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OF COPYRIGHT

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May 31, 1996

Dr. James H. Billington
Librarian of Congress
Library of Congress
Washington DC

Re: Copyright Arbitration Royalty Panel
Cable Royalties for the Years 1990-92

Dear Dr. Billington:

Pursuant to §251.53 of the Copyright Arbitration Royalty Panel Rules and Procedures the Copyright Arbitration Royalty Panel presents its majority report signed by Mel R. Jiganti, Chairperson and Ronald P. Wertheim, Arbitrator. Also attached is the dissent signed by John B. Farmakides, Arbitrator.

I hereby certify that the record, to my knowledge, is in accordance with the attached docket. As chairperson of this Panel, I am directing the Copyright Office to deliver a copy of this determination to all parties participating in the proceeding.

The entire Panel wishes to express its appreciation to the Library of Congress and its most accommodating personnel for their cooperation in producing this report.

Sincerely,

Mel R. Jiganti, Chairperson

MRJ/cbs

I.

BACKGROUND

Pursuant to Section 111(d)(3) of the Copyright Act, as amended,[1] this Copyright Arbitration Royalty Panel ("the Panel") was appointed to distribute approximately $500 million in royalty fees paid in the years 1990-1992 by cable systems for the benefit of copyright holders. The cable systems paid this "compulsory" licensing fee for retransmitting "distant signals" of "non-network" television programs. The shorthand generic term "distant signal" is used to describe those three concepts. Those terms will be explained.

There are three interrelated components in the television industry:

1. Cable Systems - Cable systems retransmit the distant signals and pay compulsory license fees to the Copyright Office. Cable systems deliver the familiar array of cable channels to their subscribers for a monthly fee. Cable systems do not produce their own programs. The programming they deliver comes from two sources: (1) broadcast stations; and (2) cable networks. Cable systems receive approximately 95% of their revenues from subscribers.
2. Broadcast Stations - These stations deliver the distant signals which cable systems retransmit.

These are the over-the-air television stations and consist of four broad categories that are significant in these proceedings: (1) the network stations, CBS, NBC and ABC, which operate through their local affiliates; (2) independent television stations which include the three original superstations, WTBS, WGN and WWOR, four other superstations (superstations deliver their signal by satellite), and all other independent television broadcast stations; (3) public broadcasting stations; and (4) Canadians (the Mexicans are not a party to this proceeding). Cable systems have a right to retransmit all of these broadcast signals to their subscribers. For the exercise of that right, they must pay a "compulsory" licensing fee, i.e., a fee mandated by Congress, for the non-network distant signals they retransmit. Broadcast stations receive their revenues from advertising. There are approximately 1500 broadcast stations in the United States.

3. Cable Networks - These are cable channels such as ESPN, TNT and CNN that sell their programming to cable systems. They do not provide distant signals and do not pay compulsory license fees. While cable networks are not directly involved,

cable networks are significant to an understanding of the television market. They are also significant because many of the aspects of the cable network market are analogous to the broadcast station market. Approximately 35-40% of the cable networks' revenues are obtained from affiliate fees paid by cable systems. The balance is obtained from advertisers.

For a rudimentary understanding of this industry, there are a few aspects that should be pointed out. When a cable system retransmits a broadcast station's programming, the Copyright Act requires that it take the entire signal from the broadcast station for six month periods. That means if a cable system wishes to broadcast the programming on WGN, it must accept the entire signal of WGN and all its programming and not merely the Chicago Bulls basketball games or a particular syndicated game or talk show. Equally significant, the cable system may not alter the signal that it retransmits. That is, it takes the entire signal, including commercials and everything else. It may not insert its own commercials or other material. The broadcast station therefore loses nothing by the retransmission by a cable system.

The compulsory licensing fee is paid by cable systems only for "non-network" "distant signals". There are reasons for this and it relates to the concept of copyright.

The copyright holder, such as the owner of a movie or sporting event, is entitled to be compensated for the publication of its work. The copyright holder negotiates with a network broadcast station. The copyright holder who negotiates with the networks, CBS, NBC, ABC, presumably agrees to have its work transmitted to the entire country because the networks, through their affiliates, cover the entire country. The same does not hold true for independent broadcast stations. Their broadcast area is considered by the Federal Communications Commission ("FCC") to be 35 miles from their station. Therefore, the copyright holder agrees to and is compensated for, having its work transmitted only in that limited area. To the extent that a cable system is beyond that area and retransmits the broadcast signal, the copyright holder is not being compensated. This occurs, for example, when a cable system in Princeton, Illinois, more than 35 miles from WGN, the broadcast station in Chicago, retransmits the WGN signal and is required to pay a compulsory royalty. The WGN signal, being retransmitted in Princeton, Illinois, is what is referred to as a "distant signal." The cable system is required to pay the compulsory license fee for that uncompensated retransmission of WGN beyond the 35 mile area. It is those distant fees that are

being allocated to the copyright holders in these proceedings.

There is a significant qualification to the above and it concerns broadcast network stations. Network stations operate through their affiliates. Network affiliates broadcast not only the programming from the network but they also broadcast their own locally produced programming such as news and other programs in addition to the national network programming. Only "non-network" programming is compensable. To accommodate this situation, where the network affiliate broadcasts both compensated and uncompensated types of programming, Congress has adjusted the compulsory license fee to approximate the amount of locally produced programming at one quarter. The Princeton station in the above example would pay a compulsory license fee at a rate of 1.0 for imported independent stations and only 0.25 for the network station. These rates are prescribed by statute and are referred to as "distant signal equivalents." The only proper claimant in this proceeding would then be the holder of the copyright for the programming that was locally produced by the affiliate.

Before we become more specific in considering the law and the parties' contentions, the following statistics may give a better overview of the universe of royalty fees collected for non-network distant signals. There are over 13,000 cable systems. The cable systems are divided into categories by

size and are referred to as Form 1, Form 2 and Form 3. Sixty-two percent of the systems, the smallest ones, are Form 1 but they contribute 0.3% of the total royalties collected. The 2,801 somewhat larger Form 2 stations contribute 2.6%. The remaining 2,236 largest systems, Form 3, contribute 97.2%. The vast majority of the evidence in this case will refer to Form 3 systems. Approximately 35% of the cable systems have 54 or more channels and 60% have between 30 and 53 channels. The remaining 5% have less than 30 channels. In the second half of 1992, 2,242 cable systems carried

approximately 3) distant signals each, for total of 7,377 distant signals. The following chart lists the sources of those distant signals:

	Instances of Carriage 1992	
	Number	%
Original Superstations	3,787	51.3%
WTBS	2,086	28.3
WGN	1,234	16.7
WWOR	467	6.3
Other Superstations	276	3.7%
WPIX	133	1.8
WSBK	84	1.1
KTLA	32	0.4
KTVT	27	0.4
All Superstations	4,063	55.1%
Other Independents	1,131	15.3%
Network Affiliates	1,559	21.1
Educational	533	7.2
Canadian	89	1.2
Mexican	2	0.0

The basic royalties collected from the distant signals are as follows:

The Source of Basic Royalties by Type of Distant Signal

	Basic Royalties 1992	
	Amount	%
Original Superstations	$50,893,371	75.0%
WTBS	30,501,138	45.0
WGN	13,872,980	20.4
WWOR	6,519,253	9.6
Other Superstations	3,431,850	5.1%
WPIX	1,669,761	2.5
WSBK	1,218,855	1.8
KTLA	386,867	0.6
KTVT	156,367	0.2
All Superstations	54,325,221	80.1%
Other Independents	8,137,902	12.0%
Network Affiliates	2,615,204	3.9
Educational	1,423,933	2.1
Canadian	1,337,176	2.0
Mexican	3,169	0.0
All other signals	$13,517,384	19.9%
Total	$67,842,605	100.0%

While superstations dominate the carriage of distant signals and the revenues generated, another statistic gives a relationship between the distant signal market and the cable network market. In 1992, cable systems paid $185 million in compulsory license fees[3] for the carriage of approximately 750 distant signals. By contrast, 15 cable networks were paid fees of $1.454 billion by cable systems.[4] As one witness testified, while the cable royalties dollar amount is large, it is a small percentage of program revenues and a small percentage of what drives the decisions of cable system programmers.[5]

II.

THE CLAIMANTS

There are approximately 600 claimants. They have traditionally divided themselves into six distinct groups. In this proceeding, referred to as a Phase I proceeding, the Panel will allocate a percentage of the fund to each of these groups. It will then be the task of the individual groups to divide their share of the total fund among each of the individual claimants in their group. That is referred to as Phase II. While there have been five contested proceedings since 1978 involving the Phase I aspect, with a single exception, the parties have been able to agree on the allocations to the individual claimants in the Phase II aspect.

The following are the Phase I program category definitions, as stipulated by the parties, with some commentary by the Panel in brackets:

> "Program Suppliers." [sometimes referred to as MPAA and Syndicated or generically as Syndicated] Syndicated series, specials and movies, other than Devotional Claimants programs as defined below. 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. 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 video shows, cartoon shows, "PM Magazine," and locally hosted movie shows. [Syndication refers to selling programming on a market-by-market basis to broadcast television stations in the United States. "Off-network" syndication refers to programming syndicated after having first appeared on a network. "Cheers" and "Roseanne" are examples. "First run" syndication refers to programs first appearing in syndication, such as talk and game shows.[4]]

"Joint Sports." [sometimes referred to as JSC] Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.

"Commercial Television." [sometimes referred to as National Association of Broadcasters ("NAB") or "local" or "news and public affairs" or "station produced"] Programs produced by or for a U.S.

commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart (3) of the "Program Suppliers" definition.

"Public Broadcasting."[sometimes referred to as "public television," "PTV," or "non-commercial"] All programs broadcast on U.S. noncommercial educational television stations.

"Devotional Claimants." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

"Canadian Claimants." All programs broadcast on Canadian television stations except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports; and (2) other programs owned by U.S. copyright owners.

III.

CHRONOLOGY

The compulsory license fee, paid for retransmission of distant signals, is payable semi-annually by each cable operator to the Copyright Office. It is then distributed on an annual basis to the copyright owners.

