

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

<i>In re</i> DISTRIBUTION OF 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds	DOCKET NO. 2012-6 CRB CD 2004-09 (Phase II)
<i>In re</i> DISTRIBUTION OF 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Satellite Royalty Funds	DOCKET NO. 2012-7 CRB SD 1999-2009 (Phase II)

**ORDER REOPENING RECORD AND
SCHEDULING FURTHER PROCEEDINGS**

I. Background

The Copyright Royalty Judges (Judges) initiated the captioned proceedings to determine proper distribution of royalty fees deposited with the Library of Congress for retransmission of broadcast signals by cable and satellite during the years 2004-2009 and 1999-2009, respectively. *See* 78 Fed. Reg. 50113 (August 16, 2013) (cable retransmissions); 78 Fed. Reg. 50114 (August 16, 2013) (satellite retransmissions). The Judges held an evidentiary hearing over five days from April 13-17, 2015, in which they received evidence and expert testimony concerning the proper distribution of royalties.¹ At the time of the hearing, the funds at issue related to two programming categories: program suppliers and devotional programming.

In accordance with 37 C.F.R. § 351.12, at the conclusion of the hearing and after oral argument, the Chief Judge announced the end of presentation of evidence and the closing of the record for the instant proceeding. The Judges closed the record granting exception for parties to file corrected and redacted exhibits in accordance with the Judges' rulings during the hearing and after the hearing based on filed and pending evidentiary motions. *See* 4/17/15 Tr. at 285.

Having considered the entire record in the proceeding, the Judges find that no party has presented a methodology and data that, together, are sufficient to support a final distribution in the contested categories.² The shortcomings of the parties' presentations leave the Judges without a sufficient record to render a reasoned determination for a proper distribution of royalties. *See* 17 U.S.C. § 803(c)(3); *Settling Devotional Claimants v. Copyright Royalty Bd.*,

¹ On December 22, 2015, the Judges concluded that there was no remaining controversy with respect to the 2008 satellite fund in the devotional category and, therefore, ordered distribution of those uncontroverted funds. *See* Order Granting Final Distribution of 2008 Satellite Royalties for the Devotional Category (Jan. 13, 2016).

² The Judges' do not rule on any of the parties' criticisms of other parties' presentations, except as set forth expressly in this Order. The Judges' silence regarding any particular criticism does not signify rejection or acceptance of that criticism.

797 F.3d 1106, 1121 (D.C. Cir. 2015). Consequently, the Judges hereby reopen the record and direct the parties to present additional evidence and expert opinion in accordance with the schedule for further proceedings attached as Appendix A.

II. Discussion

A. Shortcomings of MPAA's Presentation

MPAA presented a methodology that proffered relative royalty shares for MPAA-represented claimants and IPG-represented claimants in the program suppliers category. MPAA used distant viewership of programs as a proxy for market value, and relative viewership as a proxy for relative market value, a standard that the Judges have applied to determine the proper distribution of royalties in prior distribution proceedings. *See, e.g., Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds, Final Distribution Order*, 78 Fed. Reg. 64984, 64995-96 (Oct. 30, 2013), *aff'd in relevant part sub nom. Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132, 142 (D.C. Cir. 2015) (2000-03 Cable Distribution). Distant viewership data estimate the number of viewers who watched a television program that a cable system operator or satellite carrier retransmitted outside the program's initial local viewing area. MPAA, by its expert Dr. Jeffrey S. Gray, predicts distant viewership based on Nielsen local ratings data, numbers of distant subscribers who receive a television station, and other data points.

Dr. Gray's *predictions* of distant viewership depend, in part, on Nielsen's *measurements* of distant viewership on certain television stations. Dr. Gray uses a regression algorithm to determine the mathematical relationship between local ratings measurements and concurrent distant viewership measurements (as well as other measurements) on the same television stations. *See* MPAA PFF ¶ 61 (and record citations therein). He then uses that mathematical relationship to estimate distant viewership on all stations for which he has local ratings data for the distribution period at issue in these proceedings. *See id.*; 4/13/15 Tr. at 111-14 (Gray). The *actual* local ratings data from Nielsen cover every quarter hour for each year at issue in this proceeding, and Dr. Gray's *predicted* distant viewing values similarly cover every quarter hour for each year in the proceeding. *See* MPAA PFF ¶¶ 39-40 (and record citations therein); 4/13/15 Tr. at 42 (Gray).

