Electronically Filed
Docket: 19-CRB-0014-RM
Filing Date: 03/16/2020 04:17:09 PM EDT

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In re	
Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims	**DOCKET NO. 19-CRB-0014-RM**

PROGRAM SUPPLIERS' NOTICE OF INQUIRY COMMENTS

Pursuant to the Copyright Royalty Judges' ("Judges") *Notice Of Inquiry Regarding Categorization Of Claims For Cable Or Satellite Royalty Funds And Treatment Of Ineligible Claims*, 84 Fed. Reg. 71852 (December 30, 2019) ("Notice"), the Motion Picture Association, Inc. ("MPA"), its member companies and other producers and distributors of syndicated series, movies, specials, and non-live team sports broadcast by television stations and retransmitted by cable and satellite systems who have agreed to representation by MPA ("Program Suppliers"), hereby submit their comments regarding (1) the adoption of regulations regarding the categories that should be used in Allocation Phase proceedings before the Judges, and (2) the identification and correct treatment of retransmitted works that are not associated with valid cable or satellite royalty claims.

Program Suppliers' proposed Allocation Phase Claimant Group Definitions are attached hereto as Exhibit A. In addition, in response to the Judges' request for "relevant facts" and "legal and economic analyses," Notice, 84 Fed. Reg. at 71854, Program Suppliers submit analyses and market research performed by Jeffrey S. Gray, Ph.D. and Howard Horowitz of

Horowitz Associates, Inc. ("Horowitz"), respectively, which are attached to these comments as Exhibits B and C.

INTRODUCTION

In the Notice, the Judges recognize that royalty distribution proceedings have historically been separated into an Allocation Phase (formerly known as Phase I) and a Distribution Phase (formerly known as Phase II). Allocation Phase proceedings have determined the proper percentage allocation of royalties among different groups of self-organized claimants ("Claimant Groups"), which have been mutually exclusive and defined by the particular types of eligible works, or "program categories" they represent, as determined by the claims filed by the claimants who comprise the particular Claimant Group ("Program Types"). Allocation Phase Claimant Groups typically include (and, indeed, have always included) more than one Program Type.[1] Distribution Phase proceedings have focused on determining the proper percentage share of royalties to distribute to individual claimants, or groups of claimants, within each Allocation Phase Claimant Group.[2]

Program Suppliers support regulations formally adopting Allocation Phase categories based on Claimant Groups. Additionally, based on the market research performed by Horowitz and the analyses performed by Dr. Gray, Program Suppliers urge the adoption of regulations establishing a "Sports Claimants" Group that includes *both* the live team sports programming represented by JSC *and* all other sports programming, including the sports programming that has

[1] For example, in past proceedings, the Program Suppliers Claimant Group has represented copyright owners of movies, syndicated series, specials, and non-live team sports programs. Thus, the Program Suppliers Claimant Group has represented the interests of copyright owners of works falling within multiple Program Types.

[2] For example, the Judges have conducted Distribution Phase proceedings to resolve controversies between MPA and Multigroup Claimants ("MC") in the Program Suppliers Claimant Group, Settling Devotional Claimants ("SDC") and MC in the Devotional Claimants Claimant Group, and Joint Sports Claimants ("JSC") and MC in the JSC Claimant Group. *See Ruling And Order Regarding Objections To Cable And Satellite Claims*, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) (October 23, 2017).

previously been categorized as falling within the Program Suppliers and Commercial Television ("CTV") Claimant Groups. *See* Exhibit A. Program Suppliers' proposal is consistent with how market participants perceive sports programming, and presumably behave, in the unregulated market for content acquisition. In addition, the proposal is a pathway to eliminating the confusion and ambiguity surrounding categorization of sports and sports-related programming in Allocation Phase proceedings. Most importantly, the proposal better ensures a fair royalty allocation for sports and sports-related programming not currently represented by JSC. With the adoption of the all-inclusive Sports Claimants Group at the Allocation Phase level, the determination of the relative market values of the different sports programs will occur in the Distribution Phase, where the parties can provide more granular marketplace value information. Consequently, the proposed plan will ensure a fair and reasonable determination of royalty shares attributable to sports content. If the Judges adopt Program Suppliers' proposed Claimant Group Definitions set forth in Exhibit A, MPA will have Distribution Phase controversies in both the Program Suppliers Claimant Group and the Sports Claimants Group and will participate in proceedings to resolve those controversies.

Program Suppliers also urge the Judges to make it clear that the Claimant Group Definitions they adopt are limited to eligible claimants and their associated eligible works. The Judges must clarify that retransmitted works not associated with a valid claim are *ineligible* to receive royalties under the Copyright Act, and should not be incorporated into any measure of relative market value in the Allocation Phase, as is done in Distribution Phase proceedings.

ARGUMENT

I. The Allocation Phase Categories Should Be Based On Mutually-Exclusive Claimant Groups, Which Are Defined By Program Types.

In the Notice, the Judges seek comments on "the merit of aggregating the Allocation Phase categories by program type rather than by claimant groups, and whether doing so may result in a distribution of royalties that more accurately reflects the relative value of different programming." Notice at 71853. Program Suppliers support the formal adoption of Allocation Phase Claimant Groups which are based on defined, mutually exclusive types of programs, rather than an Allocation Phase program category structure based on Program Type.[3] Indeed, as Dr. Gray explains, adopting an Allocation Phase categorization structure by Program Type would prove unwieldy, because there are many different Program Types utilized in the television industry. For example, Dr. Gray reports that Gracenote, Inc. ("Gracenote"), an organization among many others that provides broadcast station programming data, reported as many as thirty-two (32) different Program Types in the data utilized for the 2010-13 Cable and Satellite Allocation Phase proceedings. *See* Exhibit B, Gray Declaration at ¶¶ 8-9 and Table 1. While other organizations may use Program Types similar to those used by Gracenote, there is not a formal industry standard adopted for Program Types. Meaning, those vendors may have more, or different, Program Types than those utilized by Gracenote. Dr. Gray explains that each of these Program Types fits within one of the different mutually exclusive Claimant Groups at the program level. *See id.* at ¶ 10 ("In effect, each Allocation Phase claimant represents an exclusive aggregate of program types."). Accordingly, it is reasonable to continue to employ an Allocation Phase categorization based on mutually-exclusive Claimant Groups, as opposed to an Allocation

[3] In other words, under the Claimant Group structure, each Claimant Group represents a category of defined, mutually exclusive types of programs in the Allocation Phase, while under the Program Type structure, each Program Type would be a separate Allocation Phase category.

