and the Demand for Cholesterol-reducing Drugs," *Journal of Law and Economics*, v. 45 (October), p. 672-690.

John E. Calfee (2002) "Public Policy Issues in Direct-to-consumer Advertising of Prescription Drugs," *Journal of Public Policy and Marketing*, v. 19, n. 2, p. 174-194 (Fall).

John E. Calfee (2002) "The Role of Marketing in Pharmaceutical Research and Development," *Pharmacoeconomics*, vol. 20, supp. 3, p. 77-85.

John E. Calfee, Clifford Winston,and Randolph Stempksi (2001) "Econometric Issues in Estimating Consumer Preferences from Stated Preference Data: A Case Study of the Value of Automobile Travel Time," *Review of Economics and Statistics*, v. 83, n. 4, p. 699-707 (November).

John E. Calfee (2001) "Pharmaceutical Price Controls and Patient Welfare," *Annals of Internal Medicine*, v. 134, n. 1 (June 5), p. 1060-1064.

John E. Calfee (2000) "The Historical Significance of 'Joe Camel,'" *Journal of Public Policy and Marketing*, v. 19, n. 2, p. 168-182.

John E. Calfee (2000), "The Increasing Necessity for Market-Based Pharmaceutical Prices," *Pharmacoeconomics*, v. 18, supp. 1, p. 47-57.

John E. Calfee and Clifford Winston (1998) "The Value of Automobile Travel Time: Implications for Congestion Policy," 69 *Journal of Public Economics* 83-102.

Paul H. Rubin, John E. Calfee, and Mark F. Grady (1997) "*BMW vs Gore*: Mitigating the Punitive Economics of Punitive Damages," *Supreme Court Economic Review*, v. 5, p. 179-216.

Carl Scheraga and John E. Calfee (1996) "The Industry Effects of Information and Regulation In the Cigarette Market: 1950-1965," *Journal of Public Policy and Marketing*, Vol. 15, no. 2 (Fall), p. 216-226.

John E. Calfee (1996) “Some Notes on the Effects of Alcoholic Beverage Advertising in Europe,” printed in English and French in the *Bulletin de l’office international de la vigne et du vin*, September-October.

John E. Calfee and Debra Jones Ringold (1994) “The Seventy Percent Majority: Enduring Consumer Beliefs About Advertising,” *Journal of Public Policy and Marketing*, Vol. 13, no. 2 (Fall), p. 228-238.

John E. Calfee and Carl Scheraga (1994) “The Influence of Advertising on Alcohol Consumption: Review of the Evidence and An Econometric Analysis of Four European Nations” *International Journal of Advertising*, vol. 13, no. 4, p., 287-310.

Calfee, John E. (1994) “Review of Viscusi's *Smoking: Making the Risky Decision*,” 13/1 *J. of Public Policy and Marketing* 168-170.

John E. Calfee and Clifford Winston (1993) “The Consumer Welfare Effects of Liability for Pain and Suffering: An Exploratory Analysis,” *Brookings Papers on Economic Activity: Microeconomics*, no. 1, p. 133-174.

John E. Calfee and Paul Rubin (1993) “Nontransactional Data in Managerial Economics and Marketing,” 14/2 (March-April) *Managerial and Decision Economics* 163-173.

Paul Rubin and John E. Calfee (1992) “Consequences of Damage Awards for Hedonic and Other Nonpecuniary Losses,” 5/3 *Journal of Forensic Economics* 249-260.

John E. Calfee and Paul Rubin (1992) “Some Implications of Damage Payments for Nonpecuniary Losses,” *Journal of Legal Studies*, v. 21, n. 2, p. 371-411 (June).

Calfee, John E. (1992) “FDA Regulation: Moving Toward A Black Market In Information,” *American Enterprise*, March-April, p. 34-41.

John E. Calfee and Debra Ringold (1992) “The Cigarette Advertising Controversy: Assumptions About Consumers, Regulation, and Public Debate,” *Advances in Consumer Research*, vol. 19, p. 557-562.

John E. Calfee and Janis K. Pappalardo (1991) “Public Policy Issues in Health Claims for Foods,” *Journal of Public Policy and Marketing*, vol. 10/1 (Spring), pp. 33-54.

Ringold, Debra Jones, and John E. Calfee (1990) “What Can We Learn From the Informational Content of Cigarette Advertising? Further Analysis and a Reply,” *Journal of Public Policy and Marketing*, vol. 9, pp. 30-41.

John E. Calfee and Debra Ringold (1990) “What Would Happen If Cigarette Advertising and Promotion Were Banned?” *Advances in Consumer Research*, vol. 17, pp. 474-479.

Ringold, Debra Jones, and John E. Calfee (1989) “The Informational Content of Cigarette Advertising: 1926-86,” *Journal of Public Policy and Marketing*, vol. 8, pp. 1-23.

John E. Calfee (1988) “Review of Kenney's *Biotechnology*,” *Journal of Economic Literature*, vol. 26, pp. 721-722 (June).

John E. Calfee and Debra Ringold (1988) “Consumer Skepticism of Advertising: What Do the Polls Show?,” *Advances in Consumer Research*, vol. 15, pp. 244-248.

John E. Calfee and Gary Ford (1988) “Economics, Information, and Consumer Behavior,” *Advances in Consumer Research*, vol. 15, pp. 234-238.

John E. Calfee (1987) “Cigarette Advertising Regulation Today: Unintended Consequences and Missed Opportunities,” *Advances in Consumer Research*, vol. 14, pp. 264-268.

Gary Ford and John E. Calfee (1987) “Market Forces, Information and Reduced Flammability Cigarettes,” *Advances in Consumer Research*, vol. 14, pp. 274-278.

John E. Calfee (1986) “The Ghost of Cigarette Advertising Past,” *Regulation*, vol. 10, no. 2, November-December, pp. 35-45; reprinted in *Regulation*, vol. 20, no. 3, Summer 1997, p. 41-45.

Gary Ford and John E. Calfee (1986) “Recent Developments in FTC Policy on Deception,” *Journal of Marketing*, vol. 50, pp. 82-103 (July.)

Richard Craswell and John E. Calfee (1986) “Deterrence and Uncertain Legal Standards,” *Journal of Law, Economics and Organization*, vol. 2, pp. 279-303 (Fall.)

John E. Calfee (1985) “Estimating the Demand for Electric Automobiles Using Fully Disaggregated Probabilistic Choice Models,” *Transportation Research*, vol. 19B, pp. 287-301.

John E. Calfee and Richard Craswell (1984) “Some Effects of Uncertainty on Compliance with Legal Standards,” *Virginia Law Review*, vol. 70, pp. 965-1003, June.

John E. Calfee, Gary Ford, and Tom Maronick (1983) “Consumer Research Issues at the Federal Trade Commission,” *Advances in Consumer Research*, vol. 10, 1983.

Butters, Gerard, John E. Calfee and Pauline Ippolito (1981) "Reply to Steven Kelman," 5/2 *Regulation* 41-42 (March/April).

John E. Calfee (1979) "Probabilistic Choice: An Introduction to the Issues," *Economic Forum*, vol. 10, Summer.

LEGISLATIVE AND ADMINISTRATIVE AGENCY TESTIMONY:

Invited testimony in hearings on FDA preemption of state tort liability lawsuits before the House Committee on Oversight and Government Reform, May 14, 2008.

Invited testimony in hearings on drug safety and the FDA, House Committee on Appropriations, Subcommittee on Agriculture and FDA, Feb. 27, 2008.

Testimony in public hearings before the FDA's Peripheral and Central Nervous System Drugs Advisory Committee on whether to permit the drug Tysabri to re-enter the market, March 7, 2006.

Invited testimony in hearings on "Medicaid Prescription Drugs: Examining Options for Payment Reform, House Committee on Energy and Commerce, Subcommittee on Health, June 22, 2005.

Invited testimony in hearings on "The Roles of FDA and Pharmaceutical Companies in Ensuring the Safety of Approved Drugs, Like Vioxx," House Government Reform Committee, May 5, 2005.

Invited testimony in hearings on "International Drug Prices," before the United States Senate Committee on Finance, Joint Committee on International Trade and Health, April 27 2004.

Invited testimony before the Department of Health and Human Services Task Force in Drug Importation, held at the Food and Drug Administration on April 27 2004.

Invited testimony on pharmaceutical price controls before the House Committee on Industrial Relations for the State of Georgia, Feb. 11, 2004.

Invited testimony on direct-to-consumer advertising of prescription drugs in hearings before the Federal Trade Commission, Sept. 10, 2003.

Invited testimony on the role of pharmaceutical benefit managers in hearings before the Federal Trade Commission, June 26, 2003.

Invited testimony before the U.S. Senate Committee on Health, Education, Labor, and Pensions, in public hearings on “the National Immunization Program: Is It Prepared for the Public Health Challenges of the 21st Century?,” Tuesday, Nov. 27, 2001.

Invited testimony in hearings on “Direct-to-consumer Advertising of Prescription Drugs,” Before the U.S. Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Affairs, Tuesday, July 24, 2001.

Invited testimony in hearing on “Seniors’ Access to Prescription Drug Benefits,” before the Subcommittee on Health, Committee on Ways and Means, U.S. House of Representatives, February 15, 2000.

Expert testimony on alcoholic beverage advertising, before the Cleveland City Council, July 1997.

Expert testimony on alcoholic beverage advertising, before the New Zealand Advertising Standards Authority, April 1998.

Testimony on alcoholic beverage advertising, before the Baltimore City Council, December 9, 1993.

Invited testimony on the regulation of marketing and advertising; testimony and prepared statement printed in "Oversight of FTC's Shared Responsibilities," Hearing before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, 102nd Congress, 1st Session, November 21, 1991. GPO: Serial No. 102-92, p. 165-178.

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Calfee, John E. (2000) “Comments to the World Health Organization on the Proposed Framework Convention on Tobacco Control,” American Enterprise Institute, March 2000.

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John E. Calfee and Janis K. Pappalardo (1989) *How Should Health Claims for Foods Be Regulated? An Economic Perspective*, Bureau of Economics, Federal Trade Commission, September 1989.

Calfee, John E. (1985) "Cigarette Advertising, Health Information and Regulation Before 1970," Bureau of Economics, Federal Trade Commission, Working Paper #134 (December).

BOOK CHAPTERS:

Calfee, John E. (2002) “Some Comments Inspired by Viscusi’s ‘Tobacco Regulation by Litigation’,” in W. Kip Viscusi, ed., *Regulation through Litigation*, Brookings Institution, p. 52-66.

