DEPARTMENT OF LABOR

Wage and Hour Division

RIN 1235–0018

Extension of the Approval of Information Collection Requirements

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, require that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency many not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See 5 CFR 1320.8(b)(3)(vi). The OMB has assigned control number 1235–0018 to the Fair Labor Standards Act (FLSA) information collections. In accordance with the PRA, the Department solicited comments on the FLSA information collections as they were proposed to be changed by a Notice of Proposed Rulemaking published December 27, 2011 (76 FR 81199–200). 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). On February 29, 2012, the OMB issued a notice that continued the previous approval of the FLSA information collections under the existing terms of clearance. (See OMB ICR Reference no. 201205–1235–002 *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201205-1235-002*). The OMB asked the Department to resubmit the information collection request upon promulgation of a Final Rule, after considering public comments on the December 27, 2011 Notice of Proposed Rulemaking. The Department published Application of the Fair Labor Standards Act to Domestic Service; Final Rule, in the **Federal Register** on October 1, 2013 (78 FR 60454). At the time of publication, the Department stated its intent to publish a notice announcing OMB's decision regarding the information collection (78 FR 60497).

Notice is hereby given that the OMB has approved the extension of the existing information collections under control number 1235–0018. The OMB has also pre-approved changes in the information collections that result from the Application of the Fair Labor Standards Act to Domestic Service; Final Rule; these changes become effective January 1, 2015.

Dated: October 24, 2013.

Mary Ziegler,

Director, Division of Regulations, Legislation, and Interpretation.

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LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 2008–2 CRB CD 2000–2003 (Phase II)]

Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final distribution order.

SUMMARY: The Copyright Royalty Judges announce the final Phase II distribution of cable royalty funds for the years 2000, 2001, 2002 and 2003 for the Program Suppliers and Devotional programming categories.

DATES: Effective October 30, 2013.

ADDRESSES: The final determination also is posted on the Copyright Royalty Board Web site at *http://www.loc.gov/crb.*

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658; Email: *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: On February 10, 2011, the Copyright Royalty Judges (Judges) published a notice of initiation of Phase II distribution proceedings relating to cable retransmission royalties for royalty years 2000 through 2003. 76 FR 7590 (Feb. 10, 2011). Participants in the proceeding included the Motion Picture Association of America as representative of program suppliers (MPAA), the Settling Devotional Claimants (SDC),[1] and Worldwide Subsidy Group LLC d/b/a Independent Producers Group (IPG).[2] IPG-represented claimants include copyright owners whose works fall within either the Program Suppliers category or the Devotional Programming category.[3]

Based on the considerations and analysis set forth in this Final Determination, the Judges conclude that the distributions at issue in this proceeding shall be:

ALLOCATION IN THE PROGRAM SUPPLIERS CATEGORY

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
MPAA	98.84	99.69	99.64	99.77
IPG	1.16	0.31	0.36	0.23

[1] Amazing Facts, American Religious Town Hall, Inc., Catholic Communications Corporation, The Christian Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Cottonwood Christian Center, Crenshaw Christian Center, Crystal Cathedral Ministries, Inc., Evangelical Lutheran Church in America, Faith For Today, Inc., Family Worship Center Church, Inc. (d/b/a Jimmy Swaggart Ministries), In Touch Ministries, Inc., It Is Written, Liberty Broadcasting Network, Inc., Rhema Bible Church a/k/a Kenneth Hagin Ministries, Joyce Meyer Ministries, Inc. f/k/a Life in the Word, Inc., Oral Roberts Evangelistic Association, Inc., RBC Ministries, Reginald B. Cherry Ministries, Ron Phillips Ministries, Speak the Word Church International, The Potter's House of Dallas, Inc. d/b/a T.D. Jakes Ministries, and Zola Levitt Ministries comprise the SDC.

[2] The National Association of Broadcasters as representative of program suppliers (NAB), and Joint Sports Claimants (JSC) also filed Petitions to Participate in Phase II of this proceeding. Issues relating to claimants represented by NAB were resolved prior to the Phase II hearing by agreement. *See Joint Notice of Settlement (of the Motion Picture Association of America and NAB)* (Jan. 26, 2012). Based on preliminary motions, the Judges resolved all issues relating to claimants in the Sports Programming category. *See Memorandum Opinion and Order,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (Mar. 21, 2013); *Order on Motion by Joint Sports Claimants for Section 801(c) Ruling, or in the Alternative, A Paper Proceeding in the Phase I Sports Category,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (May 17, 2013); and *Order on Motion for Distribution,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (May 23, 2013).

[3] IPG initially asserted that certain of its represented copyright owners' works also fell within the Sports category. The Judges subsequently rejected IPG's claim to any of the Phase II Sports category royalties. *See supra,* note 2.

ALLOCATION IN THE DEVOTIONAL CATEGORY

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
SDC	62.86	60.92	58.98	60.92
IPG	37.14	39.08	41.02	39.08

The following findings of fact and conclusions of law are based upon the evidence introduced at the hearing, the accepted written and live testimony of the witnesses, the direct and rebuttal statements of the parties, the precedential guidance discussed in this Final Determination, and consideration of the economic analyses offered by the parties.

I. Background

Beginning June 3, 2013, the Judges considered testimony of nine witnesses [4] and concluded with argument of counsel on June 6, 2013. During the course of the proceeding, the Judges reviewed written statements, direct and rebuttal testimony, and ruled on pre-hearing motions regarding discovery and other issues raised by the parties. The parties submitted proposed findings of fact and conclusions of law on June 14.

On July 10, 2013, the Judges issued to the parties their Initial Determination. Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, SDC filed a motion for rehearing. After reviewing the motion, the Judges denied the motion for rehearing. *Order Denying Motion for Rehearing,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (Aug. 7, 2013). As explained in the August 7, 2013 Order, the Judges determined that none of the grounds set forth in the motion constituted the type of exceptional case—namely, (1) an intervening change in controlling law, (2) the availability of new evidence, or (3) a need to correct a clear error or prevent manifest injustice—warranting a rehearing. *Id.*

A. Statutory and Regulatory Premises

Section 111 of the Copyright Act (Act) creates a statutory license that permits cable system operators (CSOs) to retransmit copyrighted works included in broadcast television signals without obtaining the authorization of the owners of those works. When a CSO retransmits non-exempt broadcast programming outside the program's original, local broadcast area the CSO must deposit royalties based on their gross receipts with the Copyright Office semiannually. 17 U.S.C. 111(d)(1). In July of each year, copyright owners, whose works the CSOs retransmit, file claims to the royalties deposited for the previous calendar year. 17 U.S.C. 111(d)(4)(A). Claimants may file individual claims or joint claims directly, or through an authorized agent.

The Judges are charged with allocation and distribution of the statutory license royalties deposited with the Copyright Office. 17 U.S.C. 111(d)(4). By statute and regulation, the Judges must render a decision and issue a determination regarding distribution of the collected funds within 11 months of conclusion of a statutorily mandated settlement conference. 17 U.S.C. 803(c)(1); 37 CFR 352.2. The settlement conference in this proceeding took place on August 10, 2012. *See Order Adopting Protective Order and Amending Discovery Schedule,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II), at 3 (July 10, 2012).

Historically, individual and joint claimants have utilized a common representative to pursue on their behalf collection and distribution of the deposited royalties. Each representative pursues claims within a program category. Distribution proceedings, by convention, have progressed in two phases. In Phase I of the proceeding, claimants contest the allocation of royalties among the program categories.[5] If representatives of the categories agree, the Judges may authorize distribution to the categories in the agreed percentages. If the representatives do not agree, the Judges initiate what has come to be known as a Phase I distribution proceeding. The Judges may authorize partial distributions pending resolution of the controversies, provided that sufficient funds remain to cover the amounts in controversy. *See* 17 U.S.C. 801(b)(3).

The allocation of funds among individual claimants within a particular category occurs in what has been termed Phase II of the distribution proceeding. Similar to Phase I, if the claimants agree, the representatives may distribute funds in accordance with the content of the claims and any representation agreement they may have with the claimants. If the validity or amount of a claim, or the claimant's proportional share of the funds within a category, is in controversy, the Judges commence a Phase II proceeding to resolve the controversies.

B. Guiding Precedent

Section 111(d)(4) of the Act provides that, in the event of a controversy concerning the distribution of royalties, ''the Copyright Royalty Judges shall, pursuant to Chapter 8 of [title 17], conduct a proceeding to determine the distribution of royalty fees.'' Unlike sections of the Act that apply to the determination of *rates,* Section 111(d)(4), which deals with *distributions,* does not set forth an economic standard that the Judges shall apply in order to determine how to distribute the royalties.

As the Librarian of Congress (Librarian) [6] has stated:

> Section 111 does not prescribe the standards or guidelines for distributing

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[4] Although Mr. Alan Whitt began his testimony, the Judges ultimately did not admit it into evidence. *See* 6/6/13 Tr. at 1358–62. By stipulation of the parties, the Judges accepted the written testimony of Mr. Michael Little (but not all exhibits). *See Stipulation Regarding Testimony of Michael D. Little* (May 31, 2013).

[5] In Phase I of the current proceeding, the claimants organized themselves into the following claimant categories: devotional programs, sports programs, Canadian programs, commercial programs, noncommercial television programs, noncommercial radio broadcast programs, music on all broadcast programs, and program suppliers. *See Distribution of the 2000–2003 Cable Royalty Funds, Distribution order, in Docket No. 2008–2 CRB CD 2000–2003,* 75 FR 26798 (May 12, 2010). IPG challenged the category definitions; the Judges rejected IPG's challenge, finding that IPG was ''collaterally estopped from contesting the definitions established by the final Phase I determination'' since IPG did not file a Petition to Participate in Phase I of the proceeding. *See Order on Motion by Joint Sports Claimants for Section 801(c) Ruling, or in the Alternative, a Paper Proceeding in the Phase I Sports Category,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II), at 2 (May 17, 2013). The claims categories adopted by the Phase I parties were developed over a number of years through a series of settlements by participants in successive royalty distribution proceedings.

[6] The Librarian was responsible for administering the Copyright Arbitration Royalty Panel (CARP) process for distributing cable royalties from 1993, when the Copyright Royalty Tribunal (CRT), a predecessor adjudicative body, was abolished, until 2005, when the Copyright Royalty Judges program was established. The Librarian had the obligation of reviewing CARP decisions and, on recommendation of the Register of Copyrights, adopting, modifying or rejecting them.

royalties collected from cable operators under the statutory license. Instead, Congress decided to let the Copyright Royalty Tribunal ''consider all pertinent data and considerations presented by the claimants'' in determining how to divide the royalties.

Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, Order, in Docket No. 2000–2 CARP CD 93–97, 66 FR 66433, 66444 (Dec. 26, 2001) (quoting H.R. Rep. No. 1476, at 97 (1976)) (1993–1997 Librarian Order).[7]

There is not, however, a wholesale absence of statutory guidance. Section 111 directs the Judges to act pursuant to Chapter 8 of the Act. The Judges are guided by the general directives contained in Chapter 8. In particular, Section 801 of the Act provides, in pertinent part: ''The Copyright Royalty Judges shall act * * * on the basis of * * * prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels * * * and the Copyright Royalty Judges, * * * and decisions of the court of appeals under this chapter.'' 17 U.S.C. 803(a)(1).

Accordingly, the Judges have reviewed the 12 prior determinations of Phase II proceedings under Section 111 of the Act—ten by the CRT,[8] and two by the Librarian under the CARP system[9]—as well as the relevant Federal court cases. The Judges have identified several basic principles from these earlier proceedings that have particular relevance to the present proceeding.

Relative marketplace value is the preeminent consideration for allocating shares of royalties to programs or groups of programs. *Program Suppliers v. Librarian of Congress,* 409 F.3d 395, 401 (D.C. Cir. 2005); *1993–1997 Librarian Order,* 66 FR at 66445. Although early CRT decisions considered other factors, such as the degree of harm to copyright owners by virtue of the statutory license, the benefits derived by the CSO, program quality and program length, *1986 Determination,* 54 FR at 16153, these factors have been deemphasized in later decisions of the CRT, the CARPs and the Librarian.

In order to assess relative marketplace value the Judges must look to hypothetical, simulated, or analogous markets, since there is no free market for cable retransmission of broadcast television programs. *See, e.g., 1993–1997 Librarian Order,* 66 FR at 66445; *1987 Music Determination,* 55 FR at 11993. While there is no single formula or source for allocating royalties, *see, e.g., 1993–1997 Librarian Order,* 66 FR at 66447, actual measured viewing is significant to determining relative marketplace value, *id.,* and viewing data compiled by The Nielsen Company (Nielsen) are a useful starting point for determining actual viewership. *See, e.g., 1986 Determination,* 54 FR at 16153. Nevertheless, viewing measurements are not perfect and the Judges must be prepared to make appropriate adjustments when claimants are able to demonstrate that their programs have not been measured or are significantly undermeasured. *See, e.g., 1987 Devotional Determination,* 55 FR at 5650; *1986 Determination,* 54 FR at 16153–54.

In making distributions under Section 111, mathematical precision is not required. Rather, the Judges' rulings must lie with a ''zone of reasonableness.'' *See National Ass'n of Broadcasters* v. *Librarian of Congress,* 146 F.3d 907, 929 (D.C. Cir. 1998); *see also Asociacion de Compositores y Editores de Musica Latino Americana v. Copyright Royalty Tribunal,* 854 F.2d 10, 12 (2d Cir. 1988) (recognizing ''zone of reasonableness'' standard in Phase II proceedings); *Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal,* 720 F.2d 1295, 1304 (D.C. Cir. 1983) (same).

With the foregoing principles clearly in mind, the Judges apply the appropriate economic analysis to the evidence adduced at the hearing.

II. Statement of the Case

A. Phase I Proceeding

In the Phase I proceeding for the present case the parties limited by stipulation the issues to be considered by the Judges. *Distribution of the 2000–2003 Cable Royalty Funds, Distribution Order,* Docket No. 2008–2 CRB CD 2000–2003, 75 FR 26798, 26799 (May 12, 2010) (Phase I Order). Specifically, the parties stipulated that the Judges would determine the Phase I share of the Canadian Claimants only, with the remaining balance to be awarded to the Settling Parties.[10] *Id.* The stipulation made clear that the parties were not seeking the individual Phase I shares of the claimant groups comprising the Settling Parties. *Id.* Consequently, on May 12, 2010, the Judges announced the final Phase I shares of the Canadian Claimants to the cable royalties for the years at issue in this Phase II proceeding and awarded the remaining balance of the 2000–2003 cable royalties to the Settling Parties. *Id.* at 26807. To date the Judges have authorized partial distributions ranging from $121.7 million in 2000 to nearly $131 million in 2003. On February 3, 2011, the Judges ordered final distribution of all cable royalties for 2000, 2001, 2002, and 2003 that were no longer in dispute. *Order Granting Phase I Claimants' Motion for Further Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds,* Docket No. 2008–2 CRB CD 2000–2003 (Feb. 3, 2011). On January 17, 2012, the Judges denied IPG's motion for a partial distribution of $3 million of the remaining royalties for 2000–2003, noting that IPG is ''not an established claimant to cable royalties'' and ''[the Judges] simply do not know at this stage of the proceeding if IPG is entitled to a royalty distribution, let alone the amount.'' *Order Denying Independent Producers Group's Motion for Partial Distribution,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (Jan. 17, 2012).

B. Commencement of Phase II

On February 10, 2011, on request of program suppliers represented by MPAA, SDC, and JSC, the Judges

[7] The 1993–1997 Librarian Order was vacated as moot after the parties settled their appeals. *Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, Notice of termination of proceeding,* Docket No. 2000–01 CARP CD 93–97, 69 FR 23821 (Apr. 30, 2004). The settlement and vacatur of the 1993–1997 Librarian Order did not disturb the reasoning articulated therein. *Id.* at 23822.

