Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	)))))	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
In the Matter of Distribution of 1999-2009 Satellite Royalty Funds	)))))	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)

INDEPENDENT PRODUCERS GROUP'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its Proposed Findings of Fact and Conclusions of Law in connection with the captioned proceedings, which are attached hereto.

# # #

Respectfully submitted,

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Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213) 624-1996
Facsimile: (213) 624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers Group

SUMMARY

1. The IPG methodology presents an unbiased analysis for the distribution of Phase II royalties that seeks to include as many qualified broadcasts as is economically feasible. The number of surveyed stations, while not comprehensive of all broadcasts qualifying for distribution of cable or satellite retransmission royalties, includes a substantial percentage of broadcasts generating the royalties at issue in this proceeding, and is a sufficiently representative sample of the aggregate of retransmitted stations. *See* sections III. B, IV. B-E., infra.

2. The IPG methodology seeks to replicate the decisions actually made by cable and satellite system operators by looking at data representative of such decisions, and data reflecting the aggregate of information that a system operator could have had at the time of its decision to retransmit a broadcast station. *See* sections III. B., IV. B-E., infra.

3. The criticisms of the IPG methodology are either unsupported by the facts, are accepted by IPG and remedied by IPG's submitted results, or are explained by IPG. In all such circumstances, the significance (if any) of all such criticisms have not been quantified by the MPAA or SDC. *See* section IV. F., infra.

4. The MPAA and SDC have submitted studies that attempt to predict the household viewing of programs. Such studies are based predominately on local

ratings data that is does not distinguish demographics and does not provide information reflecting a causal relationship between viewership ratings and MSO subscribers. The testimony of Michael Egan, the only witness to appear in a Phase II proceeding with any experience in the selection of retransmitted programming by a cable system operator, is that multiple system operators do not consider Nielsen viewership ratings when determining which stations and programming they will elect to retransmit. MSOs do not subscribe to Nielsen data, they do not consider Nielsen data and, even if they did, they would only consider demographic data or data reflecting the number of distinct viewers to a particular station as opposed to viewers to a particular program. Consistent with the foregoing facts are multiple prior rulings of the CRT, CARP, and CRB that have held that the appropriate consumer for purposes of allocating value between a willing buyer and willing seller of retransmitted programming, is the cable/satellite system operator, not the household viewer. Consequently, even if accurately measured, any study assessing the appeal of programming to a household viewer measures the wrong characteristic. *See* section II., infra.

5. The Judges adopt the recalculated figures presented by Dr. Robinson in Exhibits 261' and 277' as to the allocation of relative value between IPG, the MPAA, and the SDC. *See* section IV. E., infra.

PROPOSED FINDINGS OF FACT

I. <u>HISTORY OF PROCEEDINGS</u>.

By notice published in the Federal Register on August 16, 2013, the Copyright Royalty Judges ("Judges") initiated the Phase II proceedings for the distribution of 2004-2009 cable retransmission royalties and 1999-2009 satellite retransmission royalties.[1] CRB 4 (cable/satellite).[2] Multiple parties filed their Notice of Intent to Participate in Phase II distribution proceedings relating to claims in one or more of the Devotional Programming category, Program Suppliers category, and Sports Programming category. CRB 5-13 (cable/satellite).

On September 23, 2013, the Judges gave notice of the commencement of the voluntary negotiation period, and issued their Case Scheduling Order. CRB 15 (cable/satellite).

On September 30, 2013, the Judges issued an Order Requiring More Specific Statement, which was amended on November 1, 2013, requiring all participating parties to submit additional information relating to their asserted claims. CRB 17, 38 (cable/satellite).

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[1] *See* 78 Fed. Reg. 50113 (cable) and 78 Fed. Reg. 50114 (satellite).

[2] Numeric citations are to the 2004-2009 cable and 1999-2009 satellite dockets, respectively. All numeric references preceded by a "c" refer to the consolidated docket for 2004-2009 cable and 1999-2009 satellite.

On December 11, 2013, IPG and the JSC filed a joint motion to stay any proceedings relating to the distribution of Sports Programming royalties, which motion was denied by order of February 4, 2013. CRB 61, 80 (cable/satellite).

On May 9, 2014, Direct Statements were filed by Independent Producers Group ("IPG"), the Motion Picture Association of America ("MPAA"), the Settling Devotional Claimants ("SDC"), and the Joint Sports Claimants ("JSC"). CRB 96-99 (cable/satellite).

On May 13, 2014, the Judges issued their order setting the schedule for discovery, tentatively establishing June 23, 2014 as the last day for discovery, and the parties thereafter engaged in discovery. CRB 100 (cable/satellite).

On July 8, 2014, IPG, MPAA, and SDC filed Amended Direct Statements. CRB 136-138 (cable), 140-141 (cable/satellite).

On July 23, 2014, the Judges suspended the case schedule pending resolution of numerous discovery motions. CRB 145 (cable); CRB 144 (satellite).

On August 29, 2014, the Judges granted the motion of the JSC to dismiss all IPG claims in the Sports Programming category, and to distribute all remaining monies allocable to the Sports Programming category to the JSC. CRB 159 (cable); CRB 161 (satellite).

On August 29, 2014, the Judges consolidated the 2004-2009 cable and 1999-2009 satellite proceedings into a single proceeding. CRB 160A (cable).

On October 15, 2014, the parties filed rebuttal statements on claims issues. CRB c172-175. Hearings addressing such challenges occurred on December 8-11, 15-16. CRB c200. On March 15, 2015, the Judges issued their Memorandum Opinion and Ruling on Validity and Categorization of Claims. CRB c216.

On or about March 26, 2015, the parties filed their rebuttal statements on distribution issues. CRB c221-223, 225-231, 235, 239. Hearings addressing the distribution issues occurred on April 13-17, 2015.[3]

II. TESTIMONY of MICHAEL EGAN

A. Qualifications.

Michael Egan has been working in the cable television business for thirty-five (35) years, as an executive employee, cable system owner, and consultant. Exh. 284 at pp. 3-6; Exh. 156 (Curriculum Vitae).[4] The purpose of his testimony was to provide the Judges with the perspective of a cable industry executive who was directly responsible for purchasing programming, including distantly retransmitted signals, for nearly 20 years as a cable system operator ("CSO") and who has advised multiple large and smaller CSOs in programming matters for an additional 15 years as an industry programming consultant. Exh. 284 at p. 3. Mr.

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[3] Transcripts of the hearings occurring on April 13-17, 2015 did not appear on the docket sheet.

[4] All numeric references to exhibits are to the exhibit numbers assigned at the final distribution hearing.

Egan has been designated as an expert on the cable television industry by a prior sitting CARP, as well as the Federal Communications Commission. Exh. 284 at p. 5-6; 4/15 Tr. at pp. 107-115; *see also* Exh. 156 (Curriculum Vitae). In the current proceeding, Mr. Egan was designated as an expert witness in Multi-System Operator ("MSO") operations, programming, and decision making. 4/15 Tr. at p. 115. Mr. Egan is the only witness appearing in this proceeding *or any other Phase II proceeding* that has been employed by a CSO, the only witness that has any firsthand experience relating to how CSOs make programming decisions, and further has firsthand knowledge as to how DirecTV, an satellite system operator ("SSO"), made programming decisions. 4/15 Tr. at p. 189.

B. Factors determining the retransmission of programming, and the proper allocation of retransmission royalties.

This proceeding relates to the relative market value of programming appearing on retransmitted television stations, and the decision making of MSOs paying the retransmission royalties and valuing the programming. 4/15 Tr. at p. 164. According to Mr. Egan, MSOs do not use Nielsen program-by-program ratings data to value retransmitted programming. 4/15 Tr. at p. 146.

MSOs are multi-channel video distributors carrying hundreds of video choices, most of which are included in bundles of channels sold in monthly subscriptions. Exh. 284 at p. 6. According to Mr. Egan, Nielsen ratings are the currency of advertising revenues, and are therefore important to broadcast stations which rely on *advertising revenues*. 4/15 Tr. at p. 144. By contrast, however, MSOs rely on *subscriber revenues*, and do not rely on Nielsen ratings information. 4/15 Tr. at p. 144, 146. Whereas subscriber revenues are responsible for at least ninety percent (90%) of an MSO's income, advertising revenues constitute only a small portion of the revenues derived by MSOs. Exh. 284 at p. 6. Only about ten percent (10%) of the income from a CSO such as Time Warner Cable is derived from advertising revenues, and an SSO such as DirecTV only receives about two percent of its income from advertising revenues. 4/15 Tr. at p. 118; CRB 284 at fn. 4, 9 (Test. of Egan); Exhs. 157-159. Notwithstanding, for broadcast signals which are retransmitted in full and generate the royalties applicable to this proceeding, an MSO has no ability to splice in advertising sold by the MSO, and has no interest in the advertising revenues. 4/15 Tr. at p. 210-211.