Initially, the Copyright Royalty Tribunal ("Tribunal") was established as an independent agency in the Legislative Branch to conduct the necessary proceedings for distributing the royalties collected. This procedure was changed by the Copyright Royalty Tribunal Reform Act.[7] The Act abolished the Tribunal and reassigned its functions to ad hoc Copyright Arbitration Royalty Panels, which are convened and supported by the Librarian of Congress ("Librarian") and the Register of Copyrights ("Copyright Office").

The compulsory license was continued, and, as before, claimants to the annual royalty fund were to negotiate among themselves and to settle on a pro rata share. If a stipulated settlement was not achieved, the Librarian was authorized to determine whether a dispute among the claimants existed and, if so, to convene a Copyright Arbitration Royalty Panel to resolve it.

At the time that Congress was considering the change to the use of Panels, a proceeding to distribute the cable royalties collected in 1990 had already begun. In light of the imminent passage of the 1993 Act to abolish it, the

Tribunal formally suspended that proceeding. Later, during the initial stages of rule-making on regulations to govern the new Panel proceedings, the Copyright Office determined that matters left pending at the Tribunal would not be taken up where they had been left off, but would have to begin anew.[8] Following this development, the parties agreed to restart the 1990 proceeding only after the final rules and regulations for the Copyright Arbitration Royalty Panels had been issued.

The final rules governing the new Panels were published on December 7, 1994.[9] By Notice issued on December 8, 1994,[10] the Copyright Office publicly inquired as to whether a controversy existed for distribution of the 1990 fund. In addition, in an effort to reduce the existing backlog of potential royalty fund proceedings, the Office also inquired as to whether the 1990 proceeding should be consolidated with other cable royalty funds collected in subsequent years.

The Copyright Office found that while the consolidation of three funds represented an unprecedented distribution, it was both manageable and cost effective. In order to reduce the existing backlog, it was found that the 1991 and the 1992 cable royalty distributions should be consolidated with the 1990 proceeding. Accordingly, on March 21, 1995, the Copyright Office issued a "Notice on Consolidation of Proceedings, Request for Notices of Intent to Participate, and Precontroversy Discovery Schedule. Distribution of 1990,

1991, and 1992 Cable Royalty Funds."[11] The notice consolidated the proceedings and set out a schedule, providing for the filing of direct testimony, for the completion of a precontroversy discovery period, and for the initiation of the 180-day arbitration period on November 17, 1995.

Six parties indicated their intent to participate and to file direct cases: Program Suppliers, Joint Sports Claimants, the National Association of Broadcasters, the Public Broadcasting Service, the Devotional Claimants, and the Canadian Claimants. National Public Radio and the Music Claimants entered into settlements with the other parties and withdrew from the case.

In August, 1995, the parties exchanged their written direct testimony and commenced discovery. A joint request of the parties to delay the arbitration proceeding to December 29, 1995, was granted in part by the Office and an Order issued on November 13, 1995, approving a delay to December 4, 1995.

On November 28, 1995, the Librarian declared the existence of a "Phase I" controversy relating to the distribution of cable royalty fees paid for the years 1990, 1991 and 1992,[12] and named three members to a Panel to resolve it.[13] The proceeding commenced on December 4, 1995 and was scheduled to conclude by June 1, 1996, the statutory

due date by which the arbitrators were to make their report to the Librarian.[14]

On January 30, 1996, the Panel entered an Order extending the due dates for some of the claimants' filings while retaining June 1, 1996, as the final date for the Panel's report.

On February 2, 1996, the direct cases of the six claimants were concluded. On February 23, 1996, by joint agreement, the parties filed a "Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims" relating to "the extent to which Phase I claims are being prosecuted by fewer than all of the claimants whose programs are included within the Phase I program category."[15] The parties defined the categories and urged the Panel to apply the same procedures and approach as used earlier by the Tribunal.

Hearings on the rebuttal cases commenced on March 4, 1996, and concluded on March 22, 1996. On March 29, 1996, the Record was closed. The parties filed Proposed Findings of Fact and Conclusions of Law on April 12, 1996. Reply Findings were filed on April 26, 1996.

IV.

APPLICABLE LAW

The Copyright Act contains but a single sentence to guide the Panel in its ultimate distribution decision:

> The arbitration panels shall act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c).[16]

This was intentional. The House Report accompanying the statute noted:

> The Committee recognizes that the bill does not include specific provisions to guide the [Tribunal or Panel] in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the [Tribunal or Panel] should consider all pertinent data and considerations presented by the claimants.[17]

As already noted, there have been a number of proceedings convened for the purpose of distributing copyright royalties since the advent of mandatory licenses in 1978. In addition, there have been a number of appeals of the Tribunal's awards over the years. Given the statute's direction that this Panel should act, inter alia, on the basis of the prior decisions of the Copyright Royalty Tribunal, those decisions, together with the appellate opinions reviewing them, have provided some guidance to us.

In the 1978 proceeding, the Tribunal considered the above-quoted language and found it meant that the Tribunal "should not confine itself to a single consideration, but must instead take into account all pertinent data, facts and considerations."[18] The Tribunal also found that "no single formula advocated by any party succeeds in taking account of all pertinent data and consideration [sic]."[19] In that first distribution proceeding, the Tribunal announced certain governing principles which have been largely adhered to ever since. Three primary factors identified by that Tribunal were:

(1) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems;

(2) the benefit derived by cable systems from the secondary transmissions of certain copyrighted works; and

(3) marketplace value of the works transmitted.

In addition, two secondary factors were identified:

(1) quality of copyrighted program material; and

(2) time-related considerations.[20]

The Tribunal's adoption of these five criteria was subsequently approved by the Court of Appeals as "a reasonable interpretation of legislation by the agency charged by Congress with its enforcement."[21]

The secondary criteria, time and quality, were given less and less weight by the Tribunal in later proceedings as their deficiencies as measures of distribution became apparent.[22]

As early as 1978, the Tribunal gave "time-related" considerations "very limited weight" compared to the other factors,[33] and also found that "an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming."[34]

The Tribunal in the 1978 distribution proceeding similarly noted "the problems inherent in judging or measuring quality" and it "was not able to accord any significant weight to this factor in assessing most claims."[35] In the 1989 proceeding the Tribunal essentially abandoned the "quality" factor. It explained:

> Quality has been a secondary criterion in the Tribunal's allocation decisions since the first proceeding. Evidence on quality has been received, but ultimately no distribution decision has been made on quality. The reason should be clear. It is a subjective evaluation with serious First Amendment implications.
>
> * * *
>
> In this proceeding and in future proceedings, quality will no longer be a criterion in the Tribunal's distribution because of its conflict with the First Amendment.[36]

In addition, the Tribunal has generally discounted the "harm" criterion from its consideration due to an inability to quantify the evidence submitted on this factor while, at the same time, recognizing its importance.[37] In 1978, the Tribunal concluded that "the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems is of material importance in the distribution of royalty fees."[38] The Tribunal further determined that "most

claimants in varying degrees have sustained harm."[29] The Tribunal in the 1979 proceeding similarly noted that "[t]he record of this proceeding, including proposed findings of several parties, indicates that the 'harm' test is of limited utility in allocating royalty fees among categories of claimants."[30] Finally, the Tribunal most recently (1989), gave Program Suppliers and JSC (but not NAB or PTV) a "credit for harm" but noted that (with respect to Program Suppliers) "quantifiable evidence [of harm] is still lacking."[31]

Given this history, and taking into account the evidence and arguments regarding "harm" which have been presented in this proceeding, we have determined to make explicit what has been implicit since these royalty proceedings were first commenced. In creating the compulsory license scheme, Congress specifically recognized that harm occurs when distant signal are retransmitted without compensation. Experience has demonstrated the difficulty, if not impossibility, of quantifying this factor or of determining which claimants were "harmed" more than others by distant signal retransmissions. Consequently, we have concluded that "harm" should be taken as a given, and we will neither summarize nor address the claimants' arguments in this regard or attempt to grant or deny "credits" for a showing of harm. Instead, all claimants are deemed to have been equally harmed by virtue of their eligibility to make claim to a share of these royalties.

As opposed to the five factors delineated above, the Tribunal instead has consistently placed principal reliance on marketplace factors. In the 1978 proceeding, the Tribunal "decided that it was not the legislative intent of the Act to alter market valuation and return."[32] It "concluded that the allocation must take primary account of market factors in an effort to simulate market valuation."[33] The Tribunal similarly "concluded ... that particular attention should be paid to the benefit and marketplace value criteria."[34]

The courts of appeals have approved of the Tribunal's reliance upon the marketplace standard. In *NAB v. CRT (II)*, the court noted that the "Tribunal should rely, as it has in the past, on marketplace criteria ...."[35] Similarly, in *CBN v. CRT*, the court rejected a challenge to the cable operator survey, explaining:

> [G]iven Congress' evident intent to have the Tribunal operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, see House Report at 89, we find the Tribunal's receptiveness to evidence simulating the commercial attitudes of the "buyers" in this supplanted marketplace to be more than reasonable.[36]

In considering appeals from the 1980 proceeding, the Court of Appeals addressed whether a standard of "changed

circumstances" should govern the Tribunal's proceedings. The Court found:

> [I]t would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of "changed circumstances." ... At the same time, it is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award. But if a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.[27]

* * * *

After reviewing the statute, the Tribunal decisions, the courts of appeals' decisions, and the evidence and arguments before us in this proceeding, we have concluded that "market value" is the only logical and legal touchstone. Cable systems receive their programming from two sources: cable networks and broadcast stations. Cable systems negotiate with cable networks in an open market for programming. Cable systems do not negotiate with broadcast stations because they have a statutory right to retransmit the broadcast station programming and, in exchange for that right, they pay a compulsory licensing fee called a royalty. Conceptually, the factual question we must resolve is, what would the cable system have had to pay and be willing to spend for the broadcast station programming if, in fact, it had been

required to negotiate with the broadcast station in an open market.