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John E. Calfee, William Garrison and Janet Hopson (1981) "Electric Vehicle Potential in Hawaii, 1980-2005," chapter 12 of Volume II of the *Hawaii Integrated Energy Assessment*, Lawrence Berkeley Laboratory, Berkeley, CA.

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Janis K. Pappalardo and John E. Calfee (1991) "What's Good in Theory is Good in Practice: Using an Expected Value Rule to Regulate Health Claims," in Robert N. Mayer, ed., *Enhancing Consumer Choice: Proceedings of the Second International Conference on Research in the Consumer Interest*, p. 79-95.

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Calfee, John E. (2009) "Limiting Drug Prices Means Limiting Future Cures," *Los Angeles Times*, October 10, 2009. Available at: http://www.latimes.com/news/opinion/commentary/la-oe-calfee10-2009oct10,0,1149877.story. [reprinted in Modesto Bee, Oct. 16.]

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Calfee, John E. (2009) "I Guess They're Just Not Dangerous Enough, . . ." American.com blog. Available at http://blog.american.com/?p=1444. [On "e-cigarettes."]

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Calfee, John E. (2000) “The Unintended Consequences of Price Controls,” *Pfizer Forum* advertorial, printed in *Economist*, March 18, 2000; *Financial Times, March 23, 2000*; *National Review*; *Foreign Affairs*, July-August 2000; *Washington Post*, and others.

“Price Controls are a Prescription for Disaster,” *Wall Street Journal*, July 22, 1999.

“A Legal Nightmare for Asbestos’ Real Victims,” *Los Angeles Times*, August 2, 1998; also printed in *Albany Times-Union*, August 7, 1998, *Baltimore Sun*, August 13, 1998, *Bangor News*, and *Spokane Spokesman-Review*.

“The Litigation Logjam We Can Clear,” *Legal Times*, July 20, 1998, p. 23; also printed in *New Jersey Law Journal* and other legal newspapers.

“Why the War on Smoking Will Fail,” *Weekly Standard*, July 20, 1998, p. 23-26; abridged version published in *El Nacional*, Caracas, Venezuela, August 31, 1998, under the title, “El fracaso de la guerra contra el cigarrillo;” and in *El Mercurio*, Santiago, Chile, September 23, 1998.

“How Advertising Informs to Our Benefit,” *Consumer Research* magazine, v. 81, no. 4, April 1998, p. 13-18, excerpted from *Fear of Persuasion*.

“Efficiency Begets Fairness: the Supreme Court Takes On ‘Class Action Settlements,’” *Legal Times*, February 10, 1997, p. S40; also printed in *Connecticut Law Tribune,* Feburary 17, 1997, p. 35.

“Solving the Asbestos Litigation Morass,” *Washington Times,* November 25, 1996.

“Discussion on the Economics of the *Georgine* Settlement: Finding Virtue in an Asbestos Class Settlement,” *Legal Intelligencer,* October 16, 1996, p. 11-12.

“FDA: The Illusions Fade: letter to the editor,” *Wall Street Journal*, October 1, 1996, p. A23.

“Smoking Alternatives: letter to the editor,” *Advertising Age*, September 16, 1996, p. 24.

"Worried About Your Health? FDA Isn't," *Wall Street Journal*, September 12, 1994, p. A16

"How Clinton Lost vs. Harry & Louise," *Advertising Age*, August 29, 1994, p. 20.

"FTC's Hidden Weight-Loss Ad Agenda," *Advertising Age*, Oct. 25, 1993, p. 29.

"Proponents of Mandated Alcohol Ad Warnings Ignore Constitutional Value of Commercial Speech," *3/12 Legal Opinion Letter*, Washington Legal Foundation, May 14, 1993.

“Here We Go Again; Ads Under Fire,” *Advertising Age*, March 15, 1993, p. 24.

"BATF Censorship is Hazardous to Health of Alcohol Market and Free Speech," 2/21 *Legal Opinion Letter*, Washington Legal Foundation, Sept. 11, 1992.

"Let Market Forces, Not the FDA, Regulate Food and Drugs," *Roll Call Newspaper*, Washington, D.C., May 21, 1992, p. 18.

"FDA's Ugly Package," *Advertising Age*, March 16, 1992, p. 25.

"FDA vs the First Amendment," *Wall Street Journal*, February 13, 1992, p. A18.

"'Targeting' the Problem," *Advertising Age*, July 22, 1991, p. 18.

"FDA Underestimates Food Shoppers," *Wall Street Journal*, May 29, 1991, p. A10.

"When Cigarette Ads Harmed the Industry's Health," *Wall Street Journal*, July 6, 1988, p. 24.

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Calfee, John E. (2009) "The Dangers of Fannie Mae Health Care," *Wall Street Journal*, June 26, 2009, p. 15. Partially reprinted in *Readers Digest*, September 2009.

"Drugs, Drug Prices and Your Health," *Consumer Research* magazine, v. 83, no. 5, May 2000, p. 10-15, excerpted from *Prices, Markets, and the Pharmaceutical Revolution*. To be reprinted in Charles F. Levinthal, ed. (2002) *Point/Counterpoint: Opposing Perspectives in Drugs, Behavior, and Modern Society* (Allyn and Bacon).

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- Abridged version published in *El Nacional*, Caracas, Venezuela, August 31, 1998, under the title, "El fracaso de la guerra contra el cigarrillo;" in El Mercurio, Santiago, Chile, September 23, 1998; and El Economista, Mexico City, Mexico, September 24, 1998.
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"How Advertising Informs to Our Benefit," *Consumer Research* magazine, v. 81, no. 4, April 1998, p. 13-18 (excerpted from *Fear of Persuasion*):
- reprinted in *Span*, English-language magazine distributed in India by the United States Information Agency
- reprinted in Alison Alexander and Jarice Hanson, ed. (1998) *Taking Sides: Clashing Views on Controversial Issues in Mass Media and Society*, McGraw-Hill
- reprinted (abridged) in Byron L. Stay, ed., *Mass Media*, Greenhaven Press, 1999
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AWARDS:

Best article published in *Journal of Public Policy and Marketing* during 1991-1993: Calfee and Pappalardo (1991) "Public Policy Issues in Health Claims for Foods."

Nominated for best article published in *Journal of Public Policy and Marketing* during 1990-1992: Debra Jones Ringold and John E. Calfee (1989) "The Informational Content of Cigarette Advertising: 1926-86."

Nominated for best article published in *Journal of Public Policy and Marketing* during 1995-1997 and again for 1996-1998: Carl Scheraga and John E. Calfee (1996) "The Industry Effects of Information and Regulation In the Cigarette Market: 1950-1965."

LITIGATION DEPOSITIONS AND TESTIMONY:

Calfee, John E., Ernst R. Berndt, Robert W. Hahn, Tomas J. Philipson, Paul H. Rubin, and W. Kip Viscusi (2008) "Supreme Court Amicus Brief Regarding *Wyeth v. Levine*." Available at http://www.reg-markets.org/publications/abstract.php?pid=1277. Accessed June 4, 2008.

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Expert statement, "An Economic Evaluation of Proposed Methods for Assessing the Market Value of Programming on Canadian Distant Signals," submitted to the Copyright Royalty Tribunal, on behalf of Canadian Broadcasting Corp., in connection with the 1998-1999 Cable Copyright Royalty Distribution Proceeding, July 2003.

Expert witness on the effects of advertising for ephedra weight-loss products manufactured by the Cytodyne Corp., in *Jason A. Park vs Cytodyne Technologies, Inc.,* Superior Court of the state of California for the County of San Diego, Central Division, case no. 768364, April 15-17, 2003.

Expert witness on alcoholic beverage advertising, in Federation of Advertising Industry v. City of Chicago (Case No. 97 C 7619, United States District Court for the Northern

District of Illinois, Eastern Division). Deposed June 10, 1998; complaint dismissed before trial; matter still under appeal.

Expert witness on consumer survey design, consumer attitudes towards price advertising, and the regulation of price advertising, represented by Mayer, Brown and Platt: *B. Sanfield v. Finlay Fine Jewelers*, Case No. 93 C 20149, U.S. District Court for the Northern District of Illinois, Western Division. Northern District of Illinois, January 1998.

Expert statement, "An Economic Evaluation of the Bortz Study in Assessing the Market Value of Programming on Canadian Distant Signals," submitted to the Copyright Royalty Tribunal, on behalf of Canadian Broadcasting Corp., in connection with the 1991-1992 Cable Copyright Royalty Distribution Proceeding, February 1996.

Expert statement on the economic aspects of "Backdoor Rulemaking" at the Federal Trade Commission, on behalf of the Jenny Craig Corp., in connection with FTC litigation in the weight-loss industry, July 1994.

Designated as an expert witness for Exxon on the economic effects of punitive damages, in the Exxon Valdez litigation; deposed December 1993, but did not testify.

Expert testimony on price advertising, for May Department Stores, *Colorado v. the May Department Stores d/b/a May D&F* (1990), District Court, City and County of Denver, Case No. 89 CV 9274.

REFEREEING ACTIVITIES: Addison-Wesley Publishing Co. (consumer behavior textbook); *Advances in Consumer Research; Advances in Marketing and Public Policy;* American Marketing Association *Proceedings;* American Marketing Association dissertation competition; *Economic Inquiry*; *Health Affairs;* Institute of Medicine*; International Journal of Pharmaceutical Medicine; International Review of Law and Economics; Journal of Advertising; Journal of Business Ethics; Journal of Business Research; Journal of Consumer Research; Journal of Health Politics, Policy and Law; Journal of Industrial Economics; Journal of Public Policy and Marketing* (editorial review board, 1992-1999); *Journal of Law, Economics, and Organization; Managerial and Decision Economics; Nature Reviews Drug Discovery; Personalized Medicine; Pharmacoeconomics; Quarterly Review of Economics and Business; Regulation*; Smith Richardson Foundation.

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EDUCATION

Ph.D., Marketing, STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY, 1973.

M.B.A., Marketing, STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY, 1968.

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ACADEMIC/PROFESSIONAL EXPERIENCE

AMERICAN UNIVERSITY, Kogod School of Business, Washington, D.C.,

Emeritus Professor of Marketing, 2008.

Professor of Marketing, 1985-2007.

Chairman of Marketing, 1989-94, 1999-2001, 2004, 2006-2007.