As a result, when evaluating cable networks and broadcast stations for carriage, MSOs prioritize their contributions to the multiple components of subscriber satisfaction, subscriber acquisition, and subscriber retention. Audience size and its measure, Nielsen ratings, which is critically important to advertising sales-supported cable networks and broadcast stations, is usually *not* a considered factor. Instead, the two most critical factors are economics and programming. Exh. 284 at pp. 6-7.

The license fee to carry a cable network and the retransmission consent and copyright fees (where applicable) to carry a local or distant broadcast station will have a material impact on the MSO's economics – its expenses and its retail rates - which in turn, impacts customer satisfaction and retention. MSOs typically carry and pay for hundreds of video networks, stations, and on-demand services. Because of the continuing yearly increases in their programming costs, well in excess of the rate of inflation, and their desire to keep retail rates from rising at similarly steep rates, MSOs face the difficult task of employing effective strategies to moderate the cost increases while maintaining robust and competitive programming lineups. Exh. 284 at p. 7.

According to Mr. Egan, an MSO looks for the network or station to deliver "added value", i.e., its unique and significant content that adds something new or under-represented to the rest of the lineup. On a cable system with hundreds of viewing options, simply delivering a modest Nielsen rating does not make a channel stand out or impactful to a subscriber or valuable to an MSO. As a result, a cable system typically will place a higher value on a network or television station whose programming separates itself from the crowd by its exclusivity, brand, talent, genre, originality, breadth, and quality, all positively affecting customer satisfaction with the cable package of many, many channels. The desirability of "added value" content has resulted in the creation of dozens of niche cable networks such as CSPAN, MTV, HGTV, and Food Network, each dedicated to super-serving an under-served and small audience as measured by Nielsen ratings. Exh. 284 at p. 8.

Over the years, MSOs have primarily imported a distant television stations for the unique programming they air and that is not otherwise available in the cable/satellite system. Perhaps most often that content has been college and/or professional sports, but other common genres of exclusive content are local news from a nearby market and public affairs from a distant state capitol. For example, several of the cable systems owned by Renaissance Media, LLC were in western Tennessee, about 100 miles from the state capitol, Nashville, and carried local network affiliate stations from Jackson and Memphis. Yet, to display state government news and public affairs programming, Renaissance Media imported two duplicate network affiliates from Nashville (WSMV and WTVF), each of which was a distant signal for copyright purposes.

All other things being equal, Mr. Egan agrees that a program that airs during prime time is more valuable than a program that airs during the daytime. 4/15 Tr. at p. 198. Notwithstanding, Mr. Egan did not agree that the value of every hour of programming on a retransmitted station is the same, only the costs thereof. 4/15 Tr. at p. 204. According to Mr. Egan, allocating royalties by ratings isn't addressing the question of program value, and is also not addressing the question of cost, because the cost doesn't change according to the ratings.

> "In fairness, the only way I could see doing that is to say well, [the allocation should be based on] whatever the cost is, you know, and the royalties paid, right? I mean the cost to the [MSO] is, you know, the copyright fee. It all adds up to dollars that are being split amongst the parties."

4/15 Tr. at 205-206. According to Mr. Egan, "A formula that allocates royalty dollars by ratings is untethered to either the valuation process or the cost generation process. So it seems to [be] illogical." 4/15 Tr. at p. 207

C. The irrelevance of Nielsen ratings.

i. Nielsen ratings are not known or considered by MSOs.

According to Mr. Egan, the retransmitted station's Nielsen ratings are usually not known or considered. Rather, the factors that MSOs consider when selecting which television stations to retransmit are economics and programming that increases *subscriber revenue*. 4/15 Tr. at p. 119-120. Therefore, allocating royalties based on Nielsen ratings (the hallmark of *advertising revenues*), whether in Phase I or Phase II of these proceedings, "misses the mark". 4/15 Tr. at p. 146. Mr. Egan is unaware of a single MSO that subscribes to Nielsen ratings information, including Comcast, Time Warner, Cablevision, etc., and is unaware of a single instance in which ratings was the deciding factor as to which of two programs a CSO would air. 4/15 Tr. at p. 151, 165, 174; Exh. 284 at p. 8.

ii. The CARP previously found Nielsen ratings to be irrelevant.

Informed by many years of participation in the MSO programming, valuation, and carriage decision-making process, Mr. Egan agrees with the CARP finding, accepted by the Librarian of Congress and published in the Federal Register, that Nielsen viewership ratings do not afford an independent basis for determining relative marketplace value of programming. 4/15 Tr. at p. 202; Exh. 284 at p. 9. Recognizing the overwhelming primacy of subscriber revenue in such a determination, the CARP said, "The value of distant signals [to cable operators] is in attracting and retaining subscribers, and not contributing to supplemental advertising revenue", and, "The Nielsen study was not useful because it measured the wrong thing....[it] 'fails to measure the value of the retransmitted programming in terms of its ability to attract and retain subscribers.'" See *Distribution of 1998 and 1999 Cable Royalty Funds, p. 3613.*

Because Nielsen ratings do not indicate relative marketplace value of programming, Mr. Egan testified that it was illogical, and perhaps ultimately untenable, to allocate royalties among claimants proportional to the ratings of the programs they represent. Furthermore, because the system operator is statutorily required to carry all of an imported station's programming and the copyright fee for it is calculated as one, undifferentiated, lump sum, the MSO must take and pay for both the "favored" content that motivated importation as well as the "non-favored" programming aired during the rest of the day. The ratings variations that may occur among viewers in that system, especially during the non-favored hours, do not directly impact the MSO, so they are virtually irrelevant to the operator. And the cost of each and every hour is an equal pro rata portion of the lump sum, unaffected by ratings. As a result, a formula using ratings to allocate copyright royalties among claimants within a category seems untethered to both the marketplace's valuations of the content and its cost of carriage. As the CARP concluded previously, "without a means of translating viewing shares to value, the [Nielsen] study does not afford an independent basis for determining relative value."[5] Exh. 284 at pp. 9-10.

iii. Only certain types of Nielsen ratings, if existent, would be relevant to an MSO.

Even if ratings were considered by MSOs to evaluate retransmitted programming, which they are not, they would only be relevant if they were ratings for the area served by the MSO, as compared to ratings for the area of terrestrial broadcast, i.e., local ratings. 4/15 Tr. at p. 138, 167. Nielsen does not typically provide such ratings. Id. Further, ratings will only convey how many people are watching at a given point in time, not whether it is the same or different people watching at different times of the day, the factor most relevant to MSOs. 4/15 Tr.

[8] See *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001–8 CARP CD 98–99, 69 Fed. Reg., 3606, 3613 (Jan. 26, 2004).

at p. 139. For this reason, ratings are perfect for an advertiser seeking to determine whether to place advertising on a particular broadcast station at a particular time, but unhelpful to an MSO with hundreds of stations transmitted throughout the day, where a different dynamic exists. 4/15 Tr. at p. 140. An MSO would be primarily interested in knowing how many *different* people were watching a retransmitted station throughout the course of a day, not the number of people watching during particular quarter-hour which could be theoretically be the *same* persons watching during each quarter-hour. Household ratings are also unhelpful to MSOs because they do not identify the demographic of the viewer, a very important consideration for MSOs based on whether the demographic is underserved or already overserved by the MSO programming. 4/15 Tr. at p. 166-167.

iv. Ms. Toby Berlin's misrepresentation as to the significance of Nielsen ratings, and her admissions about DirecTV's extensive use of niche programming to satisfy, acquire, and retain subscribers contradict her assertion of the relevance of Nielsen ratings.

The only other witness to assert firsthand experience relating to how SSOs make programming decisions was Ms. Toby Berlin. However, in her testimony, Ms. Toby Berlin misrepresents the makeup and priority of the factors by which MSOs value programming, placing far too much weight on Nielsen ratings. 4/15 Tr. at p. 150; Exh. 284 at p. 10. Although Ms. Berlin attests that ratings were critically important to DirecTV's selection of retransmitted stations, the evidence does not support her statement. 4/15 Tr. at p. 151. Contrary to Ms. Berlin's suggestion, DirecTV's lineup is comprised of almost entirely niche cable networks. In fact, when speaking about DirecTV's marketing successes in her written testimony, Ms. Berlin discusses the marketing tactic of targeting niche demographics via the addition of narrow-cast networks of women-oriented, children-focused, foreign language, and religious programming, all of which deliver low ratings by design. 4/15 Tr. at 154; Exh. 633 at p. 4. The real world existence of DirecTV therefore contradicts Ms. Berlin's assertion that ratings are the singlemost important factor to the determination of what programming will be presented by an SSO. 4/15 Tr. at p. 155.