To place that conceptual issue in a workable framework, we must construct what has been called in the past -- and what we will call -- a "simulated market." This simulated market looks a great deal like the cable network market, including, most significantly, the fact that cable systems purchase not merely a program, but an entire signal, such as ESPN. Where the simulated market diverges from the compulsory license system, and what we must construct, is the negotiations between the cable system and the broadcast stations because, in fact, none exist. Further, we must hypothesize a situation whereby the cable system negotiates not for a channel, such as WTBS or TNT, but rather for an entire program category, such as sports programming, movies or public broadcasting programming, on a proportional basis. Ultimately, the question is, what would the cable system operators have had to pay in an open market for the sports, movies and other categories of programming that existed in the years 1990 through 1992?

Much of the evidence in this proceeding consisted of statistics and economic analyses providing the seeming comfort of categorical numbers. In the end, however, there is no mathematical or mechanical solution to the problem. Just as judges or jurors decide the value of the benefit of the bargain in a breach of contract case, or the value of a

trademark in a trademark infringement case, or the value of pain and suffering in an injury case, we must determine the market value of the six categories of programming at issue here. The simulated market is, by definition, mythical and imperfect. So too must be our assessment.

Before moving on to a recitation of the evidence introduced by each claimant group, and their respective arguments in support of their own position and in opposition to the other claimants' positions, we must comment on the sheer mass of materials we have before us. This proceeding has generated several hundred pages of preprinted testimony, well over 300 hours of hearings, and a transcript over 12,000 pages. The parties have each submitted proposed findings of fact and conclusions of law as well as "reply" findings and conclusions. The briefs alone run to hundreds of pages.

Given this quantity of material, it would be impossible to reiterate every item of evidence, every argument and every response thereto. Nonetheless, we have made every effort to present a fair and comprehensive summary of the record that is now before us. All of the briefs have been read and reread with great care and we have given serious consideration to each party's claim, evidence, and arguments. We have attempted to fairly summarize and respond to the major arguments presented in each party's proposed conclusions of law and the replies thereto.

V.

ANALYSIS AND AWARD

A. METHOD OF PRESENTATION

In this section of the opinion, the Panel will present facts in addition to those provided in the "Background" section that are relevant to the Panel's determination. The centerpiece of the Program Suppliers' case is the data from the Nielsen survey. They also place significance reliance on the Besen study. The centerpiece of the cases presented by JSC, NAB, PBS and the Devotionals are the Bortz surveys. We will present all relevant facts as to these major surveys that are common to most claimants and make observations regarding the significance of each of them. Following that, we will analyze each claim in light of those surveys and the other significant evidence the parties have presented. Finally, after considering each claimant's arguments as to their case (together with the other claimants' arguments in opposition), we will make an award to each claimant. Although there are three years involved, we will make one unified award for the period.

In addition to the basic fund, there are also the Syndex and 3.75 funds that we will briefly comment on at the end of this report. The Canadians settled their claims for 1990 and therefore only make claims for 1991 and 1992.

B. THE NIELSEN STUDIES AS EVIDENCE OF MARKET VALUE

Paul Lindstrom testified as a witness for the Program Suppliers. He is Vice President and Product Manager of Nielsen Home Video Index (NHI).[38] Nielsen is an independent measuring service designed to provide both buyer and seller with unbiased estimates of viewing behavior.[39] NHI was established in 1980 to measure all non-traditional broadcast uses of television including cable, pay, VCR, and video games.[40] Nielsen ratings provide an estimate of the television audience size and are a barometer of viewing habits.[41] In 1992, advertisers spent approximately $30 billion on television advertising time.[42] Advertising rates are calculated on the basis of Nielsen ratings.[43]

Nielsen uses two basic data collection instruments: meters and diaries.[44] The diary is used for recording both the channel the television set is tuned to and viewer demographic information.[45] There are over 200,000 cable households in the diary study.[46] The Nielsen People Meter (the meter) is described by Lindstrom as the heart of the system used to measure viewing on broadcast networks, national syndicated programs and 32 cable networks.[47] The meter is smaller than a cigar box and is placed on each television in the household. The accompanying control unit makes it possible to make electronic entries from anywhere in the room.[48] Each member of the sample household is assigned

a personal viewing button. Red and green lights by each button assist in showing who is watching and who is not watching when the television is on. Additional buttons are labeled for visitors.[49] Other buttons are used to record the age and sex of the viewer.[50] All of the data is stored in the in-home metering system until it is retrieved by Nielsen's computers. The recorded data includes when the set is turned on, which channel is viewed, when the channel is changed, and when the set is off, in addition to the demographic information.[51] This information is processed daily for release to the industry.[52]

The Nielsen rating is a statistical estimate of the number of homes tuned to a program.[53] For example, a 15 rating for a network television program means that 15% of the 93 million U.S. television homes are estimated to be tuned into the program.[54]

For the meter sample, scientific sampling procedures were used to randomly select housing units from the U.S. Census Bureau's count of all housing units in the nation.[55] The meter sample consists of approximately 4,000 metered television households. It is dispersed geographically to facilitate territorial and regional reporting, includes non-telephone as well as telephone households, and both urban and rural households.[56]

The meter sample is a multi-staged, stratified area, probability sample of U.S. housing units, with each housing

unit having an equal chance of selection. In addition, the sample design includes several levels of stratification and uses selection procedures to optimize the desired distribution of the sample at each stage of selection.[57]

Approximately 2,400 (or 60%) of the 4,000 metered households are cable households.[58] Within the last year, Nielsen has decided to increase the sample size from 4,000 to 5,000 households.[59] Each metered home is measured every minute of the day. For this study, simply turning on the television set starts the collection of data.[60] Nielsen itself recommends using the meter as opposed to the diary because the meter operates 24 hours a day, and because it is electronic and does not suffer from any non-response bias.[61]

The 4,000 household sample size is used because the clients feel that 4,000 is an adequate sample size and there must be a trade-off between sample size and cost considerations. As Lindstrom explained, the basic idea rests on the fact that if 20% of all U.S. homes were watching a program, and Nielsen picked 1,000 different samples of the 4,000 households to measure the viewing of that program, ten virtually all of the samples, 995 of the 1,000, would have ratings ranging between 18.2 and 21.8 or ±1.8 rating points of "the real thing." This is adequate for most practical purposes.[62] The Program Suppliers' witnesses acknowledged there is skepticism in the industry about whether the sample is big enough.[63]

Of the 4,000 households sampled, only about 3,500 meters are in use on any typical day because of various types of problems.[64] Only 60% of those 4,000 are cable subscribers; the actual daily sample for the meter study of cable subscribers is 2,100.[65] The meter response rate was about 45%.[66] Lindstrom agreed that it is possible that just 10 households in the Nielsen study could account for 5% of the total viewing minutes.[67]

Four times a year Nielsen's local market service measures all 200+ markets in the country individually. These are called the "sweep" periods.[68] In order to make the viewing more representative, Nielsen began using the meter because it allows a 12 month measurement.[69]

The results reported by Nielsen for distant signal viewing, in percentages, are as follows[70]:

	Total	Local	Movies/ Syndicat-ed	Devo-tional	Sports	Other	Non-commer-cial
'90 Sweeps	100	7	83	1	6	*	4
'91 Sweeps	100	7	82	*	7	1	3
'91 Full Yr.	100	7	83	*	7	*	2
'92 Sweeps	100	8	80	1	6	1	4
'92 Full Yr.	100	8	80	1	7	*	4

Diary-based studies were done for the Program Suppliers for the years 1989, 1991 and 1992.[71] For the years 1990-92 a people meter study was also used.[72]

Lindstrom acknowledged that he could not determine the relative value of sports (or other program categories) simply by looking at the Nielsen study.[73] He also said he had "no way of knowing" whether cable operators would have allocated the royalty pool in accordance with the results of his viewing study, or whether sports programming is worth more to cable operators than the 6% or 7% reflected in the Nielsen study.[74]

Marsha Kessler, a witness for the Program Suppliers, is employed by the Motion Picture Association of America as Vice President, Copyright Royalty Collection and Distribution. Kessler testified that the meter study presented in this proceeding is based on the same television households selected by Nielsen for its national ratings service.[75] The study began with Nielsen selecting a sample of stations from all U.S. stations which were carried as distant signals during the year in question. After selecting the sample of stations, Nielsen categorized, pursuant to Program Suppliers' direction, the non-network programming carried by each sample station into one of the claimant categories and measured the viewing on the stations.[76] Local viewing was excluded from the data base so that the final reports measure only distant cable household viewing of non-network programming.[77]

Robert P. Sieber, the Vice President of Audience Development for Turner Entertainment Networks (TEN),[78] was presented as a witness by the Program Suppliers. TEN owns and operates both cable networks (the Turner Network Television (TNT), the Cartoon Network, Turner Classic Movies) and an Atlanta independent broadcasting

station, WTBS, the most viewed distant signal in the United States.[79] Sieber's primary responsibilities at TEN include programming research. That research provided support for sales of network services to cable systems and advertising sales and promotion. Under Sieber's direction, WTBS became a leader in the development of cable television audience measurement, including the first Nielsen national metered ratings for basic cable networks.[80] This was done for the WTBS superstation in 1981 and for CNN in 1982.[81] Sieber also developed the first daily, overnight national ratings for basic cable.[82]

Sieber explained that ratings measure how well each network attracts viewers from all the subscribers that receive it. Ratings are defined as the ratio of the average audience watching the network to the total number of subscribers who can receive it.[83] Lower ratings equate to a lower subscriber involvement and more limited appeal. Cable operators are much more willing to carry the more heavily watched, higher rated services.[84]

Ratings have become more important to cable operators as channel capacity, compared to the number of programming options, has become more limited.[85] Cable operators may have been willing to try new channels, regardless of their ratings, when capacity was freely available.[86] Unless a channel attracts a fair amount of viewing, it will grow slowly, if at all. Over time, the most heavily watched channels are the ones that are carried by the largest number of systems.[87]