CATHOLIC UNIVERSITY OF LEUVEN, Department of Applied Economics, Leuven, Belgium, 1991-1992
Visiting Professor of Marketing

UNIVERSITY OF MARYLAND, College of Business and Management
Chairman, Faculty of Marketing, 1980-1985
Associate Professor of Marketing, 1978-1985
Assistant Professor of Marketing, 1973-1978

FEDERAL TRADE COMMISSION, Bureau of Economics, 1979-1980
Visiting Marketing Professor, Division of Consumer Protection

PUBLICATIONS

Refereed Journal Publications

1) "Effects of Donor Recruitment Methods on Population Responses," with E.L. Wallace, *Transfusion*, pp. 159-164 (March-April 1975).
2) "A Study of Prices and Market Shares in the Computer Mainframe Industry," with B.T. Ratchford, *Journal of Business*, pp. 194-218 (April 1976).
3) "Some Relationships of States' Characteristics to the Passage of Consumer Legislation," *Journal of Consumer Affairs*, pp. 177-182 (Summer 1977).
4) "Perceptions of Uncertainty Within A Buying Task Group," with R.E. Spekman, *Industrial Marketing Management*, pp. 395-403 (December 1977).
5) "Adoption of Consumerism Policy by the States: Some Empirical Perspectives," *Journal of Marketing Research*," pp. 125-134 (February 1978).
6) "A Study of Prices and Market Shares in the Computer Mainframe Industry: Reply," with B.T. Ratchford, *Journal of Business*, pp. 125-135 (January 1979).
7) "Evaluation of Consumer Education Programs," with P.N. Bloom, *Journal of Consumer Research*, pp. 270-279 (December 1979).
8) "Marketing and Marketing Research for Information Scientists," with P. Wasserman, *Journal of Library Administration*, pp. 27-31 (Fall 1982).
9) "Viewer Miscomprehension of Televised Communications: A Comment," with R. Yalch, *Journal of Marketing*, pp. 27-31 (Fall 1982). Reprinted in *Mass Communication Review Yearbook Vol. 4*, E. Wartella, D.C. Whitney and S. Windall (eds.), Beverly Hills: Sage Publications, pp. 145-150 (1983).
10) "Unit Pricing Ten Years Later: A Replication," with D.A. Aaker, *Journal of Marketing*, pp. 118-122 (Winter 1983).
11) "Recent Developments in FTC Policy on Deception," with J.E. Calfee, *Journal of Marketing*, 82-103 (July 1986).
12) "Inferential Beliefs in Consumer Evaluations: An Assessment of Alternative Processing Strategies," with R.A. Smith, *Journal of Consumer Research*, pp. 363-371 (December 1987).
13) "Consumer Skepticism of Advertising Claims: Testing Hypotheses from Economics of Information," with D.B. Smith and J.L. Swasy, *Journal of Consumer Research*, pp. 433-441 (March 1990).
14) "Normative Values for the Beck Anxiety Inventory, Fear Questionnaire, Penn State Worry Questionnaire and Social Phobia an Anxiety Inventory," with M. Gillis, D. Haaga and A.F. Ford, *Psychological Assessment*, vol. 7, no. 4, pp. 450-455 (1995).

15) "Can Consumers Interpret Nutrition Information in the Presence of a Health Claim? A Laboratory Investigation," with M. Hastak, A. Mitra and D.J. Ringold, *Journal of Public Policy and Marketing*, vol. 15, no. 1, pp. 16-27 (1996).
16) "Informing Buyers of Risks: An Analysis of the Marketing and Regulation of All-Terrain Vehicles," with M.B. Mazis, *Journal of Consumer Affairs*, pp. 90-123 (Summer 1996).
17) "Can the Educationally Disadvantaged Interpret the FDA-Mandated Nutrition Facts Panel in the Presence of an Implied Health Claim," with M. Hastak, A. Mitra and D. J. Ringold, *Journal of Public Policy and Marketing*, vol. 18, no. 1, pp. 106-117 (Summer 1999).
18) "Consumer Search for Information in the Digital Age: An Empirical Study of Pre-Purchase Search for Automobiles," with L. Klein, *Journal of Interactive Marketing*, vol. 17, no. 3, pp. 1-22 (Summer 2003).
19) "Application of Research on Consumer Complaint Rates to the Estimation of the Financial Impact of Prospective Product Defects," (with D. Scheffman and D. Weiskopf), *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior*, pp. 130-141 (Fall 2004)
20) "The Impact of the *Daubert* Decision on Survey Research Used in Litigation," *Journal of Public Policy and Marketing*, pp. 234-252, Fall 2005. (The members of the Editorial Review Board voted this article to receive the "Kinnear Award," as the best article published in *JPPM* from 2003-05.)

Refereed and Special Session, Proceedings Publications

1) "A Multivariate Investigation of Market Structure," refereed, *Combined Proceedings of the American Marketing Association*, pp. 177-182 (1974).
2) "The Status of Consumer Behavior: Some Empirical Perspectives," with P.G. Kuehl and R.F. Dyer, refereed, *Advances in Consumer Research*, vol. 2, pp. 51-61 (1975).
3) "Classifying and Measuring Deceptive Advertising: An Experimental Approach," with P.G. Kuehl and O. Reksten, refereed, *Combined Proceedings of the American Marketing Association*, pp. 493-497 (1975).
4) "Public Policy, The Sherman Act and the IBM Antitrust Case," with B.T. Ratchford, refereed, *Combined Proceedings of the American Marketing Association*, pp. 593-596 (1975).
5) "A Functional Analysis of Macro and Micro Marketing Systems," with W. Nickels, referred, *Proceedings of the Southern Marketing Association*, pp. 76-79 (1975).
6) "Measuring the Impact of Consumer Survival Kit: Some Preliminary Results," with P.N. Bloom and J.W. Harvey, refereed, *Advances in Consumer Research*, vol. 3, pp. 388-391 (1976).

7) "Consumer Research and Public Policy Formation: The Case of Truth in Contributions," with P.G. Kuehl and P.N. Bloom, refereed, *Combined Proceedings of the American Marketing Association*, pp. 445-450 (1976).

8) "An Assessment of the Consumer Protection Act of 1975," refereed, *Combined Proceedings of the American Marketing Association*, pp. 209-212 (1976).

9) "A Multivariate Analysis of State Consumerism Policy," refereed, *Proceedings of the Annual Meeting of the American Institute for Decision Sciences*, pp. 211-213 (1976).

10) "The Promotion of Medical and Legal Services," with P.G. Kuehl, refereed, *Proceedings of the American Marketing Association*, pp. 39-44 (1977).

11) "Consumer Protection Agencies: Their Budgets and Activities," refereed, *Proceedings of the American Marketing Association*, pp. 93-96 (1978).

12) "Box-Jenkins Analysis of a Retail Sales Intervention," with F.B. Alt, refereed abstract, *Northeast Aids Proceedings*, pp. 28-32 (1979).

13) "The Industrial Marketing Implications of Organizational Hierarchy Within Purchasing Departments," with R.E. Spekman, refereed, *Proceedings of the American Marketing Association*, pp. 178-181 (1981).

14) "Consumer Research Issues at the Federal Trade Commission," with J. Calfee and T. Maronick, refereed, *Advances in Consumer Research*, vol. 19, pp. 263-267 (1983).

15) "Consumer Psychology Research Needs at the Federal Trade Commission," with J. Calfee, refereed, *Proceedings of the Division of Consumer Psychology*, American Psychological Association, pp. 118-122 (1984).

16) "Market Forces, Information and Reduced Flammability Cigarettes," with J. Calfee, Special Session, *Advances in Consumer Research*, vol. 14, pp. 274-278 (1987).

17) "An Empirical Test of the Search, Experience and Credence Attributes Framework," with D.B. Smith and J. Swasy, special session, *Advances in Consumer Research*, vol. 15, pp. 239-243 (1988).

18) "Economics, Information and Consumer Behavior," with J. Calfee, special session, *Advances in Consumer Research*, vol. 15, pp. 234-238 (1988).

19) "Cigarettes in the Popular Press, 1930-1960: Preliminary Research," with D.J. Ringold and M. Rogers, special session, *Advances in Consumer Research*, vol. 17, pp. 467-473 (1990).

20) "Regulation of Advertising in the European Economic Community: An Overview," special session, *European Advances in Consumer Research*, vol. 1, pp. 559-564 (1993).

21) "Consumer Search for Information in the Digital Age: an Empirical Study of Pre-Purchase Search for Automobiles" (with Lisa Klein) *Advances in Consumer Research.* (2001).

Articles in Books

1) "Problems in Education and Training in Marketing and Marketing Research in Information Science," with P. Wasserman, *Education and Training: Theory and Provision*, Federation International De Documentation: The Hague, pp. 105-112 (1979) (a different version of the *Journal of Library Administration* article).
2) "Label Warnings in OTC Drug Advertising: Some Experimental Results," with P.G. Kuehl, *Current Issues and Research in Advertising*, J.H. Leigh and C.R. Martin (eds.), Univ. of Michigan Press: Ann Arbor, pp. 115-130 (1979).
3) "Using Marketing Techniques to Increase Immunization Levels: A Field Experiment," with R.E. Spekman, *Exploring and Developing Government Marketing*, S. Permut and M. Mokwa (eds.), New York, Praeger Press, pp. 304-317 (1981).
4) "The FTC's Product Defects Program and Consumer Perceptions of Product Quality," with J. Calfee, *Perceived Quality*, J. Jacoby and J. Olson (eds.), Lexington, Massachusetts, Lexington Books, pp. 175-191 (1985).
5) "The Economics of Information: Research Issues," with D.B. Smith and J.L. Swasy, *Marketing and Advertising Regulation*: *The Federal Trade Commission in the 1990s*, P. Murphy and W. Wilkie (eds.), pp. 300-312 (1990).
6) "Expert Depositions," with Jack G. Stern and Kimo S. Peluso *Taking and Defending Depositions 2009*, co-chairs Randi W. Singer and Roland K. Tellis, Practising Law Institute, New York, pp. 177-2002 (2009).

Books Edited

1) *Marketing and the Library*, New York, Haworth Press (1984).
2) *AMA Educators Proceedings*, co-edited with R.L. Lusch, G.L. Frazier, R.D. Howell, C.A. Ingene, M. Reilly and R.W. Stampf, Chicago, American Marketing Association, 403 pages (1985).
3) *AMA Educators Proceedings*, co-edited with S.P. Douglas, M.R. Solomon, V. Mahajan, M.I. Alpert, W.M. Pride, G.L. Frazier, J.C. Anderson and P. Doyle, Chicago, American Marketing Association, 287 pages (1987).

