Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of	)	
	)	
Phase II Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds	)	**Docket No. 2008-2 CRB CD 2000-2003 (Phase II)**
	)	

SETTLING DEVOTIONAL CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Settling Devotional Claimants ("SDC") hereby submit their Proposed Findings of Fact and Conclusions of Law with respect to the hearing held before the Copyright Royalty Judges on June 3-6, 2013, pursuant to the Scheduling Order of April 16, 2013.[1]

The Copyright Royalty Judges called the hearing to determine the appropriate Phase II distribution of the 2000, 2001, 2002, and 2003 royalty funds attributable to the devotional programming, program suppliers programming, and sports programming categories. These royalty funds are to be distributed among the parties representing the claimants in each category. The Judges identified the valid claimants in their March 21, 2013, Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims.[2] The Judges ordered that the appropriate allocation of funds in the sports programming category will be determined on the papers.[3] Therefore, the hearing on June 3-6, 2013, was to address the claims of MPAA-Represented Program Suppliers ("MPAA") and Independent Producers Group ("IPG") in the

---

[1] The SDC hereby adopt and incorporate their Proposed Findings of Fact and Conclusions of Law submitted on January 15, 2013 with respect to the preliminary hearing held before the Copyright Royalty Judges on November 13-14 and December 5, 2012.

[2] *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013).

[3] *Id.*

syndicated programming category, and the claims of the SDC and IPG in the devotional category. In these proposed findings of fact and conclusions of law, the SDC specifically address the allocation of funds between the SDC and IPG.

FINDINGS OF FACT

I. VALID DEVOTIONAL CLAIMANTS

1. The SDC are comprised of the following claimants for some or all of the years covered by this proceeding: (1) Amazing Facts, (2) American Religious Town Hall, Inc., (3) Catholic Communications Corporation, (4) The Christian Broadcasting Network, Inc., (5) Coral Ridge Ministries Media, Inc., (6) Cottonwood Christian Center, (7) Crenshaw Christian Center, (8) Crystal Cathedral Ministries, Inc., (9) Evangelical Lutheran Church in America, (10) Faith For Today, Inc., (11) Family Worship Center Church, Inc. (d/b/a Jimmy Swaggart Ministries), (12) In Touch Ministries, Inc., (13) It Is Written, (14) Liberty Broadcasting Network, Inc., (15) Rhema Bible Church a/k/a Kenneth Hagin Ministries, (16) Joyce Meyer Ministries, Inc. f/k/a Life In The Word, Inc., (17) Oral Roberts Evangelistic Association, Inc., (18) RBC Ministries, (19) Reginald B. Cherry Ministries, (20) Ron Phillips Ministries, (21) Speak the Word Church International, (22) The Potter's House of Dallas, Inc. d/b/a T.D. Jakes Ministries, and (23) Zola Levitt Ministries.[4]

2. IPG has asserted claims in the devotional category on behalf of the following claimants: (1) Benny Hinn Ministries, (2) Creflo A. Dollar Ministries, (3) Billy Graham Evangelistic Association ("BGEA"), (4) Jack Van Impe Ministries International ("Jack Van Impe"), (5) Life Outreach International, (6) Salem Baptist Church of Chicago, Inc. ("Salem

---

[4] Ex. 177. Evangelical Lutheran Church in America is only a claimant for 2003. Family Worship Church Center, Inc. is only a claimant for 2000 and 2001. Oral Roberts Evangelistic Association is only a claimant for 2000 and 2001. Reginald B. Cherry Ministries is only a claimant for 2002 and 2003.

Baptist Church"), (7) W.R. Portee Word Healing Ministry aka Southside Christian Palace Community ("W.R. Portee"), and (8) Eagle Mountain International Church aka Kenneth Copeland Ministries.[5] However, certain claims asserted by IPG on behalf of its claimants did not cover all four years at issue in this proceeding. No claims were made by IPG in the following years for the following entities: (1) BGEA for 2000, (2) Jack Van Impe for 2000, (3) Salem Baptist Church for 2000, (4) W.R. Portee for 2000-2002.[6]

3. IPG and the SDC have each challenged the validity of certain claimants represented by the other. Following the preliminary hearing in this matter, the Judges recognized each of the SDC as a valid copyright owner of syndicated programming in the devotional category that was carried on broadcast television stations retransmitted as distant signals during all or a portion of the period from January 1, 2000, through December 31, 2003.[7] Thus, the SDC are entitled to a portion of the cable royalty funds in the devotional category.

4. The Judges dismissed IPG's claims in this proceeding on behalf of (1) Jack Van Impe Ministries International, (2) Salem Baptist Church of Chicago, Inc., and (3) W.R. Portee Word Healing Ministry aka Southside Christian Palace Community.[8] Over SDC's objections, the remaining claimants represented by IPG are entitled to a portion of the cable royalty funds that the Judges allocate to claimants in the devotional category.

II. <u>RELEVANT FACTORS FOR ALLOCATION OF CABLE ROYALTY FUNDS</u>

5. The appropriate allocation of funds in the devotional category must be based on the relative market value of the SDC's distantly retransmitted programming as a whole and the

---

[5] Ex. 1 to the Direct Case of IPG.

[6] *IPG's Response to the Settling Devotional Claimants' Proposed Findings of Fact and Conclusions of Law in Connection with IPG's Motion to Strike Portions of IPG's Claims and Direct Case* (Jan. 30, 2013).

[7] *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013).

[8] *Id.*

relative market value of IPG represented claimants' distantly retransmitted programming as a whole. Because SDC and IPG each have their own internal methodologies for distributing funds among the individual claimants, the Judges need not assign a value to each individual claimant and neither party has requested a claimant-by-claimant award.[9]

6. The SDC and IPG have each presented a methodology for distribution of the funds. The SDC's methodology is based on viewership. The IPG's methodology is based on fee generation, subscribership, length and frequency of the broadcast, and time of the broadcast. IPG's methodology is severely flawed, unreliable, and based on faulty data. It cannot be used to allocate the royalty shares between the two competing devotional claimant groups in this proceeding. SDC's methodology, although imperfect, is a reasonably reliable method for determining the allocation of the 2000-2003 royalty shares.