Sieber testified that, as recently as 1980, none of the cable networks or superstations were measured by Nielsen's national metered panel. By 1990, 19 basic cable networks had contracts with Nielsen for national data, with most stations receiving daily "overnight" measurements, in addition to published monthly and quarterly reports.[88] Currently, 32 basic cable networks subscribe to regular, national measurement.[89] Approximately 400 multiple system operators and individual systems subscribe to data including cable audience profile reports with local estimates of cable network performance, diary and meter based special tabulations of local data and national ratings for cable networks.[90] Most of the operators of multiple systems and individual systems receive national ratings data from cable networks themselves.[91]

Sieber acknowledged that in 1990 and 1991, the only distant signal station for which Nielsen regularly reported a national rating was WTBS.[92] In 1992, Nielsen reported a national rating only for WTBS and WGN.[93] This is because money is needed to get reports; a certain amount of national penetration is necessary before ratings can be produced; and ratings must be sufficiently high for Nielsen to report.[94]

For a national cable network to succeed, according to Sieber, it is important to both advertisers and cable systems that the network's programming perform well across individual markets and regions.[95] The challenge is for the programmers to find programming with universal appeal.[96] National advertisers are adverse to clumps of viewing, peaks and valleys on a market-by-

market basis.[97] National ratings establish levels o expectation.[98] National advertisers prefer programs with uniform geographic appeal.[99] Similarly, cable systems expect cable networks to perform as well in their local market as they do nationally.[100]

Sieber explained that while attitudinal studies like the Bortz survey tell us the "why" of subscriber behavior, the ratings tell what the behavior is in some detail.[101] Many new channels, which have been offered based on stated subscriber preference, nonetheless fail.[102] Those that have lasted and prospered are those that have received the largest ratings and those that have attracted the largest audiences.[103]

It is Sieber's opinion that viewing is very important and it is the value that is most important to him as a programmer. The reason that WTBS has been so successful is that it has a tremendously broad distribution and it is watched more than any other distant signal.[104] From Sieber's perspective, there is nothing more important than consumer viewing because it goes to the heart of the situation.[105] It is Sieber's task to develop the biggest audience. To do this, he estimates the ratings of all programs that TEN is about to acquire.[106]

At one time, WTBS had difficulty selling advertising.[107] Sieber ascribed the reason for this to the fact that, until 1981, WTBS did not have ratings sufficient to prove that it was developing the audience advertisers wanted.[108] In addition, WTBS was not considered a national service and there was a limited

penetration nationally.[100] National penetration is still the problem because advertisers have the alternative of the broadcast networks.[110] While WTBS reaches 95% of 60 million cable households, it does not reach a sufficient percentage of the 95 million television households.[111] For a broadcast station carried as a distant signal to a much smaller percentage of the nation's cable households, a national advertiser is not likely to buy advertising.[112]

Sieber further testified that advertising produces 90% of the revenue for WTBS.[113] The other sources of revenue are copyright reimbursement fees and some production revenue from programs produced by WTBS.[114] Sieber acknowledged that although sports had 5% of the viewing on WTBS, he could not say that sports accounted for just 5% of the value of WTBS to cable operators or cable subscribers. Nor could he say that in an open marketplace, in the absence of compulsory licenses, cable operators would make 5% of their payments for WTBS programming for the sports on WTBS. Sieber also acknowledged that there were many other factors that had to be considered besides viewing.[115]

Criticisms of Nielsen Survey

Dr. Peter V. Miller, a professor of communications studies and journalism at Northwestern University in Evanston, Illinois, testified for JSC.[116] Dr. Miller disagreed with Lindstrom's implicit suggestion that there is industry satisfaction with the people meter, and that the task of measuring is straightforward.[117] Dr. Miller testified there are significant,

industry-recognized problems with the meter.[118] A major concern is whether the meter sample is representative of the nation's television households.[119] Although there were significant problems with the diary as well, it cannot be said that the meter system is a better technique.[120]

The meter was controversial and some major clients were opposed to it.[121] They found it wanting in several areas. The fact that Nielsen has a monopoly does not imply satisfaction.[122] With respect to the diary study, there are serious questions of non-response and response error.[123] Despite these problems, the diary data has certain advantages. One advantage is that the diary data is obtained from 200,000 households per year.[124] In addition, the participants are included in the survey for only a week.[125]

Dr. Miller also disagreed with Lindstrom's underlying assumption that, since the television industry relies on Nielsen data in making decisions about purchase and sale of advertising and programming, the meter survey is a good source of information.[126] Dr. Miller points out that the data presented to this Panel by Lindstrom is unlike the data Nielsen normally supplies.[127] Further, cable operators' valuation decisions are quite different from the valuation decisions the television industry makes in reliance on viewing data.[128] Viewing data is relied on by the industry in connection with the sale of advertising time.[129] Advertisers are concerned with who will see their advertisements. However, the cable operators do not sell advertising and they are

concerned only with what will help them attract and retain subscribers.[130]

Other witnesses also criticized the Nielsen viewing study. They included Dr. Michael Salinger, Associate Professor of Economics, Boston University School of Management, who testified that viewing data answer no questions about marketplace value.[131] Dr. David Scheffman, Professor of American Competitive Enterprise, Owen Graduate School of Management at Vanderbilt University, another economist, testified that "the Nielsen numbers are largely, if not entirely, irrelevant."[132] Cable operator Thomas Engel testified the amount of viewing to a signal has nothing to do with the value of the signal to the operator.[133]

Statistician Dr. William Fairley testified that you cannot rely solely on a Nielsen survey to get a good estimate of relative value.[134] Dr. Fairley also explained that non-response bias can be a serious problem in a statistical survey.[135] The rate of non-response for the Nielsen survey, which is in excess of 50% of those initially selected for the sample, creates significant problems of bias.[136] Drs. Miller and Debra Ringold testified that a non-response rate in excess of 50% is typically considered unacceptable in survey research.[137] Bortz testified that cable operators do not rely on any viewing measures, either ratings or the Bortz study, in making distant signal carriage decisions.[138] Tyrgve Myhren explained that the reason viewing of particular distant signals is not important is because a cable operator's goal is to design a channel lineup that has "something for everyone."[139]

Dr. Richard V. Ducey, a witness for NAB, compared certai quantitative evidence which had been introduced in the 1983 proceeding -- the Nielsen study and another entitled the ELRA cable subscriber survey.[140] The 1983 Nielsen figures showed that 7.24% of distant signal viewing was attributable to station produced programming.[141] The 1983 ELRA survey of 1,099 cable subscribers reported that the relative value cable subscribers assigned to station-produced programming was over twice as much, 17.1%.[142] By contrast, syndicated series had a much higher viewing percentage than the relative value assigned by cable subscribers (51.87% of viewing, compared to 15.8% of value).[143]

PARTIES' ARGUMENTS AS TO SIGNIFICANCE OF NIELSEN

The Program Suppliers contend that if an open market existed for distant signal programming, the Nielsen ratings would play a large role in negotiations between distant signals and the copyright owners, between distant signals and cable operators, and between distant signals and advertisers.[144] They emphasize that cable networks and distant signals rely on Nielsen viewing data for information about how subscribers use their programs and to buy attractive programming.[145] In response, other claimants note that the Nielsen data presented to this Panel is not "ratings" data.[146] Some claimants point out that tuning tonnage does not measure rating shares and is not even the same kind of information which is used in the very different broadcast television industry which is driven by advertising.[147] Cable operators, by contrast, are not

permitted to sell advertising on distant signals. Lindstrom himself confirmed that one cannot determine "ratings" from the Nielsen data that was presented in this case.[148] Some claimants emphasize that the Nielsen ratings which are purchased by many multiple system operators and cable systems provide viewing data on cable network audiences; they do not report data on distant signals, where advertising cannot be sold.[149]

Program Suppliers contend the meter improves the information contained in the study.[150] They also point out that the Nielsen viewing results were stable for the years at issue, indicating that viewers' interest remained consistent over time.[151] They further note that there is no correlation between viewing and "tonnage," thus refuting the point that more programming necessarily leads to higher viewing. (Sports in 1992, for example, had a 1% share of broadcasting time yet a 7% share of viewing.)[152]

In summary, Program Suppliers argue substantial weight should be placed on the Nielsen results for two principal reasons: First, because Nielsen measures actual viewer behavior based on the actual distant signal choices available to subscribers; and second, in a simulated open market, the Nielsen data would be given significant weight in deciding value.[153] Significantly, Program Suppliers do not argue that this Panel's allocations should match precisely the Nielsen figures. Rather, their position is that while viewing "is not the only factor, ... it appears to be a very important factor closely connected with value."[154]

The other claimants contend reliance on the Nielsen data leads to absurd results. Examples include the fact that, according to the Nielsen survey, "infomercials" were as valuable as all the Chicago Bulls games, since both attracted about the same number of total viewing minutes.[155] Further, the old syndicated series of "Tom & Jerry," "Andy Griffith," and "Little House On The Prairie" together accounted for as many viewing minutes as all of the sports programming on all the distant signals.[156] Finally, the Nielsen survey indicated that syndicated series were more valuable than movies, and should, by themselves, receive half the entire royalty pool. Stated differently, the use of viewing shares to determine relative market value overcompensates Program Suppliers by hundreds of millions of dollars, at the expense of JSC, for programming that is cheaply available in the marketplace.[157] Other claimants contend the irrelevancy of viewing minutes to cable operators is illustrated by the fact that the Nielsen ratings are extraordinarily low for specialty channels such as CNN, Discovery, and Arts & Entertainment, channels for which cable operators pay substantial license fees.[158]

According to the Nielsen critics, the meter study was not an improvement on the "abandoned" diary study. The multitude of criticisms leveled against the meter (and some of the Program Suppliers' responses) include the following:

-- it gave undue credit to a handful of households;[159] (Program Suppliers respond that the diary sample is designed to give local market ratings and it is necessary to obtain a

sufficient number of respondents in each market. National ratings do not present local market information and can be done with a much smaller sample.)[160]

-- measured tuning rather than viewing;[161] (Program Suppliers note the modern "channel surfing" phenomenon and claim tuning may be the only means to record the type of customized viewing that has become more prevalent today.)[162]

-- failed to identify which programs were actually broadcast at each time, sometimes attributing portions of a sporting event, for example, to the programming that was scheduled to follow the event;[163]

-- failed to measure either the benefits to cable operators from distant signal retransmission or the marketplace value of the retransmitted programming;[164]

-- failed to measure the reasons that people subscribe to cable, the reasons that people maintain their subscriptions, or the benefit of distant signal programming in terms of attracting and retaining subscribers;[165]

-- has an unacceptably high nonresponse rate;[166] (Program Suppliers respond by pointing out that the nonresponse rate used by the other claimants improperly combines the actual nonresponse rate with the number related to unusable meter information.[167] JSC replies that even a 45% nonresponse rate is well below the acceptable level.[168] In addition, Program Suppliers emphasize, nonresponse is a problem only if nonrespondents differ from respondents in materially important ways. Here, there was no

showing of what underrepresentation occurred or whether it affected the relative shares.)[169]

-- made no distinction among differences in intensity of viewing;[170] and

-- was not designed to simulate a marketplace or to provide relative marketplace valuations.[171]

The Devotionals also contend that the Nielsen statistics are irrelevant to their claim because their stations carry no advertising.[172]

OBSERVATIONS CONCERNING THE NIELSEN SURVEY

There are two issues involving the Nielsen statistics. First is their accuracy in the sense of whether they represent the correct percentages of viewing in each of the categories. Second, if they do indeed accurately portray those statistics, what do those statistics indicate with respect to market value?