Research Reports

1) "A Study of Parks, Recreation and Open Space in Prince George's and Montgomery Counties, Maryland," with R.W. Janes and P.G. Kuehl, for Maryland National Capital Park and Planning Commission, 253 pages (1975).
2) "A Feasibility Study to Identify Methods to Increase the Levels of Immunization of Children Receiving Services from BCHS Funded Clinics," with R.E. Spekman, prepared for Bureau of Community Health Services, D.H.E.W., 97 pages (1979).

3) "The Effects of Reduced Flammability Cigarettes on Smoker Behavior," with J.P. Brown and J.E. Calfee, prepared for the National Bureau of Standards, 65 pages (October 1986).
4) "Final Report on Undercover Investigation of ATV Dealers," prepared for Consumer Product Safety Commission, 53 pages (1989).
5) Preliminary Report "ABA Digital Evidence Project Survey on Electronic Discovery Trends and Proposed Amendments to the Federal Rules of Civil Procedure," prepared for ABA Section of Science & Technology, 64 pages (2005).

PRESENTATIONS

"The Role of Dispute Mediation in Consumer Protection," presented at Meetings of the Practicing Justice Institute, Marymount College, New York City (1978).

"The Use of Consumer Research in the Bureau of Economics, FTC," presented at Association for Consumer Research Conference, San Francisco (1979).

"The FTC's 1983 Deception Policy Statement," presented at Southern Marketing Association (November 1984).

Proposed, organized and chaired special session on "FTC Policy Toward Deception," at Association for Consumer Research Conference, Washington, D.C. (1984).

As faculty member at AMA Doctoral Students Consortium at Notre Dame, presented "Economics of Information, Advertising and Public Policy (1986) (same session was repeated at 1987 Consortium at NYU).

Proposed, organized and chaired special session on "Cigarettes and Regulation: Unintended Consequences?" at Association for Consumer Research Conference, Toronto (1986).

"An Economics of Information Approach to the Regulation of Advertising," with J. Calfee, Winter Educators Conference of the American Marketing Association (1988).

"Signals in Advertising: Preliminary Results," with D.B. Smith and J.L. Swasy, special session, Winter Educators Conference of the American Marketing Association (1991).

"Content Analysis of Advertising for All-Terrain Vehicles, 1980-1987," presented to the marketing faculty at INSEAD, Fontainebleu, France and to marketing faculty at Catholic University at Leuven (1992).

"Can Consumers Interpret Nutrition Information in the Presence of a Health Claim? A Laboratory Investigation," with M. Hastak, A. Mitra and D.J. Ringold, presented at the Annual Meeting of the Association for Consumer Research (1993).

"Interpretation of Health Claims and Nutrition Information by Disadvantaged Consumers," with A. Mitra, M. Hastak and D.J. Ringold, presented at the Annual Meeting of the Association for Consumer Research (1994).

"The Effects of Health Claims on Consumer Interpretation of FDA-mandated Nutrition Disclosures: a Mall Intercept Study," with M. Hastak, A. Mitra and D.J. Ringold, presented at the Annual Marketing Association Public Policy Conference (1997).

"Regulation of Advertising on the Internet," with J. Calfee, presented at the Annual American Marketing Association Public Policy Conference (1997).

"Consumer Search on the Internet," with Lisa Klein, presented at the Annual American Marketing Association Public Policy Conference (1999).

"Consumer Search on the Internet: Predictions from the Economics of Information," with Lisa Klein, presented at the Annual Meeting of the Association for Consumer Research (1999).

"Philosophy of Science and the Supreme Court: The Impact of the *Daubert* Decision on Survey Research Used in Litigation," presented at Kenan-Flager School of Business, UNC at Chapel Hill (Fall 2002) and Marketing Faculty Consortium at Georgetown University (April 2003)

"Philosophy of Science and the Supreme Court: The Impact of the *Daubert* Decision on Survey Research Used in Litigation," presented at the Annual American Marketing Association Public Policy Conference (2003).

PROFESSIONAL ACTIVITIES/MEMBERSHIPS

Manuscript reviewer for the American Marketing Association Educators' Conferences, 1976-present; Southern Marketing Association Conferences, 1977-1978; *Journal of Marketing*, 1979-1981, 1999-2001; *Journal of Business Research*, 1980; Association for Consumer Research Conferences, 1980, 1982, 1983, 1985-1990, 1999-2000 and *Journal of Consumer Research*, 1987-1992, 1995, 1997-2001, *Journal of Marketing Research*, 1997-2000, *Journal of Consumer Psychology*, 1999.

Reviewer for AMA Dissertation Competition, 1983, 1987, 1995. Proposal reviewer for the National Science Foundation, the Ford Foundation and the Department of Energy.

Discussant at AMA Consumerism Workshop, 1976; Southern Marketing Association Conference, 1977; American Marketing Association Educators' Conference, 1978-1980; Association for Consumer Research Conference, 1978-

1980; AMA Professional Services Marketing Conference, 1981 and Public Policy Conference, 1993, 1994, 1995, 1997.

Member of Program Committee, Association for Consumer Research meeting, 1980, 1984, 2000.

Co-Chairman of AMA Doctoral Students Consortium, 1981.

Faculty participant at AMA Doctoral Students Consortium, 1980, 1986 and 1987.

Elected to Board of Directors, Association for Consumer Research, 1982-1985.

Editorial Review Board, *Journal of Marketing*, 1982-1997.

Editorial Review Board, *Journal of Public Policy and Marketing*, 1983-present.

Special Editor, Marketing and Information Science Issue, *Journal of Library Administration*, 1983-1984.

Public Policy Track Chairman, Educators' Conference of the American Marketing Association, 1985, 1987, 2001.

Book Review Editor *Journal of Public Policy and Marketing*, 2001 to 2004.

Appointed as representative from American Marketing Association to "Census Advisory Committee of Professional Associations" for 2010 United States Census.

GRANTS, CONTRACTS AND AWARDS RECEIVED

Received competitively-bid contract from the Maryland National Park and Planning Commission for *A Survey of Parks, Recreation and Open Space in Prince George's and Montgomery Counties, Maryland*, with R.W. Janes and P.G. Kuehl, $33,878 (Spring and Summer 1975).

Received contract from National Institute of Health to develop curriculum for a two-day Cancer Communications Marketing Seminar, $8,000 (Summer 1978).

Received contract for "A Feasibility Study to Identify Methods to Increase the Levels of Immunization of Children and Adolescents Receiving Services from BCHS Funded Clinics," with Robert Spekman, from Bureau of Community Health Services, DHEW, $9,972 (Fall 1998).

Received contract for "The Effects of Reduced Flammability Cigarettes on Smoker Behavior," with John P. Brown, from Consumer Product Safety Commission and National Bureau of Standards, $19,925.

Course Release, Senate Research Committee, American University (Spring 1987 and Spring 1988).

Summer Research Grants, Kogod College of Business Administration, American University (1986 and 1987).

Received award for "The Effects of New Food Labels on Disadvantaged Consumers," with M. Hastak, A. Mitra and D. Ringold, from Marketing Science Institute, $26,000 (1993) (proposal was one of six funded out of 45 entries in MSI "Using Research to Help Society Competition").

Listed as one of "The Best Researchers in Marketing," *Marketing Educator*, p. 5 (Summer 1997).

Received the "Kinnear Award" for the best article published in the *Journal of Public Policy and Marketing* between 2003 and 2005 (February 2007).

Selected as "Outstanding Scholar," Kogod School of Business, 2006.

CONSULTING WORK

American Automobile Association
Organization of American States
Insituto De Investigaciones Electricas, Mexico
Dames and Moore, Inc.
Public Broadcasting System
Bureau of Economics, Federal Trade Commission

EXPERT AND EXPERT WITNESS ASSIGNMENTS SINCE 2005

Polo Ralph Lauren v. United States Polo Association
Paul Weiss (2005)
Expert Report, Rebuttal Report, deposition, testimony at trial
Schick Manufacturing, Inc. v. The Gillette Company (P&G)
Ropes & Gray (2005)
Weil, Gotshal & Manges (2006)
Expert Report, Rebuttal Report, deposition, testimony at hearing
Omni Pacific, Inc. v. OmniBrands, Inc.
DLA Piper (2005)
Expert Report
USA v. QVC, Inc.
Baker & Hostetler (2005)
Expert Report, deposition
9 Squared, Inc. v. Moviso, LLC and InfoSpace, Inc.
Holland & Hart (2006)
Expert Report, deposition
Medi-Flex, Inc. v. Nice-Pak Products, Inc and Professional Disposables, Inc.
Lerner, David, Littenberg, Krumholz & Mentlik (2006)
Declaration, deposition

Align Techology, Inc. v. Orthoclear, Inc. and Orthoclear Holdings, Inc.
Paul, Hastings, Janofsky and Walker LLP (2006)
Expert report, deposition
Shuttlesworth et al. v. Carleton Sheets and American Marketing Systems, Inc.
Sachnoff & Weaver (2006)
Expert Report
American Century Proprietary Holdings, Inc. v. American Century Casualty Company and American Century Claims Service, Inc.
Leydig, Voit and Mayer (2006)
Expert Report, deposition
Phar-Mor, Inc. v. McKesson Corporation t/d/b/a and McKesson Drug Company
Shepard, Mullin, Richter & Hampton (2006)
Expert Report, deposition
Leggett & Platt, Incorporated et al. v. Vutek, Inc.
Howrey LLP (2006)
Expert Report, deposition
Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse
Husch & Eppenberger, L.L.C. (2006)
Expert Report, deposition
Louis Vuitton Malletier S.A. v. Haute Diggety Dog, LLC et al.
Arent Fox, PLLC (2006)
Expert Report
Ohio Savings Bank d/b/a Amtrust Bank v. Amtrust Mortgage Corporation
Benesch, Friedlander, Coplan & Aronoff LLP (2007)
Expert Report, deposition, testimony at Daubert hearing
Ecce Panis, Inc. v. Maple Leaf Foods USA Inc.
Lerner, David, Littenberg, Krumholz & Mentlik (2007)
Declaration, testimony at evidentiary hearing
Eric Bischoff v. Boar's Head Provisions Co., Inc, et. al
Weil, Gotshal & Manges (2007)
Surrebuttal report, deposition
Rexall Sundown Inc. v. Perrigo Company
Kelley Drye Collier Shannon (2008)
Expert report, deposition
Pernod Ricard LLC v. Bacardi USA Inc.
Kelley Drye Collier Shannon (2008)
Rebuttal report, deposition, testimony at trial
The Evercare Company v. 3M Company
Paul Weiss (2008)
Rebuttal report, deposition
DGG Properties Co., Inc. v. Giovanni's II, Inc.
Kelley Drye & Warren (2009)
Expert Report
Lannett Company Inc. v. KV Pharmaceutical Company

Kenyon & Kenyon (2009)
Expert Report, deposition

Amway Corp. v. MonaVie et. al
Brinks, Hofer, Gilson and Lione (2009)
Expert report, deposition

The Hershey Company et al. v. Ptomotion In Motion, Inc.
Kaye Sholer LLP (2009)
Expert report, deposition.