[8] *1979 Cable Royalty Distribution Determination, Notice of final determination, in Docket No. CRT 80–4,* 47 FR 9879 (Mar. 8, 1982) (1979 Determination); *1980 Cable Royalty Distribution Determination, Notice of final determination, in Docket No. CRT 81–1,* 48 FR 9552 (Mar. 7, 1983) (1980 Determination); *1981 Cable Royalty Distribution Determination, Notice of final determination, in Docket No. CRT 82–1,* 49 FR 7845 (Mar 2, 1984) (1981 Determination); *1982 Cable Royalty Distribution Determination, Notice of final determination, in Docket No. CRT 83–1,* 49 FR 37653 (Sept. 25, 1984) (1982 Determination); *1983 Cable Royalty Distribution Proceeding, Notice of final determination, in Docket No. CRT 84–1 83CD,* 51 FR 12792 (Apr. 15, 1986) (1983 Determination); *1984 Cable Royalty Distribution Proceeding, Notice of final determination in Docket No. CRT 85–4–84CD,* 52 FR 8408 (Mar. 17, 1987) (1984 Determination); *1985 Cable Royalty Distribution Proceeding, Notice of final determination, in Docket No. CRT 87–2–85CD,* 53 FR 7132 (Mar. 4, 1988) (1985 Determination); *1986 Cable Royalty Distribution Proceeding, Notice of final determination, in Docket No. CRT 88–2–86CD,* 54 FR 16148 (Apr. 21, 1989) (1986 Determination); *1987 Cable Royalty Distribution Proceeding, Notice of final determination of Devotional Claimants controversy, in Docket No. CRT 89–2–87CD,* 55 FR 5647 (Feb. 16, 1990) (1987 Devotional Determination); *1987 Cable Royalty Distribution Proceeding, Notice of final determination of music controversy, in Docket No. 89–2–87CD,* 55 FR 11988 (Mar. 30, 1990) (1987 Music Determination).

[9] *Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94–3 CARP CD 90–92,* 63 FR 20428 (Apr. 24, 1998) (1990–1992 Determination); *1993–1997 Librarian Order,* 66 FR 66433.

[10] Devotional Claimants, JSC, National Association of Broadcasters for U.S. Commercial Television Broadcaster Claimants, Music Claimants, MPAA, and Public Television Claimants comprised the ''Settling Parties.''

announced initiation of a Phase II proceeding and requested Petitions to Participate. *See* 76 FR 7590 (Feb. 10, 2011). In response to the notice, the Judges received petitions from: the MPAA; SDC; JSC; NAB; Devotional Claimants; HSN, LP, AST LLC, Home Shopping En Espangol [*sic*] GP, USA Broadcasting Productions, USA Broadcasting Stations, Studios USA, and InterActive Corp., jointly (Joint Petitioners); and IPG.[11] By May 2012, the only remaining Phase II controversies were those asserted by IPG in the Devotional, Sports and Program Suppliers categories.

C. Preliminary Hearing

In August 2012, the remaining participants filed motions or objections relating to the claims asserted by other participants. The participants made far-ranging objections and submitted papers and arguments to support their objections in a form that the Judges could not accept as evidence. As a result, the Judges denied all the motions and objections without prejudice and set the matter for an evidentiary hearing on claims objections. The Judges commenced the evidentiary hearing on November 13, 2012, with a continuance after two days of testimony to December 5, 2012, to complete the participants' presentations of evidence and argument.

On March 21, 2013, the Judges entered an order resolving most of the claims challenges. *Memorandum Opinion and Order,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (March 21, 2013) (March 21 Order).[12]

Subsequent to the Preliminary Hearing, the Judges determined that IPG had no remaining valid claims to royalties in the Sports Programming category. *Order on Motion by Joint Sports Claimants for Section 801(c) Ruling or, in the Alternative, a Paper Proceeding in the Phase I Sports Category,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (May 17, 2013). As a result, the only remaining Phase I categories in dispute were the Program Suppliers category and the Devotional category. The Judges' role in this matter, therefore, is to determine the relative percentage allocations of royalties for 2000, 2001, 2002, and 2003 between MPAA-represented claimants and IPG-represented claimants in the Program Suppliers category and between SDC-represented claimants and IPG-represented claimants in the Devotional category.

III. Preliminary Rulings [13]

A. Admissibility of Exhibit

The SDC, with agreement of IPG, offered into evidence Exhibit 177, the Written Direct Testimony of Mr. Michael. D. Little, President and Chief Operating Officer of The Christian Broadcasting Network, Inc. At the hearing, IPG objected to the admissibility of Exhibit 3 to Mr. Little's testimony, which consists of approximately 600 pages of printouts of Internet Web sites. IPG objected that (1) the veracity of this document, derived from the Internet, is questionable, (2) Mr. Little, by his own admission, obtained the printouts from an undisclosed third party, raising further questions as to the veracity and authenticity of the Exhibit, and (3) the documents themselves are ''just a bunch of random stuff without any analysis attached to it.'' 6/6/13 Tr. at 1341–42. The Judges admitted Exhibit 177 and took under advisement admission of the attendant Exhibit 3. *Id.* at 1344.

IPG's objections are well-taken.[14] The SDC did not lay an adequate foundation for Exhibit 3. Even if SDC had done so, the exhibit is, from a practical standpoint, unusable. While some of the more than 600 pages contain program information, a great many do not. In the format that this document was delivered to the Judges it is not searchable, and, in many cases is nearly illegible. The SDC did not provide a summary or analysis of the specific relevant facts to be gleaned from this stack of paper. By offering evidence in this form, the SDC places an unreasonable burden on the Judges and the other parties. The Judges reject Exhibit 3 to Exhibit 177. The remainder of Exhibit 177 is thus admitted by stipulation, with that redaction.

B. Challenges to Claims Subsequent to the Preliminary Hearing

To distribute royalties to a copyright owner under Section 111 of the Copyright Act, the Judges must first determine whether the copyright owner is eligible to receive such royalties. *Universal City Studios LLLP* v. *Peters,* 402 F.3d 1238, 1244 (D.C. Cir. 2005); *see Order Denying Motions to Strike Claims,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) at 2 (Sept. 14, 2012). Under the law and regulations in effect through July 31, 2004, in order to be eligible to receive Section 111 royalties, a copyright owner (or its duly authorized representative) was required to file a claim for royalties with the Copyright Office during the month of July in the year following the year for which the copyright owner seeks such royalties. 17 U.S.C. 111(d)(4)(A) (amended 2004); 37 CFR 252.2 (repealed 2005). Similarly, the copyright owner or its duly authorized agent must file a Petition to Participate in any cable royalty distribution proceedings within thirty days after the publication in the **Federal Register** of a notice of commencement of a proceeding. 37 CFR 351.1(b)(3).

The Preliminary Hearing in this proceeding led to a resolution of almost all claims challenges asserted by the parties up to that point.[15] After the Preliminary Hearing, some claimants contacted the Judges asserting an alliance to one representative or the other. By Order issued on May 20, 2013 (Order to Show Cause), the Judges directed the parties to show cause why several of the affected claims should not be dismissed in light of the copyright owners' statements, since it appeared that either no authorized entity had filed a claim, or, a timely claim having been filed, no authorized entity had included the claimant as part of its Petition to Participate in this proceeding. The Judges received additional evidence from the parties at the beginning of the Determination hearing in order to resolve remaining representation issues and ruled on the

[11] Subsequently, MPAA settled its Phase II controversies with NAB and the Joint Petitioners, *see Joint Notices of Settlement* (January 26, 2012), and later with SDC, *see Joint Notice of Settlement* (May 26, 2012).

[12] The March 21 Order resolved all outstanding challenges to the validity of claims, except the Judges ordered IPG to obtain written clarification of representation from the Billy Graham Evangelistic Association and sought further briefing relating to ''Claim 308 from 2000,'' involving RBC Ministries in the Devotional category. The Judges validated Claim 308 from 2000 by order dated April 10, 2013. The Billy Graham organization acknowledged IPG's representative authority for 2002 and 2003, thereby resolving that controversy in favor of IPG for those royalty years. *See* Letter from Justin T. Arnot to Copyright Royalty Board (Apr. 19, 2013).

[13] During the course of the proceeding, in correspondence (particularly email correspondence); pleadings; written testimony; live testimony; and argument of counsel, certain of the parties raised questions and implied, if not spoken, requests for action by the Judges. Except to address the MPAA representation issue raised by IPG, *see* section III.B.1.a and note 18, *infra,* the Judges decline to take action on issues, substantive or procedural, when those issues are presented informally. The Judges, *in this instance,* afforded IPG the benefit of the doubt inasmuch as IPG included the issue in a responsive pleading, albeit without a specific affirmative request. Affirmative action by the Judges without a request for action is unwarranted and could be contrary to principles of due process. The Judges considered other informal requests of IPG and the other participants and rejected them on both procedural and substantive grounds.

[14] These objections, which were properly interposed by IPG's counsel, stand in contrast with the views that Mr. Galaz offered on the admissibility in his written rebuttal testimony. The views of a witness on the admissibility of evidence are improper and the Judges do not consider them.

[15] *See supra* note 12.

claims from the bench. 6/3/13 Tr. at 53–58.[16]

1. Program Suppliers Claims

a. MPAA's Representation of Joint Claimants

In his written rebuttal testimony, Mr. Raul Galaz of IPG asserts, for the first time in this proceeding, that 615 claims represented by MPAA and identified in Exhibit R–15 to his testimony should be dismissed because MPAA has failed to produce adequate documentation of its authority to represent the ultimate claimants, *i.e.,* the copyright owners. Galaz WRT at 35–38 and Ex. R–15.

Each of the 615 claimants is claimed indirectly by MPAA. MPAA represents a number of entities that have filed joint claims on behalf of other copyright owners. MPAA has no contractual privity with those copyright owners. Its representation of them is by virtue of its representation agreements with joint claimants who filed on their behalf. This, in itself, is no impediment to MPAA's representation.

The Judges conclude that IPG's challenge to MPAA's representation of these 615 claimants is not properly before the Judges.[17] IPG's counsel made no motion to strike these claims at any time during these proceedings. Moreover, IPG was in a position to raise these challenges during the preliminary hearing and failed to do so in other than an incidental way.[18]

Even assuming that IPG's challenges were properly before the Judges, the Judges would have rejected them. The sole ground that IPG asserts for invalidating the claims on Exhibit R–15 is that MPAA has not produced contracts between third parties—*i.e.,* the MPAA-represented program suppliers and the individual claimants that the MPAA-represented program suppliers represent in turn. From this lack of documentation IPG concludes, and asks the Judges to conclude, that MPAA has failed to establish that it is a duly authorized representative of those individual claimants.

Neither the Act, nor any of the regulations adopted under it, address what evidence is needed to establish one's authority to represent claimants in the filing of claims or in distribution proceedings before the Judges. Nevertheless, the Judges have stated that "the parties must manifest in some unambiguous manner that they intended for a principal/agent relationship to exist between them." March 21 Order, at 12. Ultimately the question of authority is a question of fact requiring a weighing of the evidence.

In this proceeding MPAA has produced fully-executed Representation Agreements with each of the MPAA-represented program suppliers. Ex. 500.[19] Each Representation Agreement includes a provision stating that if the "Claimant" (MPAA's counterparty) has filed a joint claim, MPAA is authorized to represent all joint claimants to that joint claim. *See, e.g.,* Ex. 500 at Bates no. MPAA–RP–05219, ¶ 16. Each Representation Agreement also includes a provision stating that the Claimant is the duly authorized representative of all joint claims submitted by the Claimant, and that the Claimant is authorized by all joint claimants to execute the Representation Agreement on their behalf. *See, e.g., id.* at Bates no. MPAA–RP–05219, ¶ 17. *See also,* 6/3/13 Tr. at 146–150 (Kessler). By their terms, the Representation Agreements are perpetual—*i.e.,* they remain effective until terminated by one of the parties. Ex. 500 at Bates no. MPAA–RP–05219, ¶ 18; 6/3/13 Tr. at 157 (Kessler).

The Judges find this evidence sufficient to establish that MPAA is duly authorized to represent the joint claimants covered by these Representation Agreements. Further evidence of representation, such as the contracts between the MPAA-represented program suppliers and the underlying claimants, is unnecessary in the absence of any evidence calling into question the authority of MPAA or the joint claimants that it represents—*e.g.,* a disavowal of representation by an underlying claimant or evidence that the claimant is represented by another party. IPG has offered no such evidence with respect to the 615 claims that it seeks to challenge. Therefore, the challenge, even if IPG had raised it properly, would have been rejected.

b. Overlapping Claims

Both IPG and MPAA have identified different sets of overlapping claims—*i.e.,* claimants that both parties claim to represent. Galaz WRT at 32 n.32 and Ex. R–11; Kessler WRT at 5.

In some instances, claimants assert that they terminated their relationship with IPG either during the years covered by this proceeding or thereafter.[20] These claimants stated that they do not want IPG to continue to represent their interests. In other instances, there are simply conflicting claims of representation, with no further communication from the claimants.[21]

As to both groups, IPG asserts that the terms of their agreements specify a termination procedure that requires at least six months' notice and authorizes and obligates IPG to continue pursuit of royalties payable through the termination date. As to the first group of claims, MPAA asserts that the Judges should honor the claimants' wishes to be represented by MPAA rather than IPG. MPAA has not addressed the second group directly.

IPG has invited the Judges to engage in an interpretation of the representation agreements that it has entered into with these claimants to determine whether a claimant's purported termination satisfies the requirements of the contract. This sort of contractual interpretation is beyond the Judges' authority. *See Nat'l Broad. Co.* v. *Copyright Royalty Tribunal,* 848 F.2d 1289, 1296 (D.C. Cir. 1988) (Tribunal's obligation is to set forth the rule of distribution, not resolve substantive rights of the parties). Where a claimant has unambiguously manifested that it no longer wants a particular entity to represent its interests in these proceedings, the Judges will honor that request. To the extent that the claimant's action may affect the rights and obligations under a contract between the claimant and the entity that purports to represent it, those issues must be resolved by a court of competent jurisdiction. *See Id.*

Applying this rule, the Judges resolve the representation of the overlapping claims as follows.

[16] *See* Appendix A.

[17] Unlike the claims the Judges addressed in their Order to Show Cause, the Judges received no new information following the preliminary hearing that would cast doubt on the validity of the MPAA claims that IPG challenges.

[18] Rather than lodging a formal pleading, IPG embedded its dissatisfaction with certain MPAA claims. Mention of a concern defensively rather than in the form of a motion or cross-motion does not present the issue for full consideration by the Judges.

[19] Exhibit 500 is a restricted exhibit. *See* 6/3/13 Tr. at 141. Consequently, access to this exhibit is limited to only the parties who have executed Non-Disclosure Certificates in accordance with the Protective Order entered in this proceeding.

[20] The following claims fall in this category: DreamWorks LLC, Litton Syndications, Inc., Marty Stouffer Productions, Ltd., Martha Stewart Living Omnimedia, Reel Funds International, Remodeling Today d/b/a Today's Homeowner, The Television Syndication Company, United States Olympic Committee, and Urban Latino TV LLC. In addition, Fintage, as a representative for Venevision International, has asserted that MPAA should represent Venevision in these proceedings. In the Show Cause hearing several of these claims were dismissed for certain years. *See supra* note 16.

[21] The claims falling in this category are: Carol Reynolds Productions, Inc., Cinemavault Releasing, Eagle Rock Entertainment, Fitness Quest, Inc., Integrity Global Marketing, Inc., Pacific Family Entertainment and Ward Productions.