Phase categorization structure based on Program Type. That said, as explained below, Program Suppliers support changes to the Claimant Group Definitions that have been utilized in past royalty allocation proceedings.

II. The Judges Should Adopt A "Sports Claimants" Claimant Group And Modify The Definition of The Program Types Falling Within The New Claimant Group And Other Groups As Appropriate.

Program Suppliers originally supported the formal adoption of the historically agreed upon Claimant Group Definitions and had proposed some modifications aimed at eliminating ambiguity regarding where sports programming—in particular, non-JSC sports programming—falls within the Claimant Group Definitions.[4] These modifications were necessary because the Program Suppliers Claimant Group claims a significant amount of non-JSC sports programs (or "Other Sports" programming) on stations distantly retransmitted by cable and satellite systems. Indeed, "Other Sports" programming has always been a type of programming represented primarily by claimants within the Program Suppliers Claimant Group, similar to "movies," "syndicated series," or "specials." However, because it includes sports and sports-related programming, "Other Sports" programming lends it to be very easily confused with JSC sports programming, especially in the context of cable operator surveys.[5]

Following issuance of the Notice, Program Suppliers engaged Horowitz to perform a series of telephone interviews with cable system operators ("CSOs") in order to ascertain

[4] *See* Program Suppliers' Briefs Regarding Proposed Claimant Group Definitions, Docket Nos. 16-CRB-0009 CD (2014-17) and 16-CRB-0010 SD (2014-17) (April 19, 2019) and Program Suppliers Responsive Briefs Regarding Proposed Claimant Group Definitions, Docket Nos. 16-CRB-0009 CD (2014-17) and 16-CRB-0010 SD (2014-17) (May 3, 2019).

[5] In the 2010-13 Cable Allocation Phase Proceeding, multiple witnesses testified that the JSC Claimant Group Definition was confusing to cable operators. *See* Written Direct Testimony of Howard Horowitz at 3, Ex. 6012, Docket No. 14-CRB-0010-CD; Written Rebuttal Testimony of Howard Horowitz at 4, 10, Ex. 6013, Docket No. 14-CRB-0010-CD; Written Direct Testimony of Sue Ann R. Hamilton at 10-12, Ex. 6008, Docket No. 14-CRB-0010-CD; Written Rebuttal Testimony of Sue Ann R. Hamilton at 6-9, Ex. 6009, Docket No. 14-CRB-0010-CD.

whether they understood the Claimant Group categories used in past Copyright Royalty Board ("CRB") proceedings, and, in particular, how they viewed sports programming on the distant signal carried by their systems. In particular, Program Suppliers sought information regarding whether CSOs understood how non-JSC sports programs such as tennis, golf, and NASCAR racing should be categorized for purposes of the CRB proceedings. *See* Exhibit C, Horowitz Declaration, at ¶¶ 4-7. Significantly, the ten CSOs interviewed by Horowitz each had a singular view of sports: they did not routinely make distinctions between live team sports programming versus other types of sports programming on distant signals in making their programming decisions. *See id.* at ¶ 6. Moreover, when the CSOs were read the different Claimant Group definitions that were used in the 2010-13 Cable Allocation Phase proceeding and asked to categorize programs like tennis, golf, and NASCAR, 7 out of 10 placed them in the JSC Claimant Group, and 3 out of 10 placed them in the CTV Claimant Group. None of the interviewed CSOs categorized tennis, golf, or NASCAR as programs that would fall in the Program Suppliers Claimant Group, *see id.* at ¶ 7, even though all three are types of programs that fall within the Program Suppliers' Claimant Group as that claimant group has been defined in past cable and satellite royalty proceedings. Horowitz's market research thus confirms the testimony of Sue Hamilton and others who explained that CSOs do not routinely differentiate between live team sports programming and other sports and sports-related programs when making programming decisions. *See* note 5, *supra.*

Further, Program Suppliers' content within an all-inclusive Sports Claimants Group is significant. Program Suppliers asked Dr. Gray to quantify and allocate among parties the relative volume shares of all distantly retransmitted sports and sports-related programming carried, that is, purchased, by cable and satellite systems, respectively, during 2010-13. Dr. Gray

calculated relative volume shares, weighted by distant subscribers, for the 2010-13 cable and satellite Allocation Phase Claimant Groups who had programs with the following Gracenote Program Types: Playoff Sports, Pseudo-Sports, Sporting Event, Sports Anthology, Sports-Related, or Team vs. Team. *See* Exhibit B, Gray Declaration at ¶¶ 20-21 and Table 4. Dr. Gray's analysis revealed that Program Suppliers represented the *majority* of the relative weighted volume share of all "sports" programming (averaging 48.38%) over the 2010-13 cable royalty years. *See id.* Indeed, Program Suppliers' relative weighted volume share of all "sports" programming for 2010-13 cable was higher than JSC's (which averaged only 18.50%) and CTV's (which averaged 31.67%). *See id.* Dr. Gray also found that Program Suppliers represented a significant relative weighted volume share of all "sports" programming (averaging 17%) over the 2010-13 satellite royalty years. *See id.*

In light of the cable executives' perception of sports programming and their behavior as market participants who make no distinction between live team sports and other sports, Program Suppliers propose that the Judges adopt an all-inclusive Claimant Group for sports and sports-related programming. This can be achieved by renaming the JSC Claimant Group the "Sports Claimants Group," and expanding its Claimant Group definition to include not only live team sports programming represented by JSC, but also to include syndicated programming of a predominately sports nature, which has been primarily represented by Program Suppliers, and to a lesser extent represented by CTV, in past Allocation Phase proceedings. Adoption of the Sports Claimants Group necessarily requires modification of the previously-used Allocation Phase Claimant Group definitions to more closely mirror how CSOs (and, presumably, satellite carriers)[6] view the very significant amount of sports and sport-related programming being

[6] There is evidence that satellite carriers have the same economic motivations as CSOs. *See* Corrected Testimony of Howard B. Homonoff, Docket No. 14-CRB-0011-SD (2010-13) at 6 (June 7, 2019) ("[T]he process by which

carried on a distant basis by their systems. Accordingly, Program Suppliers propose that the Judges adopt regulations formalizing the Claimant Group Definitions proposed by Program Suppliers, which are set forth in Exhibit A.

