

**Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, DC**

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| <b>In the Matter of</b>   | ) |  |
|   | ) |  |
| <b>Phase II Distribution of the 1998<br/>and 1999 Cable Royalty Funds</b> | ) | <b>Docket No. 2008-1<br/>CRB CD 1998-1999 (Phase II)</b> |
|   | ) |  |

**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 September 2-4, 2014, and September 8, 2014.

The Copyright Royalty Judges called the hearing to determine the appropriate Phase II distribution of the 1999 cable royalty funds attributable to the devotional programming category. These royalty funds are to be distributed among the SDC claimants and the Independent Producers Group (“IPG”) claimants. The Judges identified the valid claimants in their June 18, 2014, Ruling and Order Regarding Claims and Separate Opinion. Ruling and Order Regarding Claims and Separate Opinion, Docket No. 2008-1 CRB CD 1998-1999 (June 18, 2014) (“Claims Ruling”).

**FINDINGS OF FACT**

**I. VALID DEVOTIONAL CLAIMANTS**

1. The SDC are comprised of the following claimants for 1999 cable royalties: (1) The Christian Broadcasting Network, Inc., (2) Coral Ridge Ministries Media, Inc., (3) Crystal Cathedral Ministries, Inc., (4) In Touch Ministries, Inc., and (5) Oral Roberts Evangelistic Association, Inc. *See* Exh. SDC-D-002, at App. C.

2. IPG has asserted claims on behalf of the following claimants: (1) Adventist Media Center Productions, (2) Benny Hinn Ministries, (3) Creflo A. Dollar Ministries, (4) Eagle Mountain International Church aka Kenneth Copeland Ministries, (5) Feed the Children, Inc., (6) Life Outreach International. *See* IPG-D-001, at IPG-1.

3. The SDC have challenged the validity of several claimants represented by IPG. Following the Preliminary Hearing on May 5 and 6, 2014, the Judges dismissed IPG's claims in this proceeding on behalf of (1) Adventist Media Center Productions, and (2) Feed the Children, Inc. Claims Ruling at 22. Over the SDC's objections, the remaining claimants represented by IPG are entitled to a portion of the 1999 cable royalty funds in the devotional category.

## **II. RELEVANT FACTORS FOR ALLOCATION OF CABLE ROYALTY FUNDS**

4. 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 relative market value of IPG represented claimants' distantly retransmitted programming as a whole. Because the 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.

5. The SDC's valuation methodology is based on distant viewership as measured by a custom report from Nielsen and the testimony of John Sanders, an experienced and well-qualified expert in the field of valuation of media assets, including television programming.

6. IPG's valuation methodology is based on several metrics devised on behalf of IPG by Dr. Laura Robinson, an economist with no demonstrated experience or skill in the valuation of television programs. These metrics are: number of hours of broadcasts on the air;

time of day of the broadcasts by quarter hours; a “fee generation” matching game metric; and average distant subscribers per cable system.

7. As shown below, IPG’s methodology is worthless. The SDC’s methodology, on the other hand, although imperfect, is a reasonably reliable method for determining the allocation of the 1999 royalty shares.

### **III. IPG’S METHODOLOGY**

8. IPG’s proposed methodology is based on a series of approaches developed by Dr. Laura Robinson, an economist with essentially no experience relevant to this case. She has never conducted the valuation of a television station or cable system operator, and has never advised a buyer or seller of a television program in a real-life transaction. Tr. 74:19-79:9 (Robinson). Although Dr. Robinson testified that she served as an expert witness in the valuation the television program *American Idol* in an unrelated litigation (Tr. 82:3-17), it appears that her experience in this regard was fabricated, or at least overstated. The decision in that case reveals that the case related to valuation of stock, and not the television program, that Dr. Robinson was not a valuation expert for either party, and that her expert testimony related only of the adequacy of an auction method used to value the stock. Tr. 222:4- 227:13 (Robinson); Exh. SDC-R-005 at 4, 19.

9. As set forth below, Dr. Robinson’s analyses proved in many places to be incompetent at best, and downright deceptive at worst. In addition to overstating her credentials, she intentionally selected and manipulated her methodologies to obscure value in SDC programming (most notably with respect to her “fee-generation” metric, discussed below). On rebuttal, she feigned ignorance of the method used by the SDC’s witness, Alan Whitt, to compile the report of distant viewing on which the SDC’s expert witness relied, and then evaded

questions on cross-examination revealing that she had in fact successfully replicated Mr. Whitt's results. She used phony statistical analysis derived from data provided to her exclusively by IPG to try to fool the judges and the parties into believing that aggregating data increases standard error, a perversion of the most basic principles of statistics. Dr. Robinson was not a credible witness. Not surprisingly, her measures are inappropriate and unusable determining the relative market value of the SDC and IPG claims in this proceeding.

***Number of hours of broadcasts on the air***

10. The first measure used by Dr. Robinson compares the total number of broadcast hours of IPG programming for the distantly retransmitted broadcasts claimed by the SDC and IPG, using a sample of stations selected by IPG's employee and former owner, Raul Galaz, a disgraced lawyer and convicted felon who served time in prison for defrauding the Copyright Office in royalty distribution proceedings like this one. Exh. IPG-D-001 at 28; Tr. 229:22-230:8.

11. Dr. Robinson admits that the number of hours of broadcasts is not a measure of value. Tr. 239:11-17 (Robinson); Tr. 240:17-243:22 (Robinson). Although she describes this metric as a measure of "volume," it is not a relevant measure of "volume," because it measures only the amount of time on the air, and not the volume of programming actually distributed to distant subscribers. Tr. 247:21-251:8.

12. A measure based solely on volume is ineffective because it fails to account for any of the factors that are significant to determining value, such as the quality or content of the IPG versus SDC programs and whether anyone is watching the programs. Exh. SDC-R-001 at 5; Tr. 247:5-11 (Robinson). The number of hours of broadcast tells us nothing about how much viewers and cable system operators value the program. For example, viewers and cable system operators may find a 30-minute episode of Seinfeld more valuable than a 90-minute infomercial

on shampoo, or a 60 minute *Hour of Power* featuring Rev. Robert Schuller more valuable than five 30 minute *Life Today* programs with James Robison.

13. Even as a measure of volume, instead of value, this measure fails. Some broadcast hours are retransmitted by many cable systems, while others are retransmitted by only a few cable systems. Tr. 1085:15- 1086:10 (Erdem). Some are retransmitted to tens of millions of subscribers, while some are retransmitted to only thousands of subscribers. *Id.* Broadcast hours is not a relevant measure of volume of distant retransmissions.

***Time of day of retransmitted broadcasts***

14. IPG's second measure compares the time of day viewership of IPG versus SDC programs. Using 1997 sweep data produced by the Motion Picture Association of America in a previous case, Dr. Robinson estimates the average number of total television viewers for each quarter-hour when IPG or SDC programs were broadcast according to Dr. Robinson's Tribune data selected by Raul Galaz. Tr. 254:18- 255:6 (Robinson). Although the time of day analysis relies in part on viewership data, Dr. Robinson's time of day measure as presented is flawed in concept and application.

15. First, although it may be that time of day is *related* to value, it is not a *measure* of value. It might be inferred that a program that is broadcast at a very low-viewer population time of day is likely to have fewer viewers – and therefore less value – than it would if it were broadcast at another time during the day. But, as Dr. Robinson herself conceded, it does not follow from this inference that two programs broadcast at similar times of the day have similar value. Tr. 264:13-21 (Robinson). A program broadcast opposite the Super Bowl should not be expected to have the same value as the Super Bowl. A program broadcast opposite *Seinfeld* should not be expected to have the same value as *Seinfeld* on that basis alone.