In recent proceedings, the Judges have found viewership-based methodologies to be an acceptable approach to help determine relative market value of television programs within a single, homogeneous program category. Specifically, the Judges have found that distant viewership of programs "can be a reasonable and directly measurable metric for calculating relative market value" of distantly retransmitted programs. 2000-03 Cable Distribution, 78 Fed. Reg. at 64996; *see Distribution of 1998 and 1999 Cable Royalty Funds, Final Distribution Determination*, 80 Fed. Reg. 13423, 13432 (Mar. 13, 2015) (1998-99 Cable Distribution). The instant proceeding, however, presents the Judges with an evidentiary deficiency that was not present in the prior proceedings.

In the instant proceeding, MPAA lacked distant viewing measurements for most of the years at issue. Dr. Gray worked with distant viewership measurements for sweeps periods³ during the years 2000-2003, even though the cable portion of this proceeding covers 2004-2009 and the satellite portion covers 2000-2009. Dr. Gray used the mathematical relationship between distant viewership and local ratings that he derived from the available 2000-2003 data to compute his predictions of distant viewing from local ratings data for each of the years at issue in this proceeding.

MPAA did not proffer evidence to establish that it would be appropriate, or even reasonable, for the Judges to conclude that the mathematical relationship between local ratings and distant viewing remained constant between the beginning and end of the last decade. Distant viewing habits may have changed as, for example, cable systems moved from analog to digital transmission and greatly expanded their lineups, giving cable viewers more viewing choices. MPAA has not presented evidence, or even a persuasive rationale, to support its bald assertion that it is reasonable to project a relationship derived from viewing habits in the early 2000s onto ratings data from the late 2000s. Dr. Gray's rather conclusory statement that he doesn't "see any reason why it would change" is insufficient. The Judge's find themselves in agreement with Dr. Gray's subsequent statement that "there is no way of knowing if there is a different relationship," at least on the existing record. 4/13/15 Tr. at 115-16 (Gray).

MPAA avers, nonetheless, that Dr. Gray's use of (largely) noncontemporaneous data yields reliable results. *See* MPAA PFF ¶ 75. Dr. Gray was somewhat less categorical in his testimony: "I still think that this is a reliable methodology *given the data that was available.*" 4/13/15 Tr. at 107 (Gray) (emphasis added); *see id.* at 115 (Gray) ("Do I expect that number [the relationship between local ratings and distant viewership] to change? I don't see any reason why it would change, but it could be higher or lower.").

In an attempt to buttress Dr. Gray's use of distant viewing data from 2000 through 2003, MPAA argues that he performed "a series of robustness checks" that were "sufficiently positive to allow him to make projections based on 2000-2003 data for 2004-2009." MPAA PFF ¶ 75. However, those "robustness checks" were not designed to demonstrate the reasonableness of Dr. Gray's reliance on data from those four years (2000-2003), but rather to respond to a different specific inquiry by the Judges asking whether there was any trend *within* the 2000-2003 period that should have affected Dr. Gray's ultimate opinion as to distributions over the entire 2000-2009 period.

At the hearing, the Judges asked Dr. Gray if he had looked at the "changes in diary data from 2000 to 2001, and then 2001 to 2002, [and] finally 2000 [sic] to 2003 to see whether there were any changes from year to year within that group of data that might suggest that it would be reasonable or unreasonable, or somewhere in between, to extrapolate out to 2004 to 2009." 4/13/15 Tr. 108 (Gray). Dr. Gray testified that he would review his underlying data and supplement his testimony to respond to this question when he returned to the witness stand. Upon resuming his testimony several days later, Dr. Gray responded to the Judges' inquiry by

³ Sweeps periods are months during which Nielsen mails "diaries" to selected households throughout the United States in which the recipients record their viewing selections during a single week. *See* MPAA Ex. 365 at 4-5 (Lindstrom WDT). Nielsen sends diaries to different selected households during each week of a sweeps period, and aggregates the results into their database for the entire month. *Id.* The sweeps periods in 2000-2003 for which MPAA obtained data were February, May, July, and November. *Id.* at 4.

stating that he had performed a “robustness check⁴ to see if the regressions that I used over the 2000 to 2003 period if there was any trend within ’00 to ’03 that would lead me to be more comfortable to continue to use projections for the entire ’00 to ’09 period.” 4/17/15 Tr. at 152 (Gray).