Consistent with the foregoing, Ms. Berlin further undermines her assertion of the preeminence of ratings in carriage decisions and admits the greater significance to SSOs of subscriber retention by explaining that once a station was carried, it was rarely ever taken off DirecTV, regardless of its ratings. 4/15 Tr. at p. 155. According to Ms. Berlin:

> "[E]very station had some loyal constituency, usually a niche audience. *However small it [audience] might be, we never wanted to have subscribers retaliate by 'churning off' the platform, or discontinuing service.*" (emphasis added.) Exh. 633 at p. 7.

The primary focus of SSOs initially was to duplicate cable's lineup of stations. Exh. 284 at p. 12. The primary strategy of DirecTV, an SSO, was to duplicate cable's lineup of broadcast stations and cable networks to reach programming parity, add even more niche networks with relatively-low ratings, and offer an exclusive package of NFL games for die-hard professional football fans – even according to the testimony of Ms. Berlin. Exh. 284 at p. 12; Exh. 633 at p. 5.

In fact, because SSO's transmitted digitally immediately, they had more channels compared to CSOs. As compared to CSOs, SSOs immediately added low-rated niche networks, serving smaller audiences than CSOs. For example, SSOs immediately transmitted Spanish language programming, Asian programming, religious programming, etc., because they were capable of doing so. 4/15 Tr. at 152. CSOs eventually caught up with SSOs technologically, however these events demonstrate the true focus of SSOs. 4/15 Tr. at 152.

v. The logical inability for SSOs to rely on Nielsen ratings.

As a logical and legal matter, SSOs could not rely on Nielsen ratings as a basis for selecting retransmitted programming. A provision of the Satellite Home Viewer Act provided that if an SSO such as DirecTV wanted to carry any one local station, it had to carry all local stations that requested carriage, regardless of their ratings. Exhs. 145 (FCC fact sheet), 161 (Register of Copyright report). Logically, therefore, there was no place for a consideration of ratings in those decisions at all, even though Ms. Berlin asserts that ratings are the predominate consideration. 4/15 Tr. at p. 153.

III. TESTIMONY OF RAUL GALAZ

A. Qualifications.

Raul Galaz is an employee and authorized representative of IPG, and the initial founder thereof. Prior to forming IPG, Mr. Galaz attended the University of California, Los Angeles and graduated from Stanford Law School in 1988. He practiced law thereafter, specializing in entertainment law, representing independent film and television producers, foreign film distributors and individual artists. Mr. Galaz has previously been designated as an expert in these proceedings, on the subject of copyright royalty mechanisms. Exhs. 250, 250a at p. 1; 1998-1999 cable proceedings (Phase II), 9/8/14 Tr. at p. 965.

B. IPG theory of compensation.

i. Criteria for Phase II award.

The appropriate criteria for distribution of cable and satellite retransmission royalties is not clearly resolved from the compulsory license statute, 17 U.S.C. Sections 111, 119, or precedent. All that seems certain is that any distribution methodology that evidently focuses on just one set of criteria to the exclusion of all others, would appear arbitrary. Exhs. 250, 250a at p. 2.

IPG contends 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, and do not affect the royalties that are paid by the MSOs retransmitting a broadcast, so any attempt to distribute the royalties collected by the Copyright Office by replicating the license fees that would occur on a broadcast-by-broadcast basis in the absence of a compulsory license is misguided. Because an MSO is required to license a broadcast signal *en toto*, once there has been a determination as to which Phase I category a program should go into, then broadcasts of all programs within such category should arguably be allocated royalties based only on those factors that distinguish them within a single, integrated broadcast of a station, and are known in advance of the retransmitted broadcast - - no differently than an advance negotiated license between a copyright owner and an exhibitor. Logically then, the only factors that would be considered for distributing royalties to a particular program in Phase II are the factors of (i) which station(s) a program appeared on (which, in turn, allows for a determination as to the number of subscribers receiving the retransmitted signal, and what fees were collected from the station's retransmission), (ii) the number of times that the program was broadcast on such station, and (iii) the length of the program broadcast. Factors such as the unknown, after-the-fact determined viewership of the program, or after-the-fact ratings (there is a distinction), would be of no relevance, since the compulsory license fee paid by the MSO is paid in advance of, and regardless of, any such determinations of viewership or ratings. Exhs. 250, 250a at p. 2.

Notwithstanding, if the goal is to replicate what would occur in the free market in the absence of a compulsory license, as opposed to what has actually occurred (i.e., a statutory compulsory license rate that ignores free market factors as part of the MSO's royalty obligation), then the Judges need to additionally focus on such factors as (i) the *anticipated* viewership of the program, as reflected by the time period during which a program was broadcast (e.g., 8:00 pm versus 2:00 am). Exhs. 250, 250a at p. 3.

How calculations based on the foregoing alternatives are accomplished, with the data that is commercially available, is a complex (yet manageable) construction. IPG proposes a distribution methodology that relies on data that reflects the compulsory license fees that have been generated by retransmitted stations, the number of distant households that received the retransmitted broadcasts, programming data reflecting the length of the broadcast, and data that reflects the viewership within particular time periods calculated. With such data, each of the foregoing methodological alternatives can be constructed, against which all program claims can be fairly applied. Exhs. 250, 250a at p. 3.

ii. All Retransmitted Broadcasts Must Be Compensated.

IPG espouses that each and every program that is demonstrated to have been broadcast by a terrestrial station, and is thereafter retransmitted by an MSO, is required to receive some portion of the fees collected by the U.S. Copyright Office. Such entitlement exists based on criteria developed by the Copyright Royalty Tribunal, the Copyright Arbitration Royalty Panel, and the Copyright Office; specifically, (a) value to the MSO, (b) harm to the syndicator, (c) market value of the program, and (d) time. Moreover, such entitlement makes logical sense from the standpoint that 17 U.S.C. Sections 111 and 119 require an MSO to obtain a license for the entirety of the terrestrial signal, and deprives the owner of a retransmitted program from requiring the licensure of such program in order for such retransmission. Thus, the Judges should compensate all programs, even if such programs are broadcast on terrestrial stations that are not the most significantly retransmitted terrestrial stations, or for which no evidence of actual viewing exists. Exhs. 250, 250a at p. 4.

iii. Compensation for each Identifiable Retransmitted Broadcast should be based on Objective Criteria that exists or can be determined *before* a retransmission occurs.

One of the primary criteria for awarding royalties in these proceedings is the value of carriage and programming to an MSO. IPG recognizes the common sense fact that MSOs cannot predict the viewership that will subsequently result for all broadcasts appearing on the terrestrial stations that they elect to retransmit, and may not even have a valid measurement of broadcast-by-broadcast viewership. That is, the value or appeal of any particular terrestrial station to an MSO cannot be based on ratings that will occur only after the MSO has elected to carry a terrestrial station. Such a proposition defies logic, and any method of distributing satellite retransmission royalties to a broadcast based entirely on the specific ratings of a broadcast is flawed in this respect. Exhs. 250, 250a at p. 5.

Moreover, while the overall appeal of the terrestrial station to reach niches with an MSO's subscriber base could be the determinative factor that affects whether the MSO will carry particular terrestrial station, such overall appeal does not address the proper allocation of collected royalties *on a broadcast-by-broadcast basis* when the MSO is required to license the entirety of the terrestrial signal, and the program owner is thereby precluded from seeking recompense from the MSO that has retransmitted the program owner's program. Exhs. 250, 250a at p. 5.

IPG does not offer the definitive explanation as to why each MSO elected to carry each of its retransmitted terrestrial stations during the 1999-2009 calendar years, and leaves such determination to the Phase I proceedings. Nonetheless, and in an attempt to construct a distribution methodology that will fairly recompense all programming that has been retransmitted by an MSO pursuant to 17 U.S.C.

Sections 111 and 119, and for which a program owner has been denied the ability to directly license such distribution, IPG has attempted to construct a distribution methodology that is content-blind, and merely considers objective criteria that exists or can be determined *before* the retransmission occurs. Exhs. 250, 250a at p. 6.

C. IPG-claimed broadcasts and programming.

IPG has identified substantial broadcasts of IPG-claimed programs that have generated cable and satellite retransmission royalties during the 1999-2009 calendar years. Each of the programs is either owned or controlled by entities that have assigned IPG the right to collect satellite retransmission royalties attributable to their programming. Exhs. 250, 250a at p. 6; Exhs. 124, 125.

IPG originally identified fifty-three (53) claimants in the Program Suppliers category, eighteen (18) claimants in the Devotional programming category, and two (2) claimants in the Sports programming category, whose programming was represented by IPG. Exh. 124. Such claimants identified 4,217 distinctly titled programs falling in the Program Suppliers category that had been retransmitted by satellite system operators, 183 programs falling in the Devotional programming category, and 23 programs in the Sports programming category. Exh. 125. Such titles had generated 191,553 hours, 17,083, and 1,526 hours of satellite-retransmitted programming, in their respective categories. Exh. 127. Such claimants identified 3,473 distinctly titled programs falling in the Program Suppliers category that had been retransmitted by cable system operators, 135 programs falling in the Devotional programming category, and 22 programs in the Sports programming category. Exh. 133. Such titles had generated 203,269 hours, 58,474, and 986 hours of cable-retransmitted programming, in their respective categories. Exh. 135. A single program may appear in acquired data under a variety of names. Id.