16. Second, even if the concept were plausible – which it isn't – Dr. Robinson's application is flawed. She uses Nielsen data from 1997, instead of 1999. The sample stations in her 1997 Nielsen data are a poor fit for the 1999 Tribune sample that she used to determine the time of day of the broadcasts. She takes no account of the day of the week, even though weekend (especially Sunday) viewership might be expected to vary from weekday viewership, particularly for devotional programs. Tr. 260:9- 261:22; 263:12-16 (Robinson); Tr. 1089:1-1092:6 (Erdem); Exh. SDC-R-001, at 13.

17. Finally, Dr. Robinson's analysis does not show, as she asserted, that SDC and IPG programs are broadcast at times of day that have approximately equal viewership. It shows (for whatever it is worth) that SDC programs, on average, were broadcast at relatively higher-value times of day.

#### ***Fee generation***

18. Dr. Robinson's third measure combines CDC data on fees paid by station, and TV Data on broadcast hours by station (again based on Dr. Robinson's sample of stations selected by cable royalty fraudster Raul Galaz), ostensibly for the purpose of comparing the amounts of fees paid by cable system for retransmission of stations carrying SDC and IPG programs. Tr. 229:11-16; 271:14-20 (Robinson).

19. First, a royalty allocation methodology based on fee generation has been discredited by the Judges in prior distribution proceedings. *See Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 FR 57063, 57072-57073 (Sept. 17, 2010). Particularly for devotional programming that represents only a small fraction of the total programming on a station, it is not possible to allocate fees on a program-by-program basis. Tr. 1087:6-1088:20 (Erdem). SDC expert witness Dr. Erkan Erdem illustrates this point with an example of two

grocery stores, one large and the other small, with each one selling a different brand of coffee. In order to determine which brand is more valuable, one must know how many customers purchased each brand of coffee in the respective grocery stores. *Id.* Use of fees generated by television stations to determine the relative value of individual programs on those stations is analogous to using the grocery stores' total revenues in order to compare the value of individual brands of coffee sold in those stores. *Id.* It simply does not work.

20. But even if fee generation were a valid measure in concept, Dr. Robinson's implementation was abysmal and intentionally deceptive. Rather than calculating aggregate fee generation by stations carrying IPG and SDC programs, Dr. Robinson devised a "matching game" by number of quarter hours broadcast on stations in each of ten "fee generation categories" selected by Dr. Robinson. Dr. Robinson claimed that her matching game demonstrated that she could "match" every SDC quarter hour of programming with an IPG quarter hour in an equal or higher "fee generation category," thereby supposedly demonstrating that IPG programs were on stations to which "more than 50%" of fees were allocable. IPG-D-001 at 32 and IPG-8. This claim turned out to be false.

21. First, the "fee generation categories" were concocted entirely by Dr. Robinson, and bear no relationship to any marketplace reality. Tr. 272:9-17; 279:15-281:14. The first eight categories were in \$50,000 increments (\$0-\$49,999; \$50,000-\$99,999; \$100,000-\$149,999; etc.), but the ninth category, "\$400,000+," had no upper boundary. *Id.*; IPG-D-001 at IPG-8. This means that in the ninth category, Dr. Robinson was matching IPG quarter hours of programming on stations with between \$400,000 to \$1.6 million in fee generation to SDC quarter hours of programming on WGN, with \$53 million in fee generation (more than 1,000 increments of \$50,000 above Dr. Robinson's "\$400,000+" category). Tr. 281:14-284:11 (Robinson). Indeed,

it appears that Dr. Robinson's fee generation categories were likely designed to obscure the overwhelming advantage to the SDC of a consistently designed fee-generation measure, as a result of SDC programming on WGN (often identified in the distant marketplace as WGN-America or WGNA), by far the largest retransmitted station.

22. But even with her concocted "fee generation categories," Dr. Robinson was still unable to "match" all of the SDC's quarter hours in the "\$400,000+" category without creating an even higher fee generation category for stations with "unknown" fee generation. Tr. 285:15-293:5. According to Dr. Robinson's matching game, a station with "unknown" fee generation has even greater fee generation than a station in a category with no upper limit. If quarter hours on "unknown" stations had been assigned to the lowest category, instead of the highest category, then Dr. Robinson's matching game would have failed out of the box, because IPG would have had substantially more quarter hours than SDC in the lowest "unknown" fee generation category. *Id.*

23. After dismissal of IPG's claims for Feed the Children and Adventist Media Center Productions, Dr. Robinson recomputed her matching game. Exh. IPG-D-009. Even with the concocted fee generation categories, and even giving IPG the benefit of placing stations with "unknown" fee generation in a category higher than the "\$400,000+" category, Dr. Robinson was unable to "match" all of the SDC's quarter hours. Tr. 294:6-296:4. Nevertheless, she still testified that IPG had "more than 50%" on the basis of this measure. Exh. IPG-D-013. Dr. Robinson admitted on cross examination that this was not true. Tr. 304:20-305:6 (Robinson).

24. In response to questioning from Judge Strickler, Dr. Robinson agreed to recompute a "fee generation" metric using aggregate fee generation, instead of matching by fee generation category. Tr. 308:15-309:20 (Robinson); Tr. 397:13-402:18 (Robinson). But instead

of computing *aggregate* fee generation, she computed a metric of weighted *average* fee generation by quarter hour, again with the apparent purpose of obscuring the overwhelming effect of programming on WGN. Tr. 1032:5-1033:22 (Robinson). Because Dr. Robinson's data show that the SDC have more quarter hours of broadcasting, a calculation of average fee generation by quarter hour understates the total fee generation allocable to SDC programs by a fee generation methodology. Tr. 1034:10-20 (Robinson).

25. Even with the distortion caused by Dr. Robinson's use of average, instead of aggregate, fee generation, Dr. Robinson's revised computation shows that the average SDC quarter hour of programming was broadcast on stations with eighteen percentage points higher fee generation than the average IPG quarter hour of programming – a fact that Dr. Robinson had tried hard to obscure by use of her matching game. Exh. IPG-D-016.

#### ***Average Subscribers Per Cable System***

26. Dr. Robinson's final metric measures the average number of distant subscribers per cable system retransmitting IPG programming versus SDC programming. Tr. 311:21- 312:7 (Robinson). Because the metric measures average subscribers *per cable system*, without taking into account the number of cable systems retransmitting a station, it bears essentially no relationship to the number of distant subscribers actually receiving a program – much less the number of distant subscribers who watch the program. Dr. Erdem demonstrated, and Dr. Robinson admitted, that this metric can actually go *up* when programs are eliminated, simply because some programs happen to be retransmitted by cable systems with slightly lower than average numbers of subscribers. Tr. 331:6- 345:4 (Robinson); Exh IPG-R-001, at 8. Indeed, this metric went up for IPG after the dismissal of Feed the Children and Adventist Media Center

programming. Exh. SDC-R-001 at 7-10; Tr. 329:17-330:12 (Robinson). The direction of movement is wrong, demonstrating that the metric is useless.

27. Even Dr. Robinson admitted in response to questions from Judge Feder that she does not know whether programs would be more or less valuable if retransmitted by cable systems with average numbers of more or fewer subscribers. Tr. 405:5-407:3 (Robinson). She speculated that cable systems with more subscribers might have deeper pockets (implying willingness to pay more value) or greater bargaining power (implying willingness to pay less value). *Id.* But even these speculations are implausible, because deep pockets and bargaining power would exist, if anywhere, with the *cable system operator*, which is likely to own many cable systems, and not at the level of the *cable system* itself. There was no evidence suggesting that large cable system operators are especially likely to own large cable systems, as opposed to higher numbers of small cable systems. Tr. 316:12-20 (Robinson). Indeed, there was no evidence suggesting that how or whether cable systems generally vary much in size. All Dr. Robinson's metric really shows is that SDC and IPG programs, on average, are retransmitted on cable systems of approximately average size - an unsurprising and unilluminating finding.