III. <u>IPG'S METHODOLOGY</u>

7. IPG's proposed methodology is based on a formula developed by Raul Galaz, a disgraced lawyer and convicted felon with no training or background in any field related to valuation of television programs.[10] He is not a statistician, econometrician, or economist. He has no formal training in survey planning, sample design, or market research.[11] Indeed, Mr. Galaz's only arguably relevant experience is his history of filing and pursuing claims for royalties in this and similar proceedings – including his false copyright royalty claims in the Copyright Arbitration Royalty Panel's ("CARP") 1997 Phase II program supplier proceeding, for which he was convicted and sentenced to prison.[12] His renewed assertions of good faith ring

---

[9] *See* Galaz Rebuttal Ex. 5; Ex. 180 at 19.
[10] Tr. 929:5-930:22 (Galaz).
[11] *Id.*
[12] Tr. 931:12-932:21 (Galaz).

hollow. As an employee of IPG and a close relative of IPG's two owners (Mr. Galaz's sister and mother), Mr. Galaz has a personal stake in the outcome of this proceeding.[13] Therefore, because IPG's devotional case relies exclusively on Mr. Galaz's testimony and credibility, IPG has failed to present a credible methodology.

8. Mr. Galaz's formula generates two measures that he claims to be related to the relative value of each program retransmission in his sample. These measures he describes as "weighted value-fees" and "weighted value-subscribers."[14] To arrive at a final allocation, Mr. Galaz claims to take the average of these two measures.[15] There is confusion in Mr. Galaz's written testimony as to whether he intended to average the values before or after determining the parties' proportional shares, but it appears based on his Revised Exhibit 5 that he that he actually averaged the proportional shares resulting from the values, rather than the values themselves.[16]

9. As testified by Dr. Jeffrey Gray, MPAA's expert witness in the fields of economics, statistics, and econometrics,[17] IPG's methodology is flawed and unreliable in both concept and application.[18] Dr. William J. Brown, SDC's expert witness in the field of communication theory and research,[19] agrees. Dr. Brown testified in writing that IPG's methodology is unreliable, premised on faulty and unsupported contentions for valuation of devotional programming, and riddled with errors.[20]

---

[13] Tr. 1079:6-1082:8 (Galaz).
[14] Tr. 778:15-779:13 (Galaz).
[15] Tr. 778:15-779:13, 780:21-781:14 (Galaz).
[16] IPG Ex. R-5 (Revised).
[17] Tr. 440:4-11 (Gray).
[18] Tr. 475:8-15 (Gray); Ex. 365.
[19] Tr. 1371:13-21 (Brown).
[20] Ex. 180 at 1; Tr. 1382:4-10 (Brown).

10. Mr. Galaz's measure of "weighted value-subscribers" (or "wvs" in Mr. Galaz's notation) is equal to the number of subscribers to the system on which the program is retransmitted (or "swf_subs," in Mr. Galaz's notation),[21] attributed in a Cable Data Corporation ("CDC") compilation of information filed with the Copyright Office by cable systems,[22] times the length of the program in minutes (confusingly labeled "H" in Mr. Galaz's notation), times the "time period weight factor" ("TPWF").[23] In algebraic terms, therefore, Mr. Galaz's formula can be expressed as:

wvs = swf_subs x H x TPWF[24]

11. Mr. Galaz's measure of "weighted value-fees" (or "wvf," in Mr. Galaz's notation) is equal to the reported amount of cable royalty attributed to a signal by the CDC pursuant to its own formulation (or "swf_fees," in Mr. Galaz's notation),[25] times the length of the program in minutes, times the time period weight factor.[26] In algebraic terms:

wvf = swf_fees x H x TPWF[27]

12. Mr. Galaz then compares the sum of all weighted value-subscribers and the sum of all weighted value-fees for IPG programs with the sum of all weighted value-subscribers and the sum of all weighted value-fees for SDC programs to determine proportionate value.[28]

---

[21] Direct Testimony of Raul C. Galaz at 19 ("Galaz Direct").

[22] IPG entered into a contract with CDC whereby CDC agreed to provide the name, location, number of subscribers and compulsory license royalty paid for each distant signal listed in a Form 3 cable system for each of the years in question. Ex. 1. Smaller Form 1 and Form 2 systems were omitted from that report. Tr. 784:6-12 (Galaz); Tr. 230:6-231:5 (Martin). Using the information supplied to him by CDC for 2000, 2001, 2002, and 2003, Mr. Galaz drew a sample of 200 to 231 distantly carried stations for each year. Tr. 782:1-7; 785:22-786:16 (Galaz); *see also* Exh. 4 to the Direct Case of IPG.

[23] Galaz Direct at 18-23.

[24] Ex. 180 at 8.

[25] Galaz Direct at 19.

[26] *Id.* at 18-23.

[27] Ex. 180 at 8.

[28] Galaz Direct at 25; IPG Ex. R-5 (Revised).

13. As shown below, each of the factors in Mr. Galaz's formula is useless, either by itself or in combination with the others, in determining relative marketplace value of IPG represented programs and SDC programs. Moreover, even if the factors themselves were potentially relevant, the data to which they are applied are erroneous.