IPG omitted from its raw data those broadcasts that were not retransmitted or did not qualify for royalties. Notably, there were substantial differences between the programs contained on the WGN Chicago over-the-air feed and the WGN satellite feed distributed to cable operators. Unless broadcast data for both feeds matched as to their time, date, and program title, it was not included in the data utilized by Dr. Laura Robinson for analysis. Exhs. 250, 250a at fn. 3.

IV. TESTIMONY OF DR. LAURA ROBINSON

A. Qualifications.

Dr. Laura Robinson is currently a Managing Director at Navigant (NYSE: NCI), an international consulting firm with approximately 40 offices in North America, Asia, Europe, and the Middle East. Her prior experience includes work as Managing Principal of The CapAnalysis Group, LLC and as Vice

President/Senior Economist at Analysis Group/Economics, Inc. She has held faculty positions at the State University of New York, Stony Brook, the New York Institute of Finance, and the University of Southern California, teaching classes in corporate finance, investments, portfolio theory, financial markets, and law and economics to undergraduate and graduate students. Exhs. 287-288a.

In her professional life she has provided analyses and testimony for numerous matters related to breach of contract, securities fraud, mergers and acquisitions, intellectual property, product liability, legal fees, and insurance recovery. Dr. Robinson's work often requires the statistical and econometric analysis of large complex databases. Exhs. 287-288a.

Dr. Robinson's professional experience includes numerous engagements related to intellectual property including patent, copyright, and trademark infringement. Her experience in the entertainment industry includes the analysis of movie libraries, television shows, musical artist contracts, movie theaters and live entertainment venues. Exhs. 287-288a; see also 4/15 Tr. at pp. 54-57. Dr. Robinson has previously been designated as an expert in both the 2000-2003 cable proceeding (Phase II) and the 1998-1999 cable proceeding (Phase II), and was so designated in this proceeding in the areas of valuation, economics, and statistics. 4/15 Tr. at pp. 58-59. Dr. Robinson has previously been designated as an expert as to her review of Nielsen Media Research data, on about a dozen occasions. 4/17 Tr. at pp. 26-27.

Dr. Robinson earned Ph.D. and M.Phil. degrees in Business from the Finance and Economics Division of Columbia Business School, an M.A. in Economics from the Columbia University Graduate School of Art and Sciences, and an A.B. *cum laude* in Economics from Harvard University. 4/15 Tr. at p. 54. Dr. Robinson's further experience is summarized in her curriculum vitae. *See* Exhs. 126, 287-288a.

B. Dr. Robinson's Assignment.

Dr. Robinson was engaged to provide expert witness testimony in this proceeding, relating to the distribution of 1999-2009 satellite and 2004-2009 cable royalties. Exhs. 287-287a. Dr. Robinson presented a methodology for the distribution of such royalties then, after the conclusion of discovery revealing the identity of all other parties' programming, applied her proposed methodology to determine the relative market value of such programming in the Devotional programming and Program Suppliers categories, i.e., her "Supplemental Report". Exhs. 288-288a. Following the Judges' Memorandum Opinion and Ruling on Validity and Categorization of Claims (issued March 15, 2015; CRB c216), Dr. Robinson recalculated her findings regarding the relative market value of programming eligible for the receipt of retransmission royalties, and further recalculated her findings to address criticisms levied in the rebuttal testimony of third-party witnesses. Such recalculations were admitted into evidence as Exhibits 253'-283'.

According to Dr. Robinson, analysis of the market value of retransmitted broadcasts benefits from an examination of a hypothetical negotiation between a willing buyer (a system operator) and a willing seller (copyright owner). The economic theory of bargaining indicates that in such a negotiation it is necessary to consider the marginal costs and benefits to the parties of possible agreements as well as the next best alternative to the parties should they not reach agreement ("reservation prices'). In the case of copyright owners and the retransmission of copyrighted programs by MSOs, the copyright owner's marginal costs are minimal and thus the outcome of the hypothetical negotiation will relate largely to the negotiating power of the parties and the MSO's profitability. The actual marginal costs and benefits faced by the MSOs is complicated in part by the facts that MSOs are statutorily required to retransmit a station in its entirety and that copyrighted programs being provided to subscribers are bundled. Exhs. 287-287a at p. 4.

Dr. Robinson does not have direct information regarding the marginal benefits and marginal costs faced by the MSOs retransmitting the broadcasts at issue in the instant matter, nor is such data known to exist. However, Dr. Robinson does have data on various indicia of the economic value of the retransmitted broadcasts. These data include the length in minutes of the retransmitted broadcasts, the time of day of the retransmitted broadcasts, and the number of persons distantly subscribing the stations broadcasting the claimed programs. Dr. Robinson's proposed methodology is the only methodology to rely on such data, and all other proposed methodologies rely on the Nielsen program-by-program ratings data that Mr. Michael Egan opined was irrelevant and unrelated to any actual consideration by MSOs. Exhs. 287-287a at p. 5; Exhs. 288-288a; 4/15 Tr. at pp. 64-65.

At its core, the distinction between IPG's presented methodology and the methodologies presented by the MPAA and SDC is a distribution based on subscribership data versus viewership data. Consistent with prior rulings, IPG advocates that the MSO is the "consumer" whose choices dictate the distribution of retransmission royalties, and that the factors relied on to construct IPG's methodology reflect the actual decisions made by MSOs in determining which broadcast stations to retransmit and, therefore, the appropriate factors to consider when assessing relative market value. This is in contrast to the methodologies of the MPAA and SDC which purport to predict distant viewing from local viewership, i.e., advocating that the decisions of local viewers should substitute for the MSO "consumer", and dictate that such viewership is the appropriate measure of relative market value for programming.

Dr. Robinson reviewed the rulings from several prior proceedings relating to the distribution of retransmission royalties. Therein, the Judges and predecessor Copyright Royalty Tribunal and CARP determined that household viewing is not the measure of value. Rather, the "buyers" that are to be considered for purposes of cable distribution attribution of value are the cable system operators that select which broadcast stations are to be retransmitted on their cable system. *See* 75 Fed.Reg. 57063, 57066, 57069, 57070 (Sept. 17, 2010), Docket No. 2007-3 CRB CD 2004-2005 ("Moreover, that there are factors other than subscriber growth considerations which may also be at work in influencing the demand for distant signal stations, does not change our finding that the Bortz survey focuses on the appropriate buyer in the hypothetical market – i.e., the cable operator.")("In short, we find that the George Ford advertising approach offers no helpful insight into the relevant hypothetical market or into the behavior of the relevant buyer in that hypothetical market – i.e., the cable operator.").

C. Satellite Data utilized.

Data relied on by Dr. Robinson for the calculation of 1999-2009 satellite royalties included data from IPG, TV Data, and Nielsen Media Research. The IPG data summarizing satellite statements of account and TV Data broadcast data both comprise information about stations that were distantly retransmitted by satellite system operators during 1999-2009, while the Nielsen data comprised summary viewership information for selected stations from 2000 to 2004. Exh. 287a at p. 8.

IPG provided Dr. Robinson with data summarizing satellite statements of account applicable to 1999-2009. The data lists each distant signal station and includes data fields with information about the characteristics of each station in each year, including: the station call sign and the number of distant subscribers (i.e., the number of satellite system subscribers who receive the station and to whom the station is distant). Exh. 287a at p. 9.

The information from TV Data included broadcast data on program titles during 1999-2009 and distantly retransmitted by SSOs. The information in this database included the date and time the broadcast was aired (to the minute), the station call sign, the program length (in minutes), the program type, and the program title. In each year from 1999 to 2009, the distant subscribers of the stations covered in the TV Data covered at least 97% of the distant subscribers for all stations covered in the satellite statements of account. Exh. 287a at p. 9.

The data from Nielsen Media Research included two varieties of Nielsen data. First, it included distant diary viewing data for selected distant signal stations collected by Nielsen and produced by the MPAA in the 2000-2003 Cable Royalty Distribution Proceedings and the current proceeding, and covering calendar years 2000-2003 and a portion of 2004. These data show total projected viewership by station and time of day in quarter hour increments. Second, it included Nielsen National Viewing Data covering calendar years 2000-2009 that was produced by the MPAA in the current proceeding. Both forms of Nielsen viewing data is also supported by Nielsen Media Research reports reflecting relative viewing according to time period (i.e., "daypart viewing") over a decades-long study of viewing. *See* Exhs. 287a at p. 9, *citing* Nielsen Television Audience Report, 2010 and 2011.

Dr. Robinson merged the data on the eligible titles, the IPG summary of satellite statement of account information, the TV Data with broadcast information, and the Nielsen data on viewership. The resulting database ("1999-2009 Database") allowed Dr. Robinson to analyze characteristics and value of distant satellite-retransmitted broadcasts during 1999-2009. Exh. 287a at p. 10.