Program Suppliers anticipate that JSC would act as the Allocation Phase category representative for Sports Claimants, and that the correct allocation of the Sports Claimants' royalties among JSC and other eligible claimants who represent programming within the Sports Claimants category (such as MPA and CTV) would be resolved in Distribution Phase proceedings.[7] Program Suppliers' proposal will, as a result, significantly streamline Allocation Phase proceedings by removing a controversy that has long troubled those proceedings, and repositioning the controversy in the Distribution Phase, where relative market value analyses can be conducted, and claims examined, at a program level. This will better facilitate the type of granular, nuanced analysis necessary to divide the Sports Claimants' royalties among claimants who represent live team sports, non-team sports, and sports-related programming. Program Suppliers also propose streamlining the Claimant Group definitions as necessary to remove references to programs that no longer air, and to improve overall consistency. These proposed modifications are also incorporated in Exhibit A.

III. The Copyright Act Requires The Judges To Adopt Claimant Group Definitions Limited To Eligible Claimants, And Their Associated Eligible Works.

The Judges must ensure that the Claimant Group Definitions adopted in their regulations are consistent with the eligibility requirements for claiming and receiving statutory license

satellite operators make their programming decisions is not very different from that undertaken by cable operators."); *see also* Amended Testimony of Jeffrey S. Gray, Ph.D., Docket No. 14-CRB-0011-SD (2010-13) at 4-5 (June 7, 2019).

[7] Precedent exists for this type of scheme. For example, CTV has Distribution Phase claims within the Program Suppliers Claimant Group for syndicated station-produced programming and CTV also has Distribution Phase claims within the Devotional Claimant Group.

royalties set forth in the Copyright Act. Thus, it is necessary for the Judges to consider the appropriate scope of the Claimant Group Definitions, and address that issue in conjunction with promulgating regulations.

A. The Copyright Act Limits Royalty Distributions To Eligible Claimants And Eligible Retransmitted Works.

Sections 111 and 119 of the Copyright Act permit distribution of cable and satellite statutory license royalties only to copyright owners or their authorized representatives who have (1) filed valid claims for such royalties,[8] and (2) demonstrated that they are rightsholders of eligible retransmitted works entitled to receive such royalties.[9] These threshold eligibility requirements are statutory in nature, and cannot be waived. *See* June 22, 2000 Order at 8 (acknowledging that the Copyright Office may not waive statutory eligibility requirements); *see also Universal City Studios*, 402 F.3d at 1244 (holding that claimants seeking a share of statutory license royalties "are entitled…to nothing if they do not meet the terms of eligibility under the statute and its implementing regulations"); *Christian Broadcast Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1313 (D.C. Cir. 1983) ("the Act envisions the need for copyright holders to qualify for distribution of the Fund"); *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 380 (D.C. Cir. 1982) ("Section 111(d)(4) requires

[8] *See* 17 U.S.C. §§ 111(d)(3) and (4)(A); § 119(b)(3); § 803; 37 C.F.R. § 351.1(b)(3); *see also Distribution of the 2000, 2001, 2002, and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64987 (Oct. 30, 2013) (citing *Universal City Studios LLLP v. Peters*, 402 F.3d at 1235, 1244 (D.C. Cir. 2005)); *Order Denying Motions To Strike Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2 (Sept. 14, 2012); *see also Order On Joint Sports Claimants' Motion For Summary Adjudication Dismissing Claims Of Independent Producers Group*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 4 (Aug. 29, 2014).

[9] The works eligible for royalty compensation in this proceeding are those works that were the subject of secondary transmissions by cable operators during the relevant time period. *See* 17 U.S.C. § 111(d)(3); *see also* Order in Docket No. 2000-2 CARP CD 93-97 at 6 (June 22, 2000) ("The law is clear that only those parties whose works were the subject of secondary retransmissions are entitled to a distribution of royalties, and it is only those parties on whose behalf a claim may be filed.") ("June 22, 2000 Order"); 59 Fed. Reg. 63025, 63029 (December 7, 1994) ("We agree with NAB that section 111(d)(3) of the Copyright Act authorizes distribution of cable royalties only to copyright owners whose works were retransmitted on a distant signal.").

that the Fund be distributed 'among' designated copyright owners, and makes it clear that royalty recipients must qualify under the terms of that section."). The Copyright Act does not permit any party to these proceedings to receive statutory license royalties for works that are not associated with a timely, valid royalty claim. *See* 17 U.S.C. §§ 111(d)(3) and (4)(A), § 119(b)(3); *see also Universal City Studios*, 402 F.3d at 1244. Indeed, the Judges have routinely dismissed entities (and all their associated works) from royalty distribution proceedings because they failed to file a timely, valid claim.[10] Accordingly, works that were distantly retransmitted by cable or satellite systems during the royalty years at issue in this proceeding, but which are not associated with a timely, valid royalty claim, are ineligible to receive statutory license royalties in these proceedings.

B. "Unclaimed" Works Are Not Eligible Works Because Claimant Group Definitions Are Necessarily Limited to Eligible Works.

The Judges language in the Notice refers to "*funds* that are unclaimed because a filed claim is invalid or not validly represented in a distribution proceeding." *See* Notice, 84 Fed. Reg. at 71854 (emphasis added). However, there cannot be any unclaimed "funds" in the cable or satellite royalty pools because, by law, royalties are distributed only among valid claims for their associated eligible works. Program Suppliers presume, as later referenced in the Notice, that the Judges intended instead to reference on the proper identification and treatment of "invalidly-claimed programs," not "funds." *See id.*

[10] *See, e.g., Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 33 (March 13, 2015) (recognizing that "Sections 111 and 119 of the Act only allow copyright owners for whom claims have been timely filed to collect retransmission royalties," and dismissing 57 separate entities for failure to file a claim).