A. Station Weight Factors

14. Mr. Galaz characterizes both the number of subscribers and the fees generated from a particular cable system as "station weight factors" because they depend exclusively on the particular cable system on which a program is retransmitted, rather than on any attribute or measure of the program itself.[29] Both measures have been criticized in past decisions, and each makes particularly little sense in the case of devotional programming, which accounts for only a small percentage of distantly retransmitted programming on any of the systems in Mr. Galaz's survey. As Dr. Brown testifies in Exhibit 180, the Bortz survey results from 2000-2003 show that unlike other programming categories such as sports and movies, devotional programming is valuable principally as an offering to a comparatively small niche market.[30] The relative marketplace value of that niche market to the cable system operator is dependent on the size and avidity of that market, and not the number of subscribers as a whole. Only a comparatively small number of subscribers are attracted to the cable system by its distantly retransmitted devotional content.[31] IPG's methodology presumes – without any expert, qualitative analysis, or rationale – that every program shares responsibility for the delivery of every subscriber to a cable

[29] Tr. 769:1-20 (Galaz).
[30] Ex. 180 at 3-4.
[31] *Id.*

system, and differentiates programs on a system only by length of the programs and times of broadcast.[32]

15. Even if an indiscriminate station weight factor such as subscribership or fee generation were a reliable measure of the relative marketplace value of programming in a niche market (which it is not), Mr. Galaz's formula distorts those measures by applying the raw station weight factor to every distantly retransmitted telecast on a system,[33] thereby overvaluing programs on systems with greater numbers of distantly retransmitted signals, and undervaluing programs on systems with fewer distantly retransmitted signals.

16. By using the *system's* fee generation, or the *system's* total number of subscribers, as a factor in the valuation of each individual *program*, regardless of the number of distantly retransmitted signals, Mr. Galaz's formula essentially double counts for each additional signal retransmitted on the system. This defect in Mr. Galaz's methodology causes the highly anomalous and distorted results identified by Dr. Brown in Table 2 of Exhibit 180 (revised at Exhibit 183 based on new data provided by IPG at 4:00 p.m. on the last business day before the hearing).[34] Mr. Galaz's formula of weighing the number of subscribers and fees generated grossly inflated values to devotional programs carried by superstation WGN-America. Mr. Galaz's data show only 211 telecasts – out of more than 177,000 allegedly compensable telecasts appearing in his data - that aired on WGN's national signal. These telecasts included one series claimed by SDC and one series claimed by IPG, representing a minute fraction (0.119%) of the total number of telecasts in Mr. Galaz's study.[35] Each of the two series aired starting at 6:00 a.m.

---

[32] Ex. 180 at 4.
[33] Tr. 769:1-20 (Galaz).
[34] Ex. 180 at 12; Ex. 183.
[35] Ex. 180 at 13.

in Chicago (or 4:00 a.m. on the West Coast) for thirty minutes.[36] Under Mr. Galaz's formula, these two 6:00 a.m. programs would be credited with more than 7% of the total value of all compensable devotional content between 2000-2003.[37] This anomaly highlights the fundamental flaw in IPG's reliance on a formula that uses fees and subscribers for every system carrying WGN as multipliers for the value of each individual program on WGN.[38]

B. Program Length

17. The second factor in IPG's methodology is the length of the program, meaning the number of minutes the program airs on a particular station.[39] The Board's predecessor, the Copyright Royalty Tribunal ("CRT"), expressly rejected a time-based formula for determining appropriate allocation of funds to copyright claimants.[40] Such a factor would credit an unpopular program or one scarcely seen with the same value as a premiere program in a station lineup if it is the same length (typically 30 or 60 minutes), without regard to viewer interest or proven value to cable operators. There is no evidence that longer programs offer more value to cable operators, or are more likely to induce them to carry a particular distant signal, than shorter programs. To give an obvious example, a one-hour infomercial is not necessarily twice as valuable as a popular half-hour sitcom retransmitted by the same system at the same time. Yet this is the result that Mr. Galaz's approach would yield.

---

[36] Ex. 180 at 13.
[37] Ex. 183, Table 2.
[38] Ex. 180 at 11; Ex. 183.
[39] Tr. 770:15-20 (Galaz).
[40] *See 1983 Cable Royalty Distribution Proceeding*, Docket No. CRT 84-1 83CD, 51 Fed. Reg. 12792, 40 (Apr. 15, 1986).

C. <u>Time Period Weight Factor</u>

18. The third factor is the time period weight factor.[41] This IPG-concocted factor purports to assign a value to each half hour of the day – 48 in total – based on total nationwide television viewership on an average day, without regard to day of the week, and without regard to whether anybody is actually watching any particular program or signal.[42]

19. This time period weight factor is flawed in concept and application.

a. First, although the time period weight factor is a viewership measure, it does not take into account the viewership of any particular program.[43] As an example, a program broadcast opposite the Super Bowl would receive exactly the same value as the Super Bowl itself.[44]

b. Second, the nationwide viewership measure comes from limited Nielsen data from 1997, with no statistically sound effort to project 1997 figures to the 2000-2003 time period.[45] Moreover, the 1997 Nielsen data reflects only six dayparts, and is not broken out into 48 half-hour time periods.[46] Mr. Galaz has presented no statistically sound methodology to break each daypart down into half-hour increments.[47]

c. Third, in 1997, Nielsen did not record viewership between the hours of 2:00 a.m. and 6:00 a.m.[48] To fill the gap, Mr. Galaz uses a straight-line interpolation, assuming

---

[41] Tr. 771:21-22 (Galaz).
[42] Tr. 772:11-774:16 (Galaz).
[43] Tr. 477: 16-478:11 (Gray).
[44] Tr. 1071:17-1072:21 (Galaz).
[45] Tr. 761:17-763:6, 774:11-17, 1070:22-1071:16 (Galaz); Tr. 476:5-8 (Gray); Ex. 180 at 6.
[46] Tr. 689:4-8 (Galaz).
[47] Tr. 774:19-776:16 (Galaz).
[48] Tr. 772:11-773:7 (Galaz).