D. Cable Data utilized.

Data relied on by Dr. Robinson for the calculation of 2004-2009 cable royalties included data from Cable Data Corporation ("CDC"), TV Data, and Nielsen Media Research. Both the CDC data and the TV Data broadcast data comprise information about stations that were distantly retransmitted by cable system operators during 2004-2009, while the Nielsen data comprises summary viewership information for selected stations from 2000 to 2004. Exh. 287 at p. 8.

The CDC data was comprised of six spreadsheet files of annual data. Each of the six files consisted of distant signal data from a single year between 2004 and

2009. The CDC Data listed each distant signal station and included data fields with information about the characteristics of each station in each year, including: the station call sign, the number of distant subscribers (i.e., the number of cable system subscribers who receive the station and to whom the station is distant), and the total amount of royalty payments paid by CSOs attributable to the carriage of that station as a distant signal. Exh. 287 at p. 9.

The information from TV Data included data on program titles broadcast during 2004-2009 and distantly retransmitted by CSOs. The information in this database included the date and time the broadcast was aired (to the minute), the station call sign, the program length (in minutes), the program type, and the program title. As the cost to obtain programming data from TV Data for every station in every year is prohibitive, Dr. Robinson selected a random sample of distant signal stations per year to analyze in her report. Exh. 287 at p. 9.

The CDC Data included approximately 900 stations each year from 2004 to 2009. Because the cost to obtain TV Data on broadcasts for every station in every year is prohibitive, Dr. Robinson selected a random sample of distant signal stations to analyze in her report. Specifically, she selected a random sample of 150 stations in each year, utilizing a stratified random sampling approach to ensure that stations associated with large and small amounts of distant signal royalty payments are represented in the sample. Stratified random samples are commonly used in survey research. Exh. 287 at p.11.

In the CDC Data, analog stations and their digital complements were reported separately, so Dr. Robinson considered both the digital and analog feeds for a given call sign as a single station (with total fees equal to the sum of the fees reported for the analog and digital feeds) when stratifying the population and conducting the random sample. Before stratifying the population and conducting the random sample, Dr. Robinson excluded stations in a given year that were classified as non-commercial in either of that year's reporting periods. Exh. 287 at p. 12.

Dr. Robinson also excluded stations from the CDC Data with $0 in distant signal fees in the given year before stratifying the population and conducting the random sample. Table 1 of Dr. Robinson's amended direct testimony summarizes the total number of distant signal stations from the CDC Data and the number of stations excluded from the population from which she drew her random sample. As Table 1 shows, there were a total of between 721 and 827 distant signal stations each year from 2004 to 2009 from which Dr. Robinson drew her random sample. Exh. 287 at p. 12.

Dr. Robinson thereafter stratified the population of distant signal stations in each year into five strata of royalty classes, and computed the strata boundaries based on the cumulative square root of frequency ("CSRF") rule applied to a frequency distribution of royalty payments in $500 increments. The CSRF rule is a commonly used statistically efficient method for determining strata boundaries in instances such as this, where no clear royalty-based boundaries exist. Once the strata boundaries were calculated, Dr. Robinson conducted a simple random sample of stations, with equal probability, within each stratum in each year. She determined the number of stations to sample from each stratum based on the Neyman allocation, which provides an optimum allocation of the samples to each stratum. In each year, based on a total random sample across all strata of 150, the Neyman allocation for the strata with the greatest level of royalties is greater than the population of stations in that stratum. Therefore, Dr. Robinson sampled all stations in the stratum with the most royalties, and then recalculated the Neyman allocation of the remaining stations to sample across the remaining four strata. Characteristics of each stratum in each year, as well as the number of stations sampled from each stratum, were summarized in Table 2 to Dr. Robinson's amended direct testimony. As the last column in Table 2 reflects, Dr. Robinson's random sample represents at least 90% of the fees paid for all commercial distant signal stations retransmitted by cable system operators in each year from 2004 to 2009. Exh. 287 at p. 13.

The data from Nielsen Media Research included viewing data for selected distant signal stations collected by Nielsen and produced by the MPAA in the 2000-2003 cable royalty proceeding. This data showed total projected viewership by station and time of day in quarter hour increments. The Nielsen viewing data is also supported by Nielsen Media Research reports reflecting relative viewing according to time period over a decades-long study of viewing. *See* Exh. 287 at p. 10, *citing* Nielsen Television Audience Report, 2010 and 2011.

Dr. Robinson merged the TV Data on broadcasts with the CDC data on the stations distantly retransmitting those broadcasts and with the Nielsen Data. The resulting database ("2004-2009 Database") allowed Dr. Robinson to analyze characteristics and value of distant cable-retransmitted broadcasts during 2004-2009. Exh. 287 at p. 17.

E. The Resulting Analyses and Allocation of Royalties.

Based on the additional information provided to Dr. Robinson following the Judges' Memorandum Opinion and Ruling on Validity and Categorization of Claims (issued March 15, 2015; CRB c216), and criticisms levied in the rebuttal proceedings by third-party witnesses, Dr. Robinson computed the number of broadcasts and the number of broadcast hours claimed by IPG and the Non-IPG Claimants. The result of these recalculations appears in Exhibits 253' and 269' for cable and satellite royalties, respectively.

Dr. Robinson estimated the relative market value of IPG-claimed broadcasts and the Non-IPG Claimant broadcasts for both 1999-2009 satellite royalties and 2004-2009 cable royalties in each of the Program Supplier and Devotional categories by analyzing and comparing several metrics: the number of claimed broadcasts, the number of hours of claimed broadcasts, the time of day of the claimed broadcasts, and the number of distant subscribers to MSOs carrying the stations that carry those claimed broadcasts. Exhs. 288-288a at p. 4.

Based on the aforementioned metrics Dr. Robinson found that the royalty share attributable to IPG for the applicable years is in the range of 1.06% - 9.12% in the Program Suppliers category (cable), 9.63% - 20.69% in the Devotional category (cable), 0.29% - 3.37% in the Program Suppliers category (satellite), 0% - 31.10% in the Devotional category (satellite). Exhibits 254' and 270' summarize these results showing the royalty share estimates for the Program Suppliers and Devotional categories for the 2004-2009 cable and 1999-2009 satellite royalties, respectively. Exhs. 254', 270'.

Following discovery in these proceedings, Dr. Robinson was able to compare the stations sampled by other parties in these proceedings. Dr. Robinson concluded that MPAA witness Dr. Jeffrey Gray's random sample of distant-signal stations substantially overlapped with her sample of stations. Further, both of the samples included stations that comprise most of the subscribers for all non-commercial distant-signal stations carried by MSOs. Exhs. 288, 288a at p. 7. Exhibits 255' and 271' summarize the number of stations and subscribers covered by the respective samples of Dr. Robinson and Dr. Gray in their cable and satellite analyses.

Exhibit 255' shows that Dr. Robinson's random sample of cable-retransmitted stations consisted of approximately 150 stations each year, whereas Dr. Gray's random sample consisted of approximately 130 stations each year. Between 45 and 57 stations each year were in both random samples. These overlapping stations comprised a substantial portion of the royalty fees paid attributable to the retransmission of non-commercial distant-signal stations. For example Exhibit 255' shows that in 2009, the 144 stations in Dr. Robinson's random sample comprised 92.4% of the fees paid by CSOs attributable to the retransmission of non-commercial distant-signal stations. Of these 144 stations, 45 were also in Dr. Gray's sample of 2009 stations. These 45 stations comprised 86.3% of the fees paid by CSOs attributable to the retransmission of non-commercial distant-signal stations. Exh. 288 at p. 8.

Similarly, Exhibit 271' shows that in 2009, the 56 satellite-retransmitted stations in Dr. Robinson's sample comprised 97.9% of the satellite subscribers of all non-commercial distant-signal stations. Of these 56 stations, 55 were also in Dr. Gray's sample of 2009 stations. These 55 stations comprised 97.8% of the satellite subscribers of all non-commercial distant-signal stations. Exh. 288a at p. 8.

Exhibits 256' and 272' reflect the number of broadcasts and the number of broadcast hours claimed by IPG and the Non-IPG Claimants in the station samples for each year and each category, for each of 2004-2009 cable and 1999-2009 satellite royalties. Exhs. 288-288a at p. 9.

Exhibits 257' and 273' further analyze the retransmitted broadcasts by the average number of distant subscribers of the stations carrying the claimed cable-retransmitted and satellite-retransmitted broadcasts by year from 2004-2009 and 1999-2009, respectively. For example, Exhibit 257', Table 5A, shows that in the Program Supplier Category during 2004-2009, IPG retransmitted broadcasts are shown on stations with an average of 1,042,875 distant subscribers, approximately 3.02 times the average number of distant subscribers to stations retransmitting the Non-IPG (MPAA) Claimant broadcasts. Exhs. 288-288a at p. 11.