***“Sensitivity Analysis”***

28. Finally, Dr. Robinson applies what she describes as a “sensitivity analysis” to estimate what she believes to be a “zone of reasonableness” for each of her different metrics. In fact, she does not apply a true sensitivity analysis, which would involve changing an assumption to see what effect it would have on the results. She simply multiplies each of her results by 71% to find the bottom of the zone.

29. In response to questioning from Judge Strickler, Dr. Robinson defended her use of 71% by saying that her sample of stations contains “a majority of the data.” Tr. 156:5-22

(Robinson). But this is not true, as she later conceded. Tr. 368:21-369:20 (Robinson). Rather, her sample contains stations accounting for 71% of all of all fees paid into the cable royalty fund for 1999. *Id.* By this measure, WGNA alone accounts for more than 40%, and all the other stations in Dr. Robinson's sample account for only about 30%. Tr. 370:12-21 (Robinson); Tr. 371:19-372:11 (Robinson). The remaining approximately 29% of total fee generation is from literally hundreds of stations not included within Dr. Robinson's sample. Tr. 358:6-359:20 (Robinson). Dr. Robinson's sample therefore includes only a relatively small amount of the total data that would be relevant to her metrics. *Id.* This alone would not necessarily undermine the reliability of her results, except that unlike the SDC, Dr. Robinson did nothing to assess whether her sample was representative. Tr. 239:4-10 (Robinson). Ironically, the Judges sustained an objection by IPG to the only evidence offered in the proceeding suggesting that Dr. Robinson's sample was representative. Tr. 1093:5-1094:22.

30. In sum, IPG's methodology is useless in determining the relative market value of the SDC and IPG programming in this proceeding.

#### **IV. SDC METHODOLOGY**

31. The SDC propose an allocation methodology based on expert testimony as to what buyers and sellers actually value in the purchase and sale of television program licenses - program viewership. Exh. SDC-D-001, at 5-6; Tr. 487:14- 488:15 (Sanders). In support of their methodology, the SDC present the testimony of John Sanders, a qualified expert in the field of valuation of media assets, including television programs. Tr. 463:20-464:4 (Sanders). Mr. Sanders has more than thirty years of experience in this field, having participated in the appraisals of more than 3,000 communications and media businesses. Tr. 456:20-462:12 (Sanders); SDC-D-2, at 2-3 and App. A. Much of his work has focused on the television and

cable industries, including the valuation of television programs, television stations, and cable systems. *Id.* His clients frequently include both buyers and sellers of television programs, in real life transactions. *Id.*

32. Mr. Sanders was asked to determine the relative fair market value of the SDC's programs and IPG's programs. Tr. 468:4-12 (Sanders). He defined "fair market value" as "the price in cash or cash equivalents that would convey between a willing buyer and a willing seller, both being fully informed of the relevant facts and neither being under compulsion." Tr. 472:11-473:1 (Sanders). He explained that the difference between fair market value and "relative" fair market value is that "relative" fair market value is to determine proportionally how much value is attributable to one collection of assets as compared to how much value is attributable to the other. Tr. 473:2-12 (Sanders). "In other words, fair market value would likely be expressed in dollars. Relative fair market value would likely be expressed as a percentage." Tr. 473:13-16 (Sanders).

33. With respect to the requirement that the buyer and seller each be "fully informed," Mr. Sanders clarified that "fully informed" is not the same as "all-knowing." Tr. 474:11-475:4 (Sanders). It simply means having adequate knowledge of the relevant facts and circumstances to the issue or the proposed transaction at hand. *Id.* "I don't think in any engagement I've ever been involved in ... we have had all the information we would like to have. Typically, a valuation exercise is endeavoring to reach a conclusion based upon the information that is available." Tr. 474:20-475:4 (Sanders).

34. Mr. Sanders's definition of "fair market value," particularly with the explanation that "fully informed" means "having adequate knowledge," is functionally identical to the definition given by the Supreme Court and used in the past by the Judges: "the price at which

the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.”

*Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, Docket No. 2008-2 CRB CD 2000-2003, 78 Fed. Reg. 64984, 64991-92 (Oct. 30, 2013).

35. Mr. Sanders testified that in advising a cable system operator in the purchase of a license to retransmit a television program, he would rely primarily on audience measurement. Tr. 476:10-477:11 (Sanders). He explained that any programming, whether aired on a television station or a cable system, will be of value to that business only if it is actually generating viewers. Tr. 477:16-20 (Sanders). A cable system operator’s first goal is to offer a wide menu of different categories of programming that will attract subscribers: movies, sports, religious programming, etc. Tr. 478:4-14 (Sanders). But within each category, the cable system operator’s objective is to have individual program titles that viewers will actually be interested in watching, because more viewers within a category will attract more subscribers. Tr. 478:15-479:1 (Sanders).

36. Similarly, Mr. Sanders explained that a seller of television programming with higher evidence of viewership could be more aggressive in negotiating a price for the sale of the programming, whereas a program with no evidence of viewership will be in a “very severely handicapped position.” Tr. 479:2-18 (Sanders).

37. Valuation within a category of programming is therefore reliant on audience measurement data. “[T]he most ubiquitous and widely accepted and authoritative source of that data is Nielsen.” Tr. 480:6-13 (Sanders). Of course, it is widely recognized that Nielsen measurements are imperfect. But it is the best and most comprehensive data available, and economic decisionmakers in the television industry have come to rely upon it as the basis for

their decisions. Tr. 481:1-13 (Sanders). Although some businesses will try to conduct their own surveys or alternative ways to measure viewership, these alternative methods are generally not given the same degree of reliance as Nielsen measurements. Tr. 485:20-487:3 (Sanders).

38. To conduct his valuation in this case, Mr. Sanders relied in substantial part upon the Nielsen Devotional Household Viewing Hours Report on Programs (“HHVH report”) compiled by SDC witness Alan Whitt.

39. The HHVH report is based on Nielsen estimates of distant household viewing based on a sample of stations selected by Marsha Kessler, a former employee of MPAA (referred to throughout the hearing as the “Kessler Sample”). Tr. 488:10-490:2; 495:9-13 (Sanders). Mr. Whitt merged Nielsen distant program viewing data (from six “sweep” months of diary data) for the stations appearing in the Kessler sample with program information data from Tribune Media Services to prepare the HHVH report of devotional distant signal viewing. Exh. SDC-D-001; Tr. 418:12-17; 433:21- 434:21 (Whitt). Although IPG has attempted to raise objections to the manner in which the HHVH report was prepared, IPG’s own expert witness testified (after unsuccessfully attempting to evade the question) that she reached substantially the same results in all material respects when she merged the underlying data and ran the search terms for devotional programming. Tr. 850:15-861:7 (Robinson).

40. Using the HHVH report and the lists of program titles and claimants identified SDC and IPG, Mr. Sanders prepared a chart containing only the programs claimed in this proceeding. Tr. 489:2- 490:2 (Sanders). He then reviewed the chart of programs and stations in order to make a judgment as to whether the data was reasonably representative. Tr. 491:6-492:14 (Sanders). He found that all of the top ten Nielsen designated market areas were represented in the list, and that larger markets generally appeared to be well represented. *Id.*

This is important because, in Mr. Sanders's experience, most distant signal carriage is in smaller markets retransmitting signals from large markets. *Id.* Mr. Sanders gave the example that it is more likely for a Harrisburg, Pennsylvania cable system to carry a Washington, DC station than the other way around. Tr. 491:12-21 (Sanders).