without any basis that viewership drops steadily from 2:00 a.m. to 6:00 a.m.,[49] resulting in the absurd conclusion that a 3:00 a.m. program, for example, is more valuable than a 6:00 a.m. program.[50]

d. Fourth, Mr. Galaz fails to account for time zone differences, assigning a value based on the time where the program was broadcast (Chicago at 7:00 a.m., for example), instead of where was retransmitted (Los Angeles at 5:00 a.m., for example).[51]

e. Finally, Mr. Galaz fails to differentiate between days of the week, thereby failing to account for the fact that religious programs might not compete well during prime time on weekdays, but might do considerably better on Sundays.[52] (This is borne out by the fact, for example, that the highest rated devotional program claimed in this case, *Hour of Power*, a Sunday show, commanded considerably higher viewership than, for example, *Believers' Voice for Victory*, a weekday show. In spite of *Hour of Power*'s considerably higher viewership, Mr. Galaz's formular assigns *Believer's Voice* more than twice as much value.)[53] Under IPG's formula, programs with different viewership and different levels of popularity are given the same relative marketplace value simply because they air at the same time of day and on the same station for the same duration.[54]

20. Dr. Gray used an example of two cartoon programs, *Pokeman* (claimed by MPAA) and *Dragon Ball Z* (claimed by IPG).[55] These programs were broadcast and retransmitted on different days, but both aired at 4:30 in the afternoon for a half hour on station

---

[49] Galaz Direct at 21 n.18.
[50] Ex. 180 at 7.
[51] Tr. 1069:19-1070:16 (Galaz).
[52] Tr. 1057:2-1059:19 (Galaz); Exh. 7 to the Direct Case of IPG.
[53] Ex. 180 at 10.
[54] Tr. 477:16-481:10 (Gray).
[55] Tr. 478:18-479:20 (Gray).

WPIX.[56] Using IPG's formula of program length, time of day, and station, both cartoons have the same relative value.[57] However, in 2001, there were approximately 2,700 more households viewing *Pokeman* than *Dragon Ball Z*, and IPG's methodology fails to account for this substantial differential.[58]

21. In sum, the time period weight factor's implementation is so flawed as to render it useless in determining the appropriate allocation of funds in this proceeding.

D. Errors in IPG's underlying data

22. In addition to the methodological flaws in Mr. Galaz's analysis, his data is hopelessly riddled with errors. Mr. Galaz's databases credit IPG with programs of IPG-represented claimants excluded by the Board's Order of March 21, 2013, including programs belonging to Jack Van Impe International Ministries, Salem Baptist Church, and W.R. Portee World Healing Ministry.[59] Mr. Galaz's databases fail to credit SDC with programs that the Board deemed to be validly claimed, including *One Cubed*, *Jimmy Swaggart*, *American Religious Town Hall*, and programs of Frederick Price.[60] As the Board has already ruled, "the Judges will not hear any testimony or review any further exhibits relating to the denied claims."[61] As to certain other SDC programs, Mr. Galaz credited them to SDC, but assigned them zero subscribers and zero fees, resulting in zero value.[62] As Mr. Galaz admitted, programs must be distantly carried to

---

[56] Tr. 478:21-479:3 (Gray).

[57] Tr. 479:4-9 (Gray); Ex. 168.

[58] Tr. 479: 10-16 (Gray); Ex. 365.

[59] *See* Exs. 173, 185, 186; Tr. 1031:9-1035:3 (Galaz); Tr. 1383:15-1389:21 (Brown).

[60] *See* Exs. 187, 188, 189; Tr.1391:12-1401:13 (Brown); *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013) ("The Judges find insufficient evidence to show that IPG was authorized to file claims on Salem Baptist's [and Jack Van Impe, and W.R. Portee] behalf … Therefore, SDC's request to dismiss those claims is GRANTED").

[61] *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013).

[62] *See* Exs. 191, 192; Tr. 1402:8 – 1405:17 (Brown).

have been included in his database[63] and therefore, there should be no zero entries for subscribers or fees in his data. As to all of these errors, Mr. Galaz was confronted on the stand, but he inexplicably failed to check or explain them, even when given the opportunity to do so during an overnight break in his testimony.[64]

23. In addition to the inaccuracies in his data, Mr. Galaz admits that his data is complete. His data is based on approximately 200 of the largest Form 3 systems cannot be used to project figures for the more than 500 smaller Form 3 systems of for any Form 1 or Form 2 systems.[65] Because both his sample selection and his methodology relate to the size of a system, the sample is not representative for the methodology he espouses.[66] (For precisely this reason, Mr. Galaz describes his selection of systems as a "survey," rather than a "sample").[67] Thus, contrary to Mr. Galaz's argument that his methodology is designed to give a value to every distantly retransmitted program, a program could have been carried on over 500 stations without appearing in Mr. Galaz's survey and be assigned no value based on Mr. Galaz's study.[68]

24. Because Mr. Galaz's formula is mathematically wrong and unrelated to any reliable measure of marketplace value, and because his data is rife with errors, including inclusion and exclusion of programs in violation of the Board's Order of March 21, 2013, Mr. Galaz's methodology cannot be used in determining an allocation of royalties in the devotional category in this proceeding.

---

[63] Tr. 1050:4-10 (Galaz).

[64] Tr. 1032:18-1047:16 (Galaz).

[65] Tr. 958:18-960:20, 964:13-965:17 (Galaz).

[66] Tr. 481:21-482:21 (Gray).

[67] Tr. 959:12-960:1 (Galaz).

[68] Tr. 1024:2-6 (Galaz).