Dr. Gray concluded that the results of his analysis showed a distribution ratio that was “fairly stable across the four periods [2000, 2001, *etc.*] using each year individually and reasonably similar to using all of the periods polled [in the aggregate]....” *Id.* at 161 (Gray). Further, Dr. Gray noted that his “robustness check” indicated there might actually be “a slight uptick to MPAA’s advantage as you go across the four periods.” *Id.*

As Dr. Gray’s testimony makes clear, his “robustness check” does *not* confirm the reasonableness of using 2000-2003 data to predict relative values for the entire 2000-2009 period. At most, Dr. Gray’s “robustness check” may provide *some* evidence that using distant viewing data from any one of the four available years individually would not yield a materially different result from using the aggregated distant viewing data from all four available years. This conclusion confirms only that, *assuming the appropriateness of using such older data*, there was no material annual trend disfavoring IPG *within* the 2000-2003 period that would skew the results when the correlation derived from 2000-2003 data is extrapolated over the 2000-2009 period. *See id.* at 159-61 (Gray). The absence of a trend within the 2000-2003 time period does not demonstrate whether or not the correlation between local ratings and distant viewing derived from 2000-2003 data would continue unchanged during the 2004-2009 time period. Thus, there is no competent record evidence demonstrating that the older 2000-03 data relied upon by MPAA create a sufficient basis for distributions in this proceeding, nor is there record evidence of more contemporaneous data.⁵

In sum, the Judges conclude that without either: (1) contemporaneous data (whether local ratings and distant viewership data, as Dr. Gray utilized, or other data and analysis that might underlie a modified methodology); or (2) competent evidence that persuades the Judges that such data are not needed to produce reliable results from MPAA’s viewership-based methodology, the Judges cannot employ that methodology to distribute the funds at issue in this proceeding.⁶

B. Shortcomings of the SDC’s Presentation

The SDC, through their expert witness, Dr. Erkan Erdem, also presented a viewership-based methodology. Unlike MPAA’s methodology which employs predicted distant viewership values, the SDC’s methodology uses national averages of local ratings, “scaled” by numbers of

⁴ The “robustness check” was admitted into evidence as MPAA Ex. 379.

⁵ The Judges note, but do not resolve, a related dispute regarding Dr. Gray’s regression utilizing the 2000-2003 data, with regard to his selection of the “base year” within his regression. *See* 4/16/15 Tr. 131-132 (Robinson). If this issue remains outstanding in the parties’ submissions in the reopened proceedings, the Judges will address the substance of that issue.

⁶ The Judges are aware that the evidentiary shortcoming they identify does not apply to the 2000-2003 satellite royalty funds in the Program Suppliers category. In the interest of judicial economy, the Judges decline to sever the determination of the distribution of those funds from the remainder of this consolidated proceeding. The Judges will resolve all royalty years in a single determination, except to the extent the parties reach a settlement with respect to any of the royalty funds still in controversy.

distant subscribers who are able to access the programs. *See* SDC Ex. 635 at 17-20 (Erdem Amended WDT-Cable); SDC Ex. 636 at 18-20 (Erdem Amended WDT-Satellite). The local ratings measurements that Dr. Erdem employed covered the month of February in each year from 1999 through 2003, and each of the four sweeps periods⁷ in each year from 2004 through 2009. *See* SDC PFF ¶ 6; SDC Ex. 635 at 3. To confirm the validity of using local ratings, Dr. Erdem computed the correlation between local ratings and distant viewership of the same programs using local ratings and distant viewership data from the February sweeps period in 1999. *See, e.g.*, SDC Ex. 635 at 15.⁸