With regard to accuracy, the Nielsen critics say that diary method is superior to the meter because of the much larger number of households in the diary. We are inclined to believe that for a national survey our view is fairly summarized by Lindstrom's observation that the meter is adequate for most practical purposes. We are also unpersuaded that the criticisms involving miscategorization and nonresponse rate have any real measurable effect on the validity of the results. This is particularly so in light of the fact that none of the witnesses were able to

articulate what effect, if any, these alleged problems had on the survey results.

Dr. Peter Miller, in testifying for the JSC, says the Nielsen figures should be looked at with some degree of caution.[173] He says the numbers could be biased in one direction or another but that this cannot be quantified[174] and that we should take those numbers with "a grain of salt."[175] We do accept those numbers in that vein. We see no need to engage in a lengthy discussion about the Nielsen methodology in light of the fact that we accept these numbers merely as a reference point and not as an absolute value. Also, in addition to being unable to quantify their various criticisms, the claimants who dispute the Nielsen survey's accuracy present no alternative evidence as to viewing.

The next question is, what do these numbers reveal about market value? Program Suppliers acknowledge that the Nielsen study does not measure value; rather, it measures tuning. Program Suppliers point out they did not ask Nielsen to interpret what the results meant, but left that to the other witnesses and the evidence.[176] Program Suppliers agree that the Nielsen figures are not the sole determinant of market value.

Certainly viewing is a significant factor in value. Cable networks and broadcast stations, which together provide all of the programming for cable systems, use Nielsen ratings in pricing their programs to cable systems and advertisers. Measured against these facts is the contention by the proponents of the Bortz surveys that while advertising is significant to those industries, it is not

important to cable systems. Cable systems, they argue, care abou attracting subscribers and viewing does not translate into subscribers. We find that argument of value but not totally persuasive. It is disingenuous to say that the cable system is interested only in attracting subscribers but is totally unconcerned with whether or not the subscriber, in fact, watches the programming. As was stated by Sieber, who testified for the Program Suppliers, cable system operators are more willing to carry the more heavily watched, higher rated services. Cable system operators receive Nielsen data in a variety of ways.

Proponents of the Bortz surveys say that the Nielsen statistics obviously are going to favor Program Suppliers because syndicated series and movies have, by far, most of the time in programming available on distant signal. To which the Program Suppliers reply, that is an indication of market value. We find that while this is true, we certainly cannot equate reruns of "Tom and Jerry," "Andy Griffith," and "Little House on the Prairie" as being equal in value to all the distant signal sports programming, as the viewing figures standing alone would indicate.

In conclusion, we accept the Nielsen data for what it purports to be, a survey of actual conduct with adequate accuracy for the larger claimant groups in particular. We cannot quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant when weighed with all other factors.

C. THE BORTZ SURVEYS AS EVIDENCE OF MARKET VALUE

Paul I. Bortz testified before the Panel on behalf of the JSC. Bortz is the President of Bortz & Company, Inc., an economic, financial and market consulting firm which serves clients in the media, sports and entertainment industries.[177]

The purpose of Bortz' testimony, as characterized by the witness, was to discuss the value that cable operators placed upon different types of distant signal non-network programming during the period 1989 to 1992.[178] He compared the methodology and results of a survey his company conducted in 1989 with a similar 1992 survey. In each of the two surveys, a random sample of nearly 200 Form 3 cable operators were asked to assess the relative value of the various types of non-network programming on the distant signals that they actually carried.[179] Specifically, the operators were asked to allocate a fixed dollar amount to each of the program categories.

Bortz explained that cable programming "carriage" decisions are made based on two primary determinants of value: (1) the ability to attract and retain subscribers; and (2) programming economics. The first factor is derived from the basic economic fact that cable television systems derive approximately two-thirds of their revenues directly from basic (and expanded basic) subscription fees.[180] As a result, the value that cable operators attach to most programming depends primarily on its ability to attract and retain subscribers. The second factor, programming economics,

involves the per subscriber license fee which cable operators pa to cable networks for each subscriber to which the service is available and corresponding copyright fee.[181]

The Tribunal in the 1989 proceeding used the 1989 Bortz survey as "a key part" of its determination,[182] but criticized certain elements of the study. The 1992 Bortz study attempted to improve its methodology in response to the Tribunal's comments.[183] The Tribunal expressed concern regarding the qualifications of approximately 11% of the 1989 survey respondents and indicated uncertainty with respect to the involvement of the respondents in the program budgeting process.[184] In response to these concerns, the 1992 Bortz survey modified the initial respondent qualifying question to ensure that the respondent was the person "most responsible for programming decisions at the cable system."[185] The Tribunal also expressed a desire for enhanced programming definitions.[186] The 1992 Bortz survey modified the category definitions to conform more closely to the Tribunal's definitions and to attempt to further aid the respondents in distinguishing among the categories.[187] In response to the Tribunal's concern regarding the short time period allowed for the respondents to consider their allocations, the 1992 question was modified to attempt to ensure that respondents considered the question in a more formal manner by writing down the programming categories, and then think about their relative value and their estimates.[188] Bortz also testified that he believes responses to the survey

"reflect dominant impressions of programming value formed by respondents in their ongoing decisionmaking processes...."[189]

Results of Survey

The Bortz survey respondents were asked which types of programming broadcast by the station were "most popular" with their subscribers. Their responses for 1989 and 1992 are contained in the following table:

DISTANT SIGNAL PROGRAMMING POPULARITY AMONG SUBSCRIBERS: 1989-92

	1989	1992
Category	Percent Mentioned as "Most Popular"	Percent Mentioned as "Most Popular"
Live professional and college team sports	73.1%	76.2%
Movies	44.6	41.0
Syndicated shows, series and specials	30.1	23.4
News and public affairs programs	6.4	19.0
PBS and all other public television programming	1.1	7.3
Devotional and religious programming	1.0	2.1
Canadian programming	0.2	1.1
Other	5.6	7.9

Respondents were also asked if they used any distant signal programming in advertising and promotional efforts. Approximately 96% of the systems that promoted distant signal programming during 1992 featured sports (compared to 90% in

1989).[190] Movies declined from 73% in 1989 to 50% in 1992.[191] The respondents were also asked to rank the relative importance of the distant signal non-network programming types they feature in advertising/promotional campaigns. Sports was considered most important to feature by about two-thirds of the systems in both 1989 and 1992.[192]

As a final question, the cable operator respondents were asked to allocate a fixed program budget among the different categories of distant signal programming. Five to seven program categories were used, depending upon whether the respondent's cable system carried distant PTV or Canadian stations.[193] For 1992, the categories were:

Movies.

Live professional and college team sports.

Syndicated shows, series and specials distributed to more than one television station.

News and public affairs programs produced by or for any of the commercial stations listed, for broadcast only by that station.

Devotional and religious programming.

PBS and all other programming broadcast by the noncommercial station or stations carried.

All programming broadcast by the Canadian station or stations carried.[194]

The allocation question in 1992 read as follows:

4. Now, I would like you to estimate the <u>relative</u> value to your cable system of each type of programming actually broadcast by the stations I mentioned during 1992, other than any national network programming from ABC, CBS and NBC. That is, how much do you think each

such type of programming was worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers. We are only interested in U.S. commercial station(s) _____, U.S. non-commercial station(s) _____, and Canadian station(s)_____.

I'll read all the program types that were broadcast by these stations to give you a chance to think about them; please write the categories down as I am reading them. [READ PROGRAM TYPES IN ORDER OF RANDOM SEQUENCE NUMBER.) Assume you had a fixed dollar amount to spend in order to acquire all the non-network programming actually broadcast during 1992 by the stations I listed. What percentage, if any, of the fixed dollar amount would you spend for each type of programming? Please write down your estimates, and make sure they add to 100 percent.

What percentage, if any, of the fixed dollar amount would you spend on (READ FIRST PROGRAM TYPE)? And what percentage, if any, would you spend on (READ NEXT PROGRAM TYPE)? (COMPLETE LIST IN THIS MANNER).

Now I'm going to read back the categories and your estimates. (REREAD CATEGORIES AND RESPONSES IN RANDOM SEQUENCE ORDER TO ALLOW RESPONDENT TO REVIEW THE ESTIMATES.)

Are there any changes you would like to make? (RECORD ANY CHANGES BY CROSSING OUT ORIGINAL RESPONSE AND WRITING IN REVISED RESPONSE NEXT TO IT. PERCENTAGES MUST STILL ADD TO 100 PERCENT; PROMPT RESPONDENT IF THEY DO NOT.)