Exhibit 258' further analyzes the retransmitted broadcasts by the fees paid by CSOs to retransmit the stations carrying the claimed broadcasts by year from 2004-2009. Table 6A thereof, for example, shows that in the Program Suppliers Category during 2004-2009 that IPG retransmitted broadcasts are shown on stations for which CSOs paid an average of more than $1.86 million in fees, more than three times the approximately $612,000 for Non-IPG (MPAA) Claimant broadcasts. Exh. 288 at p. 12.

Exhibits 259' and 274' further analyze the IPG and Non-IPG retransmitted broadcasts by the time of day of the claimed broadcasts. These results are shown for each year from 1999-2009. Viewership by time of day is based on information from Nielsen Media Research on Nielsen Diary data for a sample of stations retransmitted as distant signals by cable and satellite providers. The underlying data includes daily television viewership during sweeps months in 2000-2003 and part of 2004 for the selected respective stations by time of day in quarter-hour increments. Exhibit 275' also provides a comparable measurement, however viewership is measured using annual viewership data for all stations in each quarter-hour from the Nielsen National Viewing Data for 2000 to 2009. Exh. 288 at p. 14; Exh. 288a at p. 13.

According to Dr. Robinson, the relative market value of IPG-claimed broadcasts and the Non-IPG-claimed broadcasts in each of the Program Supplier and Devotional categories can be estimated using the above analyses comparing IPG-claimed broadcasts and Non-IPG Claimant broadcasts. This comparison includes consideration of the number of claimed broadcasts and the number of hours of claimed broadcasts. In addition thereto, it is important to consider the characteristics and qualities of such broadcasts. As was discussed in Dr.

Robinson's Opening Report, *ceteris paribus*, larger number of distant subscribers to the stations retransmitting the broadcasts will indicate more valuable broadcasts. Similarly, *ceteris paribus*, more viewers watching programming during the time of day of the broadcast will indicate more valuable broadcasts. Exh. 288 at p. 16; Exh. 288a at p. 17.

Exhibits 260' and 276' summarize the results of Dr. Robinson's analyses. Each row of those exhibits provides four estimates of the relative value of the IPG-claimed broadcasts and the Non-IPG Claimant broadcasts. For those exhibits, Column [A] is the share of broadcast hours claimed by IPG. Column [B] shows the relative value of an IPG broadcast hour compared to a Non-IPG Claimant broadcast hour based on the Nielsen Satellite Diary Data on the number of viewers watching programming at the time of day of the broadcast. For 2004-2009 cable royalties, Column [C] shows the relative value of an IPG broadcast hour compared to a Non-IPG Claimant broadcast hour based on the fees paid by CSOs distantly retransmitting the station showing the programming. For 1999-2009 satellite royalties, Column [C] shows the relative value of an IPG broadcast hour compared to a Non-IPG Claimant broadcast hour based on the Nielsen National Viewing Data on the number of viewers watching programming at the time of day of the broadcast. Column [D] shows the relative value of an IPG broadcast hour compared to a Non-IPG Claimant broadcast hour based on the number of distant subscribers to the station showing the programming. These relative value metrics are derived by comparing the weighted averages for the IPG claimed broadcasts and the Non-IPG Claimant broadcasts. Exh. 288 at p. 17; Exh. 288a at p. 18.

For example, Exhibit 260' shows that an average IPG hour in the Devotional category in 2006 is worth approximately 80% of an average hour of Non-IPG Claimant programming when relative value is measured based on the time-of-day metric using Nielsen Diary Data. Column [E] shows the range of royalty shares to which IPG is entitled when adjusting IPG's share of hours (Column [A]) by the value of an IPG hour relative to a Non-IPG Claimant hour (Columns [B], [C], and [D]). The formula for calculating the royalty share in Column [E] when relative value is based on time-of-day using the Nielsen National Viewing Data (Column [C]) is: $[E] = ([A] \times [C]) / (1 - [A] + ([A] \times [C]))$. Exh. 288 at p. 18; Exh. 288a at p. 19.

After analyzing the foregoing value metrics - - the number of broadcast hours, the two measures of the time of day of the claimed broadcasts, the fees paid by CSOs distantly retransmitting eligible broadcasts (cable only), the number of distant subscribers of the stations carrying those claimed broadcasts - - Dr. Robinson was able to estimate the relative market value of the retransmitted broadcasts of the compensable copyrighted program titles held by IPG and the Non-IPG Claimants in the Program Supplier and Devotional categories and estimate the royalty share attributable to such parties for each year from 2004-2009 (cable) and 1999-2009 (satellite). These estimates represent the mid-points of the ranges identified in Exhibits 260' and 276', and are summarized in Exhibits 261' and 277' below. Exh. 288 at p. 19; Exh. 288a at p. 21.

Exhibit 261':

Table 9: Summary of IPG Royalty Shares, Cable

Year	Range of IPG Royalty Share	Midpoint
	Program Suppliers	
2004	1.28% - 5.35%	3.32%
2005	1.06% - 5.03%	3.04%
2006	1.37% - 7.13%	4.25%
2007	1.28% - 9.12%	5.20%
2008	1.39% - 7.25%	4.32%
2009	1.57% - 4.22%	2.90%
	Devotional	
2004	14.18% - 20.20%	17.19%
2005	9.63% - 13.83%	11.73%
2006	13.17% - 19.28%	16.23%
2007	12.52% - 19.52%	16.02%
2008	13.05% - 20.69%	16.87%
2009	10.07% - 14.74%	12.41%

Exhibit 277':

Table 9: Summary of IPG Royalty Shares, Satellite

Year	Range of IPG Royalty Share	Midpoint
	Program Suppliers	
2000	0.70% - 2.70%	1.70%
2001	0.68% - 3.27%	1.98%
2002	0.44% - 2.49%	1.47%
2003	0.63% - 2.28%	1.46%
2004	0.29% - 2.56%	1.42%
2005	0.45% - 2.79%	1.62%
2006	0.47% - 2.72%	1.60%
2007	0.34% - 3.37%	1.85%
2008	0.32% - 2.13%	1.23%
2009	0.78% - 2.29%	1.53%
	Devotional	
1999	0.36% - 0.63%	0.49%
2000	0.00%	0.00%
2001	11.01% - 13.80%	12.40%
2002	11.42% - 13.39%	12.40%
2003	10.43% - 12.89%	11.66%
2004	0.70% - 7.41%	4.06%
2005	4.92% - 13.51%	9.22%
2006	12.28% - 31.10%	21.69%
2007	11.83% - 21.02%	16.43%
2008	0.00%	0.00%
2009	16.17% - 19.00%	17.59%

F. Criticisms of Dr. Robinson's Methodology, and Dr. Robinson's responses thereto.

As previously noted, Exhibits 253'-283' present the recalculated figures of Dr. Robinson, modified in response to criticisms levied by third parties. Notwithstanding, those criticisms and Dr. Robinson's responses are addressed herein.

Dr. Gray's criticisms

i. Treatment of Canadian-originated broadcasts.

Dr. Gray claims in footnote 18 and paragraph 34 of his rebuttal testimony that Dr. Robinson inappropriately included in her calculations Canadian programs broadcast on Canadian-originated stations, i.e., program broadcasts falling under the Canadian Claimants Group. As an example, included therein is the reference that *Kenny v. Spenny* is a Canadian-originated program and should not be compensable in the Program Suppliers category. Exh. 373.

In fact, Dr. Robinson confirmed that there are no broadcasts of *Kenny v. Spenny* incorporated into her analysis, and after reviewing Dr. Gray's rebuttal testimony Dr. Robinson confirmed the accuracy of her coding whereby Canadian programs broadcast on Canadian stations were not compensated. 4/15 Tr. at pp. 92-93. At no time did Dr. Gray or the MPAA present any exhibit or evidence substantiating Dr. Gray's criticism.

ii. Use of only "overlap" stations as part of cable analysis.

Dr. Gray criticizes Dr. Robinson's analysis based on the overlap between Dr. Robinson's random sample of stations and his random sample of stations in Dr. Robinson's 2004-2009 cable analysis. Exh. 373 at para. 27. However, Dr. Robinson explained that she elected to use only the overlapping stations in both their analyses because the MPAA did not produce all of Dr. Gray's electronic backup before the filing of her amended report in July 2014, and that the resulting sample represented approximately 69-80% of the total distant signal royalty fees for all non-commercial distant-signal stations carried by CSOs in each year from 2004-2009. Thus, the maximum impact of the use of the overlapping sample is bounded by the impact on relative market value of broadcasts retransmitted by stations responsible for the "non-overlap" stations, and there is nothing presented by Dr. Gray to suggest that the data from the "non-overlap" stations produces a different result from the "overlap" stations. 4/15 Tr. at p. 93; 4/16 Tr. at pp. 89-90; Exh. 255'; 4/16 Tr. at p. 249.

iii. Alleged "non-random" sample of satellite-retransmitted stations.