Philip Morris USA v. Veles Ltd. et al.
Arnold & Porter (2009)
Expert report, deposition

Thoip (A Chorion Limited Company) v. The Walt Disney Company
Moses & Singer (2009)
Expert Report, deposition

Farberware Licensing Company, LLC v. Meyer Marketing Co., Ltd.
Dykema Gossett PLLC (2009)
Expert Report, deposition, testimony at trial

Julie Fitzpatrick and others v. General Mills and Yoplait USA Inc.
O'Melveny & Myers LLP (2009)
Expert report

THESIS COMMITTEES

Chairman of dissertation committees for George Coan, Dennis Pitta, Debra Ringold and Darlene Smith.

Member of dissertation committee for Bill Grazer, Michael McGinnis, Dennis McDonald, Frank Franzak, Ronald Hill and Dennis McDonnell.

COMMITTEE SERVICE AT AMERICAN UNIVERSITY

Kogod Rank and Tenure Committee (1987-1988, 1995-1998, 2004-2005)
Faculty Senate Research Committee (1985-1989)
Marketing Department Faculty Recruiting Committee (1985-2007)
Ad hoc Research committee, KSB (1986-1989)
Committee on Faculty Relations (1988-1989)
Dean's Executive Committee (1989-1994, 1999-2001, 2004, 2006-2007)
Executive Committee of the AU Chairs (1993-1994)
AU Presidential Search Committee (1993-1994)
President's Committee on Strategic Planning (1995-1997)
AU Provost's Committee on Academic Programs (1995-1997)
Director of MBA Field Studies (1995-1997)
Chair of Executive Education Committee (1998)
Faculty Advisor Men's Soccer (2002 to 2007)
Associate Dean Search Committee, KSB, (2003)

UNDERGRADUATE COURSES TAUGHT

“Principles of Marketing”
“Marketing Research Methods”
“Fundamentals of Marketing and Business for Communications”

GRADUATE COURSES TAUGHT

“Marketing Research Methods”
“Doctoral Seminar in Marketing and Public Policy”
“Research Methodology for Doctoral Students”
“Consumer Behavior”
“Marketing Management”

November 22, 2009

Rebuttal Testimony of John E. Calfee, Ph.D.

Submitted on Behalf of the Canadian Claimants Group
Docket No. 2008-2 CRB CD 2000-2003

My name is John E. Calfee. I am submitting this testimony in the Rebuttal Phase of the Copyright Royalty Judges' proceedings in the matter of the Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds. I offer this testimony on behalf of the Canadian Claimants Group (CCG) and not as an employee of the American Enterprise Institute, which does not take institutional positions on specific legislation, litigation, or regulatory proceedings. I have been asked to address the written and oral direct testimonies of Linda M. McLaughlin and Harold Singer, with reference to other testimony when necessary.

1. Qualifications

I received my Ph.D. in economics in 1980 from the University of California at Berkeley. My dissertation was on potential demand for electric vehicles. The goal of that research was to estimate consumer demand for products that were not in the marketplace. To deal with the fact that the market could not provide prices and thus could not permit consumers to reveal their valuation of competing products, I used a combination of survey research and econometric methods developed by my thesis supervisor, Daniel McFadden. My first job after receiving my Ph.D. was at the Bureau of Economics at the Federal Trade Commission, where I was a staff economist and later a Deputy Assistant Director and Special Assistant to the Director of the Bureau of Economics. At the FTC, I became familiar with interactions between government and industry and observed the ways in which government regulators took account of the preferences and interests of various parties affected by their regulations, including the role of public comments in regulatory rulemaking. When at the FTC and since then, most of my research and publications have focused on the operation of regulated markets. Among the specific topics I have written on are: the measurement of consumer demand in the absence of actual market prices (as in my research with Clifford Winston on the value of avoiding congestion when commuting), the influence of regulation on health information in food advertising and on the content of pharmaceutical advertising, the impact of price regulation on research and development, and the interactions between the pharmaceutical industry and the Food and Drug Administration. I have also testified in hearings before the U.S. House of Representatives and the U.S. Senate, and before the Food and Drug Administration.

Finally, I provided written rebuttal testimony for the Canadian Claimants Group in the 1990-1992 and 1998-1999 Cable Royalty Distribution Proceedings. I was not called to provide oral testimony in either hearing, however.

A copy of my CV is attached as Appendix A.

2. McLaughlin Testimony

I address three main points in the McLaughlin testimony: (1) Whether the compulsory licensing system for distant signal fees is completely arbitrary; (2) The relationship between distant signal carriage fees and relative value; and (3) The value of Canadian distant signals carried by systems paying the minimum fee.

A. Is the compulsory licensing system for distant signal copyright royalties completely arbitrary?

In her testimony, McLaughlin states that that "The payment rules [for distant signal fees] are arbitrary; they were established by legislative compromise, not relative market value." (McLaughlin Written Direct at 3.) In support, she cites (Id. at 3, n. 4) the November 19, 1982 findings of the Copyright Royalty Tribunal: "The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment on the part of cable operators [footnote in original omitted]." (*Copyright Royalty Tribunal Adjustment of the Royalty Rate for Cable Systems*, Docket No. CRT 81-2, Nov. 19, 1982, 47 FR 52146 at 54.) In general, her testimony suggests that the compulsory licensing plan generating the fees at issue in these hearings is arbitrary and therefore the fees cannot be related to relative value. The purpose of this compulsory licensing plan, however, is to avoid the huge transaction costs that would be required for direct negotiations among a large number of buyers and sellers of programming content. The task is greatly complicated by the fact the systems must import entire signals (i.e., everything that is broadcast by a specific Canadian, Mexican or American distant station), rather than selecting specific programs for distant carriage. A recent report from the U.S. Copyright Office describes the plan's origins:

> "At the time, it was not realistic for hundreds of relatively small cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license. Section 111 permits cable systems to carry distant broadcast signals, while compensating copyright owners for the public performance of their works, without the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs." (*Satellite Home Viewer Extension and Reauthorization Act Section 109*: a Report of the Register of Copyrights, U.S. Copyright Office, June 2008, at 3.)

Any such compulsory licensing system is bound to introduce anomalies (as explained in more detail below), including seemingly arbitrary fees. But the parties with the greatest interest in the compulsory licensing system at issue – including cable system owners and the diverse groups of owners of programming copyrights – were involved in creating these arrangements. (*See* House Report No. 94-1476, 17 USC §111, at. 8, below.) These and other interested parties have been free to suggest modifications during the many years in which the system has been in force. As a result, it is most unlikely that the licensing fee arrangements being enforced by Copyright Royalty Judges are completely arbitrary and bear no relationship to the underlying economic forces or to the preferences of copyright owners and cable system operators. Indeed, it is clear from various sources that the compulsory licensing system is a creature of legislation informed by continued industry input (from both buyers and sellers of distant programming), and that the industry has adapted its practices to these rules. For example, the June 2008 report of the Register of Copyrights, "Satellite Home Viewer Extension and Reauthorization Act Section 109 Report," notes that "Congress enacted Section 111 after years of industry input . . ." (at. i), and that "Any changes to the Section 111 statutory structure will disrupt settled expectations" (at. ix). The National Association of Broadcasters, in its July 2, 2007 comments to the U.S. Copyright Office ("Comments of the National Association of Broadcasters," In re Section 109 Report to Congress, Docket No. 2007-1, at. 24-25), emphasized that historic FCC carriage rules, including carriage rates, "reflected market realities that continue to exist today, and have produced longstanding carriage patterns upon which stations, cable operators, and cable subscribers have come to rely" (p. 25).

In fact, there are numerous ways in which essential features of the fee system reflect economic and institutional realities. An example is the assignment of DSE values to various classes of distant signals, something the McLaughlin testimony criticizes in some detail. (McLaughlin Written Direct at 6-7). On the whole, these assignments appear to reflect the nature of the programming carried by these classes when DSE values were assigned. Thus distant network-affiliated stations mainly carried programs that were also available locally, although not necessarily in the same time slots. Similarly, to varying degrees, the same would be true of public television stations to the extent they broadcast programming obtained through the Public Broadcasting Service. The Canadian stations, on the other hand, carried large amounts of unique programming that was not otherwise available to American systems. All this is consistent with the relative magnitude of DSE values.

Much of this reasoning is illustrated in the House of Representatives report on 17 U.S.C. § 111, the governing statute. That report states:

> By contrast, their retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing.
>
> In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programing carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total. (House Report No. 94-1476, 17 U.S.C. §111, p. 8.)

B. The relationship between distant signal carriage fees and relative value.

The fee generation system at issue in these proceedings can be broken into two components: (1) the determination of distant signal royalty fees to be paid by cable systems; and (2) the allocation of aggregate paid-in fees to various signal types. I address the pay-in structure first, and then turn to allocation. In both cases, the last Copyright Arbitration Royalty Panel (CARP) has emphasized that the goal is not to ascertain the actual market value of various programming, but only the relative value of programming. (CARP, *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds,* Oct. 21, 2003, at 10 ff.).

McLaughlin states that royalty fees for distant signals bear no relationship to relative value. Her first argument in support of this proposition is that fees are generated by a compulsory licensing system that was "established by legislative compromise, not relative market value." (McLaughlin Written Direct at 3; Transcript of McLaughlin Oral Testimony at 628.) From this, she infers that fees must be unrelated to relative value. This conclusion is not warranted. The simple fact that fees arise from compulsory licensing law does not imply that fees are unrelated to relative value. As I described above, the compulsory licensing mechanism used for distant signal carriage fees was not constructed in a completely arbitrary fashion, but rather was the result of compromises among interested parties including those paying and those receiving royalties, all with the goal of eliminating unreasonably costly transactions in favor of a simple fee structure that is designed only to provide a reasonable relationship, on average, among the various interests.