Thank you for your time and cooperation.[195]

The Bortz surveys showed that cable operators would have allocated their distant signal program budgets as follows:

	Percentage Allocated[196]			
	1989	1990	1991	1992
Live professional and college team sports	34.2%	37.2%	36.3%	38.8%
Movies	31.2	30.1	25.7	25.6
Syndicated shows, series and specials	16.9	14.5	15.6	16.0
News and public affairs programs	11.8	11.9	14.8	12.4
Devotional and religious programming	4.3	3.6	4.3	3.9
PBS and all other public TV programming	1.3	2.7	2.9	3.0
Canadian programming	0.2	--	0.5	0.3
TOTAL	99.9%	100.0%	100.1%	100.0%

Bortz drew three primary conclusions from the 1989 and 1992 survey results. First, sports programming was the distant signal programming type most highly valued by cable operators. Second, the disparity between the value of sports programming and the value of movie and syndicated programming increased from 1989 to 1992. Finally, in an open market where compulsory licensing did not exist, cable operators would have spent more than one-third of their 1989 to 1992 distant signal program budget on sports programming.[196]

Bortz acknowledged that the surveys did not ask the respondents to identify what they actually allocated during the period in question;[197] that the survey does not consider free, open market negotiation and does not consider the seller's side;[198] that system operators do not have to make a decision about dividing their limited resources among the various program categories that are defined in this proceeding;[199] and that the Bortz surveys do not look at actual behavior or actual budget allocation.[200] Bortz also testified that his figures were merely an estimate and that it is a "good" estimate if it is within 2-4 percentage points.[201]

James Trautman, Vice President of Bortz & Co.,[202] testified for the JSC, and described the methodology used in the 1992 Bortz survey. A stratified random sampling approach was used with the stratification based on copyright royalty payments.[203] Only Form 3 systems were surveyed.[204] More systems with large royalty payments were sampled compared to systems with small royalty payments.[205] Burke Marketing Research performed the actual telephone survey.[206] Trautman and Bortz oversaw the selection and training of the interviewers.[207] All of the interviewers specialized in surveying professional and managerial personnel.[208] The interviewers were instructed to call back as often as necessary to obtain a completed interview or definitive refusal to cooperate.[209] The interviewers were not told the name of the client or given any information regarding the nature of the study other than that contained on the interview form.[210]

In 1991, 221 questionnaires were administered and the survey was completed for 198 or 89.6%.[211] In 1992, 233 questionnaires were administered and 189 surveys were completed for a response rate for the key valuation question of 76.8%.[212]

Trautman agreed that the Bortz survey deals only with operators and does not study or analyze cable subscribers;[213] he also testified that of the respondents that answered the Bortz survey in more than one year, only 60-70% of those respondents answered within a range of 10% of their previous responses.[214]

A number of witnesses testified that the Bortz approach was the best way to measure the relative marketplace value of the different categories of distant signal programming. Among others, Dr. Joel Axelrod, president of an international market research firm, testified that if cable operators actually had to purchase different categories of distant signal programming, the results would very closely mirror what they have reported here;[215] Dr. Stephen Wildman, an economist and Director of the Program in Telecommunications Science, Management, and Policy at Northwestern University, testified that it makes sense to ask the cable operator how he or she values things rather than looking at a viewing measure;[216] and Dr. Scheffman testified that results in an open marketplace ought to be "very similar" to the Bortz results.[217]

Dr. Salinger testified that the Bortz survey is a close and unbiased estimate of what cable operators would pay in an open market.[218] Dr. Salinger indicated that the correct question for

royalty allocation would have been: "What prices of different types of programs would induce a cable system to purchase the program mix that it actually showed?"[219]

Paul J. Much, a witness for the NAB, is a valuation expert and Senior Managing Director of Houlihan, Lokey, Howard and Zukin, a financial consulting and valuation firm.[220] Much testified that it is appropriate for the Panel to look at the Bortz surveys' measure of cable operators' valuation of program categories to allocate royalties to the various categories.[221]

Much explained that the determination of value in the distant signal marketplace is similar to the task of allocating value to different classes of securities in a corporate acquisition where the total purchase price has already been determined.[222] The standard used is fair market value.[223] That is defined as the price at which a property would change hands between a willing buyer and a willing seller when the buyer is not under any compulsion to buy and the seller is not under any compulsion to sell, and both parties have reasonable knowledge of the relevant facts.[224] Considering the hypothetical willing parties, the determination of fair market value focuses on the economic attributes of the securities to be valued and not the individual motivations of the specific parties who hold these securities.[225] Much testified the valuation which this Panel must perform is similar to forced sale situations because copyright owners may not refuse to "sell" their programs, and the total price the cable operators pay for the distant signals is

fixed.[226] From a valuation standpoint, the relative value of the different categories of programs is driven by the cable operators' assessment of the economic attributes of the programs. According to Much, the allocation of value/royalties confronting this Panel should be made on the basis of the buyers/cable operators' relative valuations of program categories.[227] It would not be appropriate to first try to determine what would take place in a hypothetical open marketplace and then adjust the cable operators survey results to reflect the seller's side.[228]

Much disagrees with the argument that the Bortz surveys are faulty because they do not take the seller's side into account. The seller has to sell the distant signal. He also disagrees because we are only concerned with the relative valuation decision.[229] According to Much, the Tribunal's concerns regarding the seller's perspective do not provide a basis for discounting the Bortz surveys.[230] The Bortz surveys represent the reality of the marketplace.[231]

Criticisms of Bortz Surveys

A number of witnesses testified as to perceived defects in the Bortz surveys.

Dr. Martin Frankel, Professor of Statistics and Computer Information Sysetms, Bernard Baruch College of the City University of New York, testified on behalf of the Program Suppliers. In his opinion, the Bortz surveys are not accurate.[232] They have low reliability and lacked validity. Dr. Frankel used two methods as the basis for his conclusions.

First, he compared the cable systems operators' responses in successive years. He used the 1989 and 1990 survey years because the more recent surveys involved only one-third or one-quarter of the 140 systems included in the prior years' surveys.[233] Comparing the 1989 and 1990 figures, Dr. Frankel was able to attain a quantitative measure of the relative degree of consistency between pairs of values by using the "R-squared" method. Using this method, Dr. Frankel determined that any value less than 0.75 indicates a substantial lack of reliability.[234] The numbers found by Dr. Frankel ranged from a low of 0.014 to a high of 0.165, demonstrating either that the values assigned by operators vary widely from year to year or that the question being used to measure the value of different program types does not have high reliability.[235]

Dr. Frankel tested the validity of the Bortz survey results to determine whether they measure "true value." He did this by comparing the value allocated to PTV programs in the Bortz surveys with the proportion of the royalty payments attributable to the actual carriage of the PTV station.[236] This comparison showed very little correlation between the Bortz responses for PTV and the relative amount of royalties paid for PTV stations.[237]

Dr. John Woodbury, Vice President, Charles River Associates, also testified for the Program Suppliers. He said the Bortz results were not reliable because the operators' responses did not correspond with actual market place behavior.[238] He

believes that surveys which ask how much a person is willing to pay for various goods or services are suspect because the respondents are not required to pay these amounts.[239] Dr. Woodbury used a regression analysis to measure the extent to which the operators' answers corresponded to their actual choices.[240] Using data supplied by Bortz, and programming information provided by Dr. Besen, Dr. Woodbury determined the correlation between the respondent's hypothetical budget and the share of programming for the type of distant signals actually carried.[241] Dr. Woodbury's analysis used the hypothesis that Bortz respondents who gave a high allocation for a program type would carry a proportionately greater amount of that programming than would respondents who had given the same program type a small allocation.[242] For the years 1990 to 1992, Dr. Woodbury found only three of the 13 analyses he performed had any statistical significance.[243] Dr. Woodbury thus concluded there is no relationship between how operators say they would allocate distant signal programming and the choices they actually made.[244]

Dr. Alan M. Rubin, Professor, School of Communications Studies, Kent State University, was another witness for the Program Suppliers. He testified concerning the difficulties he perceived in the Bortz surveys' programming categories.[245] As an example, Dr. Rubin noted that PTV includes documentaries, nature programs, news and public affairs, syndicated series and movies.[246] Yet, in the Bortz surveys, these are all encompassed

by the "PBS" category. Another example involves station-produced programming which typically includes public affairs talk shows, children's programs, news magazine and interview shows, sports, documentaries and specials. However, many of these same types of programs are syndicated shows and are thus in another category.[247] Because of these "category" problems, Dr. Rubin believed there is no consistency in the values assigned by the cable operators in response to the Bortz surveys.[248] Dr. Rubin also criticized (1) the fact that many of the respondents were someone other than the general manager or programming director of the cable system,[249] (2) the fact that the interviews were conducted over the telephone rather than face-to-face,[250] and (3) the use of a "budgeting exercise" rather than asking the respondents to assign a point total or dollar amount to each category independent of the others.[251]

Dr. Rubin disagrees with Bortz' opinion that "value" is measured by the cable system's ability to attract and retain subscribers. Rather, in Dr. Rubin's opinion, the primary reasons people subscribe to cable television are (1) better reception, (2) greater program variety, and (3) more movies.[252] Dr. Rubin also testified that it is the judgment of the subscribers rather than the cable operators that matters. Dr. Rubin believes that if you ignore audience preferences you will go out of business. In a similar vein, Dr. Rubin criticized the Bortz surveys because they do not measure the opinions of the subscribers themselves.[253]

Dr. Gary Ford, professor of marketing at The American University, testified as a witness for the Canadians.[254] In Dr. Ford's opinion, the Bortz surveys have such substantive methodological flaws they do not provide value results regarding the value of programming.[255] It is not possible for the survey respondents to validly answer the key "Question No. 4" when it requires them to aggregate all non-network programming into programming categories which are shown in different amounts on different signals while simultaneously excluding the network programming that falls into those same categories.[256] An example given by Dr. Ford is the following: Assume a broadcast station which includes major league baseball and basketball, as well as movies from the station's own library, other movies, syndicated shows, news and public affairs, and a Canadian program that has international sports as well as major league baseball and National Hockey League games.[257] The survey respondent, during the course of a phone conversation, is expected to weigh and evaluate all this different programming in a short time period. According to Dr. Ford, this is not possible.