At footnote 19 of his rebuttal testimony, Dr. Gray states that "It is unclear from the Robinson Supplemental Report whether the sample used in her analysis for satellite is a random sample." Exh. 373 at fn. 19. Dr. Robinson clarified that the satellite stations for which she relied for her data covered 98-99% of the total distant satellite subscribers, and therefore essentially reflect the entire population obviating the need for a sample, i.e., a census. Again, there is nothing presented by Dr. Gray to suggest that the data from the 1-2% population not reflected in the analysis produces a different result from the 98-99% that is represented. 4/16 Tr. at pp. 91-92.

iv. Alleged failure to use 24/7 broadcast data for all sampled stations.

In paragraph 28 of Dr. Gray's rebuttal report, Dr. Gray alleges that "the Tribune data that Robinson relied on for her analysis does not contain information for 24 hours per day, 7 days a week for every station in her sample." Exh. 373 at para. 28. Dr. Robinson clarified that Dr. Gray's statement is misleading because she does include 24/7 broadcast data for all *compensable* broadcasts. Specifically, the only station for which 24/7 data is not included is WGN. This is because any missing quarter hours only reflect the WGN broadcasts that were not simulcast on WGNA. That is, only non-compensable broadcasts were omitted. 4/16 Tr. at p. 92.

v. Incorrect date restriction coding – Program Suppliers.

In paragraphs 29 and 30 of Dr. Gray's rebuttal report, Dr. Gray alleges that Dr. Robinson did not correctly apply the date restrictions on certain IPG-claimed titles that were reflected in the IPG documents on which she relied. Exh. 373 at paras. 29-30. According to Dr. Robinson, Dr. Gray was correct, and review of her programming code identified an error that resulted in time restrictions not being applied to some of the titles in her analysis. This error was fully corrected in Exhibits 253'-283'. 4/16 Tr. at pp. 92-95.

Notwithstanding, Dr. Gray only identified the IPG titles that benefitted from the coding error, and failed to note the beneficial effect on MPAA titles. The aggregate effect of the coding error was to *understate* IPG's relative value in the Robinson analysis. Correction of the error resulted in an increase in the relative value of IPG programming, a fact obfuscated by Dr. Gray's criticism. 4/16 Tr. at pp. 92-95.

vi. Alleged misattribution of *Tomorrow's World.*

In paragraph 32 of Dr. Gray's rebuttal report, Dr. Gray alleges that the title *Tomorrow's World* is actually a different program than the program to which IPG is entitled to make claim. Exh. 373 at para. 32. As noted in post-hearing motions, IPG understood that any such issue relating to improper program claims was supposed to have been addressed by the claims hearing. Notwithstanding, Dr. Gray has not presented any evidence or information to indicate that an incorrect attribution of this title was made, but simply states his unsubstantiated "understanding" that such is the case. Exh. 373 at para. 32. At no time did Dr. Gray or the MPAA present any exhibit or evidence substantiating Dr. Gray's criticism, or quantifying the significance of any alleged error, nor is Dr. Robinson aware of any such information. 4/16 Tr. at p. 96.

vii. Incorrect time coding.

In paragraph 33 of Dr. Gray's rebuttal report, Dr. Gray alleges that program length values of "100" and "200" in the Tribune Data upon which he relies represent lengths of 1 hour and 2 hours. However, Dr. Gray states that Dr. Robinson treated those values as 100 minutes and 200 minutes in her analysis. Exh. 373 at para. 33.

After reading Dr. Gray's comments, Dr. Robinson reviewed the program length fields in her Tribune data and Dr. Gray's Tribune data and found that they were different. In Dr. Robinson's Tribune data, program lengths of 60 and 120 represent lengths of 1 hour and 2 hours, whereas in Dr. Gray's Tribune data, program lengths of 100 and 200 represent 1 hour and 2 hours. Notwithstanding, Dr. Robinson incorrectly attributed any one-hour or two-hour program claimed by the MPAA with program lengths of 100 and 200, rather than 60 and 120 as had occurred with IPG programming. Consequently, the effect was to overstate the number of hours of MPAA-claimed programming relative to IPG-claimed programming, and correcting this error necessarily *increased* the estimates of IPG's royalty share. That is, while this was a coding error, it inured to the benefit of the MPAA *in every instance*. Regardless, Exhibits 253'-283' corrected this coding error. 4/16 Tr. at pp. 96-98.

viii. Alleged failure to adjust for WGN.

In paragraphs 36-37 of Dr. Gray's rebuttal report, Dr. Gray alleges that Dr. Robinson made no "adjustment" for WGN, and that WGN has an "an inappropriately large impact" on Dr. Robinson's subscriber and fee-based relative value analysis. Exh. 373 at paras. 36-37.

Dr. Robinson indicated that she was uncertain what Dr. Gray meant by his statement "inappropriately" large. It is a fact that WGN represents a huge percentage of both the cable and satellite retransmitted market, so any characteristics of WGN will necessarily have a large impact on the results. However, why such large impact would be "inappropriate" is not articulated by Dr. Gray, nor is any evidence or exhibit presented that would quantify the alleged inappropriate impact. 4/16 Tr. at pp. 98-99.

ix. Dr. Gray's asserted confidence intervals.

At paragraph 39 of Dr. Gray's rebuttal report, Dr. Gray reports 95% confidence intervals for his estimates of MPAA's viewing shares, apparently to either bolster Dr. Gray's argument or to draw comparison to Dr. Robinson's confidence intervals. Exh. 373 at para. 39.

Dr. Robinson's interpretation of these confidence intervals is that Dr. Gray actually has some very small confidence intervals around his numbers. Confidence numbers reflect an analysis of uncertainty. What is clear to Dr. Robinson is that looking at Dr. Gray's entire analysis where he starts with Nielsen survey data that's being projected to populations where that survey data is only in certain sweeps months, where those sweep months are being used to estimate viewing outside of the sweep months, where the level of zero viewing extensive, where those years of data are being used to estimate other years of distant viewing by a prediction progression model, there are many steps of uncertainty. Dr. Gray's asserted confidence intervals do not reflect all these types of uncertainty, but perhaps only the last step of uncertainty. Specifically, Dr. Robinson understands that Dr. Gray's confidence intervals tacitly assume that all of the data that was uncertain that underlies it was actually treated as certain data when no confidence level necessarily exists. 4/16 Tr. at pp. 99-100.

<u>Dr. Erdem's criticisms</u>.

x. Alleged miscategorization of *Feed the Children*.

On pages 5-6 of his rebuttal report, Dr. Erdem alleges that programs for *Feed the Children* should have been excluded from Dr. Robinson's devotional analysis because the Judges determined that these programs were not devotional in nature. Exh. 640 at pp. 5-6. However, according to Dr. Robinson, even her analysis from her July 2014 supplemental report (Exhs. 288, 288a) treated *Feed the Children* titles as Program Supplier claims. 4/16 Tr. at pp. 101-102. In fact, her supplemental report explicitly states in its opening text that it is placing *Feed the Children* in the Program Supplier category. Exhs. 288-288a, at p. 2.

It is unclear why Dr. Erdem believes Dr. Robinson treated *Feed the Children* titles as Devotional in nature. The file cited by Dr. Erdem in his footnote 10 shows no entry in the "PHASE I CATEGORY" column for *Feed the Children* titles. Dr. Robinson's programming code shows that titles with no entry in this column are treated as Program Supplier titles. At no time did Dr. Erdem or the SDC present any exhibit or evidence substantiating Dr. Erdem's criticism.

xi. Dr. Robinson's "stratified" random sample in her cable analysis.

On pages 6-7 of his rebuttal report, Dr. Erdem criticizes Dr. Robinson's use of a "stratified" random sample when selecting the sample of stations for her cable analysis, ultimately asserting that a "stratified" random sample is not a random sample. Exh. 640 at pp. 6-7. However, as discussed on pages 11 to 15 of Dr. Robinson's May 2014 cable report (Exh. 287), stratified random samples are widely used, including by Dr. Gray in this proceeding and prior proceedings. 4/16 Tr. at pp. 102-103; Exh. 287 at pp. 11-15.

xii. Alleged "non-random" sample of satellite-retransmitted stations.

Identical to Dr. Gray (see above), Dr. Erdem criticizes Dr. Robinson's sample of stations in her satellite analysis as a non-random sample. Exh. 640 at pp. 7-8. As previously noted, Dr. Robinson clarified that the satellite stations for which she relied for her data covered 98-99% of the total distant satellite subscribers, and therefore essentially reflect the entire population obviating the need for a sample, i.e., a census. 4/16 Tr. at pp. 91-92. In fact, Dr. Erdem even recognizes this fact on page 8 of his rebuttal report. Exh. 640 at p. 8. Again, there is nothing presented by Dr. Erdem to suggest that the data from the 1-2%

population not reflected in the satellite analysis produces a different result from the 98-99% that is represented.

xiii. Reliance on 2000-2004 daypart viewing data for 2004-2009 cable analysis.