The SDC's implementation of its methodology suffers from a critical lack of data. First, Dr. Erdem bases his conclusion that local ratings are an appropriate proxy for distant viewing on a correlation that he derived solely from February 1999 data. There is no basis in the record for the Judges to conclude that the correlation Dr. Erdem found in the 1999 data continues unchanged throughout the entire succeeding decade. Dr. Erdem's decision to rest his entire analysis of relative market value over a decade on such a diminutive slice of distant viewing data raises a question concerning the reliability of the application of his methodology. *See* 4/16/15 Tr. at 170 (Robinson).

Second, the local ratings data on which Dr. Erdem rests his conclusions regarding relative market value are extremely sparse. For 1999 through 2003, Dr. Erdem relies on ratings data from a single month in each year to compute relative market value. The Judges will not rest a determination upon such a slender evidentiary reed.⁹

The Judges conclude that, given the lack of contemporaneous distant viewing data, and the dearth of local ratings data—or competent persuasive evidence that such data are not needed to produce reliable results from the SDC's viewership-based methodology—the Judges cannot employ that methodology to distribute the funds at issue in this proceeding.

C. Shortcomings of IPG's Presentation

⁷ For 2004-2008 the sweeps periods were the months of February, May, July, and November. For 2009 the sweeps periods were March, May, July, and November. *See* SDC Ex. 635 at 3.

⁸ The SDC claim that their methodology is "similar to the methodology that the Judges used in the 1999 cable proceeding" SDC PFF ¶ 7. The irony of the SDC's proposed use in this proceeding of a methodology that they describe as being similar to a methodology that they are currently seeking to disavow on appeal is not lost on the Judges. The SDC is incorrect, however, in describing their present methodology as "similar" to the approach taken by the Judges in the 1999 cable distribution proceeding. In that proceeding the Judges established a "zone of reasonableness," bounded at the upper end by the royalty shares the SDC derived from their analysis of distant viewing. *See Distribution of 1998 and 1999 Cable Royalty Funds, Final Distribution Determination*, 80 Fed. Reg. 13423, 13442 (March 13, 2015). The Judges used the SDC's confirmatory analysis of local ratings (which the SDC's own expert stated was a "reasonable" number) as a further guidepost to determine where, within the zone of reasonableness, the Judges should fix the royalty allocation. *Id.* at 13442-43. Here, by contrast, the SDC seeks to use local ratings as a direct proxy for assessing relative market value in the hypothetical market for programs that are distantly retransmitted. The Judges reach no conclusion on whether a methodology based solely on local viewing data is a useful means for assessing relative market value in the hypothetical market for distantly retransmitted programming.

⁹ The Judges reach no decision whether ratings data from *four* sweeps months per year, as opposed to *one*, is sufficient to support a distribution. The Judges would need to weigh evidence and expert opinion, neither of which is in the existing record, before reaching a conclusion.

IPG presented a distribution methodology through its expert witness, Dr. Laura Robinson, that is based on the overall volume of programming and three purported indicia of value: the time of day that the program is broadcast; the royalty “fees paid” by cable systems¹⁰ to retransmit stations carrying the program; and the number of subscribers to cable and satellite systems that retransmit stations carrying the program. Dr. Robinson derived percentage shares for IPG and MPAA (in the Program Suppliers category) or the SDC (in the Devotional category) based on each of these indicia and proposed the midpoint between the highest and lowest indicia as the relative market value of the parties’ programs. See IPG PFF at 28-43 (and record citations therein).¹¹

The indicia that IPG employed in its methodology are the same that IPG employed in the 1998-1999 cable distribution proceeding and in the 2000-2003 cable distribution proceeding. The details of IPG’s calculations have changed, but its reliance on volume, time of day, fees paid and number of subscribers as measurements of value has not. See *2000-03 Distribution*, 78 Fed. Reg. at 64998; *1998-99 Distribution*, 80 Fed. Reg. at 13440. Therein lies the fundamental problem with IPG’s presentation.