Per Sections 111 and 119 of the Copyright Act, Claimant Group Definitions must be limited to eligible works.[11] Unclaimed works are not eligible works because they do not meet the statutory and regulatory eligibility requirements, including being associated with a timely, valid claim. As the D.C. Circuit made clear in *Universal City Studios*, no statutory license royalties can be attributed to invalid or ineligible claims. *See Universal City Studios*, 402 F.3d at 1244. In order for royalty determinations to be consistent with the statutes, volume estimates utilized in Allocation and Distribution Phase methodologies must be based solely on eligible works, *i.e.*, works associated with valid cable or satellite royalty claims. However, the Allocation Phase participants have not followed this practice in past royalty proceedings, and have instead based the Allocation Phase volume estimates for their respective methodologies on *all* distantly retransmitted works, rather than only *eligible* retransmitted works.

This disconnect can have a material impact on relative market value shares for the different Allocation Phase claimant groups, especially when a proposed royalty allocation methodology that relies on a volume measure (such as a fees-based regression analysis) is presented as a measure of relative market value for the Judges' consideration. To illustrate this point, Dr. Gray examined all of the program titles that were associated with valid claims for the three Allocation Phase Claimant Groups that participated in Distribution Proceedings related to the 2010-13 cable and satellite royalty funds (Program Suppliers, Devotional Claimants, and JSC),[12] and compared these three Claimant Groups' (1) respective relative shares of *all* distantly

[11] In the 2010-13 Cable Allocation Phase Proceeding, the Judges clarified that they construed the phrase "cover all eligible works" as "meaning that 'all' works in [each Allocation Phase] category would be 'eligible copyrighted works,'" and that it would not be reasonable for the Judges to construe the phrase as permitting the Allocation Phase claimant categories to include both eligible and ineligible works. *See Order Regarding Discovery*, Docket No. 14-CRB-0010-CD (2010-13) at 5, n.9 (July 21, 2016). The Judges should follow the same logic here and make it clear that the Claimant Group Definitions adopted are both mutually exclusive and limited to eligible copyrighted works.

[12] Program Suppliers sought similar discovery from all of the Allocation Phase Claimant Groups participating in the 2010-13 Cable and Satellite Allocation Phase proceedings, but the Judges denied Program Suppliers' discovery

retransmitted program volume for the 2010-13 cable and satellite royalty years to (2) respective relative shares of only *eligible* distantly retransmitted program volume for the 2010-13 cable and satellite royalty years (*i.e*., considering only those programs associated with a valid royalty claim).[13] Dr. Gray found significant differences in the relative volume shares of all distantly retransmitted program volume versus eligible distantly retransmitted program volumes for the three Claimant Groups. *See* Exhibit B, Gray Declaration at ¶¶ 15-18.

For 2010-13 cable, while the Devotional Claimants consisted of 14.67% of all distantly retransmitted programming volume, they represented only 4.37% of *eligible* retransmitted programming volume. The opposite is true for Program Suppliers, which had a 10 percentage point higher volume of eligible distantly retransmitted programming volume than its share of all retransmitted programming volume. JSC also showed a higher volume share of eligible programming volume than its share of all retransmitted programming. *See id.* at ¶¶ 16-17 and Table 2.

For 2010-13 satellite programming, JSC's volume share increased from 12.55% to a 14.70% volume share when Dr. Gray restricted his analysis to eligible claims. Program Suppliers' volume share remained roughly constant when only eligible claims were considered. Devotional Claimants volume share decreased from 2.15% to 1.15% when only eligible claims were considered. *See id.*at ¶ 18 and Table 3.

The volume shifts documented by Dr. Gray show the material impact the failure to limit relative market value consideration to eligible works would likely have on both Allocation and

requests. *See Orders Regarding Discovery*, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) (July 21, 2016).

[13] These program volumes were weighted by distant subscribers. *See* Exhibit B, Gray Declaration at ¶¶ 16-18.

Distribution Phase methodologies, particularly volume-based analyses such as regression analyses.

C. The Copyright Act's Eligibility Requirements Are Not Fully Addressed In Distribution Phase Proceedings.

Program Suppliers anticipate that some commenters may argue that the Copyright Act's requirement that only eligible claimants receive royalties can be addressed by allocating royalties based on *all* retransmitted works in the Allocation Phase, and then distributing royalties only to *eligible* claimants in the Distribution Phase. However, this argument fails for two reasons.

First, as explained above, if a particular Allocation Phase Claimant Group's relative volume share is inflated by ineligible claims, then that Claimant Group's relative share of royalties will also be inflated. Because all of the Allocation Phase shares are relative to one another, improper inflation of one Claimant Group's Allocation Phase royalty award causes a corresponding decrease in the royalty awards to the remaining Allocation Phase Claimant Groups. Accordingly, even if only eligible claimants receive royalties in the Distribution Phase, the dollar amount of those royalties will be affected by the royalty shares determined in the Allocation Phase.

Second, historically, the Judges have not required all Allocation Phase parties to participate in the Distribution Phase—even when some of the claims that the Allocation Phase Claimant Groups purport to represent are not entitled to a presumption of validity.[14] Accordingly, while numerous ineligible claims in the Program Suppliers, Devotional Claimants,

[14] For example, the Judges have held that royalty claims filed by Independent Producers Group ("IPG") and MC are not entitled to a presumption of validity, *see*, *e.g.*, *Ruling And Order Regarding Objections To Cable And Satellite Claims*, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) at 5-10 (October 23, 2017), but have not required Distribution Phase proceedings for all the Allocation Phase Claimant Groups in which IPG and MC asserted royalty claims.

and JSC categories have been eliminated through Distribution Phase proceedings,[15] not all of the Allocation Phase Claimant Groups have been subjected to such vetting. Accordingly, under the current Distribution Phase structure, the parties (and the Judges) are unable to utilize Distribution Phase proceedings to ensure that statutory license royalties are distributed only to valid claimants in all of the Allocation Phase Claimant Groups. Indeed, in at least one instance, the Judges determined in a Distribution Phase proceeding that royalties had been improperly distributed to an ineligible claimant in the Public Television Claimant Group ("PTV"),[16] however, it is unclear what effect (if any) that ruling had on the PTV category, since PTV was not a participant in the particular Distribution Phase proceeding where the ruling was made. This example demonstrates that under the current structure, the Distribution Phase does not effectively weed out invalid claims or prevent royalty distributions to ineligible claimants in all Claimant Groups.