Disposition of Overlapping Claims where Claimants Terminated Authority

Claimant	Claim Year				Rationale
	2000	2001	2002	2003	
Dreamworks LLC	X	MPAA	MPAA	MPAA	Claimant terminated IPG's authority.
Litton Syndications	X	MPAA	MPAA	MPAA	Claimant terminated IPG's authority.
Martha Stewart Living Omnimedia	IPG	MPAA	MPAA	MPAA	MPAA concedes that IPG has a representation agreement with claimant for 2000 (although the agreement is not part of the record) and did not include claimant in its petition for that year (MPAA included claimant in its petition for 2001-2003). Claimant entered into a Representation Agreement with MPAA dated 5/9/03.
Marty Stouffer Productions	X	MPAA	MPAA	MPAA	Claimant terminated IPG's authority.
Reel Funds International	IPG	IPG	IPG	IPG	Claimant confirmed IPG's authority.
Remodeling Today, Inc. dba Today's Homeowner	MPAA	MPAA	X	MPAA	Claimant terminated IPG's authority.
The Television Syndication Company	MPAA	MPAA	MPAA	X	Claimant terminated IPG's authority.
Urban Latino TV	Dismissed	X	MPAA	MPAA	Claimant terminated IPG's authority. No claim filed for 2000.
U.S. Olympic Committee	Dismissed	Dismissed	MPAA	Dismissed	Claimant terminated IPG's authority. MPAA included claimant in its petition for 2002 only.
Venevision International	Dismissed	IPG	IPG	IPG	2000: No claim filed. 2001-2003: Fintage's notification regarding termination of IPG representation is unreliable given the subsequent communications from BBC Worldwide Americas and Reel Funds International, and the Judges do not rely on it.

X'ed out boxes denote claims that were already addressed in the Show Cause hearing.

As to the overlapping claims where there has been no instruction from the claimant concerning representation, the Judges will take the later-in-time agreement between a claimant (or its representative) and a party as the most persuasive evidence concerning representation. Admitted written agreements are deemed more persuasive than oral testimony about the existence of an agreement.

Applying this rule, the Judges resolve the representation of the overlapping claims as follows.

DISPOSITION OF OVERLAPPING CLAIMS—NO COMMUNICATION FROM CLAIMANT

Claimant	Claim year				Rationale
	2000	2001	2002	2003	
Carol Reynolds Productions Inc.	MPAA	MPAA	MPAA	MPAA	2000–2001: Claimant covered by MPAA Representation Agreement with CBC dated 9/25/02; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.
Cinemavault Releasing	MPAA	MPAA	MPAA	MPAA	Claimant covered by MPAA Representation Agreement with AFMA dated 9/24/02; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.
Eagle Rock Entertainment.	MPAA	MPAA	MPAA	MPAA	Claimant covered by MPAA Representation Agreement with Audio-Visual Copyright Society dated 9/25/02; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.
Fitness Quest Inc	MPAA	MPAA	MPAA	MPAA	Claimant covered by MPAA Representation Agreement with The Goodman Group dated 7/8/04; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.
Integrity Global Marketing Inc.	MPAA	MPAA	MPAA	MPAA	Claimant covered by MPAA Representation Agreement with The Goodman Group dated 7/8/04; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.
Pacific Family Entertainment.	Dismissed	MPAA	MPAA	MPAA	Claimant covered by MPAA Representation Agreement with ComPact Collections dated 7/8/02; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time. Claimant not covered by MPAA petition for 2000.
Ward Productions	MPAA	MPAA	MPAA	MPAA	Claimant entered into Representation Agreement with MPAA dated 9/27/02; no record evidence of IPG agreement with claimant; IPG concedes MPAA agreement is later in time.

c. Claim(s) for BBC Worldwide Americas, Inc.

An additional claimant—BBC—falls into its own category. Both MPAA and IPG have included BBC Worldwide (BBC–W) in their respective Petitions to Participate. Fintage Publishing and Collections BV (Fintage) advised the Judges that it had the exclusive right to administer and collect royalties on behalf of its client, EGEDA, and EGEDA, in turn, had such rights with respect to BBC–W. *Notice Regarding Representation of BBC Worldwide, Venevision International, and Reel Funds International,* Docket No. 2008–2 CRB CD 2000–2003 (Phase II) (May 9, 2013). Fintage advised the Judges that it wished to have MPAA represent this claimant's interests in the proceedings. *Id.* at 1, 3. Subsequently, the General Counsel of BBC Worldwide Americas, Inc. (BBC–WA) advised the Judges that it is represented by IPG. *Notice Regarding Representation of BBC Worldwide Americas,* Docket No. 2008–2 CRB 2000–2003 (Phase II) (May 21, 2013) (BBC Notice).

IPG filed claims on behalf of BBC–W for 2000, and on behalf of BBC–WA for 2001–2003. Fintage filed a claim on behalf of BBC–W for 2002. BBC–WA filed its own claims for 2000 and 2001. No claims were filed on behalf of BBC–W for 2001 or 2003.

This appears to be a case of mistaken identity on IPG's part. BBC–WA's General Counsel has clarified that BBC–W (or, to be precise, BBC Worldwide Limited) is a separate entity from BBC–WA. *BBC Notice,* at 2. IPG's relationship is with BBC–WA, not BBC–W. Fintage's relationship is with BBC–W (through EGEDA), not with BBC–WA. These are separate claimants with separate claims. There is no overlap.

IPG, however, mistakenly identified its client as BBC–W, rather than BBC–WA, in its Petition to Participate. Any claimant in a distribution proceeding must file a Petition to Participate. 37 CFR 351.1 (a). Section 354.1(b)(2) requires parties to a proceeding to file a Petition to Participate within 30 days of commencement of the proceeding, providing detail concerning the participant or claimants the participant is representing in a joint petition. The Judges may accept late petitions up to a date that is no less than 90 days before the date set for filing written direct statements. 37 CFR 351.1(d). That date is long past. It is now too late to rectify IPG's error by adding a new claimant to these proceedings. BBC–WA is not a represented claimant in this proceeding, and IPG's mistaken claim for BBC–W is dismissed.[22]

[22] The Judges note that this ruling is contrary to the ruling from the bench regarding BBC–WA that was made during the Show Cause hearing. *See* 6/3/13 Tr. at 57. Upon further reflection and examination of the record the Judges conclude that their earlier determination was incorrect.

As to MPAA's representation of BBC–W, the only year for which both predicates for representation in this proceeding—filing of a valid claim and inclusion in a Petition to Participate—have been met is 2002. No claims were filed for BBC–W in 2001 and 2003. The only year in which MPAA included BBC–W in its petition is 2002 (through its inclusion of Fintage which, in turn, listed BBC–W in its joint claim). In summary:

DISPOSITION OF CLAIMS INVOLVING BBC ENTITIES

Claimant	Claim year			
	2000	2001	2002	2003
BBC Worldwide	Dismissed	Dismissed	MPAA	Dismissed.
BBC Worldwide Americas	Dismissed	Dismissed	Dismissed	Dismissed.

Nearly all of the disputed claims are thus resolved in MPAA's favor (apart from Reel Funds and Venevision, which have an insignificant effect on the relative shares [23]). The Judges conclude that the dismissal of BBC–W (one MPAA-represented claimant out of approximately 1400) for three claim years does not have a material effect on the relative shares.[24] Similarly, the dismissal of two of IPG's claimants (BBC–WA for all claim years and Venevision for 2000) out of more than 150 does not have a material effect on the relative shares. As for the allocation of the disputed claims to MPAA, MPAA's expert witness on economics and econometrics, Dr. Jeffrey Gray, credited all of them to MPAA in his computation of relative shares, 6/4/12 Tr. at 513 (Gray), so there is no need to make any adjustment to reflect that resolution. In sum, the Judges conclude that no adjustment to the relative royalty shares of IPG and MPAA is needed as a result of the foregoing determination of claims.

2. Devotional Programming Claims

IPG challenged 42 of the SDC's claims [25] for the first time in Mr. Galaz's rebuttal testimony. As with IPG's challenge to 615 of MPAA's claims, these challenges are not properly before the Judges. IPG's counsel made no motion to strike these claims at any time during this proceeding, and IPG was in a position to raise these challenges during the Preliminary Hearing (when IPG challenged eighteen of the SDC's claims) and failed to do so.

Moreover, IPG does not (and cannot) allege that the SDC's claims are for programs that were not retransmitted on a distant basis during the claim years they challenge. 6/5/13 Tr. at 905 (Galaz). Rather, IPG argues that the claims should be dismissed because the specific example of a broadcast the Devotional claimants cited in their claims did not take place as described on the claim form. The Judges rejected that argument as a basis for challenging the validity of claims in the March 21 Order, and would do so now as well if IPG's challenge were timely.

IV. Analysis

A. Economic Issues

1. Relative Market Value Standard

Despite the absence of a defined statutory standard, as noted above the Judges do not write on a clean slate. More particularly, prior Phase II determinations in cable retransmission proceedings have referred to a ''relative market value'' standard, although ''relative market value'' has not been defined explicitly. In order to make explicit the Judges' application of the relative market value standard in the present Determination, the Judges begin by expressly defining relative market value.

2. Definition of ''Relative Market Value''

At the outset, it is necessary to appreciate the reason for the statutory license and the concomitant distribution proceedings. Statutory licenses substitute for free market negotiations because of a perceived intractable ''market failure'' inherent in the licensing of copyrights—particularly the assumed prohibitively high ''transaction costs'' of negotiating a multitude of bilateral contracts between potential sellers and buyers.[26] *See, e.g.,* R. Picker, *Copyright as Entry Policy: The Case of Digital Distribution,* 47 Antitrust Bull. 423, 464 (2002) (''The modern structure of * * * validating or conferring rights in copyright holders yet coupling those rights with statutory licenses has the virtue of mitigating the exercise of monopoly power and minimizing the transaction costs of negotiations.''); S. Willard, *A New Method of Calculating Copyright Liability for Cable Rebroadcasting of Distant Television Signals,* 94 Yale L.J. 1512, 1519 (1985) (''One important reason for compulsory licensing * * * was to avoid the 'prohibitive' transaction costs of negotiating rebroadcast consent.''); S. Beser, W. Manning & B. Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem,* 21 J.L. & Econ. 67, 87 (1978) (''Compulsory licensing * * * has lower negotiating costs than a system based on full copyright liability * * *.''). The statutory license avoids this feared breakdown in the contracting process by allowing copyright use to be undertaken *ex ante* payment—thereby permitting consumers to obtain the enjoyment (''utility,'' in economic terminology) of viewing the copyrighted work—with the price to be paid to the individual copyright owner *ex post* viewing.

The Judges begin parsing the phrase ''relative market value'' by considering the word ''relative.'' The fact that the Phase II categories are finite (the allocation among categories having been finalized in Phase I), indicates that the word ''relative'' is intended to denote that the value of any retransmitted program is to be determined in relation to the value of all other programs in the respective Phase I categories.

The next two words in the phrase—''market value''—are typically construed together. Further, ''market value'' is traditionally stated in decisional and administrative law more fully as ''fair market value.'' The Supreme Court has defined ''fair market value'' as ''the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of

[23] Dr. Gray recalculated the royalty shares with Reel Funds and Venevision allocated to IPG. The shares did not change to the second decimal place. 6/4/13 Tr. at 490 (Gray).

[24] The remaining MPAA claims that were dismissed were not included in MPAA's petition or Dr. Gray's calculations.

[25] Mr. Galaz claims to challenge 44 claims that appear in Exhibit R–2 to his written testimony. Only 43 claims appear in that exhibit, one of which IPG challenged unsuccessfully in the Preliminary Hearing.

[26] Notwithstanding the compulsory nature of statutory licenses under the Copyright Act, in most contexts, the Act requires the Judges to consider the evidentiary value of directly negotiated licenses in setting rates and terms for royalty fees and in determining distributions of those fees.

relevant facts.'' *U.S.* v. *Cartwright,* 411 U.S. 546, 551 (1973).

Dr. Gray defined relative market value in his Written Direct Testimony as ''the price at which the right to transmit a program carried on a distant broadcast signal would change hands between a willing buyer (a CSO) and a willing seller (a copyright owner), neither being under any compulsion to buy or sell.'' Gray WDT at 7–8; *see also* 6/4/13 Tr. at 445–46 (Gray).[27]

The Judges note that application of these definitions to the present dispute is neither simple nor obvious. More particularly, it is necessary to further define the various terms that comprise the foregoing definition of relative market value, which the Judges undertake below.

a. The Hypothetical Willing Seller (the Copyright Owner)

The copyright owner seeks to maximize profit from the licensing of the program to the CSO. Since the copyright owner's marginal costs are low and approaching zero (most of the costs incurred in creating the work are sunk, fixed costs), this means simply that the copyright owner wants to maximize the revenue it receives from the CSO as a result of the retransmission of its program over the distant broadcast signal by that CSO. Given the minimal marginal costs and the ''public good'' aspect of a copyrighted work, the copyright owner, as the hypothetical willing seller, will always have an incentive to sell at some positive price, but will likely engage in bargaining whereby the copyright owner threatens to refuse to grant the license unless its (undisclosed) reservation price is offered. *See* Beser, *et al, supra,* at 81 (When the CSO fails to offer a price which the hypothetical seller requires, ''the program supplier * * * will simply refuse to allow the cable system to carry the program'').

b. The Hypothetical Willing Buyer (the CSO)[28]

For the CSO, the economics are less straightforward. The revenue that the CSO earns from retransmitted broadcasts is a consequence of the impact of the retransmissions on the sale of subscriptions to its cable bundles (packages or tiers). This is in contrast to the terrestrial commercial television station whose signal is being retransmitted, and whose revenues are received from advertisers.[29]

To the CSO, the program offered by the Copyright Owner is an input—a factor of production—utilized to create the product that the CSO sells to its customers, *viz.,* the various subscription bundles of cable channels. In a hypothetical program market, a CSO would buy a program license for retransmission, as it would purchase any factor of production, up to the level at which that ''factor price'' equals the ''Marginal Revenue Product'' (MRP) of that program. In simple terms, this means that a CSO in a competitive factor market would only pay a price for a program if the revenue that the CSO can earn on the next (marginal) sale of the final product is at least equal to that price. In practical terms, why would a CSO pay $50,000 to retransmit a program that the CSO estimates would add only $40,000 to the CSO's subscriber revenue? *See* Beser, *et al., supra,* at 80 (''To the cable system the value of carrying the signal is equal to the revenue from the extra subscribers that the programming will attract and any higher subscriber fees it can charge less the additional costs of importing the program.'').[30]

c. ''Neither Being Under Any Compulsion To Buy or Sell''

The ''compulsion'' limitation within the definition of ''fair market value'' is often treated as a truism and thus not subject to analysis. Here, in the actual (*i.e.,* non-hypothetical) market, any program available for purchase by the CSO already has been pre-bundled by the terrestrial broadcast station into that station's signal. The CSO cannot selectively purchase for retransmission some programs broadcast on the retransmitted station and decline to purchase others; rather, the signal is purchased *in toto.* 17 U.S.C. 111(c)(3).

Is this required bundling a form of ''compulsion'' upon the CSO? It is *compelled* to take every program pre-bundled on the retransmitted distant station, despite the fact that the various pre-bundled programs would each add different monetary value (or zero value) in the form of new subscriber volume, subscriber retention, or higher subscription fees. Indeed, some programs on the retransmitted station may have so few viewers that the CSO—if it had the right—would decide not to purchase such low viewership programs.

Further, certain programs may have more substantial viewership, but that viewership might merely duplicate viewership of another program that generates the same sub-set of subscribers. For example, hypothetically, the viewers of reruns of the situation comedy ''Bewitched'' may all be the same as the viewers of reruns of ''I Dream of Jeannie,'' a similar supernatural-themed situation comedy. However, ''Bewitched'' may have fewer viewers than ''I Dream of Jeannie.'' The hypothetical, rational profit-maximizing CSO that had already paid for a license to retransmit ''I Dream of Jeannie'' would not also pay for ''Bewitched'' in this hypothetical marketplace, because it fails to add marginal *subscriber revenue* for the CSO.[31] Rather, the rational CSO would seek to license and retransmit a show that marginally increased subscriber revenue (or volume, if market share was more important than profit maximization), even if that program had lower total viewership than ''Bewitched.''