In the *2000-03 Distribution* determination, the Judges evaluated these same proposed indicia of value and found them wanting. “[T]he IPG Methodology uses factors that tend to treat as similar programs that are distantly retransmitted at the same time of day, run for the same number of minutes per program or that appear on the same station. Thus the IPG Methodology considers neither the initial necessity of considering absolute viewership nor the subsequent necessity of considering the iterative process” *2000-03 Distribution*, 78 Fed. Reg. at 65000. “[T]he IPG Methodology, although intended to eschew viewership as a primary measure, nonetheless is based implicitly upon viewership, as it considers the duration of a program as an indicia of value (a program of relatively longer duration would be more valuable because of its viewership over a longer period), as well as the time of day a program is aired (there are more viewers at some times of day than others).” *Id.* at 65002.

The Judges again criticized IPG’s reliance on these indicia of value in the *1998-99 Distribution* proceeding¹²:

A second problem with the IPG Methodology ... [is that it] implicitly uses indicia of viewership to measure program value[:] ... duration of a program, ... (a program of relatively longer duration would be more valuable because of its *viewership* over a longer period),... the time of day a program is aired (there are *more viewers* at some times of day than others), and the number of subscribers (*potential viewers*) to CSOs retransmitting the program. Simply put, IPG’s Methodology is not true to its own critique of valuing programs based on viewership. Thus, the IPG Methodology fails to address either the initial necessity of considering absolute viewership or the subsequent necessity of

¹⁰ Dr. Robinson did not use the “fees paid” metric for satellite retransmissions.

¹¹ IPG failed to number its proposed findings and conclusions by paragraph as required by 37 C.F.R. § 350.14(c). The Judges admonish IPG and direct it to do so in all future proposed findings and conclusions that it files with the Judges.

¹² For unrelated procedural reasons, the proceeding for 2000-03 distributions occurred before the proceeding for 1998-99 distributions.

undertaking a Shapley type of measurement or estimation in order to create a “bundle” of programs.

1998-99 Distribution, 80 Fed. Reg. at 13440; *see also id.* at 13442 (describing IPG’s metrics as “individually untenable or of minimal value”).

In the instant proceeding, Dr. Gray levels similar criticisms against Dr. Robinson’s most recent iteration of an IPG methodology based on volume, time of day, subscribership, and fees paid:

In discussing the motivation for her analysis, Robinson states that the number of distant subscribers and/or fees paid by the CSO or SSO carrying a distantly retransmitted program, as well as the time-of-day the program aired, are economic indicia of value. However, because the number and type of distant signals carried by CSO/SSOs are a function of the regulatory scheme, they are at best flawed indicia of value. In my opinion, insofar as broadcast time-of day, subscriber count, and fees paid are associated with higher distant viewership opportunities, each index is associated with *higher potential* relative market value. For example, a program retransmitted at a time of day when more people are viewing television, such as prime time, would be available to a larger audience and therefore would have an *opportunity* for more viewing than a program broadcast and retransmitted in the middle of night. Similarly, a program carried by a SSO or CSO with more subscribers, and therefore greater fees paid, has an *opportunity* for greater viewing than a program carried by SSOs or CSOs with few subscribers and low fees paid. Since each of Robinson’s proposed measures of a program’s value only measures the program’s *opportunity* for viewing, each is, at best, an indirect and incomplete measure of a program’s actual viewing. In measuring the relative market value of programming, it is critical to assess whether opportunities for greater viewing are in fact associated with more viewing. That is, it is critical to examine the underlying subscriber demand for the distantly retransmitted programs as measured by the viewing choices subscribers make. None of Robinson’s measures do this.

MPAA Ex. 373, at ¶ 18 (Gray WRT); *see also* SDC Ex. 640, at 5 (“what Dr. Robinson proposes ... has major flaws and do[es] not provide reliable estimates for relative market value”) (Erdem WRT).