41. Mr. Sanders further observed that many of the smaller markets in which devotional programming was broadcast appeared to be from what Mr. Sanders described as "Bible Belt markets," like Tuscaloosa and Birmingham, Alabama. Tr. 492:8-14 (Sanders). It was not surprising to observe devotional programming retransmitted on stations from those markets, suggesting that there were sufficient smaller markets in the Nielsen sample used in the HHVH report to present a reasonable and representative picture. *Id.* Although Mr. Sanders acknowledged that the Nielsen sample from which the HHVH report was derived was likely not a random sample, he found it to be "a convincing body of data, and I wouldn't have any hesitation using this if I were advising a client to make an actual economic decision related to this programming." Tr. 496:1-498:5 (Sanders).

42. Mr. Sanders then calculated the total household viewing hours for the SDC versus IPG programs, aggregated the positive viewing results with the zero viewing results for both the SDC and IPG, and used the aggregate positive values to arrive at a relative share of 81.5% for the SDC and 18.5% for IPG. Tr. 490:13-491:6; 476:5-8 (Sanders).

43. To further test the reasonableness of the SDC and IPG relative shares allocation, Mr. Sanders reviewed the Nielsen Station Index ("NSI") Report of Devotional Programs from February, 1999, which summarizes the local ratings of programs during that sweep month. Tr. 491:7- 492:14 (Sanders); Exh. SDC-D-002, at 9-10. Recognizing that local ratings data covers a different set of viewers and time period from the distant viewing at issue in this proceeding, Mr.

Sanders used a correlation coefficient analysis to measure the relationship between the NSI local signal data and HHVH distant signal data (excluding programming on WGNA for purposes of the correlation coefficient, because the number of distant subscribers was incomparable to distant viewership for other stations in the HHVH report). Tr. 501:17-503:21 (Sanders); Exh. SDC-D-002, at 10. He found a correlation coefficient of 0.75, suggesting that a program that is highly viewed locally is also likely to be highly viewed on a distant basis – not a surprising conclusion. Tr. 503:2-21 (Sanders). This analysis revealed that the NSI data provided a reasonably predictable correlation to the HHVH data, and in both instances, the SDC claimants controlled three of the four top ranked programs. Tr. 501:17-504:16 (Sanders); Exh. SDC-D-002, at 10-11. This was consistent with Mr. Sanders’s conclusion that the SDC-claimed programs have greater relative market value on the whole than the IPG-claimed programs. Tr. 504:17- 506:11; 507:1-510:9 (Sanders). Mr. Sanders also observed that the two top-rated programs in both the HHVH report and in the NSI report - *In Touch* and *Hour of Power*, both of which are SDC-claimed programs - together generated a majority of the total viewing. Tr. 503:22-504:16 (Sanders).

44. On the basis of the HHVH report, confirmed by Mr. Sanders’s own observations and the reasonable correlation between the HHVH report results with local viewing reported in the NSI report, Mr. Sanders found a relative fair market valuation of SDC-claimed programs and IPG-claimed programs as follows:

SDC: 81.5%

IPG: 18.5%

Tr. 475:16-476:8 (Sanders).

***Criticisms of the SDC methodology***

45. In her written rebuttal testimony and orally, Dr. Robinson identified three alleged criticisms of the SDC methodology: (1) Mr. Sanders has relied on the results of Mr. Whitt's HHVH report, which she claims cannot be replicated (notwithstanding the fact that she successfully replicated it herself), and no evidence is available concerning how the Kessler sample used in the report was selected, (2) Mr. Sanders relies exclusively on viewership as a measure of relative value, and (3) Mr. Sanders has not accounted for the high incidence of zero-viewing in the Nielsen data. However, evidence presented at the direct and rebuttal hearing overwhelmingly demonstrates that Dr. Robinson's critiques either are invalid or do not substantially affect the reliability and usefulness of the SDC methodology for determining the relative market value of the SDC and IPG programs.

**a. Data underlying the HHVH report**

46. Code files to Merge Nielsen and Tribune Data. SDC witness Alan Whitt acknowledged that he no longer has access to the code files used to merge the Nielsen and Tribune data used in his HHVH report. Tr. 426:19- 427:5 (Whitt). However, these intermediate files are not necessary to establish the validity of the SDC's methodology.

47. As an initial matter, the Judges have already rejected IPG's attempt to strike portions of the SDC Direct Statement relying on the report on the grounds of the alleged unavailability of certain underlying data. *Order Denying IPG's Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014) ("Order Denying Motion to Strike"). IPG has raised precisely the same claim again in its Motion in Limine, filed on August 26, 2014. The SDC responded to that motion on September 2, 2014, and subsequently presented a Declaration of Matthew J. MacLean, SDC-R-007, to respond to further matters presented at the hearing in

connection with IPG's challenge. IPG's current challenge to the HHVH report raises nothing that was not already addressed by the Judges' prior ruling.

48. Additionally, the Judges have already given credence to Dr. Erdem's testimony that IPG had all of the data needed to test the SDC's methodology. Dr. Erdem testified during the Hearing on IPG's Motion to Strike Portions of the SDC's Written Direct Statement that using only the data produced to IPG, and SDC-provided sweep date data,<sup>1</sup> he was able to replicate Mr. Whitt's results with a difference of only 5% (410 retransmitted programs identified in Dr. Erdem's study as compared to 399 in Mr. Whitt's). Order Denying Motion to Strike at 7.

49. Further, as noted by the Judges in their Order Denying IPG's Motion to Strike, Dr. Robinson acknowledged under oath that she could have performed a merger of the data used by Mr. Whitt to create his report. Transcript, Hearing on IPG's Motion to Strike, at 68-69 (Robinson); Order Denying Motion to Strike at 6. Therefore, the data produced by the SDC to IPG is more than sufficient for IPG to test the bottom-line numbers presented in the SDC's methodology.

50. Perhaps even more importantly, Dr. Robinson admitted on cross-examination that she had been able to replicate Mr. Whitt's results when she merged the Nielsen data with the Tribune data and then ran the search terms provided in Mr. Whitt's testimony. Tr. 850:15-861:7 (Robinson). She admitted that the minor differences between her results and Mr. Whitt's results were not material to this proceeding. *Id.* Although she claimed unconvincingly that she "had never heard" that the Nielsen data used by Mr. Whitt embodied the Kessler sample (Tr. 862:10-17), this testimony is directly contradicted by the transcript of her own testimony during the

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<sup>1</sup> The dates of the Nielsen sweeps were publicly available, and were provided to IPG by SDC in discovery as soon as the SDC became aware that they were needed to merge the Nielsen data with the Tribune data. *See* Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement (May 2, 2014) at 8 n. 15.

hearing on IPG's motion to strike (Tr. 1003:18-1009:12 (Robinson)) and by the abundant record with respect to the SDC's discovery and other efforts to assist IPG in replicating Mr. Whitt's report (Exh. SDC-R-007).

51. Mr. Sanders testified that based on his vast industry experience, the HHVH report is sufficiently reliable to render his opinion concerning the relative market value of the SDC and IPG programs. Tr. 525:5- 526:11 (Sanders). Mr. Sanders stated that the data appeared to be logical and comprehensive based upon the markets, stations, and programs included, and that the data passed muster under his reasonableness test after being compared to Nielsen's local viewing data. *Id.* Most importantly, Mr. Sanders testified that the results would be sufficiently reliable for use in real life transactions between buyers and sellers of television programming, and that no reasonable buyer or seller would ignore the data because of the deficiencies alleged by Dr. Robinson.

52. The Kessler Sample. The SDC acknowledge that they do not know precisely how the stations in the Kessler sample were selected. The SDC had no role in the development of the Kessler sample. But this does not render the data unreliable.