D. Opposing Parties Must Be Afforded An Opportunity To Test Whether Allocation Phase Claims Are Limited To Eligible Claimants And Works.

The Judges have ruled that all opposing parties in proceedings before the Judges are entitled to seek full discovery, including inter-category discovery, to allow parties to test the validity of methodologies presented in these proceedings. *See Amended Joint Order On Discovery Motions*, Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 4-10 (July 30, 2014). If the Judges adopt Claimant Group Definitions that are limited to eligible works, and which expressly exclude unclaimed works, then all

[15] *See, e.g., Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 2004-2009 (Phase II) (March 13, 2015); *Ruling And Order Regarding Objections To Cable And Satellite Claims*, Docket Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) (October 23, 2017).

[16] *See Memorandum Opinion And Ruling On Validity And Categorization Of Claims*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 2004-2009 (Phase II), Exhibit A-2 at 2 (March 13, 2015) (recognizing that Independent Producers Group collected royalties in the PTV category on behalf of Bob Ross, Inc., and holding that the invalid claims were "disallowed," but that there was "no effect on the Devotional Programming Fund.").

participants should be afforded an opportunity to conduct inter-Claimant Group Allocation Phase discovery to enable them to test whether the Allocation Phase methodologies presented by the Claimant Group representatives are properly limited to eligible works. Accordingly, the Judges should clarify that inter-Claimant Group discovery is appropriate regarding such eligibility issues as a part of this rulemaking proceeding.

CONCLUSION

For all of the foregoing reasons, Program Suppliers' proposals regarding the language and scope of Claimant Group Definitions should be adopted and incorporated in the Judges' regulations.

Respectfully submitted,

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Dated: March 16, 2020

EXHIBIT A

EXHIBIT A

CABLE
Program Suppliers' Proposed
Allocation Phase Claimant Group Definitions

Allocation Phase Claimant Group	Eligible Program Types[1]
"Canadian Claimants."	All programs broadcast on Canadian television stations, except: (1) programs that fall within program types claimed by Sports Claimants, and (2) programs owned by U.S. copyright owners.
"Commercial Television Claimants."	Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those programs that fall within program types claimed by Program Suppliers or Sports Claimants.
"Devotional Claimants."	Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.
"Sports Claimants."	Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, and all syndicated programs of a predominately sports nature, except those programs that fall within program types claimed by Canadian Claimants and Public Television Claimants.
"Music Claimants."	Musical works performed during programs that are in the following claimant groups: Program Suppliers, Sports Claimants, Commercial Television Claimants, Public

[1] "Eligible" programs are programs that are eligible to claim and receive royalties under 17 U.S.C. § 111 and the Copyright Royalty Judges' regulations.

EXHIBIT A

	Television Claimants, Devotional Claimants, and Canadian Claimants.
"National Public Radio."	All non-music programs that are broadcast on NPR Member Stations.
"Program Suppliers."	Syndicated series, specials, and movies, except those programs that fall within program types claimed by the Devotional Claimants; Commercial Television Claimants or Sports Claimants. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. commercial television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, and locally-hosted movies.
"Public Television Claimants."	All programs broadcast on U.S. noncommercial educational television stations.

EXHIBIT A

SATELLITE
Program Suppliers' Proposed
Allocation Phase Claimant Group Definitions

Allocation Phase Claimant Group	Eligible Program Types[2]
"Commercial Television Claimants."	Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those programs that fall within program types claimed by Program Suppliers or Sports Claimants.
"Devotional Claimants."	Syndicated programs of a primarily religious theme, but not limited to programs produced by or for religious institutions.
"Sports Claimants."	Live telecasts of professional and college team sports broadcast by U.S. television stations, and all syndicated programs of a predominately sports nature.
"Music Claimants."	Musical works performed during programs that are in the following claimant groups: Program Suppliers, Sports Claimants, Commercial Television Claimants, and Devotional Claimants.
"Program Suppliers."	Syndicated series, specials, and movies, except those programs that fall within program types claimed by the Devotional Claimants; Commercial Television Claimants or Sports Claimants. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. commercial television stations during the calendar year in

[2] "Eligible" programs are programs that are eligible to claim and receive royalties under 17 U.S.C. § 119 and the Copyright Royalty Judges' regulations.

	question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, and locally-hosted movies.

EXHIBIT B

Before the
Copyright Royalty Judges

In re	
Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims	**DOCKET NO. 19-CRB-0014-RM**

DECLARATION OF JEFFREY S. GRAY, PH.D.

I, Jeffrey S. Gray, Ph.D., hereby state under penalty of perjury that:

1. I am over eighteen (18) years of age and am employed as President of Analytics Research Group, LLC.[1] I have been retained by the Motion Picture Association, Inc. ("MPA") (formally the Motion Picture Association of America, Inc.) to serve as a consulting witness in the captioned consolidated proceedings. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I received a copy of the *Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims* issued by the Copyright Royalty Judges ("Judges") and published in the Federal Register on December 30, 2019 ("December 30 NOI") from MPA's counsel.

3. The December 30 NOI describes how, pursuant to sections 111 and 119 of the Copyright Act, each year, cable systems and satellite carriers deposit royalties with the Copyright Office for the privilege of retransmitting over-the-air television broadcast signals distantly to their subscribers. Collected royalties are distributed to copyright owners of programs included in the retransmitted signals who filed valid claims with the Copyright Royalty Board ("CRB").

4. Since 1980, the distribution of collected royalties followed a two-phase process. In the first phase, the Allocation Phase (formerly known as Phase I), the Judges determine the allocation of royalties among broad categories of self-organized claimant representatives. In the second phase, the Distribution Phase (formerly known as Phase II), the Judges determine the allocation of royalties among individual copyright owners or their representatives, within each broad claimant category.

5. The December 30 NOI seeks input on (a) identifying the Allocation Phase categories, and (b) treatment of ineligible works (*i.e.*, programming) in all categories.

6. MPA counsel requested that I perform certain economic and statistical analyses that they could refer to in their comments submitted in response to the December 30 NOI. Except

[1] A description of my background and experience, as well as a recent copy of my *curriculum vitae*, were included with my written testimony submitted in Docket No. 14-CRB-0011-SD (2010-13), amended June 7, 2019 ("Gray Satellite-WDT").

where I state otherwise, all of my discussions below relate to distantly retransmitted broadcast television stations and compensable programming carried on those stations.[2]

A. The Identification of the Allocation Phase Categories

7. The Judges inquired as to the merit of aggregating the Allocation Phase categories by program type rather than the current approach of defining categories by claimant groups. The Judges did not suggest a list of program types or how individual works included on broadcast signal retransmissions would be assigned to specified program types.