McLaughlin also describes how the compulsory licensing system can create anomalous outcomes. For example, a higher-valued signal might generate a lower fee than a less-valued signal. (McLaughlin Written Direct at 3-4.) In her numerical example, she shows that if two signals provide different relative value ($25 and $75), but generate the same fees ($20 each), there will either be a disparity between relative values and fee allocation, or a disparity between relative value and what is actually paid for the signals. But this anomaly is simply a result of setting equal fees for two signals in the same class. This kind of thing is unavoidable in a compulsory licensing mechanism, simply because fees are not separately negotiated for each distant signal.

To address McLaughlin's claim that fees and relative values are essentially unrelated, one has to examine how the fee system works in practice. Much of McLaughlin's testimony focuses on specific aspects of fee calculation for systems that subscribe to more than one distant signal. An examination of these aspects of compulsory licensing system reveals strong relationships between fees and the relative value of distant signals.

i. **Carriage fees and service tiers:** One aspect of the fee system addressed by McLaughlin is that royalties are calculated as a percentage of cable system revenues for the relevant service tiers. Because systems can exercise considerable discretion in arranging tiers, the effect is to alter royalties fees paid in even when distant signal carriage is unchanged. In particular, systems probably reduce carriage fees by placing distant signals in relatively low-priced tiers, which reduces copyright royalties because they are calculated as a percentage of tier revenues. This applies to all distant signals, however, and appears to have no bearing on the extent to which fees for various distant signals are correlated with relative value.

ii. **The designation of 3.75% signals:** McLaughlin also describes the arbitrariness of the designation of 3.75% signals. Under certain circumstances, when a system imports two or more distant signals, one or more of those signals must be paid for at the 3.75% rate, in which case the signal generates a fee of 3.75%, nearly four times the 0.956% for the first signal. When the cable operator can select which signal to treat as the 3.75% signal or signals by designating one or more signals as "permitted", the designation made by the cable system may be seen as arbitrary. The McLaughlin testimony emphasizes that this anomaly is "not minor" (McLaughlin Written Direct at 6). The testimony simply describes the 3.75% system, however. It does not provide any reason to think that the anomaly's practical effects would be significant, however, nor does it suggest how to deal with the anomaly. Suppose a system initially carries one distant signal and pays the minimum fee of 0.956%. Suppose it adds a second signal that triggers a 3.75% designation. That increases the fee from 0.956% to 4.706% (3.75% + 0.956%). But the system could simply drop the first signal and replace it with the second one, keeping the fee at 0.956%. By choosing to keep both signals, the system reveals that each one is worth at least the difference between the minimum fee and the new fee, i.e., 3.75%. For example, suppose a system is considering the carriage of two distant signals, one with a value to the system of 3.5% and the other, 2.5%. Either signal would be worth carrying while paying the minimum fee of

0.960%, but the first signal would provide more value (3.5%), yielding a net value after fees of 2.54% (3.50% minus 0.96%). If the system adds the second signal, total value would increase to 6.0%, but total fees would increase by 3.75%, from 0.96% to 4.706%, so that net value would decrease from 2.54% to 1.294% (6.0% minus 4.706%). The system would stick with just the first signal even though the two signals together would be worth substantially more than the total fee including the 3.75%. This reflects the fact that the first signal is a relative bargain, costing only the minimum fee, compared to the second signal, which costs 3.75%. If the system carries both signals, each must be worth at least 3.75%. If both signals were worth 3.5%, for example, carriage of just one would yield net value of 3.5% - 0.96% = 2.54%, while carriage of both would yield net value of 7.0% - 4.706% = 2.29%, which is less than the 2.54% yield from carrying only one signal.

This logic carries through regardless of which signal is designated as the 3.75% signal. A reasonable way to deal with this situation is to split the royalties equally among the originators of the signals. I have been informed that in order to reflect these conditions, Cable Data Corporation (CDC) has examined the cable systems that carried a distant Canadian station and paid 3.75% royalties and reallocated the royalties so that both distant signals receive an equal allocation of the combined base and 3.75% royalty payments.

iii. **The impact of the declining fee scale for multiple distant signals:** A third aspect of the fee schedule for distant signals discussed by McLaughlin is the declining or "sliding" fee scale: 0.956% of the system's gross receipts for the first DSE, 0.630% for the second through fourth, and 0.296% for the rest (these rates were slightly lower during period 2000-1). This sliding scale is the outcome of the legislative process discussed above as involving the parties with the greatest interest in constructing a reasonably efficient mechanism to eliminate the costs of multitudes of separate negotiations and transactions. The fee schedules in effect in 2000 through 2003, i.e., the actual royalty rates and the revenues required to be a Form 3 system, were the result of settlement of the inflation rate adjustment proceeding between cable operators and copyright owners. (*See* Library of Congress, *Adjustment of Cable Statutory License Royalty Rates*, 65 Fed Reg. 64622 (Oct 30, 2000).) The fee schedule is also a reasonable way to deal with the economic reality that not all distant signals are of equal value, so that systems tend to select the most valuable signals first when deciding which and how many signals to import. The designation of which of two or more signal generates the initial, largest fee, is often arbitrary, however. McLaughlin argues that this is a significant flaw in the compulsory licensing system. But as she points out in her written testimony, "As a practical matter, during 2000-03 only a very small amount of importation occurred above one DSE. The average subscriber in Form 3 systems with distant signals received 1.2 DSEs." (McLaughlin Written Direct at 8.)

The declining fee schedule appears to be an example of how seemingly striking anomalies in compulsory licensing can turn out to be of little practical importance. This is illustrated in a series of calculations of fee data. The rebuttal testimony of David Bennett in the prior distribution proceedings over the 1998 and 1999 royalty pool testimony included the results of a "min/max" exercise in which Canadian base rate royalties were calculated twice, once with the Canadian distant signal designated to generate the highest possible fee (0.893% at the time, rather than 0.956% for the present proceedings), and again with a Canadian signal designated to generate the lowest possible fee (usually the 0.563% rate then used for 2nd through 4th signals), depending on the number of signals actually carried by each cable system carrying a Canadian distant signal. The results, based on the Bennett testimony, are reproduced in Table 1. (See Exhibit CDN-5, Tab C, at 4-5.) The difference was quite small. For period 1999-2, for example, the maximum amount of $1,428,206 is only about 10% greater than the minimum amount of $1,293,624.

Table 1:
Base Royalty Fee Min/Max Calculation,
1991-2, 1992-2, 1998-2, and 1999-2

Accounting Period	Minimum Canadian Base Rate Royalties	Actual CDC Allocation of Base Rate Royalties	Maximum Canadian Base Rate Royalties	Min Base Fee As % of Actual	Min Base Fee As % of Actual
1991-2	$1,010,951	$1,262,459	$1,573,058	80.08%	124.60%
1992-2	$1,072,095	$1,337,176	$1,654,633	80.18%	123.74%
1998-2	$1,050,862	$1,097,286	$1,183,725	95.77%	107.88%
1999-2	$1,293,624	$1,317,249	$1,428,206	98.21%	108.42%

In the present hearings, rebuttal testimony from Jonda Martin, President of the Cable Data Corporation, will provide a new min/max analysis for the years 2000 through 2003. The results of Ms. Martin's analysis are presented in Table 2. Just as in the prior proceeding, the differences are quite small. For the year 2003, for example, the maximum amount of $4,109,290 is about 11% greater than the minimum amount of $3,622,282.

Table 2:

Base Royalty Fee Min/ Max Calculation, 2000-2003

Year	Minimum Canadian Base Rate Royalties	Actual CDC Allocation of Base Rate Royalties	Maximum Canadian Base Rate Royalties	Min Base Fee As % of Actual	Max Base Fees As % of Actual
2000	$2,649,851	$2,760,030	$2,899,995	96.01%	105.07%
2001	$2,712,491	$2,815,634	$2,955,502	96.50%	104.75%
2002	$3,298,580	$3,456,589	$3,660,761	95.43%	105.91%
2003	$3,622,282	$3,800,001	$4,019,290	95.32%	105.77%

As can be seen, the CDC fee allocation is roughly the mid-point, within about 5% in either direction, of the highest and lowest possible royalty allocation for Canadian signals. It is clear that during 2000-2003, as in 1998-1999, fee generation as reported by CDC is quite robust with respect to the assignment of the order of signals and their sliding fees.

iv. **The assignment of DSE values to classes of distant signals:** Finally, a fourth aspect of the distant signal fee schedule discussed by McLaughlin pertains to the assignment of 0.25 versus 1.0 DSE to various classes of distant signals. Her testimony argues that Canadian signals are 1.0 DSE even though they carry significant programming that is duplicative of local programming, as do network stations, which are only 0.25 DSE signals. The testimony does not indicate the extent of duplicative programming, however, and evidence produced in the CCG's direct case indicates that the bulk of Canadian distant signal programming is Canadian in origin. (*See* Testimony of Janice de Freitas, Exhibit CDN-1 at 6-8, and Tab CDN-1-Q.) In any event, this is essentially just a criticism of the legislative findings that led to the structure of the compulsory licensing system. In my earlier discussion of how the compulsory licensing was created through legislation, it was clear that the determination of DSE weights was informed by discussion among the interested parties of such central issues as the extent of duplicative programming among distant and local signals.

C. The value of Canadian distant signals carried by systems paying the minimum carriage fee.

Cable systems that carry 1.0 DSE or less are required to pay as the minimum fee, the base rate fee for 1.0 DSE, equal to 0.956% of combined revenues from the highest tier including a distant signal plus lower tiers (i.e., gross receipts). McLaughlin states that when cable systems pay the minimum fee, there is no reason to think that the distant signals carried by those systems provide significant value to those systems (McLaughlin Written Direct at 7-8). In particular, McLaughlin argues that distant Canadian signals can be assumed to be of negligible value to systems that carry no other distant signal and therefore pay the minimum fee. The implication is that to extent that the pool of paid-in fees consists of minimum fees from systems that subscribe to one or more distant signals, there is no reasonable way to assign relative value to these distant signals.

There are several reasons why we can assume that even for minimum-fee systems, all or nearly all distant Canadian signals are of substantial value, often comparable to or exceeding the minimum fee. The switch of WTBS from a broadcast signal to a cable network in 1998 provides a useful natural experiment for assessing the value of Canadian distant signals. In my rebuttal testimony in the 1998-1999 proceedings, I briefly noted that many Canadian signals were carried by systems paying the minimum fee, but that many or most of the those systems had previously carried Canadian signals in addition to a 1.0 DSE signal. In that analysis, I relied partly upon data from the CDC. For the current proceedings, I requested more comprehensive data from CDC. One item I also initially reviewed was Settling Parties' Exhibit SP-7, which was a report titled CDINDEX, containing a printout of detailed data by cable system. However, the report was incomplete for several years leading up to the WTBS switch in 1998; in particular, Exhibit SP-7 lacked information on WTBS carriage in the relevant years. I have since been provided with an updated version of this report containing complete data sets including TBS carriage. The replacement CDINDEX list of detailed cable system data is provided as Exhibit CDN-R-2-A to my testimony. CDC also provided me with the data for Table 3, below.