IV. SDC METHODOLOGY

25. The SDC proposes an allocation methodology based on program viewership.[69] The independent and corroborative testimony of Dr. Brown and Dr. Gray support the conclusion that for Phase II proceedings, program viewership provides a reasonable and direct measurement of relative market value of the devotional programming for royalty allocation purposes.[70]

26. SDC's methodology is set forth in Dr. Brown's written testimony, which was admitted into evidence without objection as Exhibits 179 and 180,[71] and is based on Nielsen estimates of distant household viewing based on a sample of stations selected by MPAA witness Marsha Kessler (referred to throughout the hearing as the "Kessler Sample").[72] Paul Lindstrom, Senior Vice President of Nielsen,[73] testified that he culled information from Nielsen's four full and two partial sweep reports measured annually for each of the four years,[74] to estimate the distant cable viewing in quarter hour blocks of time for all measured stations in the Kessler Sample.[75] Merged with data from Tribune Media Services, the Nielsen data on the Kessler Sample assigned estimated viewership for each of the program broadcasts distantly retransmitted in 2000-2003 that appeared in the sample.[76]

---

[69] Exs. 179, 180.

[70] Tr. 446:2-22, 537:10-15 (Gray).

[71] Tr. 1373:20-1382:10 (Brown).

[72] Ex. 180 at 13.

[73] Tr. 114:9-122:14 (Kessler).

[74] Mr. Lindstrom also indicated that two partial sweep months data for March and October of each year are also used. Tr. 290:20-21 (Lindstrom).

[75] Tr. 294:4-295:4 (Lindstrom).

[76] Ex. 180 at 14-15.

27. Using the Nielsen and Tribune data for the Kessler Sample obtained from MPAA, Dr. Brown determined the relative shares for the SDC programs as a whole and IPG-represented programs as whole.[77]

Claimant	2000	2001	2002	2003
SDC	60.8%	77.0%	61.9%	70.5%
IPG	39.2%	23.0%	38.1%	29.5%

(Ex. 180 at 15).

Dr. Brown testified, as Dr. Gray testified,[78] that relative share of viewership is a reasonable measure of relative marketplace value of programs within a category.[79]

28. To check the validity of the SDC and IPG relative shares allocation, Dr. Brown reviewed the Nielsen Station Index ("NSI") Report of Devotional Programs, which summarizes the local ratings of programs during the sweep months.[80] He then reviewed the NSI viewing data for February of each year (2000-2003) for each of the programs claimed by SDC and IPG in this proceeding.[81] Dr. Brown found that proportional distant viewing based on Nielsen and Tribune data for the Kessler Sample is reasonably close to NSI viewing data (which is predominantly local viewing).[82]

Claimant	2000	2001	2002	2003
SDC	74.5%	72.7%	67.5%	67.5%
IPG	25.5%	27.3%	32.5%	32.5%

(Ex. 180 at 19).

[77] *Id.* at 15.
[78] Tr. 446:6-9 (Gray).
[79] Ex. 179 at 5; Ex. 180 at 13.
[80] Ex. 180 at 17.
[81] *Id.*
[82] *Id.* at 17-19.

This is as expected, based on Dr. Brown's expert opinion that local viewing can be used as a tool to assess distant viewing,[83] and based on a regression analysis performed by Dr. Gray showing that local viewing can be used reliably to project distant viewing.[84] Dr. Brown therefore recommended that a zone of reasonableness for the Board's award in this case for each year can be found between the parties' proportional share based on the Nielsen and Tribune data for the Kessler Sample and the parties' proportional share based on the NSI data that he reviewed.[85]

29. As a second and more targeted verification of his analysis, Dr. Brown looked at comparative data for local ratings to compare and contrast the HHVH information for the *Hour of Power* and Kenneth Copeland Ministries' daily and weekly program, *Believer's Voice of Victory*, with the IPG subscriber and fees generated sum weighed/time based methodology.[86] In 2000, *Hour of Power* had estimated distant household viewing of 362,738, while *Believer's Voice of Victory* had estimated distant household viewing of 221,255. Combined, this equals 583,993, of which Hour of Power's share is 62.1% and *Believer's Voice of Victory's* share is 39.7%.[87] These percentages are almost identical to the relative values these programs had in local ratings for February 2000.[88] Dr. Brown's comparison and analysis with respect to the value of local ratings data is a demonstration that SDC's methodological approach yields reliable results.

30. The SDC acknowledge that Mr. Brown's use of the Nielsen data from the Kessler sample, and his use of local data as a comparison point, is a less sophisticated approach than Dr.

---

[83] *Id.* at 17.
[84] Tr. 463:18-465:20 (Gray).
[85] Ex. 180 at 18-19.
[86] *Id.* at 10.
[87] Tr. 1376:15-1377:4 (Brown); Ex. 183 at Table 1.
[88] Ex. 180 at 17-18.

Gray's more comprehensive analysis on behalf of MPAA.[89] All parties to this proceeding recognize, however, that cost is a factor in selecting the study to be performed.[90] The devotional category includes a substantially smaller funding pool than the program suppliers category.[91] Whereas MPAA seeks to establish its share of the program suppliers category to a precision of hundredths of a percentage point, SDC's methodology merely seeks to establish a zone of reasonableness over a range of several percentage points.[92] Perfect precision is not required, especially when dealing with smaller sums.

31. IPG challenges viewership data generally by reference to the supposedly high number of "zero viewing" instances in Nielsen's reports – instances in which there was no detected viewing for a particular telecast. But there is ample evidence showing that the instances of "zero viewing" do not undermine the reliability of Nielsen data in the aggregate.

32. Mr. Paul Lindstrom, Senior Vice President of Nielsen,[93] acknowledged that "zero viewing" entries are anticipated results in a sample study such as the one performed on the Kessler Sample.[94] The figures do not suggest that no viewing occurred; rather, they indicate that

---

[89] Using five sources of data – (1) Cable Data Corporation "(CDC") data from all cable system operators who distantly retransmit signals, (2) Nielsen diary data with information on distant viewing (which was derived from Marsha Kessler's sample), (3) a random representative sample that Dr. Gray designed, (4) Tribune Media data on programs broadcast, and (5) the Reznick Group data - Dr. Gray conducted a regression analysis to calculate distant viewing and propose an allocation of funds between MPAA and IPG in the program suppliers category. Tr. 447:17-450:14; 460:11-474:19 (Gray). Although Dr. Gray's regression analysis was more sophisticated, he reached the same conclusion as SDC witness Dr. Brown with respect to the flaws in IPG's methodology. Tr. 475:5-15. Although IPG attempted to argue that it did not have the underlying data to replicate Dr. Gray's analysis, IPG admitted that it had all of the data sources that Dr. Gray used to conduct his regression. All IPG had to do was merge the data, but it failed to do so. Tr. 1264:16-1273:10 (Robinson).