If the Judges were to measure ''relative market value'' in these instances solely by viewership of the programs actually retransmitted, then the valuation process would arguably fail the ''non-compulsion'' requirement of the ''fair market value'' standard

[27] Although the Judges *generally* agree with Dr. Gray's application of the definition of ''fair market value'' to the definition of ''relative market value,'' the Judges note that Dr. Gray omitted from the latter the requirement that the parties have ''reasonable knowledge of relevant facts.'' This condition is important because issues regarding the hypothetical parties' knowledge of such facts as viewership levels and CSO program bundling strategies are relevant to this Determination, as discussed in the analysis of the IPG Methodology, *infra.*

[28] Dismayingly, none of the parties proffered admissible testimony (written or oral) of a witness with knowledge of CSO programming. Both Mr. Galaz and Dr. Robinson, on behalf of IPG, and Dr. Gray, on behalf of MPAA, noted their lack of pertinent experience in connection with the negotiation of copyright licenses, 6/5/13 Tr. at 928–29 (Galaz); 6/6/18 Tr. at 1218–20 (Robinson); 6/4/13 Tr. at 439 (Gray), and none of those witnesses offered any competent evidence as to how a CSO actually makes programming decisions. IPG attempted to introduce only the written testimony of a producer of a syndicated children's show, Mr. Thomas Moyer, who claimed to have knowledge of the relative unimportance of viewership/ratings to CSOs. (The parties were unable to arrange for a *de bene esse* deposition of Mr. Moyer to perpetuate his testimony. He was subpoenaed by MPAA to testify in person at the hearing, but he did not appear. Accordingly, the Judges did not admit Mr. Moyer's Written Rebuttal Testimony. 6/6/13 Tr. at 1288–98; 1302–04. We note, though, that Mr. Moyer's written testimony indicated that he lacked the experience necessary to provide the Judges with competent testimony regarding the programming decision-making process of a CSO.).

[29] Since CSOs must retransmit a station's signal in its entirety (including advertisements) without alteration, it cannot sell advertising on retransmitted broadcast channels. 17 U.S.C. 111(c)(3).

[30] If the CSO, as a program purchaser, had some degree of monopsony power in the factor market, it could pay less than a price equal to MRP, but still would buy programs in a *quantity* at which MRP would equal the Marginal Cost of an additional program.

[31] Indeed, this notion is akin to the ''displacement'' argument advanced in the present proceeding by IPG. Galaz WRT at 14.

identified by Dr. Gray. Why should a CSO (hypothetically) be *compelled* to pay for a program based on its higher viewership, but which adds less value than another show with lower viewership? By extension, why should the Judges, in this distribution proceeding, establish program value solely as if such compulsion were present?

Simply put, the hypothetical, rational profit-maximizing CSO would not pay copyright owners based solely on levels of viewership. Rather, the hypothetical CSO would (i) utilize viewership principally as a heuristic to estimate how the addition of any given program might change the CSO's subscriber revenue, (ii) attempt to factor in the economics of various bundles; and (iii) pay for a program license (or eschew purchasing that license) based on that analysis.

On the other side of the coin, is the seller, *i.e.,* the copyright owner, under any ''compulsion'' to sell? In the actual market, one in which the terrestrial station signal is acquired in a single specific bundle by the CSO, the answer appears to be yes, there is ''compulsion.'' The copyright owner cannot carve out its program and seek to maximize its value independent of the pre-packaged station bundle in which it exists.

Of course, in the ''hypothetical market'' that the Judges are charged with constructing, it would be inappropriate not to consider the inherent bundling that would occur. That is, the bundling decision is a ''feature'' rather than a ''bug'' in even a hypothetical market in which the statutory license framework does not exist. Thus, while the copyright owner could offer to supply its program at a given price, the equilibrium market price at which supply and demand would intersect would reflect the CSO's demand schedule, which is based in part upon the fact that the buyer, *i.e.,* the CSO, would pay only a price that is equal to (or less than) the MRP of that program in a bundle to be purchased by *subscribers.*[32]

To summarize, the hypothetical market the Judges will apply in this Determination contains the following participants and elements: (1) The hypothetical seller is the owner of the copyrighted program; (2) the hypothetical buyer is the CSO that acquires the program as part of its hypothetical bundle of programs; and (3) the absence of compulsion requires that the terrestrial stations' initial bundling of programs does not affect the marginal profit-maximizing decisions of the hypothetical buyers and sellers.[33]

B. Analysis of Parties' Proposals

1. Program Suppliers Category

a. Description of the MPAA Methodology and Proposed Allocation

As in past distribution proceedings, MPAA's calculation of relative market value is based almost exclusively upon estimated levels of viewership of the distantly retransmitted programs, as based on data received from Nielsen.[34] MPAA contends that program viewership provides a direct and reasonable measure of program market value, especially because the allocation of MPAA Program Suppliers' royalties in this Phase II proceeding involves examination of relatively homogeneous programming. Gray WDT at 3.[35]

The initial steps of MPAA's proposed relative market value calculation entail selection of a sample of television stations whose programming would be the basis for the remuneration of royalties to MPAA-represented claimants (Kessler Sample). Ms. Marsha Kessler, a former executive of MPAA, testified that she obtained from Cable Data Corporation (CDC)[36] a listing of broadcast stations that were retransmitted as distant signals by cable systems from 2000 through 2003. Ms. Kessler, believing they were not compensable in the Program Suppliers category, then excluded Canadian, Mexican, and public television stations.[37] Ms. Kessler ranked stations according to the number of distant subscribers and then selected her sample stations based on a combination of fees generated and distant subscribers. Finally, because the Nielsen ratings do not differentiate between distant and local viewing, Ms. Kessler performed a local county analysis for each sample station to identify local county viewing data for each station so that it could be filtered out by Nielsen. 6/3/13 Tr. at 114–27 (Kessler); Kessler WDT at 11–13 and Appendices D, E, and F. The Kessler Sample was not (and was not intended to be) a random sample. 6/3/13 Tr. at 122–25 (Kessler).

Ms. Kessler forwarded the Kessler Sample stations to Nielsen, instructing Nielsen to measure viewing only in the counties identified by MPAA as outside the originating station's local county viewing area.[38] Ms. Kessler further instructed Nielsen to place the programming in one of the eight Phase I categories. 6/3/13 Tr. at 114–27 (Kessler); Kessler WDT at 13–14.

Mr. Paul Lindstrom, Senior Vice President at Nielsen, testified that Nielsen provided MPAA with so-called ''diary data'' for each of the Kessler Sample stations measuring viewing in non-local counties during sweeps periods.[39]

[32] As discussed below, IPG suggests the need for such a bundling-based analysis. However, as also discussed below, the IPG Methodology itself fails to address the economics of bundling and thus serves only as a weak counter-argument to MPAA's viewer-centric analysis.

[33] A focus on marginal costs and benefits is not only efficient for the hypothetical buyers and sellers, but also for the consuming public: ''Optimal program diversity will result if cable operators and the public they serve pay to copyright owners the marginal value derived from viewing syndicated programming.'' Willard, *supra,* at 1518.

[34] Nielsen ratings are a statistical estimate of the number of homes tuned to a program based upon a sample of television households selected from all television households. The findings within the sample are ''projected'' to national totals. A rating measures what percentage of the universe of television households are tuned in to a program. Lindstrom WDT at 3.

[35] Dr. Gray tested this conclusion through a three-step estimation approach. First, Dr. Gray calculated the relative volume of MPAA programming and IPG programming. Second, Dr. Gray calculated the relative viewership of MPAA programming and IPG programming (as described *infra*). Third, Dr. Gray examined statistically whether, given the same level of viewership, MPAA and IPG programming affect subscriber growth differently. Dr. Gray hypothesized that, in the absence of a meaningful difference in how the two sets of programs affect subscriber growth, viewership is the most economically sound measure of relative market value. Gray WDT at 14–15.

[36] CDC collects and analyzes information on Statements of Account (SOAs) that cable systems file with the Licensing Division of the Copyright Office. CDC makes the collected information available to users by purchase, either on an as-needed basis or by subscription. CDC is the only company providing such a service. Martin WDT at 1–2.

[37] Some programs broadcast on Canadian and Mexican stations are, in fact, compensable in the Program Suppliers category. This issue is discussed *infra.*

[38] Nielsen data are recorded on a county-by-county basis. MPAA provided Nielsen with its list of distant viewing counties to enable Nielsen to produce estimates of distant cable viewing to the Kessler Sample stations. Nielsen conducted this custom analysis for MPAA. Lindstrom WDT at 5; 6/3/13 Tr. at 288 (Lindstrom).

[39] During 2000–2003, Nielsen utilized two basic data collection instruments in its syndicated services: Meters and diaries. Lindstrom WDT at 4. A set meter is an electronic device attached to a television set in a particular household that detects the channel to which the television is tuned. The data from these set meters are converted into household ratings. Nielsen collected household meter data year-round in a random sample of households in selected geographic markets across the United States, *i.e.,* Nielsen's metered markets, during 2000–2003. Lindstrom WDT at 4; Gray WDT at 15–16, 18–19.

Diaries are paper booklets in which each person in the household records viewing information. In 2000–2003, diary data were collected in Nielsen's diary markets during the months of November, February, May, July, and in some cases October and March, which are also known as the ''sweeps'' ratings periods (Nielsen Diary Data). Nielsen mailed seven-day diaries to homes randomly selected by Nielsen to keep a tally of when each television in the household was on, what it was tuned to, and

Continued

MPAA also retained the services of the Reznick Group P.C. (now known as CohnReznick LLP) (Reznick) to match title information provided by MPAA to compensable retransmissions of television broadcasts. Mr. Kelvin Patterson of Reznick testified that he and his team at Reznick conducted two analyses for MPAA—one based on Tribune Media Services (Tribune) data and the other based on MPAA title information provided to Reznick by MPAA. The first required Reznick to examine broadcast television station logs provided by Tribune for the Kessler Sample stations and a separate set of sample stations provided by MPAA's economics expert, Dr. Jeffrey Gray (Gray Sample), for each of the years 2000, 2001, 2002 and 2003, and exclude those program titles that are not compensable for purposes of this proceeding in the Program Suppliers category: (1) Programs identified in the Tribune Data as broadcast type ABC, CBS and NBC (*i.e.,* network programming); [40] (2) programs airing on WGN's local feed (WGN-local) that were not simultaneously broadcast on WGN's national feed (WGN–A); and (3) programs not identified by Tribune as a series, special, movie, documentary or ''other.'' Patterson WDT at 2–3.

The second analysis conducted by Reznick involved using a computer to electronically compare a list of program titles claimed by MPAA-represented claimants, prepared and provided by MPAA,[41] with the refined Tribune data to identify every distant retransmission of each MPAA title on the Kessler Sample stations and the Gray Sample stations. Patterson WDT at 3; 6/3/13 Tr. at 250–51 (Patterson).[42] Thus, Reznick was able to identify the potentially compensable broadcasts of MPAA titles that aired on the Kessler Sample and Gray Sample stations. Patterson WDT at 5.

MPAA retained Dr. Gray to design an allocation methodology and compute the results of that methodology (the MPAA Methodology). 6/4/13 Tr. at 440 (Gray). Dr. Gray testified that his analysis seeks to determine the ''relative market value'' of copyrighted programs based on an econometric model of estimating viewership that takes into account program characteristics and popularity that affect the program's predicted relative viewership. His approach analyzes program volume, program viewing and the number of subscribers for the Gray Sample—a stratified random sample of 120 stations generated by Dr. Gray from CDC data for each year from 2000 to 2003. Gray WDT at 3, 9; Gray WRT at 25, 30.

Dr. Gray relied upon five data sources in creating and applying the MPAA Methodology: (1) CDC data for all cable system operators in the United States who distantly retransmitted broadcast signals, which included information about the signals they distantly retransmitted as well as the total number of distant subscribers to those signals; (2) a custom analysis of Nielsen Diary Data, prepared by Mr. Lindstrom, which shows the viewing of distant retransmissions of the Kessler Sample stations during Nielsen's ''sweeps'' periods; (3) information from Nielsen's local ratings, derived from individual television electronic meters, provided on a quarter-hour basis, for 24 hours a day, seven days a week, and 12 months a year (Local Ratings Data), for the Gray Sample stations; (4) Tribune Data, including the program title, time of broadcast, information on the station, whether or not the station was a network affiliate, the type of programming, the actors and directors and other information about the program, for every broadcast in the Kessler Sample stations and Gray Sample stations; and (5) the Reznick data analyses, in the form of a list of MPAA compensable programming, based upon start time, date and station, and a separate list of IPG compensable programming, based upon start time, date and station. 6/4/13 Tr. at 447–50 (Gray).

Dr. Gray analyzed the relationship between distant viewing and local ratings, holding constant the number of distant subscribers, which, Dr. Gray posited, is equivalent to examining distant ratings and local ratings. Dr. Gray testified that he found a positive and strong statistically significant relationship between distant viewing and local ratings. After establishing this correlation, Dr. Gray built his full econometric model combining all of the five data sets he identified in his written testimony.[43] Dr. Gray then utilized a multiple regression analysis to predict distant viewing for every single quarter hour, for every single program, 24 hours a day, seven days a week, 12 months a year, for all four years.[44] 6/4/13 Tr. at 465–67 (Gray).

Based on his analysis, Dr. Gray calculated the viewership (and distribution) shares of MPAA and IPG programming as follows.[45]

MPAA PROPOSED VIEWERSHIP AND DISTRIBUTION SHARES

	2000	2001	2002	2003 (percent)
MPAA	98.93	99.72	99.69	99.80
IPG	1.07	0.28	0.31	0.20

who in the household was watching. Over the course of a four-week sweeps period, Nielsen mailed diaries to a new panel of randomly selected homes each week. At the end of each sweeps period, all of the viewing data from the individual weeks were aggregated into Nielsen's database. Each sweeps period yielded a sample of approximately 100,000, aggregating to 400,000 households over the course of a year. Lindstrom WDT at 4; Gray WDT at 15–16; 6/3/13 Tr. at 290, 296–98, 312 (Lindstrom).

[40] In fact, Reznick failed to exclude the network programming and this task was performed by Dr. Gray. 6/3/13 Tr. at 246–48 (Patterson); 6/4/13 Tr. at 488–89 (Gray).

[41] The MPAA list of titles was compiled initially through program title information that was submitted by the claimants it represents and from its own research. MPAA then prepared a certification report listing the titles that it believed were attributable to the claimant, and supplied a certification form for the claimant to sign verifying that it has the right to claim retransmission royalties for the works listed. Each claimant was instructed to strike through any titles for which it was not entitled to claim retransmission royalties. Kessler WDT at 9–10.

[42] To the extent the comparison analysis conducted by Reznick left programs that did not match, Reznick conducted a manual matching exercise. As part of this manual matching exercise, whenever Reznick found titles that appeared to be a match, it would check for other examples of the same or similar program titles manually inspecting each to determine if the programs were in fact a match. For non-English programs, Reznick employed a native Spanish speaker to assist in the manual matching exercise. 6/3/13 Tr. at 273–74 (Patterson).

[43] These data sets provided Dr. Gray with information on distant viewing, local ratings, the number of distant subscribers, the quarter hour of the day the broadcast took place, station affiliation, and which programs were compensable in these proceedings.

[44] All of Dr. Gray's calculations of program viewing were based on the Gray Sample. The Kessler Sample was merely used to make projections of distant viewing from the Local Ratings Data. 6/4/13 Tr. at 452–54 (Gray).

[45] The lower and upper bounds of the 95% confidence intervals for the estimates of MPAA's viewership shares for each year are: For the year 2000, 98.84% to 99.03%; for the year 2001, 99.69% to 99.75%; for the year 2002, 99.64% to 99.74% and for the year 2003, 99.77% to 99.83%. Gray WRT at 26 n.25. 6/5/13 Tr. at 754–58 (Gray).

Gray WRT at 26.

(1) Evaluation of the MPAA Methodology

IPG opposes a relative market value assessment based solely on Nielson viewership data. One broad attack by IPG on the use of Nielsen viewership data is that the data do not exist until *after* the distantly retransmitted programs are broadcast. Thus, IPG argues, the hypothetical willing buyer and willing seller could not utilize this viewership data *ex ante* to negotiate a license. Galaz WDT at 13. Although this criticism is literally correct, it does not preclude the use of such viewership data to estimate the value of the hypothetical licenses. Ideally, it might be preferable to utilize *anticipated viewership* as the viewership-centric measure of value.