8. Each year there are thousands of unique program titles carried on broadcast signals transmitted by satellite carriers and cable systems.[3] Gracenote, Inc. ("Gracenote") collects information on each program broadcasted on over-the-air signals, including a definition of each work's program type ("Gracenote program type"). Other companies collect and provide similar information.

9. Table 1 reports the number of quarter hours of programs carried on broadcast signals retransmitted by cable systems and satellite carriers, on average, over the 2010-2013 royalty years, for each Gracenote program type.

[2] Programs airing on WGN's local feed ("WGN") that were not simultaneously broadcasted on WGN's national feed ("WGNA") are defined as non-compensable programs. Also, for stations retransmitted by cable systems, all network programming broadcasted on ABC, CBS, and NBC networks are defined as non-compensable. Network programming is defined as compensable for stations carried on a distant basis by satellite systems.

[3] *See* Gray Satellite-WDT and my testimony Docket No. 14-CRB-0010-CD (2010-13), corrected April 3, 2017 ("Gray Cable-WDT") for a description of the data, sampling methodology, and program categorization methodologies relied upon in this Declaration.

Table 1: Annual Average Number of Quarter Hours Retransmitted by Cable Systems and Satellite Carriers by Gracenote Program Type, 2010-2013

	Program Type	*Cable Systems*	*Satellite Carriers*
1	Arts	232,618	18
2	Cartoon	2,121,088	26,517
3	Children's Show	1,048,278	20,493
4	Children's Special	35,097	1,916
5	Cinema	35,376	0
6	Daytime Soap	925,268	82,699
7	Finance	252,431	12,381
8	First-run Syndication	20,640	4,206
9	Game Show	908,975	94,696
10	Health	313,909	6,643
11	Hobbies & Crafts	75,924	78
12	Instructional	929,202	7,059
13	Mini-series	94,400	167
14	Movie	1,057,648	56,811
15	Music	895,225	15,101
16	Music Special	321,485	3,782
17	Network Series	3,061,056	208,091
18	News	4,666,688	573,161
19	Other	5,232,815	270,281
20	Pelicula	103,924	3,424
21	Playoff Sports	163,043	19,103
22	Pseudo-Sports	24,503	1,035
23	Public Affairs	599,144	8,182
24	Religious	2,752,166	28,121
25	Special	1,215,876	20,346
26	Sporting Event	702,898	69,997
27	Sports Anthology	37,276	5,432
28	Sports-Related	643,527	36,865
29	Syndicated	9,215,187	673,514
30	TV Movie	49,568	2,057
31	Talk Show	6,315,898	695,134
32	Team vs. Team	671,186	59,055

10. At the Allocation Phase level, claimants organize themselves based on mutually exclusive broad program categories. Meaning, depending on the type and number of broadcast stations airing a program, each foregoing Gracenote program type program typically will fit within one of the broad program categories at the Allocation Phase level. Each broad program category at the Allocation Phase level is represented by an individual claimant or a claimant group or, put differently, each Allocation Phase claimant represents an exclusive aggregate of program types. Therefore, under the scheme used during the 2010-2013 cable and satellite Allocation Phase proceedings, the Allocation Phase categories are effectively already organized

by program types. As discussed later in this Declaration, the one Allocation Phase category that remains ambiguous is the Sports category.

11. Sections 111 and 119 of the Copyright Act allow cable systems and satellite carriers to retransmit broadcast television signals out-of-market without the need to negotiate individual private license agreements with the multitude of copyright owners whose programs air on those signals. Economists refer to the time and expense associated with negotiating such private license agreements as transaction costs. The statutes essentially eliminate the transaction costs that would occur in a market without the compulsory license and set the rates for the compulsory license fees paid by the cable systems and satellite carriers.

12. In my opinion as an economist, accepting broad Allocation Phase claimant categories reduces the CRB's administrative costs and facilitates the ultimate distribution of royalty funds to the copyright owners of retransmitted works. Transitioning to program type categories, such as Gracenote program types with over thirty different categories, would increase administrative costs without any clear benefit.

B. The Identification of Invalid Claims

13. The December 30 NOI also requested comments regarding the identification and treatment of ineligible, or invalid claims. I view invalid claims as programming carried on distantly retransmitted signals that have not satisfied the statutory requirements of Section 111 and/or 119 and the regulatory requirements of the CRB that would make them eligible to receive royalties.

14. It is my understanding that the current process does not compensate copyright owners of invalid claims. However, because of how the different methodological approaches have been applied during the Allocation Phase proceeding, even where the programming represented by claimants is presumed valid, some claimants' Allocation Phase awards may be overvalued while others are correspondingly undervalued. To illustrate this point, below, for certain Allocation Phase claimants, I quantify the share of program minutes, weighted by the number of subscribers reached, by claimant category for (1) *all retransmitted* programs and (2) programs *actually eligible* for royalties (that is, programs on behalf of which valid claims were filed).

15. I received comprehensive lists of eligible program titles for three claimant categories for the 2010-2013 cable and satellite royalty years: Devotional Claimants ("Devotionals"), Program Suppliers, and Joint Sports Claimants ("JSC").[4] I can update my calculations if and when I am provided lists of validly claimed programs for the remaining Allocation Phase program categories.

16. For Program Suppliers, JSC and the Devotional Claimants, Table 2 compares, (1) relative shares of all retransmitted weighted program volume for the 2010-2013 cable royalty years to (2) relative shares of only eligible weighted program volume for 2010-2013 cable

[4] MPA received the information during discovery in connection with the Distribution Phase of the 2010-13 cable and satellite royalty proceedings from participants within the Devotional Claimants, Program Suppliers, and JSC Allocation Phase categories, which were the only categories that participated in the Distribution Phase of the 2010-13 cable and satellite royalty proceedings.

royalty years. Across the four years, while the Devotional category relative volumes, on average, consisted of 14.67% of all retransmitted programming volume, they represented only 4.37% of eligible programming volume. The opposite is true for Program Suppliers, whose relative volume share of eligible programming is approximately 10 percentage points higher than its relative share of all retransmitted programming volume.