53. Mr. Sanders testified that although the Kessler sample was not randomly selected, and he does not have information on how the stations were chosen, he was able to observe that the HHVH report is a "good representation of markets and a representation of programs," and that it was reliable enough to use if he were advising a client to make a real-life "economic decision related to [the] programming." Tr. 496:16- 498:5 (Sanders). In making this determination, Mr. Sanders pointed to the following key facts: (1) programs of every claimant at issue in this proceeding are represented in the data; (2) all of the top 10 designated markets areas for Nielsen are represented; (3) the viewership of the programming is consistent with Mr.

Sanders' industry experience; (4) the data were consistent and correlated with Nielsen's off-the-shelf Report on Devotional Programming for February, 1999, of local viewing of devotional programs. Tr. 499:22- 501:9 (Sanders); Tr. 626:15- 636:13 (Sanders). As both Mr. Sanders and Dr. Robinson agreed, a sample need not be random in order to be sufficiently representative for a reliable projection. Tr. 234:21-235:9. Accordingly, Mr. Sanders's expert testimony provides sufficient grounds for the Judges to find that the Kessler sample and HHVH report are sufficiently reliable in determining the relative market value of the SDC and IPG programs.

54. The only aspect of the Kessler sample that Dr. Robinson has specifically identified as suggestive of being unrepresentative is its apparent exclusion of Canadian stations. But Dr. Robinson's own station selection contains only a single Canadian station on which programs claimed in this proceeding were broadcast, and that station broadcast both an IPG program and an SDC program. Tr. 1092:7-20 (Erdem). As the Judges previously found in the 2000-2003 cable proceeding, there is no evidence that the exclusion of Canadian stations substantially affects the results as to either side in this case. *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64998 ("The Judges conclude that, while the exclusion of the Canadian stations was an error, it did not have a significant effect on the relative shares computed by MPAA").

**b. Viewership as a reliable measure of value**

55. Mr. Sanders has explained that viewership is the single most important component of valuation of television programs within a category of programming. It is a measure of value routinely used in the television and cable industry.

56. Although it is true that cable system operators are most directly interested in maximizing the number of subscribers, and not the number of viewers per se, it is clear that

viewership is closely related to subscribership, because every viewer is a subscriber and the most compelling reason for a subscriber to subscribe is that the cable system offers programs that the subscriber wants to view. In a sense, every program offered by a cable system operator is an advertisement to subscribe to that cable system operator's service. It is only an effective advertisement if people are watching.

57. Dr. Robinson argues that cable system operators cannot have taken 1999 viewership into account when deciding to retransmit in 1999, because the information would not have been available then. The Judges have already rejected this argument, on the basis that anticipated viewership, as opposed to viewership, would be impractical and prohibitively expensive to measure. *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995.

58. Moreover, as Mr. Sanders testified, the television industry routinely addresses this very problem through the use of "make good" provisions, in which buyers and sellers agree to adjust the value paid based on actual viewership data when it becomes available. Tr. 685:1-695:18 (Sanders). As the Judges have noted, "it also would not be unreasonable to hypothesize that the CSO and Copyright Owner might negotiate a license that would contain a provision adjusting the value of the license, post-viewing, to reflect actual viewership." *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995 n. 48.

59. Dr. Robinson argues that viewership is an imperfect measure of value to a cable system operator because the marginal value of each program to a cable system operator is dependent on the number of additional subscribers that the program is able to attract, beyond those subscribers who are already attracted by similar programs. Displacement of viewers by other similar programs potentially decreases the marginal value of a program.

60. The point is best illustrated using an example that the Judges have used before. *Bewitched* and *I Dream of Jeannie* are similar programs that might be expected to appeal to the same niche market of viewers who enjoy 1960s situational comedies about suburban housewives with magical powers. See *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64993, 65002. If *Bewitched* has more viewers, then a cable system operator already carrying *Bewitched* might place no value in *I Dream of Jeannie*, because it would be likely to attract no additional viewers, and therefore no additional subscribers. *Id.* Conversely, a cable system operator already carrying *I Dream of Jeannie* might value *Bewitched* less than in the absence of *I Dream of Jeannie*, because although *Bewitched* might attract more viewers, the marginal value of *Bewitched* to an offering that already includes *I Dream of Jeannie* might be less than in the absence of *I Dream of Jeannie*. *Id.*

61. Of course, this criticism is one of the principal reasons that viewership is not an appropriate measure of value in Phase I, when valuing different categories of programming in which programs might have substantial overlapping viewership within each category, and lower levels of overlapping viewership with programs in different categories. Tr. 477:12-479:1 (Sanders); Tr. 705:8-706:7 (Sanders). A devotional program might have higher marginal value than, say, *Bewitched*, even if *Bewitched* has more viewers, because the devotional program might appeal to a different audience than *Bewitched*, which shares its audience with other similar programs. See *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64993, 65002.

62. But within a category of relatively homogeneous programming, where the amount of overlapping viewership is expected to be relatively uniform because the programming is

geared largely to the same audience, is there a way to test the likely effects of overlapping viewership on value?

63. Fortunately, there is model capable of measuring marginal value of individual players in a coalition of players. Tr. 1073:2-1074:9 (Erdem). Or, in this case, the marginal value of individual programs in a coalition of programs retransmitted by a cable system operator. *Id.* The measure is known as Shapley value (named for Nobel Prize-winning economist Dr. Lloyd Shapley).<sup>2</sup> It measures the average marginal value of a player in a coalition over all possible orders in which the player could have joined the coalition. Tr. 1075:19-1076:7 (Erdem).

64. Shapley value is calculated as follows:

$$\phi_i(v) = \frac{1}{|N|!} \sum_R [v(P_i^R \cup \{i\}) - v(P_i^R)]$$

Where:

$v$  is value.

$\phi_i(v)$  is the Shapley value of player  $i$ .

$N$  is the set of all players in the coalition.

$R$  is the set of all possible orders in which the coalition could have been formed.

$P_i^R$  is the coalition before  $i$  joined.

Tr. 1075:1-1079:17 (Erdem).

65. Applying this formula to *I Dream of Jeannie* and *Bewitched*, we assume hypothetically that *I Dream of Jeannie* ( $i_1$ ) has the capacity to attract 100 subscribers to a cable system, and *Bewitched* ( $i_2$ ) has the capacity to attract 150 subscribers to the cable system, of

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<sup>2</sup> [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/2012](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2012) (visited on September 17, 2014). Dr. Shapley's credentials are admittedly outside the record in this matter, but it would be a disgrace not to give credit where credit is due.

whom 100 are the same subscribers who are attracted by *I Dream of Jeannie*. Tr. 1079:18-1080:14 (Erdem).

66. There are two possible orders ( $r_1$  and  $r_2$ ) in which the programs can join the coalition:  $[i_1, i_2]$  and  $[i_2, i_1]$ . *Id.* The Shapley value solution can be charted as follows:

|   | $i_1$           | $i_2$           | $Total (P_i^R \cup \{i\})$ |
|---|-----------------|-----------------|----------------------------|
| $r_1 [i_1, i_2]$                        | 100 subscribers | +50 subscribers | 150 subscribers            |
| $r_2 [i_2, i_1]$                        | +0 subscribers  | 150 subscribers | 150 subscribers            |
| <b>Average (<math>\phi_i(v)</math>)</b> | 50 subscribers  | 100 subscribers | 150 subscribers            |

Tr. 1079:18-1081:3 (Erdem).