However, such a measure would be quite difficult to assemble in a Section 111 proceeding. Each type of program would be subject to its own yardstick: For example, reruns could be valued based on their prior ratings, newly syndicated programs could be valued based on the past ratings of comparable programs; and first-run televised movies could be valued based on their box-office value in theaters. The gathering and presentation of such evidence likely would be prohibitively expensive, and the evidence in the record before the Judges does not permit such an analysis.

Another attack by IPG on the use of Nielsen Data concerns the so-called ''zero viewing'' problem. The quarter-hour sampling points within the Nielsen Data relied upon by MPAA contain, annually, between 76% and 82% ''zero viewing'' sampling points. Robinson WRT at ¶ 31. In previous Phase II proceedings the existence of these ''zero viewing'' sampling points had not been adequately explained by MPAA's witnesses, which diminished the value of its methodology. *See, e.g., 1993–1997 Librarian Order,* 66 FR at 66449–50. However, in *this* proceeding, MPAA has provided adequate evidence to demonstrate, to the satisfaction of the Judges, that the incidence of so-called ''zero viewing'' does not preclude the Judges' reliance in part upon the Nielsen data, subject to adjustments in the allocations to acknowledge some imprecision arising out of the ''zero viewing'' sample points.

First, to be precise, the percentages of ''zero viewing sampling points'' represent—on a station-by-station basis—the percent of total sampling points at which no sample households with Nielsen diaries recorded that they were viewing that station. These percentage figures do not represent that ''zero households'' had viewed a particular program over the entirety of the sampling period, *i.e.,* the sweeps period at issue. Although both Mr. Galaz and IPG's economist, Dr. Laura Robinson, were critical of the high incidence of ''zero viewing'' sampling points, Dr. Robinson proffered no evidence, 6/6/13 Tr. at 1195–97 (Robinson), and Mr. Galaz proffered no admissible or credible evidence, 6/5/13 Tr. at 844 (Galaz),[46] that the Nielsen data had revealed *particular programs* with ''zero viewing'' throughout the Nielsen diary sampling periods. This distinction is critical, because, under the hypothetical market construct, royalties would accrue on a program-by-program basis to individual copyright owners, not to the distantly retransmitted stations.

Second, the Judges agree with Mr. Lindstrom that these ''zero viewing'' sampling points can be considered important elements of information, rather than defects in the process. As Mr. Lindstrom testified, when doing sampling of counts within a population, it is not unusual for a large number of zeros to be recorded, 6/4/13 Tr. at 391–93, 410 (Lindstrom), and those ''zero viewing'' sample points must be aggregated with the non-zero viewing points. 6/3/13 Tr. at 323 (Lindstrom).

Third, as Dr. Gray testified, when those zeros are included with non-zero data from the sample in a regression that correlates local and distant viewing, the zeros are placed in an appropriate statistical context. 6/14/13 Tr. at 614–15 (Gray).[47]

Fourth, as Mr. Lindstrom testified, distantly retransmitted stations typically have very small levels of viewership in a television market fragmented (even in the 2000–2003 period) among a plethora of available stations. 6/4/13 Tr. at 393 (Lindstrom). Thus, it would be expected, not anomalous, for Nielsen to record some zero viewing for any given quarter-hour period within the diary sampling (sweeps) period.

Despite these reasonable and credible explanations of the ''zero viewing'' sampling points, the Nielsen data are not without problems. The sample size is not sufficient to estimate low levels of viewership as accurately as a larger sample. Mr. Lindstrom acknowledged that ''[t]he relative error on any given quarter-hour for any given station * * * would be very high,'' 6/3/13 Tr. at 303 (Lindstrom)—an acknowledgment echoed by Dr. Gray. 6/4/13 Tr. at 518–19 (Gray) (agreeing that, with samples of 10,000 households, there is a high relative error rate for each quarter-hour ''point estimate'').

Furthermore, Mr. Lindstrom acknowledged that he had not produced the margins of error or the levels of confidence associated with the Nielsen viewership data, despite the fact that such information could be produced. 6/3/13 Tr. at 391–93, 410 (Lindstrom). Without this information, the reliability of any statistical sample cannot be assessed. (By way of comparison, Dr. Gray provided with his conclusions the margin of error and the level of confidence associated with his findings. Gray WRT at 26 n.25.). The Judges infer that, had such information underscored the reliability of the Nielsen data, it would have been produced by MPAA.

Thus, the Judges conclude that viewership as measured after the airing of the retransmitted programs is a reasonable, though imperfect proxy for the viewership-based value of those programs.[48]

(2) Dr. Gray's Economic Analysis

The Judges credit the economic analysis undertaken by Dr. Gray, as set forth in his Written Direct Testimony

[46] Mr. Galaz claimed in his live testimony that he prepared a document which set forth his calculation of the percent of programs that Nielsen reported to have had zero viewing. Under questioning from the Judges, however, Mr. Galaz acknowledged that he had never provided such a document to MPAA, 6/5/13 Tr. at 846–47, and IPG did not seek to have that document admitted into evidence. 6/5/13 Tr. at 888–89.

[47] To adapt an analogy used by Dr. Gray, if one were attempting to estimate the number of left-handed individuals in the United States, by sampling ten people in New York City and Washington, DC, respectively, it would not be implausible to find zero left-handed people in the sample. However, when the sampling expanded to ten people each in Boston, Los Angeles, and San Francisco, one might find two, three, and perhaps even seven left-handed individuals, respectively, in those cities. While only about 10% of the population in the United States may be left-handed, it would make no more sense to eliminate (as supposedly unrepresentative) the zero counts in New York and Washington than it would to exclude the (unusually high) count of seven left-handed individuals in San Francisco. *See* 6/4/13 Tr. at 606–08 (Gray).

[48] Since it is a *hypothetica*l market we are constructing, it also would not be unreasonable to hypothesize that the CSO and the Copyright Owner might negotiate a license that would contain a provision adjusting the value of the license, post-viewing, to reflect actual viewership. *See* 6/4/13 Tr. at 562–63 (Gray). In that regard, the Judges refer to one of the pre-conditions for relative market value—the one omitted by Dr. Gray—''reasonable knowledge of relevant facts.'' Actual viewership would be a ''relevant fact'' that could be applied if post-viewing adjustments to the license fees were hypothetically utilized by the bargaining parties. While the parties might find the ''transaction costs'' of such post-viewership negotiations and adjustments to be prohibitive in practice, it is the function of the Judges, as noted *supra,* to construct a hypothetical market in which such transaction costs are avoided. *See* O. Williamson, The Economic Institutions of Capitalism 45 (1985) (one aspect of the ''transaction cost problem'' is the inability of the negotiating parties to obtain ''perfect information.'').

and in his oral testimony at the hearing, *see, e.g.,* Gray WDT at 3; 6/4/13 Tr. at 446 (Gray), but not without some reservations. First, the Judges agree with Dr. Gray that viewership can be a reasonable and directly measurable metric for calculating relative market value in cable distribution proceedings. Indeed, the Judges conclude that viewership is the initial and predominant heuristic that a hypothetical CSO would consider in determining whether to acquire a bundle of programs for distant retransmission, subject to marginal adjustments needed to maximize subscribership. Nevertheless, the Judges are reluctant to rely *solely* on viewership data merely because the marginal bundling adjustments are not readily measurable. The Judges must also consider subscriber fees and subscribership levels, even if the evidence relating to subscribership creates only a crude proxy for addressing the economic bundling issue.

The Judges agree with Dr. Gray that the programs within the Program Suppliers category are more homogeneous *inter se* than they are in comparison with programs in either the Sports Programming or the Devotional Programming claimant categories. 6/4/13 Tr. at 446, 455–57 (Gray). This relative homogeneity suggests that a rational CSO would not be as concerned with whether different programs would attract different audience segments (compared with more heterogeneous programming) and therefore such a CSO would rely to a greater extent on absolute viewership levels. The Judges note, however, that Dr. Gray's position appears to conflict with Ms. Kessler's testimony which described the mix of MPAA programs as quite varied (*i.e.,* heterogeneous), Kessler WDT at 4–6. Taken at face value, Ms. Kessler's observation suggests that the hypothetical CSO would consider whether there was a fragmentation of viewership among MPAA-represented programs that would reduce its reliance on absolute viewership and increase its use of a bundling analysis to exploit such heterogeneity. This disparity confirms the Judges' conclusion that viewership data alone cannot form the basis for measuring relative market value. Notwithstanding Ms. Kessler's testimony to the contrary, the Judges accept Dr. Gray's analysis of the lack of an impact of changes in programming upon subscribership. Dr. Gray's analysis suggests that, even if program heterogeneity could affect value via the CSO's bundling choices, there is no evidence in the current record to suggest that the programs of the claimants whom IPG represents have created a programming mix that would increase the value of those programs *vis à vis* programs of non-IPG claimants. 6/4/13 Tr. 554–55 (Gray); Gray WDT (Amended) at App. C.

Moreover, the Judges rely upon Dr. Gray's use of a *random* sample of approximately 120 stations annually from 2000 through 2003 to construct his viewership estimates. Indeed, Dr. Gray's sample is the only *random* sample of stations presented to the Judges in this proceeding, and must be contrasted with the admittedly *non-random* sampling of stations undertaken by Mr. Galaz and Ms. Kessler.[49]

The Judges view favorably Dr. Gray's decision to increase his data base by supplementing it with Nielsen *meter* data—the Local Ratings Data—in order to determine, in his regression analysis, the relationship between local viewing and distant viewing of the retransmitted stations. 6/4/13 Tr. at 448. The use of this additional data allowed Dr. Gray to observe approximately 1.6 million quarter-hours of local viewing data (6/4/13 Tr. at 465, 467) strengthening his results, and further mitigating any potential problems with the zero viewing sampling points contained in the Nielsen *Diary* Data.

Nevertheless, the Judges find that Dr. Gray's decision not to summarize the results of his regression as it related to other independent variables, especially the impact of time of day upon the level of distant viewing of the transmitted stations, is a shortcoming in his analysis. Dr. Gray conceded that there was a strong positive relationship between time of day and the level of distant viewing, 6/4/13 Tr. at 639–41 (Gray), which could support IPG's use of a Time Period Weight Factor as a basis for allocating royalties. 6/4/13 Tr. at 639–43 (Gray).

In addition, the Judges recognize the criticism, leveled by IPG's expert witness, Dr. Laura Robinson, that Dr. Gray wrongly replaced Nielsen Diary Data regarding distant viewing for the six months of sweeps, with his projected data, derived from Nielsen Local Viewing Data. Dr. Robinson also noted that, if Dr. Gray had retained his Nielsen Diary Data, with its approximate 80% of zero viewing sampling points, he should have had at least a level of approximately 40% zero viewing points in his final analysis. 6/6/13 Tr. at 1202–03.

In response to Dr. Robinson's criticism, Dr. Gray ran the distant viewership numbers in the manner suggested by Dr. Robinson. To use Dr. Gray's terminology, using these ''supplant'' values would have resulted in an even greater allocation to MPAA at the expense of IPG. 6/6/13 Tr. at 1328–30 (Gray). IPG objected that it had not been afforded the details of this analysis previously, but the Judges discount that objection, given that Dr. Robinson had not presented her critique of this aspect of Dr. Gray's analysis until her live testimony at the hearing.[50]

[49] Statistically valid unbiased inferences regarding an entire population cannot be projected from a non-random sample. The Judges, therefore, remain troubled by the fact that Dr. Gray did not insist on scrapping Ms. Kessler's non-random sample and require (as a condition to his engagement as MPAA's expert) the use of a random sample. Instead, Dr. Gray attempted to mitigate the non-randomness of Ms. Kessler's sample by shrinking his 120-station random sample to the 70-station sample which constituted the overlap between the Kessler Sample stations and the Gray Sample stations. However, a non-randomly selected sub-set of an otherwise random sample is not a random sub-set. The 70 stations were then used to derive a mathematical relationship between local and distant viewing. That relationship was then used in Dr. Gray's regression analysis to project distant viewing from the local viewing data for all 120 sample stations, and, ultimately, to make a prediction with regard to the distant viewing of the entire population of MPAA and IPG programs that were distantly retransmitted by every CSO.

The Judges credit Dr. Gray's testimony that MPAA refused to abandon the Kessler Sample and that, without it, Dr. Gray would not have had access to distant signal viewing data with which to perform his regression. The Judges likewise credit Dr. Gray's testimony as to the fact that scrapping Ms. Kessler's non-random sample likely would have caused additional expense for MPAA, as MPAA would have been required to rely on Dr. Gray's truly random sample and develop a new set of distant signal viewing data through additional work by CDC, Nielsen and Reznick. 6/4/13 Tr. at 583–587 (Gray). Although the Judges understand why MPAA might have chosen to avoid this additional cost and rely, at least in part, on a compromised sample of stations, that cost-saving decision compromises the Judges' ability to give more weight to Dr. Gray's analysis than they have done in this Determination.

Dr. Gray attempted to demonstrate that the use of the flawed Kessler Sample did not damage the accuracy of his analysis. The Kessler Sample suffered from Ms. Kessler's intentional selection of the largest stations in terms of subscribers, and her ''intuitive'' decision to cut off her sampling at a particular level. 6/3/13 Tr. at 122 (Kessler). This bias toward larger stations could have prejudiced IPG, if the programs of the IPG-represented claimants were relatively more concentrated on smaller stations than were the MPAA-represented programs. To test that possibility, Dr. Gray ran his regression including only the bottom quartile of the Kessler Sample stations and found no change in viewership estimates. 6/4/13 Tr. at 469–70, 500, 570 (Gray). Of course, that fact only indicates that, within the Kessler Sample, changes in broadcast station size did not affect IPG negatively, and at best only suggests that inclusion of even smaller stations (excluded from the Kessler Sample or within Dr. Gray's 120-station sample but excluded from the 70-station Kessler/Gray overlapping sample) would not have increased viewership estimates for IPG.

[50] The Judges note that Dr. Robinson was engaged by IPG only two months prior to the June 2013 hearing, and one month prior to the May 2013

The Judges also acknowledge Dr. Robinson's criticism that, given the level of zero viewing in the raw Nielsen diary data, Dr. Gray should have used a different regression model than his selected Poisson regression. Dr. Gray defended his use of the Poisson regression model, however, as a basis to perform a regression with such a large number of zeros in the data. Although Dr. Robinson suggested the use of another form of regression to account for the relatively high number of zeros, (such as a negative binomial regression), she did not provide any alternative analysis to indicate how such a different form of regression would have changed the results, and Dr. Robinson acknowledged that she therefore was unable to state that Dr. Gray's conclusions were wrong. 6/6/13 Tr. at 1279–81 (Robinson). Moreover, to the extent the zeros in the raw data reflect non-viewing of television at the moment of sampling, or to the extent they reflect poor sampling of small numbers of viewers, a separate regression to account for the zero viewing may have been appropriate. As noted, *supra,* Mr. Lindstrom and Dr. Gray both pointed out, however, small numbers of viewers, indeed zero viewers, is a meaningful sample point, given the small number of viewers of distantly retransmitted broadcast stations, so those zeros should not be isolated and treated differently.

Another of IPG's criticisms of the MPAA Methodology concerns the treatment of Canadian and Mexican stations. *See, e.g.,* Galaz WRT at 40–41. MPAA and Dr. Gray did, in fact, exclude Canadian and Mexican television stations from the Kessler and Gray Samples. 6/3/13 Tr. at 116 (Kessler); 6/5/13 Tr. at 753–54 (Gray). This appears to have resulted from the belief that programs carried on those stations were either not compensable, or not included in the Program Suppliers category. 6/3/13 Tr. 116–17 (Kessler); 6/5/13 Tr. at 754 (Gray). This exclusion was an error.

Section 111(c)(1) unambiguously grants cable system operators a statutory license to retransmit Canadian and Mexican broadcast stations.[51] Section 111(d)(3)(A) likewise directs that royalties deposited by cable system operators under the statutory license be distributed to any copyright owner whose work was included in a secondary transmission made by a cable system of a non-network (*i.e.,* not ABC, CBS or NBC) television program on a distant signal basis. The statute provides no exception for works carried in retransmissions of primary signals that originate in Canada or Mexico. MPAA's conclusion that programs carried on Canadian and Mexican broadcast stations are noncompensable was erroneous.