The CDC data show that in the period 1997-2, just before the WTBS switch, 95.2% of cable systems carried WTBS, which was a 1.0 DSE signal. Systems that also carried a Canadian distant signal had to pay at least the base fee of 0.956% plus 0.630% (the fee for a second DSE) of gross receipts. This indicates that for a typical system, the first Canadian distant signal was worth at least 0.630%. Canadian signals that were valued at less than 0.630% (which was also charged for the 3rd and 4th distant signal) would not have been carried.

Let us suppose, as the McLaughlin testimony suggests, that many of the Canadian signals carried after the WTBS switch were worth relatively little – say, 0.5% or less of gross receipts. If so, most of those signals would not have been carried before the WTBS switch because they would have incurred a fee of 0.63% after paying the basic fee for WTBS itself. McLaughlin's argument therefore predicts that we should observe a disparity between Canadian signal carriage before and after the WTBS switch, with substantially fewer signals being carried before the switch. This can be tested with data. Table 3 presents data for periods 1990-1 (the first half of 1990) through 2003-2 (the second half of 2003) on Form 3 systems (which account for almost all royalties). The table displays the number of Form 3 systems, the number and percentage of Form 3 systems with zero DSEs, the number with 1 or more Canadian distant signals, the number with exactly one Canadian distant signal, the number with two or more, and the number of Form 3 systems for which a Canadian distant signal is the only distant signal carried. It can be seen that during 1990-1 through 1997-2, periods in which WTBS was classified as a distant signal, very few systems carried only a Canadian signal and no other distant signal (2 systems at the most) – reflecting the fact that nearly all systems already carried WTBS at 1.0 DSE. This means that practically all systems importing a Canadian distant signal incurred a fee of 0.630%. Between 61 and 68 systems carried one or more Canadian distant signal, along with one or more other distant signals. Of those, between 47 and 51 (48 in 1997-1, 51 in 1997-2) carried exactly one Canadian distant signal.

Additional information about the value of Canadian signals can be inferred from the facts that virtually no systems carried only a single Canadian signal and no other distant signal, and that many systems carried more than one Canadian signal (again, see Table 3). The value of individual Canadian signals is bound to vary greatly among the various cable systems, as reflected in the frequent decision to carry more than one signal. It is most unlikely that each system importing a single signal happened to value it at exactly 0.63% or slightly more. Far more likely is that valuations, while all being at least 0.63%, ranged well beyond that. Similar reasoning, albeit with less force given the fewer number of signals involved, applies to the 2nd or 3rd or 4th signals in systems that imported more than one Canadian distant signal. The June 2008 report of the Register of Copyrights, "Satellite Home Viewer Extension and Reauthorization Act Section 109 Report," emphasized that "Section 111 has proven to be an efficient mechanism to clear copyrighted works at below-market rates" (at. vii). Also, in its July 2, 2007 comments to the U.S. Copyright Office ("Comments of the National Association of Broadcasters," In re Section 109 Report to Congress, Docket No. 2007-1) The National Association of Broadcasters pointed out that even the most expensive signals, 3.75% signals, provide copyrighted programming at "below market" rates (at 22). There seems to be no reason why Canadian signals would be an exception to this general observation.

In 1998-1, immediately after the switch, 51 systems carried a single Canadian signal. During 2000-2 through 2003-2, between 47 and 53 systems carried a single Canadian signal. Clearly, the WTBS switch had virtually no impact on cable operator's decision to carry Canadian distant signals– neither on the number of systems importing a single Canadian signal nor on the number importing more than one Canadian signal. These numbers strongly indicate that even in systems paying the minimum carriage fee, Canadian signals provided significant value equal to or exceeding the 0.63% fee. Moreover, recalling why most of these signals were probably worth substantially more than 0.63% before the switch, there are sound economic reasons to think the signals imported for minimum fee system were probably worth at least 0.63% and in most cases, substantially more. An alternative scenario, of course, is that Canadian signals simply declined substantially in value after the WTBS switch but happened to be picked at the same rate because of other, unknown factors. That scenario does not seem plausible. Certainly, the McLaughlin testimony provides no support for such a scenario.

Table 3:

Canadian Distant Signal Carriage, 1990-2003

Accounting Period	Num. of Form 3 Systems	Form 3 Systems with 0 DSEs	0 DSE Systems as % of Total	Systems with 1 or more Canadian Distant Signals	Systems with 1 Canadian Distant Signals	Systems with 2 or more Canadian Distant Signals	Systems with only Canadian Distant Signals
1990-1	2,105	16	0.760%	68	50	18	0
1990-2	2,124	12	0.565%	67	48	19	0
1991-1	2,200	13	0.6%	68	48	20	0
1991-2	2,202	12	0.5%	63	46	17	0
1992-1	2,250	14	0.6%	65	47	18	0
1992-2	2,271	16	0.7%	66	48	18	1
1993-1	2,347	14	0.6%	66	47	19	1
1993-2	2,287	15	0.7%	68	49	19	2
1994-1	2,241	10	0.4%	66	49	17	2
1994-2	2,213	14	0.6%	63	49	14	1
1995-1	2,242	12	0.5%	64	50	14	1
1995-2	2,301	12	0.5%	63	49	14	2
1996-1	2,343	15	0.6%	61	47	14	2
1996-2	2,383	26	1.1%	61	48	13	2
1997-1	2,334	36	1.5%	62	48	14	2
1997-2	2,346	40	1.7%	65	51	14	2
1998-1	2,344	459	19.6%	66	51	15	25
1998-2	2,363	437	18.5%	65	51	14	25
1999-1	2,312	382	16.5%	59	45	14	20
1999-2	2,296	378	16.5%	62	48	14	22
2000-1	2,307	380	16.5%	63	48	15	22
2000-2	1,898	311	16.4%	58	47	11	22
2001-1	1,853	325	17.5%	60	49	11	21
2001-2	1,818	312	17.2%	65	53	12	20
2002-1	1,759	306	17.4%	62	50	12	17
2002-2	1,723	308	17.9%	65	48	17	18
2003-1	1,687	300	17.8%	63	50	13	21
2003-2	1,648	272	16.5%	62	49	13	22

Source: CDC.

3. Singer Testimony

Singer's testimony focuses on the role of "changed circumstances" between the copyright royalty proceedings for years 1990-1992, 1998-1999, and 2000-2003. When the CARP used the fee generation method to award an increased share of copyright royalties to the Canadian Claimants Group in the 1998-1999 distribution proceedings, compared to its share in the 1990-1992 proceedings, the CARP and the Canadian Claimants Group cited several changed circumstances – most of them triggered by the WTBS switch at the end of 1997 – to explain why the Canadian Claimants Group share should be larger and why the fee generation method calculated a larger share for the Canadian Claimants Group. Singer's argument is that if similar changed circumstances did not occur between the 1998-1999 and 2000-2003 periods, there is no reason to apply the fee generation method to data from 2000-2003. Rather, awards should be identical to the results of applying the fee generation to the 1998-1999 data.

I believe this reasoning is unsupportable for three reasons. The first is that there is no reason to expect large, identifiable factors (particularly recurring factors) to be the prime causes of significant changes in relative values. The cumulative effects of relatively small changes can also be substantial, even if no large change can be identified. That is typical of markets generally.

The second problem with Singer's exclusive focus on large, identifiable factors is that relative values may be influenced by factors that cannot be identified at all, or if identified, are impossible to measure. For example, CBC programming has received numerous awards in recent years. Whether these awards reflected increased relative values, or even influenced those values, is probably impossible to determine. One can imagine many other potential factors – demographic changes in cable system communities, for example, or unexpected impact from DVD usage or even the altered fortunes of sports teams – which could exert substantial influence on cable system operators' choice of distant signals and the pricing of service tiers, without our being able to estimate the influence of those factors on relative values.

Third, there seems to be no reason why the fee generation results based on 1998-1999 data would be preferred over results using data for the years in which the royalties in question were actually collected. A chief virtue of the fee generation method is that despite its limitations, it automatically takes account of whatever forces were at work during the relevant periods. This is clear from the CARP report of the distribution of 1998-1999 fees. After first discussing at length the impact of the WTBS switch, and then addressing the use of the fee generation method for the CCG award, the report noted, "Other than a substantial increase in relative shares of actual fees generated of both the Basic Fund and 3.75% Fund, the Panel does not discern any changed circumstances that would significantly affect the Canadians award." (CARP, *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds*, Oct. 21, 2003, at 74). And later, "An assessment of changed circumstance, based upon an approximate doubling of relative fees, implicates a substantial increase from the last award . . ." (CARP, *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds*, Oct. 21, 2003, at 74).

The function served by the fee generation method is similar to that of the successive Bortz surveys used in cable royalty distribution proceeding, which provided useful evidence on relative value without identifying any particular factors in the marketplace that might have affected those relative values. However, a new Bortz survey was required for each period for which the allocation of fees was at issue; previous survey results were bound to be less useful than those from a new survey conducted at the appropriate time. Thus, the CARP report of the distribution of 1998-1999 fees noted (CARP, *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds*, Oct. 21, 2003, at 31):

> "We note here that JSC adduced substantial evidence of changed circumstances for the purpose of supporting an increase in JSC's 1990-92 award [n. 14 omitted]. *See generally* JSC PFFCL 174-83. The Panel need not address this evidence. The Bortz survey, which subsumes all conceivable relevant changes, provides a much more reliable and objective measure of relative value."