Dr. John E. Calfee, also a witness for the Canadians, testified that the Bortz survey is unsuited to assessing the demand for a niche product such as Canadian programming.[258]

Dr. Richard Ducey, a witness for the NAB, did not see any usefulness in comparing a complete channel i.e., Canadian or PTV to a programming category on another channel. Such a comparison

is not a very good measure and does not have good construct validity.[259]

PARTIES' ARGUMENTS AS TO SIGNIFICANCE OF THE BORTZ SURVEYS

The claimants other than Program Suppliers and the Canadians contend the Bortz surveys should be the starting point for the Panel's awards because the survey was designed to and does measure relative marketplace value.[260] Some claimants note it was the perceptions of the cable operators about the value of distant signals which drove their decisions and generated the monies contained in the royalty fund. It is also argued that the Bortz surveys are better suited to addressing real-world considerations, taking into account a host of factors beyond simple viewing data.[261] These claimants further argue if the simulated marketplace involves copyright holders being forced to sell, leaving only the relative price for each category at issue, the record establishes that the "supply" side need not be considered.[262] As Much testified, in forced sale situations, value is determined by the economic attributes of the asset and not the motivations of the particular seller.[263] Program Suppliers respond that the "forced sale" analogy does not work for three reasons: first, it is the antithesis of free market conditions because it does not involve willing buyers and sellers; second, although the royalty fund is a fixed amount, a relative value determination is not limited by the dollar amount of the royalty fund; and third, courts have held that an

"unwilling seller's" actions must be considered in setting a fair market value.[264]

The Bortz-proponents further argue that "value and viewing can move in opposite directions," noting that although the average hourly ratings for network sports programming declined, the value of sports programming, as measured by rights fees, skyrocketed.[265]

As to the validity of the surveys, the Bortz proponents contend the surveys were carefully constructed and properly executed. They say no new substantial criticisms of the survey were raised in this proceeding.[266] Program Suppliers respond by claiming that "old" criticisms have never been rectified.[267]

The Bortz advocates further contend that advertising is of minor importance in the cable marketplace, representing only 5% of cable operator's revenues.[268] Consequently, cable operators rely on market research similar to the Bortz surveys to make decisions.[269] Program Suppliers respond that the Bortz surveys have never been utilized other than for purposes of the distribution of these royalties and that the research referred to concerns subscribers rather than operators.[270] The goal of a cable system operator is not to attract the largest number of subscribers, but to maximize cash flow. This is so even over maximizing profits.

PTV's proposed Bortz "adjustments" will be considered in the section below addressing PTV's claim.

The Program Suppliers also have a multitude of criticisms directed at the Bortz survey. They contend:

-- it relies on "subjective impressions that have no anchor in reality;"[271] (The other claimants respond, in part, that the Bortz survey is not a mere attitudinal survey; that it measures the relative value of components of distant signals that the cable operators have already purchased.)[272]

-- it uses a "fixed" program budget;[273] (In response, the Bortz proponents note that Program Suppliers complained about this in the '89 proceeding, but the Tribunal gave no weight to the objection.[274]

-- it makes no attempt to compare the respondents' actual distant signal carriage behavior with their relative value answers to see if their opinions matched actual behavior;[275] (In response, the Bortz advocates point out that Program Suppliers' witness, Dr. Frankel, is not an expert on the cable industry, was unaware of the various factors which could cause a particular system's answers to change from year to year and thus did not control for any of them.[276] Program Suppliers say this is contrary to the consistency contention: that the Bortz results have remained stable over time despite changes in the industry.[277]

-- it does not consider free, open market negotiation and does not consider the seller's side; (Other claimants point out Much and Drs. Salinger and Scheffman all testified that supply-side considerations are not appropriate for the Panel's task.[278]

The Devotionals also contend the Bortz surveys were "likely" to have taken into account any "supply side" considerations, since the respondents were likely to be aware of the values of program in other markets, and to take that into consideration when responding to the key question.)[279]

-- it does not measure the opinions of the subscribers themselves;[280]

-- the categories are not sufficiently precise.[281]

In response to the various criticisms of the Bortz surveys offered by Dr. Rubin, others respond that Dr. Rubin offered no quantification for any of his complaints; that Dr. Rubin's complaint about the use of a constant sum scale was made and rejected in the '89 proceeding; and, in response to the complaint about the identity of the respondents, note that Bortz testified that marketing managers were among the people at the cable systems most responsible for program budgeting decisions.[282]

Program Suppliers emphasize Dr. Woodbury's analysis which shows no correlation between the Bortz respondents and the actual behavior of the cable operators.[283] Other claimants respond that Dr. Woodbury's very premise -- that viewing or hours shares ought to correlate with value -- is wrong. Therefore, the analysis cannot shed any light on the validity of the Bortz surveys.[284] Program Suppliers say this mischaracterizes the analysis which, in fact, measured whether the Bortz respondents who gave a high value to sports retransmitted a higher amount of sports programming than respondents who gave a low value.[285]

Program Suppliers also point out that the ability of the Bortz respondents to accurately recall their perceptions of relative value is called into question by the fact that one-fifth of the respondents to the 1991 survey failed to notice that they were given the wrong distant signal carriage complement because a signal had been omitted.[286]

Program Suppliers dispute the Bortz proponents' assertion that the economics of the cable business is all about how to gain subscribers and keep them. According to Program Suppliers, almost all witnesses agreed that the economics of the business is about maximizing profits, with the attraction and retention of subscribers being a "subsidiary goal."[287] Bortz addresses, at best, only this subsidiary goal. The other claimants respond that all of the ways cited by the Program Suppliers to maximize profits depend upon the number of subscribers that the system attracts and that no expert criticized the Bortz surveys on this basis.[288] They also point out the cable operator witnesses who agreed with the importance of attracting and retaining cable subscribers.[289]

Program Suppliers further contend "consistency" of results year after year does not show "validity" and that neither Bortz nor the survey proponents has undertaken a test to determine whether and to what extent the Bortz responses match actual behavior. Thus, according to Program Suppliers, it is impossible to determine how closely the opinions would reflect fair market value in actual purchase decisions.[290] Other claimants respond

that numerous experts from a variety of disciplines testified that the Bortz results did have predictive validity and were a good estimate of marketplace value. They also note that because cable operators purchase signals rather than programs or categories of programs, there is no distant signal purchase behavior that anyone could compare with the survey results.[291]

The Canadians argue "numerous" experts testified the survey was simply too blunt and too flawed to measure the value of Canadian programming. (Measuring Canadian value through the Bortz study is likened to weighing a T-shirt on a bathroom scale.)[292] They suggest this point is confirmed by the testimony of Bortz himself who stated that he believed his estimates were good if they were within 2-4 percentage points. According to the Canadians, given the fact that their shares in the Bortz surveys are 0.5% or less, and their claim is for less than 2%, the Bortz survey was simply unable to measure the Canadians' share.[293]

The Canadians also claim the Bortz results are directly contradicted by the royalty data which shows that cable operators actually spend about 2% of basic fund royalties to carry Canadian stations while Bortz predicts the operators would have spent between 0% and 0.6% of their budgets for all of the programming on Canadian stations.[294] JSC responds by noting there is little difference: under the Bortz survey, the Canadians would be entitled to "perhaps as much" as 0.6% of the total royalty pool

while, under the Canadians' own approach, they might be entitled to as little as 0.6% of the total royalty pool.[295]

OBSERVATIONS CONCERNING THE BORTZ SURVEY

The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the same categories we are presented here in the form of claimant groups -- that is, sports, movies, and the others. That is also what the Panel must do. The question then asks the cable system operator what percentage of a fixed dollar amount, "...would you spend for each type of programming?" That question does not take into account the "supply" side of the supply and demand equation in an open market. The question should ask what would the cable system operator have to and be willing to spend. While the operator may be willing to spend a certain amount of its budget for a given category of programming, the market supply may be at odds with what the operator is willing to spend. While this is a significant limitation on our acceptance of the Bortz survey, it is nonetheless focused more directly than any other evidence to the issue presented: relative market value.

There are two other limitations of the Bortz survey. The first involves its execution, which considerably affects the Panel's confidence. In a telephone interview of approximately ten minutes, the cable system operators were asked to configure a market that does not comport with the way programming is handled in their every day business. That is, they were not asked to decide the value of a distant signal station (which they had made an affirmative decision to carry or not carry) but rather to decide the value of individual components of different stations and then aggregate them in a manner they had never seen and, in a relatively few minutes, assign a value to each of those categories. Ironically, what they did in ten minutes is what this Panel is being asked to do after considering hundreds of hours of testimony, 12,000 pages of transcripts and hundreds of pages of briefs. Second, this was a survey of attitudes rather than a survey of conduct. Without contradiction, all of the witnesses say that it is far better to survey conduct.

In conclusion, the Bortz survey is well designed and attempts to ask the right question, but does not quite do so. However, even if it did so, it still is constrained by the inherent limitation that it is a study of attitudes. Conducting a survey in such a short time, and asking the operators to categorize programming in an unfamiliar way, precludes its acceptance *in toto*. Considered as a whole, the Panel nonetheless finds the Bortz survey highly valuable in determining market value.

D. THE BESEN STUDY AS EVIDENCE OF MARKET VALUE

In further support of their claim, Program Suppliers presented an econometric study by Dr. Stanley Besen, Vice President of Charles River Associates. The study employed a multiple regression analysis to estimate the relative value to cable operators of each program category carried on distant signals (excluding PTV and the Canadians for which there were insufficient data). This was estimated by a "hedonic" analysis measuring the correlation between changes in compulsory license royalty fees paid by cable systems and changes in viewing hours for each program category carried by those systems. Treating royalty payment changes as reflecting the marginal value of distant signal programming to cable operators net of associated revenues and other costs, the Besen study examined percentage changes in those payments arising from actual cable operator decisions to add, drop, or swap distant signals between any two successive six-month accounting periods from 1988 to 1992.