As to the categorization of programs carried on Canadian and Mexican Stations, the parties in the Phase I proceeding in this matter stipulated to definitions of the following program categories: Program Suppliers; Joint Sports Claimants; Commercial Television; Public Broadcasting; Devotional Claimants; Canadian Claimants; National Public Radio; and Music Claimants. The definitions are mutually exclusive and, in the aggregate, comprehensive. *See Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims,* Docket No. 94–3, CARP CD 90–92 (Feb. 23, 1996), at 3 (stating that Phase I categories identical to those used in this proceedings were ''intended to cover all non-network television programs on all stations retransmitted as distant signals by U.S. cable systems * * * on a mutually exclusive basis''). In other words, every compensable program must fall within one and only one program category.

The ''Canadian Claimants'' category is defined as:

> All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners.

Kessler WRT at Addendum B.

The first exception describes programs that fall within the Sports Programming category.[52] The second exception includes all programs owned by U.S. copyright owners. Although programs falling within the second exception could, potentially, fall into any of the other categories, in reality they are all within the Program Suppliers[53] category. *Phase I Order,* 75 FR at 26800 n.5; *see also* Written Direct Testimony of Janice de Freitas, Ex. CDN–1, Docket No. 2008–2 CRB CD 2000–2003 (Phase I) at 2.

There is no ''Mexican Claimants'' category, so any compensable programming carried on distantly retransmitted Mexican broadcast stations must fall into one of the other agreed categories (other than Canadian Claimants), including the Program Suppliers. It is simply incorrect to conclude that all compensable programming on distantly retransmitted Canadian and Mexican broadcast stations falls outside the Program Suppliers category. MPAA erred by excluding Canadian and Mexican stations from its analysis.

The Judges do not have before them sufficient evidence to determine the precise degree to which MPAA's exclusion of Canadian and Mexican stations has affected their proposed distribution. The Judges can, however, construct a rough estimate based on IPG's sample stations, which were selected because they were the most widely retransmitted television stations based on fees generated. 6/5/13 Tr. at 762 (Galaz).

Of the 223 stations that IPG included in its sample for royalty year 2000, 12 stations (5.38% of the total) were Canadian. Those stations represented 4.46% of the overall number of distant subscribers covered in the IPG sample. Only two Mexican stations (0.90% of the total) were included in the IPG sample, representing 0.02% of distant subscribers covered in the IPG sample. The Judges conclude that the effect on MPAA's proposed distribution shares of excluding Mexican stations from their regression analysis was negligible. On its face, however, the impact of excluding the Canadian stations may not be negligible.

Evidence from the Phase I proceeding suggests that a relatively small amount of the programming on Canadian broadcast stations is allocable to the Program Suppliers category. Written Direct Testimony of Janice de Freitas, Ex. CDN–1, Docket No. 2008–2 CRB CD 2000–2003 (Phase I) at 6 and Ex. CDN–1–I. Assuming, for purposes of this rough estimate, that there are half as

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deadline for the filing of rebuttal testimony. 6/6/13 Tr. at 122 (Robinson). IPG's delay in that regard may have compromised its expert's ability to construct a more comprehensive critique of Dr. Gray's analysis. As Dr. Robinson was engaged after the Preliminary Hearing in this matter, IPG, by its own delay in retaining Dr. Robinson, was unable to seek additional discovery based upon her purported need for additional information.

[51] Section 111(c)(4) places certain geographic restrictions on such retransmissions.

[52] The ''Joint Sports Claimants'' category is defined as:

> Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category * * *.

Kessler WRT at Addendum B.

[53] The ''Program Supplier'' category is defined as:

> Syndicated series, specials and movies, other than Devotional Claimants programs as defined [in the stipulation]. Syndicated Series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. Commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, ''PM Magazine,'' and locally hosted movie shows.

Id.

many programs on Canadian stations that fall in the Program Suppliers category than there are on U.S. stations, Canadian stations carried roughly 2.7% of retransmitted programs in the Program Suppliers category. It thus appears that a small, but not negligible, number of programs in this category are carried on Canadian stations.

For the exclusion of the relatively small percentage of programs broadcast on Canadian stations to have a material impact on the relative shares computed by MPAA, the proportion of MPAA-represented programs to IPG-represented programs on Canadian stations would have to differ fairly significantly from that on U.S. stations. There is no evidence to suggest that it does.[54] The Judges conclude that, while the exclusion of the Canadian stations was an error, it did not have a significant effect on the relative shares computed by MPAA.

b. Description of the IPG Methodology and Proposed Allocation

IPG's distribution methodology (the IPG Methodology) was created by Mr. Raul Galaz, an employee and former principal of IPG. Mr. Galaz testified that the IPG Methodology was formed in response to a perceived bias in the distribution methodology historically utilized by MPAA. Galaz WDT at 7–8. IPG espouses that each and every program that is broadcast by a terrestrial station, and is thereafter retransmitted by a CSO pursuant to the Section 111 statutory license, is entitled some portion of the fees deposited with the U.S. Copyright Office. *Id.* at 14.

Upon the commencement of this Phase II proceeding, IPG obtained updated data from CDC of all Form 3 retransmitted stations from 2000–2003, which data included the number of households to which any particular terrestrial signal was retransmitted, as well as the fees generated from the retransmission of any particular terrestrial signal. IPG ranked such stations on a year-by-year basis, according to the cable retransmission fees generated by such stations. *Id.,* at 16; 6/5/13 Tr. at 762 (Galaz).

IPG thereafter acquired from Tribune Media the programming data for the 200 broadcast stations (IPG Sample) generating the largest amount of cable retransmission fees, and supplemented such information with broadcast data already acquired by IPG for calendar years 2000 and 2001.[55] Galaz WDT at 16; *see* Galaz WDT at Ex. IPG–4; 6/5/13 Tr. at 762, 790 (Galaz).[56] The IPG Sample was not (and was not intended to be) a random sample. 6/5/13 Tr. at 765–66, 808–09 (Galaz). From this programming data IPG identified 11,213,962 individual broadcasts that took place on the IPG Sample stations which, after omitting non-compensable programming (*e.g.,* network feed programming), yielded 8,515,052 compensable broadcasts representing 39,969 discrete titles. Galaz WDT at 17.

According to Mr. Galaz, IPG then undertook to confirm with all of the claimants that it represents exactly which titles and broadcasts were owned or controlled by them. IPG submitted to each claimant the list of compensable titles, and requested that the claimant respond to IPG with a list of any titles on the list that correspond to titles owned or controlled by the claimant. In some circumstances IPG determined which titles and broadcasts were owned or controlled based on information within the IPG contracting documents, or information previously provided to IPG in the course of IPG's representation. Galaz WDT at 18; 6/5/13 Tr. at 791–93 (Galaz). Based on that vetting process, IPG determined that 1,297 compensable programs were owned or controlled by IPG-represented claimants, reflected within 541,586 compensable broadcasts. Galaz WDT at 10; *see* Galaz WDT at Exs. IPG–2, 3.

The weight that IPG accorded to any given compensable broadcast was the product of (*x*) a ''Station Weight Factor,'' (*y*) a ''Time Period Weight Factor,'' and (*z*) the duration of the broadcast. Galaz WDT at 18–23.

IPG took two alternative approaches to creating a Station Weight Factor. One assigned a value to a station based on the number of distant cable subscribers that received retransmissions of that station's broadcasts. The other assigned a value to a station based on the amount of distant cable retransmission fees generated by the station, as disclosed in CDC data. IPG presented three alternative computations based on each of the Station Weight Factors and an average of the two. Galaz WDT at 18; *see* Galaz WDT at Ex. IPG–4; Galaz WRT at Exs. R–19 and R–20; 6/5/13 Tr. at 769, 768, 779–81 (Galaz).

The Time Period Weight Factor reflects the fact that average television viewership varies by time of day. IPG based the Time Period Weight Factor on Nielsen Media Research's assessment of distant viewership of all persons during 48 half-hour dayparts that was, in turn, based on Nielsen viewing data from 1997.[57]

Mr. Galaz testified that the IPG Methodology seeks to replicate the decisions actually made by CSOs by looking at data representative of such decisions, and data reflecting the aggregate of information that a CSO could have had at the time of its decision to retransmit a broadcast station. 6/5/13 Tr. at 761, 763, 768 (Galaz). He explained that it was for this reason that IPG used its Time Period Weight Factor in preference to projections of actual viewership. IPG avers that actual viewership can only be known after a broadcast has taken place; prior to a CSO's decision to retransmit a particular broadcast, the CSO may only reasonably predict on a day-by-day basis the relative viewership of a program based on the timing of its placement on a station's lineup. Galaz WDT at 20–22; 6/5/13 Tr. at 770–75 (Galaz).

As a final step, the broadcast length of all compensable broadcasts appearing in the IPG analysis was applied against the ''Station Weight Factor(s)'' and the ''Time Period Weight Factor'' to create a weighted value for each of the broadcasts. After segregating the compensable broadcasts into their respective Phase I categories, including the Program Suppliers category, IPG summed the resulting weighted values for (i) all IPG-claimed broadcasts, and (ii) all MPAA-claimed broadcasts. Galaz WDT at 24; Galaz WRT at Exs. R–19 (revised) and R–20 (revised); 6/5/13 Tr. at 778 (Galaz). By comparing these

[54] In his analysis of the IPG Methodology, Dr. Gray evaluated the effect of IPG's *inclusion* in its methodology of *non*-U.S. programs carried on Canadian stations and concluded that it resulted in an overstatement of the value of IPG's claims (perhaps reflecting a higher proportion of non-U.S. programming among IPG-represented programs than among MPAA-represented programs). Gray WDT at 15–17. Unfortunately that analysis sheds no light on the effect of MPAA's *exclusion* of *U.S.* programs on Canadian stations on its calculation of relative shares of royalties.

[55] IPG's samples consisted of 223 stations for 2000; 231 stations for 2001; 200 stations for 2002; and 200 stations for 2003. Galaz WDT at 16; *see* Galaz WDT at Ex. IPG–4; 6/5/13 Tr. at 762, 790 (Galaz).

[56] The stations surveyed as part of the IPG Sample accounted for 89–93% of the aggregate number of Form 3 subscribers receiving retransmitted commercial signals in any given year during 2000–2003, and 94–96% of the distant cable retransmission fees generated by commercial stations in any given year during 2000–2003. Galaz WDT at 17; *see* Galaz WDT at Ex. IPG–5; 6/5/13 Tr. at 765, 788 (Galaz).

[57] IPG contended that it was reasonable to use 1997 data for this purpose because Nielsen Media Research publications indicate that there have been only trace changes in U.S. daypart viewing, even over the span of decades. Galaz WDT at 21–22; 6/5/13 Tr. at 775–77 (Galaz). IPG's calculations originally were based on six dayparts, rather than 48. When this issue was brought to IPG's attention, IPG produced revised calculations based on the 48 dayparts described in Mr. Galaz' written testimony. *See* Galaz WRT at Exs. R–19 (revised) and R–20 (revised). In live testimony, Mr. Galaz stated that the error was inadvertent. 6/5/13 Tr. at 774 (Galaz).

''Sum Weighted Values'' for IPG and MPAA, IPG calculated its proposed relative distribution shares.

Using a Station Weight Factor based on numbers of distant subscribers, IPG computed the following proposed relative distribution shares.

IPG PROPOSED DISTRIBUTION SHARES

[SWF—Subs]

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
MPAA	90.52	92.77	94.54	94.95
IPG	9.48	7.23	5.46	5.05

Galaz WRT, Ex. R–19, at 1 (revised).

Using a Station Weight Factor based on fees generated, IPG computed the following proposed relative distribution shares.

IPG PROPOSED DISTRIBUTION SHARES

[SWF—Fees]

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
MPAA	90.60	92.57	94.56	94.86
IPG	9.40	7.43	5.44	5.14

Id.

Using an average of the shares produced by the previous two methods, IPG computed the following proposed relative distribution shares.

IPG PROPOSED DISTRIBUTION SHARES

[SWF—Subs and fees]

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
MPAA	90.56	92.67	94.55	94.91
IPG	9.44	7.33	5.45	5.09

Id.

(1) Evaluation of the IPG Methodology

IPG, through the written testimony of its sole direct witness, Mr. Galaz, did not definitively state that its methodology was an application of ''relative market value.'' Galaz WDT at 11. At the hearing, on cross-examination, Mr. Galaz initially declined to state that the IPG Methodology was consonant with any ''economic principle.'' Under further cross-examination, Mr. Galaz testified that he thought that the IPG Methodology fits under the ''relative market value'' standard. 6/5/13 Tr. at 942–47.

The IPG Methodology for distributing royalties in this Phase II proceeding eschews explicit reliance upon viewership levels. Rather, IPG asserts that ''certain obvious factors that would otherwise affect a negotiated license between a producer and an exhibitor are not present in the compulsory licensing scheme * * * .'' Galaz WDT at 12. The Judges understand IPG's position in this regard to be premised on the assertion that the hypothetical CSO is interested in maximizing subscriber fees (*i.e.,* profits, assuming constant costs) or subscriber levels (*i.e.,* market share), rather than viewership.

IPG is not incorrect in its assertion of the different ''factors'' (*i.e.,* incentives) that apply to a CSO, as opposed to an ''exhibitor'' (*i.e.,* a broadcast station) in this retransmission context. The Judges conclude, however, that the substance of IPG's direct case suffers from three major defects:

First, the maximization of subscriber revenues or levels is not divorced from viewership levels. Rather, a CSO would attract subscribers on a distantly retransmitted station only to the extent that the programs it offered were demanded by consumers who intended to *view* the programs. Indeed, even IPG's expert witness, Dr. Robinson, acknowledged that, in her professional experience, viewership was a factor in determining the value of a retransmitted television program. 6/6/13 Tr. at 1219–21 (Robinson).

Second, it is true, as IPG asserts, that since a CSO is concerned about which programs the marginal subscriber might prefer, a CSO may prefer a program with a smaller level of viewership if that viewership represents *new* subscribers, instead of a show with a large audience that consists only of *existing* subscribers. IPG has not, however, proffered any evidence applying such a marginal analysis in the present proceeding. Dr. Robinson testified that such an analysis would require a ''more sophisticated model,'' incorporating perhaps ''game theoretic'' principles to demonstrate how a CSO would maximize subscribership through such a marginal viewer analysis. 6/6/13 Tr. at 1230 (Robinson). Likewise, Dr. Gray testified that such an approach would require a ''more sophisticated'' analysis than the parties' evidence permitted in this proceeding. 6/4/13 Tr. at 547 (Gray).

Third, the IPG Methodology does not follow from the foregoing critique. Rather, the IPG Methodology uses factors that tend to treat as similar programs that are distantly retransmitted at the same time of day, run for the same number of minutes per program or that appear on the same station. Thus, the IPG Methodology considers neither the initial necessity of considering absolute viewership nor the subsequent necessity of considering the iterative process (''perhaps a ''game theoretic'' approach, as Dr. Robinson testified). Simply put, aside from any other defects in the IPG Methodology, it is not true to its own critique of a viewership-based analysis.

(2) The Testimony of Mr. Galaz

IPG's direct case also suffers from the fact that it was presented by a particular single witness, Mr. Galaz. For the following reasons, Mr. Galaz, to say the least, was an imperfect messenger to convey the IPG Methodology.

First, the Judges note that Mr. Galaz was previously convicted and incarcerated for fraud in the context of copyright royalty proceedings—a fraud that caused financial injury to MPAA. 6/5/13 Tr. at 932 (Galaz). In connection with that fraud, Mr. Galaz also admittedly lied in a cable distribution proceeding much like the instant proceeding. *Id.* Mr. Galaz's fraud conviction and prior false testimony compromises his credibility, especially in this proceeding.