17. Program Suppliers' relative volume share increased from 84.43% to 94.46% when restricting the analysis to eligible claims. JSC's relative volume share increased from 0.90% to 1.17% when restricting the analysis to eligible claims.

Table 2: **Share of All Retransmitted Versus Eligible Minutes Among Claimant Groups Providing Claim Information (Weighted by the Number of Subscribers Receiving Retransmissions) - Cable**

Year	*Claimant Category*	*Volume Share - All Retransmitted Titles*	*Volume Share – Eligible Titles with Valid Claims*
2010	Devotionals	6.82%	1.81%
2010	Program Suppliers	92.23%	96.88%
2010	JSC	0.95%	1.31%
2010	Total	100.00%	100.00%
2011	Devotionals	10.77%	3.17%
2011	Program Suppliers	88.93%	96.40%
2011	JSC	0.30%	0.42%
2011	Total	100.00%	100.00%
2012	Devotionals	9.75%	2.09%
2012	Program Suppliers	88.98%	96.18%
2012	JSC	1.27%	1.73%
2012	Total	100.00%	100.00%
2013	Devotionals	22.33%	7.63%
2013	Program Suppliers	76.65%	91.14%
2013	JSC	1.02%	1.23%
2013	Total	100.00%	100.00%
All Years	Devotionals	14.67%	4.37%
All Years	Program Suppliers	84.43%	94.46%
All Years	JSC	0.90%	1.17%
All Years	Total	100.00%	100.00%

18. Table 3 presents the same comparison of relative shares of all retransmitted weighted program volume for the 2010-2013 satellite royalty years versus relative shares of only eligible weighted program volume for the 2010-2013 satellite royalty years.[5] JSC has a higher volume share of retransmitted programming in satellite compared to cable. Overall, JSC's volume share increased from 12.55% to 14.70% when restricting the analysis to eligible claims. Program Suppliers' relative volume share was similar for all titles compared to its shares when

[5] A major difference between satellite and cable is that network programming is compensable for the satellite royalty fund allocation, but not for cable.

restricting the analysis to eligible claims (85.30% compared to 84.15%, respectively). Across all satellite royalty years, the Devotionals category represented 2.15% of relative program volume across all titles and represented 1.15% share of volume restricted to validly represented titles.

Table 3: **Share of All Retransmitted Versus Eligible Program Minutes Among Claimant Groups Providing Claim Information (Weighted by the Number of Subscribers Receiving Retransmissions) - Satellite**

Year	*Claimant Category*	*Volume Share - All Retransmitted Titles*	*Volume Share – Eligible Titles with Valid Claims*
2010	Devotionals	3.12%	1.82%
2010	Program Suppliers	86.49%	85.24%
2010	JSC	10.40%	12.94%
2010	Total	100.00%	100.00%
2011	Devotionals	2.36%	1.33%
2011	Program Suppliers	86.43%	85.85%
2011	JSC	11.21%	12.81%
2011	Total	100.00%	100.00%
2012	Devotionals	1.51%	0.65%
2012	Program Suppliers	83.15%	82.18%
2012	JSC	15.34%	17.17%
2012	Total	100.00%	100.00%
2013	Devotionals	0.87%	0.36%
2013	Program Suppliers	83.92%	82.01%
2013	JSC	15.21%	17.63%
2013	Total	100.00%	100.00%
All Years	Devotionals	2.15%	1.15%
All Years	Program Suppliers	85.30%	84.15%
All Years	JSC	12.55%	14.70%
All Years	Total	100.00%	100.00%

C. The Treatment of Sports Programming

19. In past proceedings, the Allocation Phase category definitions were agreed to by the participating parties.[6] However, some of those agreed upon claimant category definitions may appear counter-intuitive to market participants. For example, the Program Suppliers category is comprised of producers and/or distributors of syndicated series, movies, specials, and non-team sports, excluding devotional programs. Thus, certain sports programming that

[6] *See Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation) and Scheduling Order*, Docket No. 14-CRB-0010-CD (2010-13) (Nov. 25, 2015) at Exhibit A (describing the mutually exclusive Agreed Categories as "non-exhaustive descriptions of the types of programs or other creative works that fall within each of the agreed categories of claimants (Agreed Categories) to which categories the Judges may approve an allocation of cable retransmission royalties.").

commonly airs on distant broadcast signals such as NASCAR racing, professional bowling, golf, tennis, and the Olympics fall into the Program Suppliers category and not the JSC category, which consists of only live telecasts of professional and college team sports. Locally produced high school sports broadcasted on a single station belong to the CTV category.

20. Table 4 below reports each claimant category's share of minutes, weighted by the number of subscribers reached, of *all* sports programming retransmitted over 2010-2013. I define a program as a sports program for purposes of this analysis if its Gracenote program type is designated as Playoff Sports, Pseudo-Sports, Sporting Event, Sports Anthology, Sports-Related, or Team vs. Team.

Table 4: **Share of *All* Sports Programming Minutes Among Claimant Groups with Sports programming – Cable and Satellite, 2010-2013**

Year	*Claimant Category*	*Weighted Volume Share in Cable*	*Weighted Volume Share in Satellite*
2010	Canadian	0.22%	n/a
	CTV	17.87%	5.63%
	Program Suppliers	45.75%	20.26%
	PTV	0.96%	n/a
	JSC	35.20%	74.11%
	Total	100.00%	100.00%
2011	Canadian	0.20%	n/a
	CTV	15.36%	4.32%
	Program Suppliers	51.61%	16.86%
	PTV	2.34%	n/a
	JSC	30.49%	78.82%
	Total	100.00%	100.00%
2012	Canadian	0.07%	n/a
	CTV	19.63%	3.02%
	Program Suppliers	39.50%	16.62%
	PTV	4.94%	n/a
	JSC	35.86%	80.37%
	Total	100.00%	100.00%
2013	Canadian	0.03%	n/a
	CTV	37.14%	4.29%
	Program Suppliers	50.75%	13.35%
	PTV	0.40%	n/a
	JSC	11.68%	82.36%
	Total	100.00%	100.00%
All Years	Canadian	0.06%	n/a
	CTV	31.67%	4.37%
	Program Suppliers	48.38%	17.00%
	PTV	1.40%	n/a
	JSC	18.50%	78.63%
	Total	100.00%	100.00%

21. Overall, during 2010-13, JSC sports programming constituted 18.50% of all retransmitted sports programming on cable systems and 78.63% of all retransmitted sports programming on satellite carriers. Sports programming within the Program Suppliers category represented almost half of sports programming retransmitted by cable systems (48.38%) and 17.00% of sports programming retransmitted by satellite carriers. Finally, overall, CTV represented 31.67% of retransmitted sports programming carried by cable systems and 4.37% of sports programming retransmitted by satellite carriers.