[90] Tr. 1157:8-15 (Galaz).

[91] *See, e.g., Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3620 (Jan. 26, 2004) (program suppliers category is approximately 40 times the size of devotional category).

[92] Ex. 180 at 19.

[93] Lindstom's Direct Tesimony; Tr. 280:14-323:22, 368:18-433:1 (Lindstom).

[94] Tr. 371:14-373:6 (Lindstom).

no viewing was recorded for the diary sample respondents.[95] Mr. Lindstrom explained that the aggregation of data over the entire sample renders the results reliable for the sample stations selected.[96] Dr. Gray concurred in this point.[97] Even IPG's expert witness, Dr. Robinson, agreed that individual negative results, while not necessarily reliable in isolation, can be reliable when aggregated with positive results.[98]

33. The Nielsen data relied upon by Dr. Brown included "zero viewing" instances. But all but one of the IPG represented claimants had positive viewing reported in the aggregate.[99] At any rate, "zero viewing" instances do not favor SDC as a whole.[100] In fact, the SDC have more claimants with zero reported viewing than IPG.[101] Accordingly, Dr. Brown recommended that the Board allocate shares based on the household viewing results, supplemented by his local viewing data analysis.[102] SDC and IPG will handle the allocation of shares to non-measured programs from their awards, rather than having the Judges speculate as to the additional merits of their relative claims.

34. Mr. Galaz offered testimony relating to certain SDC claims listed in Exhibit 2 to his written Rebuttal to the Written Direct Statement of the SDC that he believes should be excluded. He testified that for some of these programs, the SDC failed to introduce evidence showing that the program aired on the station, date, and time specified in the July claim.[103] The

---

[95] Tr. 298:11-299:14 (Lindstrom).

[96] Tr. 388:16-389:3, 410:4-13, 411:15-412-10 (Lindstrom).

[97] Tr. 607:15-608:17 (Gray).

[98] Tr. 1199:10-1200:16, 1258:6-1259:3(Robinson).

[99] The only IPG claimant not represented in the viewership study is Billy Graham, whose specials claimed by IPG for 2001-2003 appear to have aired outside the Nielsen sweep periods.

[100] Ex. 180 at 17.

[101] *Id.*

[102] *Id.* at 16-20.

[103] Tr. 903:17-905:18 (Galaz).

Board has already ruled in its March 21, 2013 Order, that the SDC claimants are valid and that it will not rehash this issue.[104] The Board found that as long as the program was distantly retransmitted, it is immaterial whether the particular retransmission was referenced in the July claim.[105] When the SDC objected to Mr. Galaz's testimony on the grounds that this issue was already raised and ruled on in at the November preliminary hearing, the Judges sustained the objection.[106]

35. There is no evidence in the record supporting the allegation by IPG's counsel that some SDC programs were not distantly retransmitted at all. Even when Mr. Galaz was given an opportunity on the stand to identify specific situations where an SDC program was not broadcast at all, he did not do so.[107]

36. Moreover, the purpose of this proceeding is to determine relative marketplace value. The inclusion or exclusion of the SDC's disputed programs is immaterial to this proceeding because it is inconsequential to both IPG and the SDC's proposed methodologies. In both methodologies, the data used for the valuation is exclusively from distantly retransmitted signals.[108]

37. None of the criticisms of the SDC methodology affect the validity of the SDC's proposed allocation of the devotional funds in this proceeding.

---

[104] *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013).

[105] *Id.*

[106] Tr. 905:19-906:1 (Barnett).

[107] Tr. 907:2-918:2 (Galaz).

[108] Tr. 1050:4-10 (Galaz); Ex. 180at 14.

CONCLUSIONS OF LAW

I. Legal Standard

38. With respect to the devotional category of programming, the Board must determine the relative marketplace value of distantly retransmitted broadcast signal programming as between IPG-represented programs as a whole and SDC programs as a whole.[109] Because IPG and SDC have their own internal methodologies for distribution of awards among individual claimants, it is not necessary in this Phase II proceeding for the Board to determine an award on a claimant-by-claimant basis.

II. IPG's Methodology is Unreliable and Unsupported by Precedent

39. The methodology promoted by IPG, based exclusively on the testimony of Mr. Galaz, relies on a host of factors that the Board and its predecessors have rejected as insufficiently related to marketplace value. Specifically, Mr. Galaz relies on the number of distant subscribers, fee generation, and time-based formulas, none of which is appropriate, either alone or in combination with the others, for determining the market value of devotional programming. In addition to these methodological flaws, Mr. Galaz relies on incorrect data that further diminishes the reliability of its methodology.

40. *Subscribers* – Mr. Galaz's use of subscriber numbers as a factor in his methodology contravenes Board precedent and does not produce an adequate measure of market value. The CARP rejected an allocation method based on the number of distant subscribers to signals in the 1998-1999 Distribution Proceeding.[110] There, PBS presented a study that attempted to show a relationship between the relative number of distant subscriber instances to

---

[109] *See Distribution of 2004 and 2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010).

[110] *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3616 (Jan. 26, 2004).

PBS signals and the relative marketplace value of the programming carried on those signals. The CARP rejected this theory, stating:

> … [S]ubscriber instances … attempt to equate relative programming *volume* with relative programming *value*. … We view [the] subscriber instances theory as relatively unuseful because it is based on a measure of time, not value.[111]

41. IPG's methodology relies on subscriber instances, and thus improperly attempts to equate how many subscribers had access to the devotional programs in the IPG sample with the relative value of those programs. IPG has presented no evidence even suggesting that subscribers are an adequate measure of value.