Second, Mr. Galaz, the founder and previously an owner of IPG, is now an employee of IPG. Galaz WDT at 7. IPG is currently owned by his mother and sister. 6/5/13 Tr. at 1079 (Galaz). Thus, he clearly has a self-interest which renders the IPG Methodology—of which he is the architect—less credible than a methodology created by an outside expert.[58]

Third, Mr. Galaz acknowledged that he is not an economist, statistician, or econometrician, and that he had no particular expertise that would permit him to opine as an expert on the construction of a methodology to establish ''relative market value'' in this distribution proceeding. 6/5/13 Tr. at 928–30. The Judges gave serious consideration to granting the motion *in limine* filed by MPAA and the SDC at the start of the hearing to bar Mr. Galaz's testimony on the basis that he was offering expert opinion but was not qualified as an expert witness. For the reasons stated on the record, however, the Judges denied the *in limine* motion and decided to permit Mr. Galaz to testify and accord his testimony whatever weight it warranted. 6/3/13 Tr. at 58–64. Nothing in Mr. Galaz's testimony indicates that the Judges should give his testimony any weight, except to the limited extent certain general principles he utilized in his IPG Methodology provide a basis to modify marginally the distribution allocations arising from the MPAA Methodology.

Fourth, Mr. Galaz did not indicate that he had any experience working for or on behalf of a CSO, and he admitted that he had not discussed the IPG Methodology with any CSO. 6/5/13 Tr. at 970–72. Thus, his suppositions as to how a CSO might construe viewership lack foundational support. Moreover, since Mr. Galaz is not an economist, he cannot apply microeconomic theory in order to opine upon the economic incentives to which a hypothetical CSO might respond when acquiring a bundle of licenses from owners of program rights.

(3) Additional Problems With the IPG Methodology

In addition to the foregoing overarching and substantial defects in IPG's direct case, particular elements of the IPG Methodology are also deficient.

First, IPG contends that the purpose of the IPG Methodology is to compensate every claimant, even if there is no evidence that there was any viewership of the claimant's program.[59] The Judges find such a methodology unacceptable. Even if viewership as a metric for determining royalties may be subject to some adjustment in light of the economic incentives facing a CSO, there is certainly no basis to allow for compensation in the absence of *any* evidence of viewership. *See* 6/5/13 Tr. at 950 (Galaz).

Second, IPG's ''sample'' of stations was not selected in a statistically random manner. *Id.* at 957 (Galaz). Thus, it suffers from the same infirmity as the Kessler Sample relied upon in part by MPAA. However, unlike MPAA, IPG made no effort to mitigate the problems with its non-random sample. Indeed, at the hearing, Mr. Galaz attempted to disavow that his list of stations was a sample, and instead re-defined his station selections as a ''survey.'' *Id.* at 959 (Galaz).

Third, the IPG Methodology, with its reliance on the so-called ''Station Weight Factor,'' grossly ignores viewership, resulting in a much higher relative market value for relatively low-rated programs. The following two pairs of examples from Dr. Gray's Written Rebuttal Testimony, unrebutted by Mr. Galaz at the hearing, show how the IPG Methodology calculates the relative value of two programs as identical, merely because they aired at the same time of day, even though the MPAA-claimant programs (''Judge Joe Brown'' and ''Pokémon'') had substantially higher viewership levels than the IPG-claimant programs (''Animal Adventures'' and ''Dragon Ball Z'') which aired in the same time period:

TABLE 2—EXAMPLES SHOWING THAT FACTORS OTHER THAN STATION, TIME OF DAY, AND PROGRAM TYPE IMPACT DISTANT VIEWING OF A PROGRAM *

Date/time	Station	Program	Program type	Entity claiming	Nielsen viewing households	Gray viewing households	IPG estimated relative value
7/8/2000:							
16:30	KRON	Animal Adventures	FIRST-RUN SYNDICATION.	IPG	740	952	2,358,915
5/21/2000:							

[58] It is noteworthy that IPG engaged Dr. Robinson to critique the MPAA methodology and Dr. Gray's analysis, but, as Dr. Robinson testified, she was not asked to defend the IPG Methodology created by Mr. Galaz. 6/6/13 Tr. at 1226 (Robinson).

[59] Mr. Galaz asserted that compensating each and every copyright owner affected by the Section 111 statutory license was a constitutional imperative. Galaz WDT at 14; IPG PFF at 12. Counsel for IPG echoed this ''takings'' argument in his closing statement. 6/6/13 Tr. at 1454–55. IPG did not brief or argue this issue, so it is not before the Judges for decision. Nevertheless, the Judges note that, on its face, this argument proves too much. In addition to statutory licenses, the Copyright Act includes a number of outright exceptions *(e.g.,* fair use under Section 107) where a copyright owner's exclusive rights are limited without *any* compensation whatsoever. IPG's Fifth Amendment takings argument would, absurdly, render these exceptions unconstitutional.

TABLE 2—EXAMPLES SHOWING THAT FACTORS OTHER THAN STATION, TIME OF DAY, AND PROGRAM TYPE IMPACT DISTANT VIEWING OF A PROGRAM *—Continued

Date/time	Station	Program	Program type	Entity claiming	Nielsen viewing households	Gray viewing households	IPG estimated relative value
16:30	KRON	Judge Joe Brown	FIRST-RUN SYNDICATION.	MPAA	1,840	1,635	2,358,915
7/30/2001: 16:30	WPIX	Dragon Ball Z	CARTOON	IPG	2,898	5,586	63,748,728
2/5/2001: 16:30	WPIX	Pokémon	CARTOON	MPAA	10,888	8,228	63,748,728

Notes: "Gray Viewing Households" refers to predicted household distant viewing based on the econometric estimation procedure described in my Direct Testimony. IPG Estimated Relative Value is based on Mr. Galaz's SWF Subs measure. Programs in the two sets of examples also have identical IPG Estimated Relative Value based on Mr. Galaz's SWF Fees measure. Nielsen Viewing Households represents the number of households viewing the program distantly as reported in the Nielsen Diary Data and averaged over the quarter hour increments that constitute the full program time.

Gray WRT at 8.

Fourth, the IPG Methodology, with its additional reliance on the so-called "Time Period Weight Factor," ascribes equal relative value to MPAA-claimed programs and IPG-claimed programs that aired on the same station and for the same duration, despite substantially different levels of viewership. The following comparison of programs that aired on WGN in 2001 demonstrates this outcome.

TABLE 4—EXAMPLE OF MY [DR. GRAY'S] AND MR. GALAZ'S ESTIMATED RELATIVE VIEWING OF RETRANSMITTED WGN BROADCASTS

Date/time	Program	Entity claiming	Nielsen viewing households	Gray viewing households	IPG's TPWF	IPG relative value
5/12/2001: 17:00	Andromeda	MPAA	117,501	102,065	0.612244	1,220,182,908
2/3/2001: 10:00	Video Computer Store	IPG	6,754	12,325	0.612244	1,220,182,908
5/6/2001: 17:00	Coach	MPAA	117,088	143,757	0.612244	610,091,454
7/14/2001: 9:30	As Seen on TV PC	IPG	10,282	14,322	0.612244	610,091,454

Notes: "Gray Viewing Households" refers to predicted household distant viewing based on the econometric estimation procedure described in my Direct Testimony. IPG Estimated Relative Value is based on Mr. Galaz's SWF Subs measure. Programs in the two sets of examples also have identical IPG Estimated Relative Value based on Mr. Galaz's SWF Fees measure. Nielsen Viewing Households represents the number of households distant viewing the program as reported in the Nielsen Diary Data and averaged over the quarter hour increments that constitute the full program time.

Id. at 22.

Fifth, compounding the problems with the IPG Methodology, Mr. Galaz utilized 1997 data to estimate the level of viewing throughout the broadcast day, rather than data that was contemporaneous with the 2000 through 2003 royalty distribution period at issue in this proceeding.[60] 6/5/13 Tr. at 973 (Galaz).

Sixth, Mr. Galaz claimed originally to have utilized half-hour viewing segments to create his Time Period Weight Factor. However, as Dr. Gray explained in his Written Rebuttal Testimony, Mr. Galaz in fact did not utilize half-hour viewing segments in his analysis, but rather utilized the six "daypart" categories upon which IPG had relied in the 1993–1997 Phase II proceeding, which reliance was criticized by the CARP convened for that prior proceeding. Gray WRT at 20–21. Mr. Galaz acknowledged this problem, described it as a good faith error, and changed his calculations by substituting the half-hour viewing segments for his "daypart" categories in his application of the Time Period Weight Factor. *Compare* Galaz WRT at Exs. R–19 and R–20 (original) *with* Galaz WRT at Exs. R–19 and R–20 (revised).

What is particularly noteworthy about this issue is the extent to which the use by Mr. Galaz of the "daypart" categories, as compared to his claimed use of the half-hour segments, inured to IPG's benefit. As Mr. Galaz testified, 6/6/13 Tr. at 1155–56 (Galaz), his use of the "daypart" categories significantly inflated IPG's claimed percentage of the Program Suppliers category in each of the years at issue as follows.

For 2000, IPG's claimed percentage was inflated by 23%, *i.e.,* from 9.47% if Mr. Galaz had correctly used half-hour segments, to 11.62% when he instead utilized "daypart" categories.

For 2001, IPG's claimed percentage was inflated by 32%, *i.e.,* from 7.33% if Mr. Galaz had correctly used half-hour segments, to 9.71% when he instead utilized "daypart" categories.

For 2002, IPG's claimed percentage was inflated by 27%, *i.e.,* from 5.45% if Mr. Galaz had correctly utilized half-hour segments, to 6.9% when he instead utilized "daypart" categories.

For 2003, IPG's claimed percentage was inflated by 21%, *i.e.,* from 5.09% if Mr. Galaz had correctly utilized half-hour segments, to 6.33% when he instead utilized "daypart" categories.

Id.

Given the serious issues of credibility regarding Mr. Galaz's testimony, as discussed *supra,* the Judges cannot state

[60] Mr. Galaz asserted that information published by Nielsen supported his use of 1997 data. *See supra* note 57. Mr. Galaz lacks the requisite expertise on which to base that conclusion, however.

with any confidence that these rather significant errors—all of which would have substantially inflated IPG's allocation and were left uncorrected until they were disclosed in Dr. Gray's Written Rebuttal Testimony—were not the product of design rather than inadvertence.

Seventh, the IPG Methodology, although *intended* to eschew viewership as a primary measure, nonetheless is based implicitly upon viewership, as it considers the duration of a program as an indicia of value (a program of relatively longer duration would be more valuable because of its *viewership* over a longer period), as well as the time of day a program is aired (there are *more viewers* at some times of day than others).

(4) Limited Applicability of the IPG Methodology

Although the Judges reject the *wholesale* application of the IPG Methodology in this Determination, they do note that the IPG Methodology attempts to address certain issues of value which are worthy of consideration when the Judges determine the extent, if any, to adjust an allocation based upon the MPAA viewership-based methodology.

First, Dr. Gray acknowledged that the IPG Methodology was an ''approximation'' of Dr. Gray's own methodology, albeit a ''*crude* approximation.'' Gray WRT at 4 *(emphasis added).*

Second, as noted *supra,* Dr. Gray acknowledged that even his own regression analysis showed a strong correlation between the time of day when a program aired and the level of viewership of the distantly retransmitted programs. This correlation generally affirms that IPG's Time Period Weight Factor is *not irrational,* even though IPG's emphasis on that factor, and its failure to acknowledge the much greater importance of per-program viewership, is *unreasonable.*

Third, IPG's argument that lower-rated shows might enhance subscriber fees or levels more than higher-rated shows is a logical economic concept. In that regard, the Judges understand IPG's theory to be an application of the bundling problem in economics, an application that can be summarized as follows.

—A CSO does not make decisions based upon maximizing viewership, but rather upon maximizing subscriber revenues (assuming costs are constant) or by maximizing subscriber volume (if maximizing market share is more important than maximizing profits at any given point in time).

—A CSO maximizes subscriber revenue or volume by creating a mix of program types (even within a given Phase I category).

—The CSO's maximizing mix of program types is not (merely) a function of total viewership.

—Rather, the CSO will *bundle* different programs in order to obtain additional new (*i.e.,* marginal) subscribers.

—These new subscribers may be attracted to programs at viewership levels that are lower than the viewership levels of other shows available for licensing, but the latter shows may simply have more of the *same* viewers who have already subscribed based upon the other shows in the CSO lineup.[61]

—Therefore, assessing the relative market value of retransmitted programs on the basis of relative viewership alone is an imperfect measurement because viewership does not explicitly account for the CSO's incentive to *bundle* programs in a manner designed to maximize subscriber fees (profits) or levels (market share).

When bundling is considered, the economic analysis shifts from the relatively straightforward profit maximization analysis advanced by MPAA (using viewership as a measure of value) to a more nuanced valuation assessment. In essence, the hypothetical CSO whose buying decisions we must consider would create an ersatz station by bundling programs in a combination that would maximize its expected revenues or volumes (with all other costs assumed constant). As previously explained, an attempt to maximize profits would result in the purchase of program licenses at a fee (the marginal cost of the program input) up to the anticipated MRP from that program in a competitive market.

So stated, IPG's argument is rational in *theory.* However, as both Dr. Gray and Dr. Robinson testified, such a concept would require a much more detailed economic and game theoretic model of CSO programming than was presented by IPG in this proceeding.[62] Further, such an argument would require evidence and testimony from someone with actual knowledge of CSO programming decisions and strategies pertaining to the bundling of programs. *See supra* note 28. In these two regards, (an undeveloped theory and the absence of factual support) the Judges cannot adopt the IPG Methodology.

(5) Conclusion Regarding the IPG Methodology

For the foregoing reasons, the Judges conclude that the IPG Methodology cannot be applied to establish the basis for an allocation of the royalties in the Program Suppliers category. However, given the few generally correct principles, noted above, within the IPG Methodology, and given certain imperfections in the MPAA Methodology, the Judges conclude that the allocations otherwise established by a strict application of the MPAA Methodology should be adjusted downward *marginally.*

c. Allocations Within the Program Suppliers Category

The Judges conclude that the MPAA Methodology should be accorded substantial weight in establishing the zone of reasonableness for the allocations in the Program Suppliers category. By contrast, in light of the Judges' conclusion that the IPG Methodology is seriously deficient, the IPG methodology cannot be used in establishing the parameters of the zone of reasonableness for the allocation of royalties in the Program Suppliers category.

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[61] At the hearing, the Judges offered the fanciful example that an instructional show with low viewership might be more valuable to a CSO, on the margin, than reruns of ''Bewitched'' with higher viewership, if the ''Bewitched'' viewers were merely redundant of, or displacing, viewers of another similar show, *e.g.,* ''I Dream of Jeannie,'' which was already part of that CSO's offering. 6/4/13 Tr. at 551–53.

[62] There is a wealth of economic literature analyzing the economics of bundling, *i.e.,* the impact of the offering for joint sale or purchase two or more products or services. *See generally* B. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey on the Economic Literature on Bundling,* 1 J. of Competition L. & Econ. 707 (Dec. 2005). For example, bundling is utilized by sellers who possess market power as a means of ''price discrimination,'' by tying two products with different elasticities of demand together in order to convert the ''consumer surplus'' which would exist in the absence of a tying or bundling, into higher profits for the seller. *See* G. Stigler, U.S. v. Loew's Inc.: *A Note on Block Booking,* 1963 Sup. Ct. Rev. 152 (1964). Thus, a rational bundling CSO with market power would not simply seek to acquire a copyright license to a program that, in isolation, would add more subscriber fees, but rather would determine which combination of programs extracted the most profits, based upon the relative inelasticity of demand for popular shows. To cite another issue created by bundling, the program owner (with monopolistic power over its own relatively more valuable program) might hold out for a license royalty that appropriated for itself the profits from bundling, thus frustrating the CSO's attempt to price discriminate by assembling a roster of shows which would create the profit-maximizing bundle. This is a variant of the classic and indeterminate problem of price-setting between a monopolist and a monopsonist, as to which the game theoretic principles referred to by Dr. Robinson would be applicable. These are the types of issues which the IPG Methodology simply does not address.