The Judges credit Dr. Gray’s testimony that, to the extent IPG’s purported indicia of value have any relevance in this proceeding, it is because of their relationship to viewership. *See* MPAA Ex. 373, at ¶ 18 (Gray WRT) (quoted *supra*). Each of IPG’s indicia measures *potential* viewership or *opportunities* to view programs, as Dr. Robinson effectively conceded. *See, e.g.*, 4/15/15 Tr. at 61-62 (Robinson). IPG offered no other explanation why these indicia are relevant to the issue of relative market value. But IPG’s indicia of value remain flawed because they fail to draw a connection between opportunities to view (which is an expression of the *supply* of programs), and actual viewing of programs (which represents the *demand* for those programs). The former are, as Dr. Gray testified, “indirect” and “incomplete.” MPAA Ex. 373, at ¶ 18 (Gray WRT). Moreover, their selection was driven largely by the data that IPG chose to provide to Dr. Robinson. *See* 4/15/15 Tr. at 61. Apart from some Nielsen data that IPG acquired from MPAA through discovery, these are essentially the same data that IPG utilized in the 2000-2003

and 1998-1999 cable distribution proceedings. The Judges noted in the 1998-1999 proceeding that

Dr. Robinson clearly was straitjacketed in attempting to devise an appropriate methodology by the limited data she received from Mr. Galaz. ... Mr. Galaz is not an economist, statistician, econometrician or an expert in the field of valuation of television programs or other media assets, ... he therefore had no particular expertise that would permit him to select or approve the use of appropriate data, especially when that selection dictated the construction of a methodology to establish "relative market value" in a distribution proceeding.

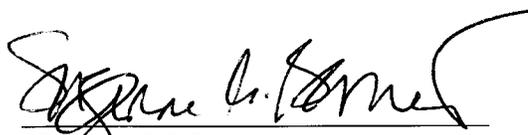
1998-99 Distribution, 80 Fed. Reg. at 13440. Dr. Robinson was similarly constrained in this proceeding by Mr. Galaz's selection of what data to provide. The Judges conclude, as they have in the previous two litigated Phase II distribution proceedings, that IPG's methodology "cannot be applied to establish the basis for an allocation." *2000-03 Distribution*, 78 Fed. Reg. at 65002; *1998-99 Distribution*, 80 Fed. Reg. at 13441.

III. Conclusion

The Judges are left with no valid and reliable methodology that they can use as a reasoned basis to make a distribution in this proceeding. Consequently the Judges **ORDER** that the record be reopened and hereby **DIRECT** the parties to present new evidence in accordance with the case schedule attached as Appendix A. In presenting new evidence the parties may seek to introduce additional data and expert testimony to improve upon the methodologies they have already presented, or they may present new methodologies.

The Judges hereby set aside the parties' Written Direct Statements concerning allocation (and any supplements or amendments thereto), Written Rebuttal Statements concerning allocation (and any supplements or amendments thereto), all exhibits accepted into evidence at the allocation hearing, and all testimony presented at the April 13-17, 2015 allocation hearing. The parties may seek to reintroduce any previously introduced evidence, but shall employ new exhibit numbers that do not overlap with any exhibit numbers that have already been used to identify documents in this proceeding. Parties may also designate prior hearing testimony in accordance with 37 C.F.R. § 351.4(b)(2).

SO ORDERED.


Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: May 4, 2016

Appendix A

Schedule for Further Proceedings

Case Event	Due Date
Parties file Written Direct Statements	August 8, 2016
Parties jointly file Proposed Order establishing detailed discovery schedule	August 5, 2016
Judges issue Order regarding discovery details and discovery period begins	August 10, 2016
Discovery period ends	October 12, 2016
Parties file Amended Written Direct Statements	October 27, 2016
Joint Settlement Conference period	October 28 – November 11, 2016
Parties file Joint Settlement Conference Report	November 28, 2016
IF PARTIES DO NOT SETTLE:	
Parties jointly file Proposed Order establishing detailed rebuttal discovery schedule	November 30, 2016
Judges issue Order regarding rebuttal discovery details and rebuttal discovery period begins	December 2, 2016
Rebuttal Discovery Period Ends	January 25, 2017
Parties file Written Rebuttal Statements	February 24, 2017
Evidentiary Hearing commences	TBD April 2017