42. Furthermore, the unique nature of devotional programming makes subscriber instances a particularly misleading mechanism for measuring relative value. The Bortz survey results of 2000-2003 show that unlike other programming categories, devotional programming is a niche factor for cable operators seeking to attract niche subscribers.[112] The Bortz survey credits devotional programming with a "distant signal programming value" of about 6.4%.[113] This compares to 75% - 80% for sports and movies/series.[114] Because subscribers of devotional programming constitute only a small portion of a cable operator's subscriber base, the number of distant subscribers tells one nothing about the value that should be allocated to devotional programs.[115] There is no way to determine which subscribers should be credited to devotional programs compared to other kinds of programs. Because IPG relies on subscribers as a measure of value, in contravention of Board precedent and in spite of its potential to distort value

[111] *Id.*
[112] Ex. 179 at 5; Ex. 180 at 3-4.
[113] Ex. 180 at 3-4.
[114] *Id.*
[115] Ex. 179 at 3; Ex. 180 at 15-16.

allocations, there is no legal or factual basis for considering it as a factor in allocating devotional funds.

43. *Fee Generation* **-** IPG's fee generation analysis is equally unjustified in this proceeding. The Copyright Royalty Tribunal ("CRT") repeatedly rejected fee generation as a methodology for valuation.[116] In those few proceedings where fee generation has been adopted, the Board has stated that claimants must demonstrate that it is the *best* means to determine relative marketplace value.[117] Fee generation may be an adequate approach when the signals at issue are retransmitted by cable systems as discrete, intact distant signals containing a single kind of programming,[118] because in such cases, the amount of fees paid may approximate the value that the cable system operator places on that particular kind of programming.[119] For example, in the 1998 and 1999 Distribution Proceeding, the CARP accorded weight to a fee generation approach in allocating funds in the PBS category because PBS signals are retransmitted as discrete signals containing only PBS programming.[120] Similarly, this Board has approved a modified fee generation approach as a measure for valuation of Canadian programs because such programs are often retransmitted on discrete signals containing mostly or only Canadian programming. But the Board reduced the Canadian Claimants' free generation award precisely

---

[116] *See Distribution of the 1978 Cable Royalty Funds*, Docket No. CRT 79-1, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980) ("[b]ecause we find that cable systems pay under compulsory license is not a clear or true reflection of the direct marketplace value of the work, additional considerations … were used by the Tribunal to determine the marketplace value…"); *See also Distribution of the 1980 Cable Royalty Funds*, Docket No. CRT 80-1, 48 Fed. Reg. 9552, 9569 (Mar. 7, 1983) (Fee generation was "based upon a methodology which the Tribunal has repeatedly indicated fails to lend itself to an application of the Tribunal's criteria").

[117] *See Distribution of 2004 and 2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, 75 Fed. Reg. 57063, 57071 (Sept. 17, 2010) ("In order for [fee generation] to be adopted in this proceeding, the [claimants] must demonstrate that it is the *best* means of determining [claimants'] programming's relative marketplace value") (emphasis in original).

[118] *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004).

[119] *Distribution of the 2000-2003 Cable Royalty Funds*, Docket No. 2008-2 CRB CD 2000-2003 (Mar. 3, 2010).

[120] *Id.*

because of the distorting effect on systems that did not retransmit predominantly Canadian signals.[121]

44. IPG's Station Weight Factor relies heavily on a fee generation model, yet IPG has not demonstrated that fee generation is the best method, or even a plausible method, for determining devotional programming shares. No evidence suggests that any signals in Mr. Galaz's study contain predominantly devotional programming. It is impossible for IPG to determine how much in fees a cable operator paid for any devotional program. Simply put, IPG cannot justify the use of fee generation in this proceeding.

45. *Program Length* **-** IPG's second factor in its methodology, program length, must also be rejected. The CRT has on multiple occasions rejected time-based formulas, as they distort marketplace analysis and ignore market considerations.[122] The number of minutes that a program airs does not indicate the value of the program to a cable operator or subscriber. IPG's time-based methodology thus does not inform the Board as to the value of devotional programming.

46. *Time Period Weight Factor* – IPG's time period weight factor must be rejected for similar reasons. A formula based on the time of day that a program airs does not take into account program popularity, number of viewers, or the nature of the program. In the case of devotional programming, it fails to reflect that religious programming is often featured on Sunday mornings in preference to other time periods to provide an alternative church service for its viewers. Other time periods might have higher average relative ratings for other kinds of

---

[121] *Distribution of 2004 and 2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, 75 Fed. Reg. 57063, 57073 (Sept. 17, 2010).

[122] *1983 Cable Royalty Distribution Proceeding*, Docket No. CRT 84-1 83CD, 51 Fed. Reg. 12792, 12813 (Apr. 15, 1986); *see also Distribution of the 1979 Cable Royalty Funds*, Docket No. CRT 80-4, 45 Fed. Reg. 9879, 9897 (Mar. 8, 1982).

programming, but this does not address the niche value of devotional programming to cable operators. IPG's approach produces distorted results, and IPG has failed to meet its burden of establishing that the time period weight factor is a reliable measure of relative marketplace value.[123]

47. Erroneous Data – The record further shows that Mr. Galaz's data is riddled with errors, including incorporation of programming dismissed from its case by the Board's Order of March 21, 2013. The undisputed evidence establishes that IPG's calculations exclude the programs of SDC claimants that the Board deemed valid – specifically *One Cubed*, *Jimmy Swaggart*, *American Religious Town Hall*, and *Frederick Price*.[124] The undisputed evidence also establishes that Mr. Galaz's calculations included claims of IPG-represented claimants that the Board rejected in its Order of March 21, 2013, including claims on behalf of Jack Van Impe, Salem Baptist Church, and Bishop W.R. Portee.[125] Whether IPG has ignored the Board's order neglectfully or intentionally is unknown. In either case, the Board cannot ignore the fact that IPG has offered a methodology based on faulty data.