67. As can be seen in the example above, a property of the Shapley value formula is that in a coalition of multiple players with similar amounts of overlap, greater overlap favors the higher value player. Tr. 1082:10-1083:10 (Erdem). In other words, among programs with similar amounts of overlapping viewership, a Shapley value measurement would predict comparatively lower value for less viewed programs. *Id.* In the example above,  $i_2$  receives double the Shapley value of  $i_1$ , even though it has only 50% more viewership. *Id.*

68. Therefore, although IPG is correct that overlapping viewership can affect the use of viewership as a measure of value, Shapley value would predict that a straight measure of viewership overvalues, and does not undervalue, lesser viewed programs such as IPG's. If anything, Shapley value analysis shows that the SDC's viewership measure of value likely gives IPG's programs more value than they are worth, since the marginal value of a lesser viewed program is largely eclipsed by overlapping viewership with more highly viewed programs in the same category. Tr. 1083:7-10 (Erdem).

69. The data needed to calculate precisely the relative Shapley values of IPG and SDC programs do not exist, or at least are not obtainable by the SDC. Tr. 1084:13-1085:12; 1100:16-1101:18 (Erdem). Therefore, the SDC have prudently assigned IPG's programs full

value based on viewership, rather than discounting IPG's programs for the overlapping viewership that likely occurs. Any criticism of this approach would be expected to work in favor of the SDC's higher rated programs, and not IPG's lower rated programs, absent an unexpected asymmetry in the amount of overlap among SDC and IPG programs. Tr. 1083:7-10 (Erdem).

**c. Instances of Zero Viewing**

70. Dr. Robinson 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.

71. Mr. Sanders testified that "zero-viewing" entries are anticipated results in data measuring a small, niche kind of programming such as devotional, which is viewed by such a small percentage of people. Tr. 518:19- 520:5; 522:9- 525:1 (Sanders). Likewise, Dr. Erdem testified that zero viewing figures are anticipated in survey data, and that data points of zero-observed viewing, like data-points of positive viewing, become reliable when aggregated. Tr. 1053:15- 10:54:9 (Erdem).

72. Although Dr. Robinson speculates that the relatively high number of zero-viewing instances suggests an inadequate sample size, her own analysis leads to the opposite conclusion. Dr. Robinson found that "2,820 or 91% of IPG broadcasts had zero-viewing compared with 1,485 or 79% of SDC broadcasts. Based on Pearson's chi-squared test, the difference between 91% and 79% is statistically significant at the 99.9% confidence level." Robinson Rebuttal at 17 n. 17. In other words, it is 99.9% likely that the difference in zero-viewership instances is not simply the result of random "noise" in the data – Nielsen diary holders really were less likely in a given quarter hour to be watching an IPG program than an SDC program. Tr. 522:9-525:1

(Sanders); Tr. 1071:2-1072:18 (Erdem). The data is sufficient to arrive at a reliable, non-random result.

73. As the Judges have previously found, “these ‘zero viewing’ sampling points can be considered important elements of information, rather than defects in the process,” and that aggregation of “zero-viewing” instances with positive results increases the reliability of the results. *See Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995. Indeed, “it would be expected, not anomalous, for Nielsen to record some zero viewing for any given quarter-hour period within the diary sampling (sweeps) period.” *Id.*

74. Dr. Robinson disagrees. She makes the surprising claim that “[a]lthough no increase in the total number of viewers is observed when broadcasts with zero viewers are added to the total, the standard error of the sum *does* increase.” Exh. IPG-R-001, at 11 (emphasis in original). To examine this claim, we must consider how standard error and standard deviation are calculated, and how Dr. Robinson uses these formulae to reach her counter-intuitive conclusion that aggregating data *increases* standard error.

75. Dr. Robinson refers to the following formula in support of her claim:

$$s(X_1 + X_2) = \sqrt{s_1^2 + s_2^2}$$

Where:

$s(X_1 + X_2)$  is the standard deviation of the sum of two independent variables,  $X_1$  and  $X_2$ .

$s_1$  is the standard deviation of  $X_1$ .

$s_2$  is the standard deviation of  $X_2$ .

Exh. IPG-R-001, at 10; Tr. 872:6-11 (Robinson).

76. Because the standard deviation of the sum of two independent variables is equal to the square root of the sum of the squares of the standard deviation of the variable (in precisely

the same way that the hypotenuse of a right triangle is equal to the square root of the sum of the squares of the remaining sides), Dr. Robinson infers that each addition of an instance of zero viewing to the total increases standard error. Exh. IPG-R-001, 10-11.

77. There are three basic flaws in Dr. Robinson's approach:

a. First, the formula she uses is for the calculation of standard deviation, not standard error. Tr. 872:10-875:13 (Robinson); Tr. 1055:11-1056:1 (Erdem). The basic formula for calculating standard error is:

$$SE(\bar{y}) = \sqrt{\left(1 - \frac{n}{N}\right) \frac{s^2}{n}}$$

Where:

$SE(\bar{y})$  is the standard error of the value  $\bar{y}$ .

$N$  is the size of the population (in this case, all television households in the United States).

$n$  is the size of the sample (in this case, all Nielsen diary holders in a given quarter hour – or, if aggregated, all Nielsen diary holder responses for all quarter hours).

$s$  is the standard deviation within the sample.

Exh. IPG-R-001, at 10.

Standard error is related to standard deviation, but they are not the same thing. Tr. 872:10-875:13 (Robinson). Importantly, it can be observed from the formula that standard error would be expected to go down as the sample size,  $n$ , goes up. *Id.* Because every observation of either zero viewing or positive viewing increases  $n$  by the number of diary holders, aggregation of zero viewing instances would generally be expected to

decrease standard error, and not to increase standard error. *Id.*; Tr. 1060:10-1061:20 (Erdem).

b. Second, even if Dr. Robinson had intended to refer to standard deviation, and not standard error, the formula she applies can only be used in the aggregation of *independent* variables – that is, variables that are not correlated, either positively or negatively. Just as the Pythagorean Theorem cannot be used to calculate the length of a side of a triangle with no right angles, Dr. Robinson’s formula, sometimes known as the “Pythagorean Theorem of Statistics,” cannot be used to calculate the standard deviation of the sum of two variables that are correlated positively or negatively in any way. Tr. 880:6-884:14 (Robinson).

There is no evidence that different instances of either zero viewing or positive viewing are independent of one another, and there are many reasons to expect that they would be correlated. Tr. 1057:14-1058:5 (Erdem). Each diary holder who is watching a program for the first quarter hour may be more likely to continue watching the same program in the next quarter hour or to watch the same program in another quarter hour. Tr. 884:15-885:1 (Robinson). Each diary holder watching one program in a quarter hour is less likely to be watching another program in the same quarter hour. Tr. 886:10-21 (Robinson). Assuming the sample is representative of the population, each diary holder in any quarter hour is more likely to watch a popular program than an unpopular program. Tr. 885:7-886:8 (Robinson). Indeed, Dr. Robinson herself found a correlation between instances of zero viewing when she determined that IPG programs received a statistically significantly higher proportion of zero viewing instances than did SDC programs. Exh. IPG-R-001, at 17 n. 17. Similarly, Mr. Sanders found a correlation

between distant viewership and local viewership. Exh. SDC-D-002, at 9-11. Therefore, because different quarter hours of viewing are correlated, the Pythagorean Theorem of Statistics cannot be used to calculate the standard deviation of the sum of aggregated quarter hours of observation, zero or otherwise.

c. Finally, even if Dr. Robinson had intended to refer to standard deviation instead of standard error, and even if there were no positive or negative correlation between quarter hours of viewing (a fallacious assumption, as set forth above), it still would not follow that aggregating instances of zero viewing would increase standard deviation. The formula for calculating standard deviation is:

$$s = \sqrt{\frac{1}{n-1} \sum_{i \in S} (y_i - \bar{y})^2}$$

Where:

$y_i$  is each value in the sample (in this case, the viewership of particular program by a single diary holder in a quarter hour).

$\bar{y}$  is the average of all values in the sample (in this case, the average viewing of a program over all diary holders in the quarter hour).

Exh. IPG-R-001, at 10.