At page 11 of his rebuttal report, Dr. Erdem criticizes Dr. Robinson's use of 2000-2003 daypart viewing data on distant viewership for purposes of her 2004-2009 cable analysis. Exh. 640 at p. 11. In fact, Dr. Robinson relies on daypart viewing data for 2000-2003 and part of 2004. Exh. 288 at p. 14.

Dr. Robinson observes, however, that she only used viewing data to assess *daypart* viewing, i.e., what percentage of viewing is in each quarter hour, a very aggregated calculation. As noted, the Nielsen daypart viewing data is also supported by Nielsen Media Research reports reflecting relative viewing over a decades-long study of daypart viewing, whereby viewing has changed only 1% in one of the six major viewing dayparts during the last thirty years. *See* Exhs. 287, 287a at p. 9, *citing* Nielsen Television Audience Report, 2010 and 2011.

In Dr. Robinson's opinion it is reasonable to consider *daypart* viewing data from 2000-2004 to evaluate distant *daypart* viewing during 2004-2009. She noted that Dr. Gray relies on 2000-2003 program-by-program viewing data to estimate 2004-2009 program-by-program viewing without any qualification. Exh. 289. As a matter of comparison, Dr. Robinson's daypart viewing data is aggregated into only 96 dayparts, whereas Dr. Gray's program-by-program viewing data is disaggregated into *millions* of program-by-program ratings. Moreover, Dr. Erdem's *entire* analysis for 2004-2009 cable and 1999-2009 satellite is predicated on the correlation between local viewing and distant viewing *for a select number of titles during a single sweeps month in February 1999.* Dr. Erdem's own criticism renders his entire analysis unreliable. 4/16 Tr. at pp. 103-106.

xiv. Alleged computational error in Dr. Robinson's cable analysis.

On page 15 and Table 1 of Dr. Erdem's rebuttal report, Dr. Erdem alleges that you made a computational error related to distant subscribers over multiple markets, in that you calculated the average of the subscribers over those markets instead of summing them. Exh. 640 at p. 15.

Dr. Robinson clarified that the intention of her programming code was to average subscribers for the same station when she was given data for two accounting periods, which would often happen when a station changed affiliation, channel number, or call sign mid-year. In performing this average calculation, she did not realize that the same station might appear twice in the data because the same station broadcasts *from* different markets. In 95% of the CDC data instances there was only one line item per call signal, and in 5% of the instances there was more than one line item for a call sign. In the 5% of observations with multiple line items there were two categories of reasons for such effect: (i) a station changed affiliation, channel number, or call sign mid-year, or (ii) because the same station broadcasts from more than one market. The first reason implies that the number of subscribers should be averaged and the second reason implies the numbers should be summed. Thus, both IPG and Dr. Erdem made mistakes regarding such data – IPG always averaged and Dr. Erdem always summed. 4/16 Tr. at 106-107. Regardless, even according to Dr. Erdem's own calculation "This change has essentially no effect on the results", and such was the conclusion of Dr. Robinson. Exh. 640 at fn. 50; 4/16 Tr. at p. 107.

xv. Alleged miscalculation of distant subscribers in cable analysis.

On pages 15-16 and Table 2 of his rebuttal report, Dr. Erdem describes an alleged error in Dr. Robinson's calculation for her cable analysis, stating that she calculated distant subscribers according to weighted averages, but gave more weight to observations for the second accounting period in a year than the first accounting period of the year. Exh. 640 at pp. 15-16.

As Dr. Robinson clarified, Dr. Erdem is totally incorrect in his interpretation of the accounting period field in the CDC data that she used in her cable analysis. In the CDC data Dr. Robinson used, the accounting period field I use is "# of Acct Periods". This field represents the number of accounting periods represented in a given row of data. If a station was only retransmitted during one accounting period in the year, then the "# of Acct Periods" column would be "1", regardless of whether the accounting period was the first or second accounting period of the year. This was not understood by Dr. Erdem. 4/16 Tr. at 106-107.

In fact, the example Dr. Erdem included in his Table 2 misstates the data. There are multiple entries for WMEU-C in the CDC data because there are actually two reported call signs (WMEU-CA and WMEU-LP) for this signal, not because there is a row for each accounting period. The row for WMEU-CA represented one accounting period, whereas the row for WMEU-LP represented two accounting periods. Regardless, even by Dr. Erdem's own calculation calculation "This change has essentially no effect on the results", and such was the conclusion of Dr. Robinson. Exh. 640 at fn. 50; 4/16 Tr. at p. 107.

xvi. Incorrect date restriction coding – Devotional.

Identical to Dr. Gray (see above), on pages 16-17 of his rebuttal report Dr. Erdem indicates that Dr. Robinson's programming code contained an error that did not correctly apply the date restrictions on certain IPG-claimed titles that were reflected in the IPG documents on which she relied. Exh. 640 at pp. 16-17.

Dr. Robinson confirmed the existence of this error. 4/16 Tr. at pp. 110-111. However no different than with Dr. Gray and the Program Supplier titles, Dr. Erdem only identified the IPG titles that benefitted from the coding error, and failed to note the beneficial effect on SDC titles. The aggregate effect of the coding error was to *understate* IPG's relative value in the Robinson analysis.

Correction of the error resulted in an increase in the relative value of IPG programming, a fact obfuscated by Dr. Erdem's criticism. 4/16 Tr. at p. 113. Regardless, this error was fully corrected in Exhibits 253'-283'. 4/16 Tr. at p. 111.

xvii. "Double Count" of programs in two categories.

On pages 17-18 of his rebuttal report, Dr. Erdem alleges that Dr. Robinson "double-counted" programs that are claimed as either Devotional or Program Supplier titles by IPG. Exh. 640 at pp. 17-18.

As clarified by Dr. Robinson, in her initial calculations she did not yet know how these titles would be categorized so she included the titles in both the Devotional and Program Supplier analysis at that time. However, as soon as Dr. Robinson received the Judges' Memorandum Opinion and Ruling on Validity and Categorization of Claims, issued on March 15, 2015, she revised her analysis accordingly. 4/16 Tr. at pp. 112-113. Due to the fact that Dr. Erdem's rebuttal report was submitted simultaneously with Dr. Robinson's post-Memorandum recalculations, Dr. Erdem was unaware that Dr. Robinson's updated figures assign programming to only one category. Consequently, there are no program titles that appear both in the Devotional and in the Program Supplier categories.

xviii. An alleged lack of correlation between Dr. Robinson's factors and limited local ratings data.

On pages 18-24 of his rebuttal report, Dr. Erdem criticizes the results of Dr. Robinson's analysis based generally on the lack of correlation between each of the factors considered by Dr. Robinson, viewed in isolation, against asserted "Nielsen ratings". Exh. 640 at pp. 18-24. Consequently, the asserted correlations are not between the relative market value of programming that is proposed by Dr. Robinson and the asserted "Nielsen ratings", but rather correlations between the various factors considered by Dr. Robinson in the calculation of the relative market value that she opines exists, viewed separately and in isolation. Criticisms of Dr. Robinson's methodology therefore distorts her position by considering any indicia in isolation, and to the exclusion of all other indicia.

The asserted "Nielsen ratings" are, in fact, limited ratings data applicable to only (i) local broadcasts, i.e., ratings that are mutually exclusive from the only retransmitted broadcasts actually compensated in these proceedings, (ii) ratings during only certain "sweeps" periods, e.g., February for years 1999-2003, and (iii) ratings for fewer than all of the programs claimed by IPG and the SDC. Exh. 640 at p. 21.

Further, Dr. Erdem utilizes examples of programming that were expressly excluded from the devotional programming category, e.g., *Singsation*, *Easy*

Money, *Firestorm*, thereby reflecting that Dr. Erdem's analysis in his rebuttal report did not incorporate the Judge's ruling from the Memorandum Opinion issued on March 15, 2015. Exh. 640 at pp. 23-24.

Finally, Dr. Erdem's criticism purports to address a correlation amongst Dr. Robinson's factors, viewed in isolation, and a factor (limited Nielsen local ratings data) that witness Michael Egan has expressly opined is irrelevant to any consideration by MSOs. Consequently, the results of Dr. Erdem's calculations are of no significance.

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of August, 2015, a copy of the foregoing was sent by overnight mail to the parties listed on the attached Service List.

Brian D. Boydston, Esq.

MPAA-Represented Program Suppliers:

Gregory O. Olaniran, Esq.
Lucy Holmes Plovnick Esq.
Mitchell, Silberberg & Knupp LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036

Settling Devotional Claimants:

Clifford M. Harrington
Pillsbury, Winthrop, et al.
P.O. Box 57197
Washington, D.C. 20036-9997