The Judges conclude that the ''zone of reasonableness'' in the Program Suppliers category in this proceeding corresponds with the range established by the 95% confidence interval that Dr. Gray computed for MPAA's proposed distribution allocation. *See supra* note 45; Gray WRT at 26 n.25. In light of the noted defects in the MPAA Methodology, and given the few generally correct principles identified by IPG as noted above, the Judges conclude that the distribution levels should be set at the lower bound (''lower'' in terms of percent of distributions awarded to MPAA) of Dr. Gray's confidence interval (and, therefore, the lower bound of the ''zone of reasonableness'').

Accordingly, the Judges establish the following annual distribution levels, finding them to be within the zone of reasonableness:

ALLOCATION IN THE PROGRAM SUPPLIERS CATEGORY

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
MPAA	98.84	99.69	99.64	99.77
IPG	1.16	0.31	0.36	0.23

2. Devotional Category

a. The IPG Methodology

IPG proposes the identical formula for the Devotional allocations as it proposed for the Program Suppliers category. Specifically, IPG applies a methodology that considers: (1) The station(s) on which a devotional program appeared, thereby providing the number of subscribers receiving the distantly retransmitted station and the fees paid by those subscribers (the Station Weight Factor); (2) the time of day during which each devotional program was broadcast (the Time Period Weight Factor); and (3) the length of each devotional program. These factors are then multiplied and aggregated for IPG and MPAA programs. IPG then uses those aggregate program values to determine the relative value as between the IPG-claimed Devotional Programs and the SDC-claimed Devotional Programs.[63]

IPG's formula produced absurd results in the Devotional category, as it did in the Program Suppliers category. The Judges note Dr. Brown's Amended Written Rebuttal Testimony, in which he explained how, for example, in the Devotional category, application of the IPG Methodology bizarrely: (1) Would cause a program with 167% of a competing program's national rating to receive *less than 30%* of the value assigned to that competing program; and (2) would allow programs comprising 0.119% of the entire Devotional category to receive more than 18% of all Devotional category revenue simply because that 0.119% of the programs were broadcast on WGNA, which was retransmitted to a disproportionately high number of subscribers. Brown WRT (Amended) at 10–13.

More generally, in the discussion regarding the Program Suppliers distributions, the Judges have explained in detail the deficiencies in the IPG Methodology, and the few positive attributes arising from—to use Dr. Gray's language—the ''crude approximation'' of relative market value created by the IPG Methodology. The Judges adopt in this Devotional category analysis those prior statements regarding the attributes of the IPG Methodology.[64]

b. The (Proffered) SDC Methodology

The SDC explicitly requests that, in the Devotional category, the Judges adopt the MPAA Methodology to establish relative market value. Indeed, the SDC claims to have relied upon, *inter alia,* the non-random Kessler Sample of stations, as well as the Nielsen Diary Data originally provided to MPAA and about which Mr. Lindstrom testified. As discussed below, the Judges have declined to rely on the results of the application of the SDC Methodology because the SDC offered evidence of the application of its methodology in an untimely manner, in contravention of the Judges' procedural rules. Therefore, the Judges cannot use the SDC Methodology to determine the allocation of the Phase II share of royalties in the Devotional category.

The SDC's direct case consisted of the written and oral testimony of Dr. William Brown and the written testimony of Mr. Michael Little, which was admitted pursuant to stipulation of the SDC and IPG. *Stipulation Regarding Testimony of Michael D. Little* (May 31, 2013).[65] Mr. Little's testimony describes the diversity of the SDC programming. Little WDT at 1–4. He identifies 23 SDC-represented claimants and their respective programs during the years 2000–2003. *See* Little WDT at Ex. 2.

The heart of the SDC's case rests on Dr. Brown's testimony. Dr. Brown, a Professor and Research Fellow at the School of Communication and the Arts at Regent University in Virginia Beach, Virginia, served as the SDC's expert witness in the field of communication theory and research. *See* 6/6/13 Tr. at 1371 (Brown). In his direct testimony, Dr. Brown asserted that ratings are a ''valuable tool'' in determining Phase II allocations. Brown WDT at 4. He described how

> Nielsen compiled data on an overnight basis using a scientific sample of several thousand households electronically metered to monitor TV viewing, and during sweeps periods (pre-selected, 4-week cycles) using tens of thousands of diaries of households that keep records of TV viewing activities.

Id. Consequently, Dr. Brown opined, that ''[t]he most useful quantifiable data is Nielsen viewing data, projected to distant households.'' [66] *Id.* at 5.

At no time during the direct phase of its case did the SDC offer any testimony, written or oral, specifically setting forth the *application* of the MPAA methodology to Devotional Programming. Rather, the SDC attempted to introduce such evidence during the *rebuttal* phase of its case by proffering the written and oral testimony of Mr. Alan G. Whitt, the

[63] As in the Program Suppliers category, IPG computes three alternative Station Weight Factors: A pure subscriber-level factor, a pure fee-based factor and an average of the two.

[64] IPG also asks the Judges to order the SDC to reimburse IPG for costs it incurred to develop data also relied upon by the SDC. IPG PFF (Devotional) at 22. However, IPG did not file a motion seeking such reimbursement, and the Judges are not aware of any statutory or regulatory authority pursuant to which such costs can be shifted in this proceeding.

[65] The Judges excluded Exhibit 3 to Mr. Little's testimony for reasons discussed *supra. See* text accompanying note 14.

[66] Dr. Brown also proposed that the Nielsen data be ''supplemented, where applicable, with Bortz [Survey] study data.'' Brown WDT at 5. However, in his Amended Written Rebuttal Testimony, Dr. Brown testified: ''I conclude that the Bortz survey data cannot be used to supplement the MPAA/ Nielsen viewing data to determine the comparative value of programs within the single genre of devotional programming.'' Brown WRT (Amended) at 16.

founder and principal of IT Processing, Inc. The purpose of Mr. Whitt's testimony was to provide the underlying data upon which Dr. Brown would rely to form his opinion as to the proper distribution of royalties for the Devotional category for the years 2000 through 2003. Specifically, Mr. Whitt gathered: (1) The Kessler non-random sample of stations; (2) the Nielsen data prepared on behalf of MPAA; (3) the Tribune Media Services database of programs that aired during the relevant calendar years; and (4) the MPAA ''Reports of Household Viewing Hours for the MPAA Copyright Royalty Databases'' for 2000–2003. He then identified programs as ''Devotional'' or, synonymously, ''Religious.'' Whitt WRT at 3–8. In his rebuttal testimony, Dr. Brown explained how he used Mr. Whitt's work to arrive at the SDC's proper distribution:

> Nielsen's quarter hour results were * * * transmitted to *Mr. Whitt* * * *. *Mr. Whitt* received the data and, utilizing sophisticated software programming and the data from Tribune Media Services (TV DATA) of programs telecast in 2000–2003, [*Mr. Whitt*] determined the programs to which the viewing information was attributed. * * * *Mr. Whitt organized programming data for entities he identified as religious or devotional.*

Brown WRT (Amended) at 14–15 (*emphasis added*).

The Judges excluded Mr. Whitt's testimony on the basis that the SDC was required by the Judges' regulations to provide Mr. Whitt's testimony in its *direct* case. *See* 37 CFR 351.4(b)(1), (c)(contents of and amendment of Written Direct Statements) and § 351.10(e)(introduction of studies and analyses); 6/6/13 Tr. at 1352–53, 1361–62 (to the extent Whitt's testimony provided foundation for Dr. Brown's testimony, it ''needed to be included in the direct case of SDC.'').

By failing to provide Mr. Whitt's testimony until its rebuttal case, a mere three weeks before the hearing, the SDC prejudiced IPG and, in essence, engaged in trial by ambush, in violation of the letter and spirit of the Judges' procedural rules. More specifically, by not including Mr. Whitt's testimony in its direct case, the SDC deprived IPG of the opportunity to review the work undertaken by Mr. Whitt. Although Dr. Brown, in his Written Direct Testimony, indicated that the SDC intended to utilize the MPAA Methodology,[67] the SDC's application of that methodology by Mr. Whitt was not properly disclosed in the SDC's direct case. Consequently, the Judges cannot consider the application of the SDC Methodology in their determination of the Phase II distribution to the Devotional category.

c. Allocations in the Devotional Category

In light of the foregoing, the Judges are faced with a Hobson's Choice. The SDC has failed to introduce evidence of its distribution methodology in a timely manner. IPG has set forth a methodology that suffers from a number of flaws and which has validity only in certain limited respects, as explained above. The Judges are, nevertheless, obligated to reach a determination based on the existing record. Given the evidentiary constraints, and in order to allocate the royalties in the Devotional category in a manner within the ''zone of reasonableness,'' the Judges hereby conclude as follows.

IPG's proposed allocations, and the SDC's proffered allocations (unsubstantiated in the SDC's direct case) are as follows.

PROPOSED ALLOCATIONS IN THE DEVOTIONAL CATEGORY

Year	Party	SDC proposed allocation range (percent)	IPG proposed allocation (percent)
2000	SDC	60.8–74.5	62.86
	IPG	25.5–39.1	37.14
2001	SDC	72.7–77.0	54.88
	IPG	23.0–27.3	45.12
2002	SDC	61.9–67.5	58.98
	IPG	32.5–38.1	41.02
2003	SDC	67.5–70.5	53.32
	IPG	29.5–32.5	46.68

For the year 2000, the Judges note that the IPG proposal falls within the range the SDC had proposed. There is, therefore, some degree of agreement between the parties as to the appropriate allocation. Accordingly, the Judges find it well within the ''zone of reasonableness'' to allocate 62.86% of the royalties in the Devotional category to SDC and the remaining 37.14% to IPG.

For the year 2002 (the years 2001 and 2003 will be considered below), a very similar (but not identical) situation exists. The IPG proposal is almost equal to the lower bound of the results of the SDC's proffered distribution range. Given this near equality, the Judges find that for the year 2002, again there is some degree of agreement between the parties as to the allocation of royalties. It is well within the ''zone of reasonableness'' to allocate the royalties in the Devotional category for the year 2002 as follows: 58.98% to SDC and 41.02% to IPG.

For the years 2001 and 2003, there is a marked difference between the percentage allocations proposed by IPG and the percentage allocations set forth in the SDC's proffered allocations (unsubstantiated in the SDC's direct case), and, therefore, little agreement between the parties. Given the wide divergence between the competing methodologies, the Judges cannot reconcile the competing proposals in the same manner as undertaken for the years 2000 and 2002.

Given that the SDC's application of its methodology was not supported in the SDC's Direct Case, and that the SDC's attempt to provide such support in Mr. Whitt's rebuttal testimony was not timely presented and, therefore, rejected, that methodology cannot serve as any guide-post for the Judges to apply (except, as noted above, to the extent that the allocations proposed by the SDC demonstrate some degree of agreement between the parties). Moreover, since the SDC Methodology cannot be credited, there is no record evidence explaining why the percentage

[67] One important difference, though, was that the MPAA did not rely on the non-random Kessler Sample of stations and took steps to mitigate its impact; the SDC simply utilized the Kessler Sample.

allocations for 2001 and 2003 should be so markedly different in those years compared to 2000 and 2002.

The IPG Methodology, while in evidence, is so flawed that the Judges cannot credit the percentage allocations as proposed. Indeed, in prior determinations, the CRT did not hesitate to make a ''downward adjustment'' to a participant's proposal to reflect ''perceived deficiencies in the methodology.'' *See, e.g., 1979 Determination,* 47 FR at 9892.

Accordingly, the Judges conclude that the percentage allocations for the years 2001 and 2003 should be set at the average of the allocations for the years 2000 and 2002. Therefore, the allocations for each of the years 2001 and 2003 shall be 60.92% to SDC and 39.08% to IPG. To summarize, the royalty allocations in the Devotional category for the years 2000 through 2003 shall be:

ALLOCATION IN THE DEVOTIONAL CATEGORY

	2000 (percent)	2001 (percent)	2002 (percent)	2003 (percent)
SDC	62.86	60.92	58.98	60.92
IPG	37.14	39.08	41.02	39.08

V. Conclusion

This Final Determination determines the allocation of cable royalty funds for the years 2000, 2001, 2002, and 2003 in the Program Suppliers and Devotional categories, respectively. The Register of Copyrights may review the Judges' final determination for legal error in resolving a material issue of substantive copyright law. The Librarian shall cause the Judges' final determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

So ordered.

Dated: August 13, 2013.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Jesse M. Feder,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Dated: August 13, 2013.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Approved by:

James H. Billington,

Librarian of Congress.

Appendix A

The Judges ruled as follows.

CLAIMS DISMISSED AT SHOW CAUSE HEARING

Claimant	Claim Year				Rationale
	2000	2001	2002	2003	
Dreamworks LLC	Dismissed				Claimant terminated IPG's authority effective 12/31/02. Claimant identified in IPG's petition that was filed after claimant terminated IPG's authority. MPAA did not include claimant in its petition for 2000.
Litton Syndications	Dismissed				Claimant terminated IPG's authority no later that 5/18/12. Claimant identified in IPG's petition that was filed after claimaint terminated IPG's authority. MPAA did not include claimant in its petition for 2000.
Marty Stouffer Productions.	Dismissed				Claimant alleges termination of IPG authority in july 2002. IPG's petition that includes claimant was filed after alleged termination. Claimant is not included in MPAA's petition for 2000.

CLAIMS DISMISSED AT SHOW CAUSE HEARING—Continued

Claimant	Claim Year				Rationale
	2000	2001	2002	2003	
Remodeling Today, Inc. DBA Today's Homeowner.	....	....	Dismissed	....	Claimant terminated IPG's authority on 3/1/04. Claimant identified in IPG's petition that was filed after claimaint terminated IPG's authority. MPAA did not include claimant in its petition for 2002.
The Television Syndication Company.	....	....	....	Dismissed	Claimant terminated IPG's authority on 4/29/04. Claim for 2003 filed after claimant terminated IPG's authority; no valid claim filed.
Urban Latino TV	....	Dismissed	....	....	No claim was filed for 2000. Claimant terminated IPG's authority on 5/28/03. Claimant identified in IPG's petition that was filed after claimaint terminated IPG's authority. MPAA did not include claimant in its petition for 2001.

[FR Doc. 2013–25453 Filed 10–29–13; 8:45 am]
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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–125]

National Space-Based Positioning, Navigation, and Timing (PNT) Advisory Board; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, and the President's 2004 U.S. Space-Based Positioning, Navigation, and Timing (PNT) Policy, the National Aeronautics and Space Administration (NASA) announces a meeting of the National Space-Based Positioning, Navigation, and Timing (PNT) Advisory Board.

DATES: Wednesday, December 4, 2013, 9:00 a.m. to 5:00 p.m.; and Thursday, December 5, 2013, 9:00 a.m. to 12:00 p.m., Local Time.

ADDRESSES: The Omni Shoreham Hotel, 2500 Calvert Street NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Mr. James J. Miller, Human Exploration and Operations Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4417, fax (202) 358–2830, or *jj.miller@nasa.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

The agenda for the meeting includes the following topics:

- Update on U.S. Space-Based Positioning, Navigation and Timing (PNT) Policy and Global Positioning System (GPS) modernization.
- Explore opportunities for enhancing the interoperability of GPS with other emerging international Global Navigation Satellite Systems (GNSS).
- Examine emerging trends and requirements for PNT services in U.S. and international arenas through PNT Board technical assessments.
- Prioritize current and planned GPS capabilities and services while assessing future PNT architecture options.
- Assess the current and projected economic impact of GPS on the United States, and consider the effects of potential PNT service degradation if adjacent radio-band spectrum interference is introduced.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

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NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meeting

TIME AND DATES: The Members of the National Council on Disability (NCD) will meet in closed executive session by phone on Friday, November 1, from 1:00 p.m.–2:00 p.m., Eastern.

PLACE: The meeting will occur by phone. The meeting will be open only to the NCD Council Members.

STATUS: The meeting on Friday, November 1, from 1:00 p.m. till 2:00 p.m., Eastern will be closed to the public.

MATTERS TO BE CONSIDERED: The Council will meet by phone to discuss matters related solely to internal personnel rules and practices of exigent import, pursuant to paragraph (c)(2) of the Sunshine Act, and in accordance with a