By definition, in a quarter hour of zero viewing of a program, every  $y_i$  is zero, because every diary holder did not watch the program. Tr. 890:18-894:15 (Robinson); Tr.

1056:13-1057:13 (Erdem).  $\bar{y}$  is also zero, because it is the average of all  $y_i$ 's. *Id.*

Therefore, the standard deviation of a single quarter hour of zero viewing is zero. *Id.*

This is another way of saying that there is no standard deviation if every value in the sample is the same.<sup>3</sup>

Therefore, even if the Pythagorean Theorem of Statistics were the proper formula to apply, it would not result in an increase in standard deviation when quarter hours of zero viewing are aggregated. Addition of zero standard deviation does not increase standard deviation. (To be sure, aggregation of zero viewing instances with positive viewing instances *could*, but would not necessarily, increase standard deviation, but that is as a function of the general formula for calculating standard deviation, and not a function of Dr. Robinson's formula for aggregating the standard deviations of independent variables). Tr. 1056:13-1058:5 (Erdem).

78. These are basic formulae that can be found in any introductory textbook on statistics. Tr. 1067:1-1067:14 (Erdem). Indeed, Dr. Robinson cites to an introductory statistics textbook as her source for the principal formula on which she relies. Exh. IPG-R-001, at 10 n. 15. Dr. Robinson's misapplication of these formulae is much too basic to be plausibly explained as a mistake on her part, especially from a recognized expert in statistics with a Ph.D in finance and economics. The only plausible explanation for the flaws in her analysis is an attempt to deceive the Judges by the use of mathematical formulae and jargon that she hoped neither the Judges nor the SDC would understand. That was a miscalculation on Dr. Robinson's part.

79. The SDC acknowledge that standard error is not calculable based on the information they have. Tr. 1067:15-17 (Erdem). It would obviously be preferable to have a

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<sup>3</sup> The standard error of the individual quarter hour of zero-viewing sample would also be zero, because standard error is a product of standard deviation. Of course, this is not to say there is no error. "Standard error" is a term of art with a particular meaning in statistics – a meaning that Dr. Robinson attempted to distort. The *relative error* of a single quarter hour of viewing, whether zero or positive, is likely to be quite high. See *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64996. The data only become reliable in the aggregate.

calculation of standard error. But the lack of standard error is acceptable. Economists, buyers, and sellers must make business decision on the basis of the data that they have. Tr. 1067:18-1068:4 (Erdem) (“So I will [not] be troubled with the lack of standard error”).<sup>4</sup>

80. As to the criticisms of the SDC methodology as a whole, the SDC admit that there is no perfect methodology. Moreover, as testified by Mr. Sanders, cost is a factor in selecting the study to be performed. Tr. 466:3- 468:3 (Sanders). Because the devotional category includes a substantially smaller funding pool than the program suppliers category, this must be considered in determining what is reasonably reliable to allocate the funds at issue. Perfect precision is not required, especially when dealing with the relatively small amount at issue in this proceeding. What is required is a showing that the valuation, while necessarily imperfect, is reasonably and sufficiently reliable to allow the Judges to reach a non-arbitrary award based on evidence. The SDC has met this burden through the testimony of its expert witness. Therefore, the Judges have sufficient evidence to distribute a non-arbitrary award of the 1999 devotional fund in accordance with the SDC’s methodology.

## **CONCLUSIONS OF LAW**

### **I. Legal Standard**

81. 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, and then allocate the royalty shares accordingly. *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); *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 401 (D.C. Cir. 2005). Because IPG and SDC

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<sup>4</sup> The word “not” was incorrectly omitted from the transcript.

have their own internal methodologies for distribution of awards among individual claimants, it is not necessary in this Phase II proceeding for the Judges to determine an award on a claimant-by-claimant basis.

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

82. IPG's methodology relies on a host of factors that the Judges and their predecessors have rejected as insufficiently related to marketplace value. Specifically, IPG relies on the number of broadcast hours, a flawed and deceptive fee-generation matching game, a measure of total television viewership by time of day, and a measure of average subscribers per cable system. None of these is appropriate, either alone or in combination with the others, for determining the market value of devotional programming. IPG presented a methodology using similar measures in the 2000-2003 Distribution Proceeding, and each measure was expressly rejected by the Judges as presented. *See Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 65000-65003.

83. *Length of Broadcasts* – IPG's first measure in its methodology, the length of the retransmitted broadcasts, must be rejected. The Copyright Royalty Tribunal ("CRT") and the Judges have on multiple occasions rejected time-based formulas, as they distort marketplace analysis and ignore market considerations. *Id.* at 65001; *see also 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). In the 2000-2003 Distribution Proceeding, the Judges rejected IPG's "time period weight factor" on numerous grounds, including the fact that it "ascribed equal value to MPAA-claimed programs and IPG-claimed programs that aired on the same station and for the same duration, despite substantially different levels of viewership." *See*

*Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 65001. Here, IPG's length of broadcast measure fails for the same reason. The number of minutes that a program airs does not indicate the value of the program to a cable system operator or subscriber – or even how many subscribers were actually receiving the program. IPG's time-based methodology thus does not inform the Judges as to the value of devotional programming.

84. Subscribers – IPG's use of subscribership as a measure in its methodology contravenes precedent and does not produce an adequate measure of market value. The Copyright Arbitration Royalty Panel ("CARP") expressly rejected an allocation method based on the number of distant subscribers to signals in the 1998-1999 Distribution Proceeding.

*Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3616 (Jan. 26, 2004). There, PBS presented a study that attempted to show a relationship between the relative number of distant subscriber instances to 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.

*Id.*

85. Similarly, in the 2000-2003 Distribution Proceeding, the Board rejected IPG's implementation of its subscriber-based factor on the grounds that a CSO attracts subscribers "only to the extent that the programs it offered were demanded by customers who intended to view the programs." *See Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64999.

86. In this case, IPG's methodology does not even measure the number of subscribers receiving a program, and even Dr. Robinson admits that she does not know whether higher average number of subscribers per cable system would translate into more value or less value.

87. Furthermore, the unique nature of devotional programming makes subscriber instances a particularly misleading mechanism for measuring relative value. SDC witness John Sanders testified that unlike other programming categories, devotional programming is a niche factor for cable operators seeking to attract niche subscribers. Tr. 512:22- 513:13 (Sanders). 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. There is no way to determine which subscribers should be credited to devotional programs as compared to other kinds of programs.

88. Fee Generation - IPG's fee generation analysis is equally unjustified in this proceeding. The CRT repeatedly rejected fee generation as a methodology for valuation. *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”). In those few proceedings where fee generation has been adopted, the Judges have stated that claimants must demonstrate that it is the *best* means to determine relative marketplace value. *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). 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, 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. 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. *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004). Similarly, this Board has approved fee generation as a measure for valuation of Canadian programs because such programs are generally retransmitted on discrete signals containing mostly or only Canadian programming. But the Board reduced the Canadian Claimants’ fee generation award precisely because of the distorting effect on systems that did not retransmit predominantly Canadian signals. *Distribution Order*, Docket No. 2008-2 CRB CD 2000-2003 (Phase I) (Mar. 3, 2010).

89. Here, even setting aside the foolish and deceptive way in which IPG chose to compute and present its fee generation metric, IPG has failed to demonstrate that it is the best method, or even a plausible method, for determining devotional programming shares. No evidence suggests that any signal in IPG’s study contains 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.

90. *Time of day viewership* – IPG’s time of day viewership measure 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 rather than other time periods to provide an alternative church experience for viewers. Although other time periods might have higher average relative ratings for other kinds of programming, this does not address the niche value of devotional programming to cable operators.