22. Based upon my review of programming carried on broadcast stations retransmitted by cable systems and satellite carriers over 2010-13, it is my opinion that aggregating Allocation Phase categories by program type rather than the current approach of self-organized claimant groups would unnecessarily increase administrative costs. Therefore, there is no need to change the Allocation Phase Claimant Group approach. That approach, however, requires refined definitions of program categories, particularly with regard to sports programming, whose market-based definition may be broader than has been applied in royalty distribution proceedings.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct, and of my personal knowledge.

Executed this 13th day of March, 2020, at Washington, DC.

Jeffrey S. Gray, Ph.D.
President, Analytics Research Group, LLC

EXHIBIT C

Before the
Copyright Royalty Judges

In re	
Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims	**DOCKET NO. 19-CRB-0014-RM**

DECLARATION OF HOWARD HOROWITZ

I, Howard Horowitz, hereby state under penalty of perjury that:

1. I am over eighteen (18) years of age and the Founder and Chief Executive Officer of Horowitz Associates, Inc. ("Horowitz Research"), a firm based in New York specializing in market research since its inception in 1985.[1] I have been retained by the Motion Picture Association, Inc. ("MPA") to serve as a consulting witness in the captioned consolidated proceedings. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. In the Copyright Royalty Judges' ("Judges") *Notice Of Inquiry Regarding Categorization Of Claims For Cable Or Satellite Royalty Funds And Treatment Of Ineligible Claims*, 84 Fed. Reg. 71852 (December 30, 2019) ("Notice"), the Judges recognized that the categorization of claims for purposes of Allocation Phase proceedings has historically been determined by stipulation, and has not been based on a finding by the Judges. *See id.* at 71852. The Judges further observed that "there may be reasonable concerns if the effect of the stipulated categories is to aggregate programs within categories in a manner that is inconsistent with the cable system operators' usual decision making process," and inquired regarding "the merit of aggregating the Allocation Phase categories by program type rather than by claimant groups." *See id.* at 71853.

3. In light of the Judges' questions in the Notice, counsel for MPA asked Horowitz Research to conduct one-on-one interviews with experienced cable programming executives in order to gather information regarding (1) how cable system operators ("CSOs") categorize the programs that they carry on out-of-market broadcast stations (*i.e.*, distant signals); and (2) whether the manner in which programs have been historically aggregated within categories in Copyright Royalty Board ("CRB") proceedings is consistent with CSOs' decision making process.

4. Horowitz Research interviewed ten cable system executives who are responsible for programming decisions for their respective systems. The self-qualifying executives' titles were Director of Content Acquisition, Senior Vice President of Programming, Vice President of

[1] A description of my background and experience, as well as a recent copy of my *curriculum vitae*, were included with my written testimony submitted in Docket No. 14-CRB-0010-CD (2010-13), corrected April 25, 2017.

Programming, SVP/General Manager, Vice President of Marketing, Chief Administrative Officer, Head of Content Acquisition, Video Product Manager, and two Principals. The executives represented a mix of small, medium, and large cable systems. Horowitz Research assured the cable executives interviewed that their names and personal information would be kept confidential, and that the information gathered from the interviews would be reported only in an aggregate form. Almost all of the executives interviewed had between 20 to 30 years of industry experience. Each interview was approximately 30 minutes in duration and was conducted during February, 2020. The interviews were conducted for Horowitz Research by Sue Panzer, a seasoned cable industry executive with over 35 years of experience.

5. Horowitz Research asked the cable system executives about what factors they considered with respect to programming when making decisions to select which distant signals to carry. Factors that the cable system executives described as driving their distant signal programming decisions were subscriber demand (*i.e.*, content that their subscribers might find valuable), ratings, cost, legacy carriage (*i.e.*, what has been historically carried), and a sense of what the market can bear.

6. When the cable system executives were asked about the types of programming on distant signals they were interested in bringing to their systems, they mentioned categories of content such as news, sports, syndicated series, movies, and religious programming. As to how cable system executives thought about sports programs on distant signals, they thought about **the full breadth of available sports content** carried by the stations. The executives indicated that, in making their distant signal programming decisions, they did not distinguish between live team sports versus other sports, or network versus non-network sports, as such programming is distinguished the CRB proceedings.

7. During the interview, the cable system executives were read the Claimant Group definitions adopted by the CRB for the recent 2010-13 Cable Allocation Phase proceeding, Docket No. 14-CRB-0010-CD (2010-13) ("CRB Categories"),[2] and asked whether they understood these CRB Categories and the types of programs that fell within them. Horowitz Research also asked each cable system executive to identify the specific CRB Categories within which they thought non-team sports programs such as tennis, golf, and NASCAR belong. The executives said they understood the CRB Categories. However, as to the categorization of the non-team sports programs, seven out of the ten cable executives responded that these non-team sports programs belong in the Joint Sports Claimants category, and three executives responded that these non-team sports programs belong in the Commercial Television Claimants category. None of the cable system executives interviewed placed non-team sports programs in the Program Suppliers category.

8. Cable executives' confusion over the categorization of non-team sports programming based on the CRB Categories' definition underscores the reason for separating Other Sports programming from live team sports programming when Horowitz Research

[2] Horowitz Research omitted the CRB Claimant Group definitions for Music Claimants and National Public Radio when reading the CRB Categories to the cable system executives, since these category definitions are not based on program genres.

conducted its cable operator survey, which I submitted as part of my direct testimony in Docket No. 14-CRB-0010-CD (2010-13).

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct, and of my personal knowledge.

Executed this 12th day of March, 2020, at Washington, DC.

Howard Horowitz
Horowitz Associates, Inc.