Thus, rather than use the 1998-1999 date for the fee generation method, it makes far more sense to use 2000-2003 data. These data reflect, albeit imperfectly, the course of events since 1998-1999, including the impact of changes in the number and variety of signals available for carriage, changes in perceived attractiveness of programming, and other factors too numerous or too little understood to be listed here. The virtues of using recent data are borne out by much of the data provided by Singer. His Figure 4 presents data on the number of subscribers to U.S. and Canadian distant signals for 1998-1999 and 2000-2003. Subscribers to United States signals increased by 2.7% (from 65,552,925 to 67,336,460) while subscribers to Canadian signals increased by 16.7% (from 2,436,998 to 2,843,673). His Appendix 4 makes this case as well showing steady growth for subscribers to Canadian signals while subscribers to US signals decrease or remain constant. All else equal, this would suggest an increase in the CCG's royalty share. Singer's Table 2 provides data on the average number of U.S. and Canadian distant stations carried per cable system for 1998-1999 and 2000-2003. The average number of U.S. distant stations increased by 12.3% (from 1.78 to 2.00), while the average for Canadian distant stations increased by 25% (from 0.04 to 0.05). Again, this factor alone suggests an increase in the CCG's royalty share. Finally, the Singer notes between 1998-1999 and 2000-2003, the share of fees generated by distant Canadian signals increased from 3.48% to 4.34%. (Singer Written Direct at 17.) This means that demand for Canadian signals grew more rapidly than demand for U.S. signals: Again, this alone would suggest an increase in the CCG share of copyright royalties.

Taken together, these data reinforce the notion that the fee generation method should be applied to 2000-2003 data rather than repeating the use of 1998-1999 data. The CARP faced a similar issue in its consideration of the cable operator survey evidence, covering the years 1996 through 1999, presented by Dr. Ringold in its distribution of 1998-1999 royalties. The Panel concluded, "[T]he Panel is unpersuaded by Dr. Ringold's advocacy of a four-year survey average. Perhaps the Panel reposes more confidence in her survey than Dr. Ringold herself. But we see no reason *not* to focus exclusively on the survey responses for 1998 and 1999 – the years for which we are distributing royalties." (CARP, *In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds*, Oct. 21, 2003, at 73.) Similar reasoning would apply to the fee generation method.

4. Conclusions

I have examined the testimony of Linda McLaughlin and Harold Singer on whether to apply the fee generation method to 2000-2003 fees in order to allocate copyright royalties for Canadian distant signals carried by U.S. cable systems. McLaughlin argues that the compulsory licensing system that establishes the distant signal fee structure is arbitrary, causing fees to bear little or no coherent relationship with the relative value of distant signals. Singer notes that in previous litigation over the 1998-1999 fees, CARP was satisfied that the fee generation method would take reasonable account of obvious changes in certain marketplace measures since the 1990-1992 fees were allocated. Singer states that those same measures changed much less between 1998-1999 and 2000-2003, so much less, in fact, that he concluded they did not amount to a material change in circumstances. He argues that rather than allocate 2000-2003 according to the results of the fee generation method for those years, fee should again be allocated according to the results of applying the fee generation method to 1998-1999 data.

I believe that both these broad arguments are mistaken. Fees arising from compulsory licensing inevitably appear arbitrary and generate numerous anomalies. But the compulsory licensing mechanism itself is a reasonable result of legislation closely watched and informed by the most interested buyers and sellers of programming provided through distant signals, and those same parties. The fee schedule largely coheres with basic economic principles despite its oddities, and there are compelling reasons to believe that fees paid bear a reasonable relationship with the relative value of the distant signals and the programming they contain. This applies specifically to Canadian fees paid by cable systems that pay minimum fees because they carry 1.0 DSE or less of distant signals. The natural experiment offered by the 1998 switch in the status of WTBS makes clear that rather than providing negligible value, Canadian signals carried by minimum-fee systems generally provide substantial value to those systems, probably exceeding the minimum fee itself. Moreover, repeated use of the fee generation method automatically takes account of the cumulative effect of large and small changes in market circumstances, including the data provided by Singer that suggest a continuing shift toward Canada programming. For all the reasons discussed above, my opinion is that the fee generation method reasonably measures relative value and that application of that method to the pool of year 2000-2003 fees makes far more economic sense than using the results of the fee generation method applied to year 1998-1999 fees.

DECLARATION OF JOHN E. CALFEE, Ph.D.

I, John E. Calfee, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and Correct..

Executed on July 23, 2009.

John E. Calfee, Ph.D

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Appendix A

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American Association for the Advancement of Science
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Association for Consumer Research (Director, 1988-90)
Journal of Public Policy and Marketing (editorial review board, 1992-1999, 2002-present)

EMPLOYMENT:

January 1995 - present: Resident Scholar, American Enterprise Institute.
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Sept. 1975 - Sept. 1980: Graduate study, part-time teaching, U. California, Berkeley
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Invited testimony in hearings on FDA preemption of state tort liability lawsuits before the House Committee on Oversight and Government Reform, May 14, 2008.

Invited testimony in hearings on drug safety and the FDA, House Committee on Appropriations, Subcommittee on Agriculture and FDA, Feb. 27, 2008.

Testimony in public hearings before the FDA's Peripheral and Central Nervous System Drugs Advisory Committee on whether to permit the drug Tysabri to re-enter the market, March 7, 2006.

Invited testimony in hearings on "Medicaid Prescription Drugs: Examining Options for Payment Reform, House Committee on Energy and Commerce, Subcommittee on Health, June 22, 2005.

Invited testimony in hearings on "The Roles of FDA and Pharmaceutical Companies in Ensuring the Safety of Approved Drugs, Like Vioxx," House Government Reform Committee, May 5, 2005.

Invited testimony in hearings on "International Drug Prices," before the United States Senate Committee on Finance, Joint Committee on International Trade and Health, April 27 2004.

Invited testimony before the Department of Health and Human Services Task Force in Drug Importation, held at the Food and Drug Administration on April 27 2004.

Invited testimony on pharmaceutical price controls before the House Committee on Industrial Relations for the State of Georgia, Feb. 11, 2004.

Invited testimony on direct-to-consumer advertising of prescription drugs in hearings before the Federal Trade Commission, Sept. 10, 2003.

Invited testimony on the role of pharmaceutical benefit managers in hearings before the Federal Trade Commission, June 26, 2003.

Invited testimony before the U.S. Senate Committee on Health, Education, Labor, and Pensions, in public hearings on "the National Immunization Program: Is It Prepared for the Public Health Challenges of the 21st Century?," Tuesday, Nov. 27, 2001.

Invited testimony in hearings on "Direct-to-consumer Advertising of Prescription Drugs," Before the U.S. Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Affairs, Tuesday, July 24, 2001.

Invited testimony in hearing on "Seniors' Access to Prescription Drug Benefits," before the Subcommittee on Health, Committee on Ways and Means, U.S. House of Representatives, February 15, 2000.

Expert testimony on alcoholic beverage advertising, before the Cleveland City Council, July 1997.

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Invited testimony on the regulation of marketing and advertising; testimony and prepared statement printed in "Oversight of FTC's Shared Responsibilities," Hearing before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, 102nd Congress, 1st Session, November 21, 1991. GPO: Serial No. 102-92, p. 165-178.

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AWARDS:

Best article published in *Journal of Public Policy and Marketing* during 1991-1993: Calfee and Pappalardo (1991) "Public Policy Issues in Health Claims for Foods."

Nominated for best article published in *Journal of Public Policy and Marketing* during 1990-1992: Debra Jones Ringold and John E. Calfee (1989) "The Informational Content of Cigarette Advertising: 1926-86."

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LITIGATION DEPOSITIONS AND TESTIMONY:

Calfee, John E., Ernst R. Berndt, Robert W. Hahn, Tomas J. Philipson, Paul H. Rubin, and W. Kip Viscusi (2008) "Supreme Court Amicus Brief Regarding *Wyeth v. Levine*." Available at http://www.reg-markets.org/publications/abstract.php?pid=1277. Accessed June 4, 2008.

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Expert statement, "An Economic Evaluation of Proposed Methods for Assessing the Market Value of Programming on Canadian Distant Signals," submitted to the Copyright Royalty Tribunal, on behalf of Canadian Broadcasting Corp., in connection with the 1998-1999 Cable Copyright Royalty Distribution Proceeding, July 2003.

Expert witness on the effects of advertising for ephedra weight-loss products manufactured by the Cytodyne Corp., in *Jason A. Park vs Cytodyne Technologies, Inc.*, Superior Court of the state of California for the County of San Diego, Central Division, case no. 768364, April 15-17, 2003.

Expert witness on alcoholic beverage advertising, in Federation of Advertising Industry v. City of Chicago (Case No. 97 C 7619, United States District Court for the Northern District of Illinois, Eastern Division). Deposed June 10, 1998; complaint dismissed before trial; matter still under appeal.

Expert witness on consumer survey design, consumer attitudes towards price advertising, and the regulation of price advertising, represented by Mayer, Brown and Platt: *B. Sanfield v. Finlay Fine Jewelers*, Case No. 93 C 20149, U.S. District Court for the Northern District of Illinois, Western Division. Northern District of Illinois, January 1998.

Expert statement, "An Economic Evaluation of the Bortz Study in Assessing the Market Value of Programming on Canadian Distant Signals," submitted to the Copyright Royalty Tribunal, on behalf of Canadian Broadcasting Corp., in connection with the 1991-1992 Cable Copyright Royalty Distribution Proceeding, February 1996.

Expert statement on the economic aspects of "Backdoor Rulemaking" at the Federal Trade Commission, on behalf of the Jenny Craig Corp., in connection with FTC litigation in the weight-loss industry, July 1994.

Designated as an expert witness for Exxon on the economic effects of punitive damages, in the Exxon Valdez litigation; deposed December 1993, but did not testify.

Expert testimony on price advertising, for May Department Stores, *Colorado v. the May Department Stores d/b/a May D&F* (1990), District Court, City and County of Denver, Case No. 89 CV 9274.

REFEREEING ACTIVITIES: Addison-Wesley Publishing Co. (consumer behavior textbook); *Advances in Consumer Research; Advances in Marketing and Public Policy;* American Marketing Association *Proceedings;* American Marketing Association dissertation competition; *Economic Inquiry; Health Affairs;* Institute of Medicine; *International Journal of Pharmaceutical Medicine; International Review of Law and Economics; Journal of Advertising; Journal of Business Ethics; Journal of Business Research; Journal of Consumer Research; Journal of Health Politics, Policy and Law; Journal of Industrial Economics; Journal of Public Policy and Marketing* (editorial review board, 1992-1999); *Journal of Law, Economics, and Organization; Managerial and Decision Economics; Nature Reviews Drug Discovery; Personalized Medicine; Pharmacoeconomics; Quarterly Review of Economics and Business; Regulation*; Smith Richardson Foundation.

DECLARATION OF JOHN E. CALFEE, Ph.D.

I, John E. Calfee, declare under penalty of perjury under the laws of the United States of America that the foregoing written rebuttal testimony prepared for submission by the Canadian Claimants Group to the Copyright Royalty Judges is true and Correct..

Executed on Aug. 31, 2009

John E. Calfee, Ph.D.