91. Additionally, IPG’s time of day analysis relies in part on 1997 Nielsen data, which provides less coverage of the channels associated with the SDC and IPG titles than the 1999 Nielsen data. Tr. 260:10- 263:11 (Robinson). In the 2000-2003 proceeding, the Board expressly rejected IPG’s use of 1997 data to estimate viewing rather than data “contemporaneous with the 2000 through 2003 royalty distribution period at issue.” *See Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 65000-65001.

92. IPG has failed to meet its burden of establishing that its time of day analysis is a reliable measure of relative marketplace value. *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).

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

93. The SDC’s methodology relies on program viewership data to determine relative market value of devotional programming. Viewership is the appropriate approach for allocating devotional shares between SDC and IPG for three reasons: (1) The Judges and their predecessors have relied on viewership data for allocating Phase II shares; (2) viewership is the best available measure of marketplace value within a niche market such as devotional programming; and (3)

based on the evidence presented in this proceeding by SDC witness John Sanders, an expert in the field of valuation of assets, the SDC's data is reliable.

94. The Board and its predecessors have frequently used viewership as a measure of relative marketplace value in allocating shares of cable royalties. *1986 Cable Royalty Distribution Proceeding, Notice of final determination, in Docket No. CRT 88-2-86CD*, 54 FR 16148, 16153 (Apr. 21, 1989); *see also Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986. Indeed, the Judges have concluded that “viewership is the initial and predominant heuristic that a hypothetical CSO would consider in determining whether to acquire a bundle of programs for distant retransmission...” 78 Fed. Reg. at 64996. While the Judges' precedents have 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 at least a crude measure of relative marketplace value where Bortz data is unavailable. *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). 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.

95. Viewership is a particularly effective measure of relative marketplace value for programming within a niche market, like the market for devotional programming. Tr. 512:22-513:13 (Sanders). 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.

96. As established by the SDC's expert testimony, the Nielsen viewing data used by the SDC in this proceeding is reasonably reliable. Tr. 465:20- 466:2; 480:6- 481:13; 496:1-22; 499:22- 500:20; 525:15- 526:11 (Sanders). For decades, the Nielsen study has been credited by the CRT and the CARP in determining royalty distributions in cable proceedings. *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); *see also Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986. 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 translating shares to value. *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004). Here, the SDC have met this standard by taking Nielsen 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. Exhs. SDC-D-001 and SDC-D-002; Tr. 418:12-17; 433:21- 434:21 (Whitt); Tr. 490:13-492:14; 476:5-8 (Sanders).

97. Although IPG criticizes the SDC's methodology on the grounds that information is unavailable concerning the selection of the stations in the Kessler sample, and the Nielsen data contains high instances of zero viewing, IPG has failed to persuade the Board with similar arguments in prior royalty determinations. In the 2000-2003 Distribution Proceeding, the Board endorsed MPAA expert Dr. Gray's decision to use Nielsen local ratings data in his analysis to determine the relationship between local viewing and distant viewing, finding that the use of local viewing data strengthened the results and mitigated any potential problems with zero-viewing contained in the Nielsen diary data. *Distribution of the 2000-2003 Cable Royalty*

*Funds*, 78 Fed. Reg. at 64996. Further, despite the Judges' criticism that Dr. Gray incorporated into his analysis Ms. Kessler's non-random sample of 70 stations, the Judges nevertheless credited Dr. Gray's methodology and found that the sample was sufficiently representative. *Id.*, at n.49.

98. The SDC have used a less sophisticated methodology than the MPAA in this proceeding (which does not necessarily mean it is less reliable – indeed, it is substantially easier to test, as evidenced by the fact that Dr. Robinson succeeded in her efforts to test it). But the SDC should be credited for their use of a related viewership methodology with many of the same elements, particularly given the minimal size of the devotional fund at issue here. Using a “custom analysis of Nielsen diary data [based on a] Kessler sample,” “information from Nielsen's local ratings,” and “Tribune Data,” all of which were used by Dr. Gray in his analysis (*Id.* at 64994.), Mr. Sanders calculated the relative value shares of the SDC and IPG programs, and then used local viewing data as compared to distant viewing data to test the validity of his results. Tr. 490:13-492:14; 476:5-8 (Sanders).

99. Although the Judges have in the past resorted to discounting valuation methodologies based on perceived shortcomings, this practice comes with an important caveat: the opposing claimants must demonstrate a likelihood that they were harmed by the alleged deficiency:

[V]iewing measurements are not perfect and the Judges must be prepared to make appropriate adjustments *when claimants are able to demonstrate that their programs have not been measured or are significantly undermeasured.*

*Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986 (citing *1987 Cable Royalty Distribution Proceeding*, 55 Fed. Reg. 5647, 5650 (Feb. 16, 1990); *1986 Cable Royalty Distribution Proceeding*, 54 Fed. Reg. 16148, 16153-54 (Apr. 21, 1989)) (emphasis added).

100. Without this requirement for a showing of harm as a result of the alleged deficiencies, the Judges would give the parties a strong disincentive to present the best available methodology, and a strong incentive to force opposing parties to present the best available methodology. They would also give excessive bargaining power to parties with less valuable programming and no usable methodology of their own, who could afford simply to adopt a nihilistic approach of simply poking holes and hoping that the Judges will split the difference in the face of a perceived “Hobson’s Choice.” There is no such thing as a perfect methodology, and it would be unfair and unjust for the party presenting the best available methodology invariably to bear any discounts occasioned by deficiencies in the methodology, absent a showing that the deficiencies likely favored the party offering it.

101. Similarly, the Judges must be reluctant to reject a reasonable methodology simply because flaws can be found, particularly where the costs of supplementing the methodology would be prohibitive. One of the principal purposes of the statutory license process is to mitigate the “prohibitively high ‘transaction costs’ of negotiating a multitude of bilateral contracts between potential sellers and buyers.” *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64991. That purpose would be utterly defeated if the Judges required the parties to assemble and present information that is costlier than the entire pool of funds, just to have a shot at their fair of the funds.

102. The Judges have adopted a definition of fair market value that evaluates what a “willing buyer and a willing seller” would do in a real life transaction. *Id.* at 64984, 64992 (Oct. 30, 2013). Mr. Sanders testified that real buyers and sellers would consider whether the cost of the work will exceed the value generated. Tr. 467:14-468:3 (Sanders). The Judges likewise have recognized that likely cost of further data must be taken into account when considering a

valuation methodology. *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64995 (“The gathering and presentation of such evidence likely would be prohibitively expensive, and the evidence in the record before the Judges does not permit such an analysis”).

103. Here, IPG has presented no evidence whatsoever to establish that the alleged flaws in the SDC methodology are any more likely to hurt IPG than the SDC. Indeed, Shapley value analysis suggests the opposite. Furthermore, while the SDC’s measure of viewership may be imperfect, it nevertheless allows the Board to make a rational, non-arbitrary allocation of the devotional royalty fund based on substantial evidence in the record. 5 U.S.C. § 706; *Nat’l Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 146 F.3d 907, 923 (D.C. Cir. 1992). Mr. Sanders’ analysis sets forth a methodology of sufficient precision for a reliable result. This is all that is required.

104. Because the 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 should award cable royalty funds in the devotional category for 1999 as follows:

SDC - 81.5%

IPG - 18.5%

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Clifford M. Harrington". The signature is fluid and cursive, with a long horizontal stroke at the end.

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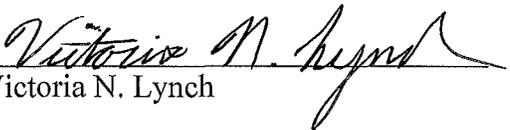
*Counsel for Settling Devotional Claimants*

September 23, 2014

## CERTIFICATE OF SERVICE

I, Victoria N. Lynch, 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 23<sup>rd</sup> day of September, 2014 to the following:

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