48. Because IPG's methodology depends on factors that do not adequately predict relative marketplace value, and is based upon flawed data, its methodology cannot be used to determine the appropriate allocation of funds in the devotional category.

III. SDC's Methodology, Although Imperfect, is Sufficiently Reliable and Supported by Precedent.

49. SDC's methodology relies on program viewership data to determine relative market value of devotional programing. Viewership is the appropriate approach for allocating

[123] *See Distribution of 2004 and 2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010).

[124] *Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (March 21, 2013).

[125] *Id.*

devotional shares between SDC and IPG for three reasons: (1) The Board and its predecessors have relied on viewership data for allocating Phase II shares; (2) based on the evidence in this proceeding from MPAA and Nielsen, SDC's data are reliable; and (3) viewership is a better predictor of marketplace value for niche markets such as devotional programming.

50. The Board and its predecessors have used viewership as a measure of relative marketplace value in allocating shares of cable royalties. While the Board's precedent has established that Bortz data is the preferred data source for measures of relative value in Phase I proceedings, the Board has relied upon viewership as a crude measure of relative marketplace value where Bortz data is unavailable.[126] Bortz data is unavailable here, because the Bortz survey addresses relative valuation of different categories of programming, not relative value of programs within a category.[127] In the absence of Bortz data, viewership data can be used to determine relative market value.[128]

51. As established by MPAA witnesses in this proceeding, the Nielsen viewing data used by the SDC is reasonably reliable.[129] For decades, the Nielsen study has been credited by the CRT and the CARP in determining royalty distributions in cable proceedings.[130] Even after the CRT began to place less reliance on the Nielsen study for Phase I purposes, the CRT acknowledged that the Nielsen study could determine relative value if coupled with a means of

---

[126] Ex. 180 at 16; *See Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004); *see also Program Suppliers v. Librarian of Congress*, No. 04-1070 (D.C. Cir. May 31, 2005).

[127] Ex. 179 at 3; Ex. 180 at 15-16.

[128] *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) ("The Panel . . . found that [a Nielsen study] could be a useful tool in those circumstances when the Bortz survey could not be used.").

[129] *In the Matter of Distribution of 1998-1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99.

[130] *See Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3612 (Jan. 26, 2004).

translating shares to value.[131] Here, the SDC has met this standard by taking Neilsen data from the Kessler sample, incorporating Tribune Media Services data to determine what programs were distantly viewed, calculating the relative shares using Household Viewing Hours data, and then testing the results by comparison to local ratings data.[132]

52. Viewership is a particularly effective measure of relative marketplace value for programming within a niche market, like the market for devotional programming. Cable systems value devotional programming because of its value in attracting and retaining a niche market of viewers who might be less interested in other kinds of programming. The value of a niche market is directly related to the size of that market, and viewership is a measure of size.[133]

53. While SDC's measure of viewership may be less sophisticated than the methodology presented by MPAA-represented claimants, SDC's methodology still allows the Board to make determinations within the required zone of reasonableness, as required by the Board's precedents.[134] More precision is better, of course, but the consequences of imprecision are not as great in a small category, like devotional category, which is minuscule in comparison to a large category like program suppliers. Dr. Brown's analysis sets forth a zone of reasonableness of sufficient precision for a reliable result:

Claimant	**2000**	**2001**	**2002**	**2003**
SDC	61-74%	73-77%	62-68%	68-70%
IPG	26-39%	23-27%	32-38%	30-32%

(Ex. 180 at 19).

[131] *Id.* at 3613.
[132] Ex. 180 at 13-19.
[133] *Id.* at 34.
[134] *National Cable Television Ass 'n* v. *Copyright Royalty Tribunal,* 734 F.2d 176, 182 (D.C. Cir. 1983).

54. Because SDC's methodology appropriately relies on viewership data with the required amount of precision, it is an appropriate measure of the relative marketplace value of devotional programming in this proceeding.

IV. Conclusion

The Board awards cable royalty funds in the devotional category for the years 2000 through 2003 as follows:

Claimant	2000	2001	2002	2003
SDC	67.5%	75.0%	65.0%	69.0%
IPG	32.5%	25.0%	35.0%	31.0%

Respectfully submitted,

Clifford M. Harrington (D.C. Bar No. 218107)
Matthew J. MacLean (D.C. Bar No.479257)
Victoria Lynch (D.C. Bar No. 1001445)
PILLSBURY WINTHROP SHAW PITTMAN LLP
Post Office Box 57197
Washington, DC 20036-9997
Telephone: 202-663-8525
Facsimile: 202-663-8007
E-Mail: Clifford.Harrington@PillsburyLaw.com
Counsel for Settling Devotional Claimants

June 14, 2013

CERTIFICATE OF SERVICE

I, Matthew J. MacLean, hereby certify that a copy of the foregoing "SETTLING DEVOTIONAL CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW " was sent overnight delivery via Federal Express this 14th day of June, 2013 to the following:

INDEPENDENT PRODUCERS GROUP Brian D. Boydston Pick & Boydston, LLP 10786 Le Conte Avenue Los Angeles, CA 90024	PROGRAM SUPPLIERS Gregory O. Olaniran Lucy Holmes Plovnick Mitchell Silberberg & Knupp LLP 1818 N Street, NW 8th Floor Washington, DC 20036
JOINT SPORTS CLAIMANTS Robert Alan Garrett Stephen K. Marsh James R. Wood Tara L. Williamson Arnold & Porter LLP 555 Twelfth Street, NW Washington, DC 20004-1206	

Matthew J. MacLean