Those royalty payment changes were then correlated with percentage changes during the same successive periods in the total number of viewing hours for each program category carried by the particular cable systems, based on data from Nielsen's diary-based viewing studies provided by the Program Suppliers. To take differences in day-part values into account within each program category, the viewing hours were weighted by their proportionate shares of Nielsen national viewing data for each

category.[296] Available data initially permitted 423 observations, which, after filtering for various data problems, were reduced to 208 observations for 171 individual cable systems. Observations were limited to instances in which a cable system both dropped and added one or more distant signals, in order to highlight the effects of programming changes on royalty payments.[297]

The correlation coefficients produced by this analysis, expressed in fractions of 1.0 in which 1.0 equals absolute correlation, were transformed into percentage shares of relative value by moving the decimal point (equivalent to multiplying by 100). In statistical terms, Dr. Besen's analysis had an explanatory power of .30 which means that distant signal programming changes explained 30% of royalty payment changes.[298] The remaining 70 percent were attributable to other factors not measured.

Dr. Besen's basic equation estimated negative coefficients (less than zero correlation) for both local station-produced (NAB) and devotional programs, with only the movies/series result statistically different from zero. The resulting relative shares were:

Program Category	Share[299]
Movies/Series	86.3%
Sports	7.7%
NAB	-1.4%
Devotional	-0.25%

Dr. Besen preferred to rely on those results.[300] Nevertheless, as an alternative he adjusted those results to assume that the coefficients for local and devotional programming were positive, by utilizing for those two categories the coefficients at the upper bounds of their confidence intervals, and then scaling the resulting positive coefficients to add up to 100 percent.[301] As adjusted, the estimated shares for each of the program categories were as follows:

Program Category	Share[302]
Movies/Series	86.3%
Sports	7.7%
NAB	-1.4%
Devotional	-0.25%

These results were substantially similar to those of the Nielsen study presented by Program Suppliers in this proceeding, a consequence which Dr. Besen termed "coincidental" since he had never seen the Nielsen numbers.[303] Program Suppliers describe the Besen study as presenting, for the first time, an analysis of actual cable operator behavior in contrast to attitudinal surveys lacking predictive validity.[304]

The Besen study was criticized on numerous conceptual and methodological grounds by four economists presented by other parties: Dr. Robert Crandall, Senior Fellow in Economic Studies, the Brookings Institution (JSC); Dr. Michael Salinger (Devotionals); Dr. Scheffman (PTV); and Dr. George Schink, former Senior Vice President, Wharton Econometric Forecasting Associates

Group and now Principal of the Law and Economics Consulting Group (NAB). We summarize here only their major criticisms, together with Program Suppliers' responses.

All four opposing experts observed that in utilizing viewing hours as the measure of program value to cable operators, the Besen study foreordained its results, measuring no more than an estimate of each program category's share of viewer weighted hours.[305] Dr. Besen acknowledged that his analysis treated viewing as a measure of value to the cable operator.[306] Dr. Salinger testified that the Besen study failed to exclude the null hypothesis that percentage changes in total hours explained royalty changes equally as well as programming composition changes.[307] He found that the same 30% explanatory power resulted no matter what categories the signal may be divided into,[308] because the study was merely a complicated way to establish each category's share of viewer weighted hours.[309] In response to these criticisms and to the related skepticism of the other parties concerning the "coincidental" similarity between the Besen results and the meter-based Nielsen study results, Program Suppliers pointed out that Dr. Besen had no access to the current Nielsen <u>meter</u> study. Dr. Besen relied on Nielsen <u>diary</u> data (not presented here), and there was no evidence that Nielsen diary data results were closely linked to the Besen results.[310]

Several criticisms concerned the Besen study's omission of critical variables such as changes in cable network programming

and in available broadcast programming, the availability of premium channels, local economic and demographic conditions, the influence of the distant signal schedule on royalty rates, and channel constraints.[311] Dr. Schink referred to these omissions as "model misspecification." Dr. Besen conceded that he did not perform a true hedonic analysis which would have required consideration of such other factors.[312] Dr. Besen himself had criticized a regression analysis submitted by JSC in the 1979 proceeding for omitting critical variables, and the Tribunal had given no weight to that study.[313] Program Suppliers responded that such other factors change only slowly over time and that it is unlikely that such factors would significantly affect royalty payment changes in the six-month periods examined by Dr. Besen. Further, any such changes would most likely be excluded from the Besen analysis by the filters that eliminated observations involving very large changes in monthly subscriber rates or royalty payments. The Besen study was not designed to explain the effects of all factors that might change royalties, only the effects of programming changes for which the study reported an explanatory power of no more than 30%.[314]

A third set of criticisms was that Dr. Besen's samples, of both distant signals and cable systems, were nonrandom and not representative. The 208 observations over five years averaged only 21 changes in each six-month accounting period, and 36% of those changes could be accounted for by the addition or deletion of just three superstations: WTBS, WWOR, or WGN.[315] Sample

sensitivity was demonstrated by the inconsistency of the Besen results across subsamples. Dr. Crandall testified that considering only observations in the Besen sample in which a distant signal was added, the relative value estimates of Besen's basic equation were reversed, with the sports share jumping from 7.7% to 54.8% and the movies/series share dropping from 86.3% to -21.7%.[316] Dr. Besen found this result shocking and unbelievable.[317] In addition, Dr. Crandall found that the Besen equation had only two significant coefficients: sports for systems adding signals and movies/series for systems dropping signals.[318] The use of the diary-based viewing studies also was said by NAB to bias the Besen results in favor of movies and syndicated programming, and against station-produced programs, by reliance on a sample that included virtually all independent stations carried as distant signals but only half of the network-affiliated stations, as previously found by the Tribunal.[319] Dr. Besen's exclusion from the sample of observations in which added signals carried program categories that had not previously been carried at all, such as religious programs in five or six instances, while perhaps technically necessary in Besen's methodology to avoid an unmeasurable infinite percentage increase,[320] also were said to make the Besen results unreliable.[321] Program Suppliers' response to Dr. Crandall was that transforming the coefficients in Crandall's adds-only subsample analysis, by assuming negative coefficients to be zero and weighting the sports coefficients by the number of

observations for each subset of sports, yielded results similar to Dr. Besen's.[322] (JSC responds that Program Suppliers have not explained what such "transforming" and weighting of Dr. Crandall's coefficients means, and that no expert evidence supported such an adjustment of Dr. Crandall's analysis.[323]) No bias arose from Dr. Besen's use of diary-based viewing data, because the bias claim rests on the overall composition of all stations in the Nielsen diary study while Dr. Besen used viewing results only on an individual station level. Dr. Schink testified that a random sample is not necessary for an analysis such as Besen's unless there is insufficient variation in the attributes within the sample,[324] but no witness indicated that the Besen sample lacked sufficient variation. Nor did any economist challenge Dr. Besen's professionally routine exclusion of observations that would have resulted in infinite percentage changes.[325]

Dr. Schink testified that the Besen study suffers from an analytical defect called "multicollinearity," which compounds the model misspecification problems arising from omission of significant variables. Multicollinearity results when strong correlations exist <u>among</u> the explanatory variables in the regression model. This defect makes it essentially impossible to estimate accurately the coefficients in the Besen model, thereby rendering inaccurate Dr. Besen's estimates of the relative value shares.[326] Dr. Besen did not test for multicollinearity, although he agreed that one sign of multicollinearity is a

program category having a negative coefficient when it is expected to be positive.[327] Dr. Besen's preferred basic equation showed negative coefficients for NAB and Devotionals and a statistically insignificant correlation for JSC, indicating that the only distant signal programming of value to cable operators was the "movies and series" category, a result which Dr. Schink said "makes no sense" and Devotionals called "absurd."[328] In Dr. Besen's analysis there is a relatively strong correlation between the percentage changes in movies/series and the percentage changes in local programming hours, and a weaker correlation among the percentage changes in devotional, sports and movies/series programming hours.[329] Dr. Schink concluded that considering the omission of critical variables, the low explanatory power of only 30% and the reduced reliability of coefficients due to multicollinearity, the Besen study "should literally be disregarded."[330] When Dr. Schink applied a method called "principal components" regression analysis to correct for the multicollinearity in the Besen study, the following estimated relative value shares resulted:

Program Category	Share[331]
Movies/Series	43.38%
Sports	31.28%
NAB	13.75%
Devotional	11.59%

These results are comparable to those of the Bortz study.[332] This correction does not "cure" the multicollinearity, which would require time-consuming and expensive collection of additional data that does not have multicollinearity problems, but it reflects results having the lowest volatility in the estimated model coefficients.[333] Program Suppliers respond that multicollinearity was not clearly demonstrated by four rule-of-thumb tests performed by Dr. Schink but only by the formal signal-to-noise test which is a "very tight test."[334]

OBSERVATIONS CONCERNING THE BESEN STUDY

The Panel finds all of the critiques of the Besen study to be telling, to one degree or another. In particular, the Panel finds that utilization of Nielsen viewing hours as the measure of program value to cable operators inevitably forecasted the outcome of Dr. Besen's study. Nielsen viewing hours were built into Dr. Besen's equation even before weighting for those hours further magnified their impact. While Nielsen's meter-based results were not available to Dr. Besen, those results are highly consistent with the 1989 diary-based results.[335] It may reasonably be presumed that the same is true of the more recent diary data on which Dr. Besen did rely. More importantly, since the criticism is not one of manipulation but one of conceptual bias, which is not dependent upon awareness of the particular Nielsen meter numbers, Program Suppliers' response does not dilute the substance of this criticism. Moreover, the omission

of significant variables was compounded by the degree of multicollinearity found by Dr. Schink, as illustrated by the reverse results produced by Dr. Crandall's adds-only subsample analysis and by the statistical significance only of sports adds and movies/series drops. There is no evidence that more than six months is required for changes in other important variables to affect royalty payments; the evidence is to the contrary.[336] Dr. Salinger's evidence that Dr. Besen had failed to exclude the null hypothesis and that any categorization of distant signal programming would yield the same 30% explanatory power was not contradicted by any expert analysis or evidence, nor was Dr. Crandall's evidence that the Besen study is inconsistent across subsamples. The negative coefficients or statistically insignificant results from Dr. Besen's basic equation for all claimant groups other than movies/series are incongruous and lend strength to Dr. Schink's finding of multicollinearity. Dr. Besen's adjustment in producing his alternative results was not supported by any economic analysis or rationale other than avoidance of the negative coefficients. The national Nielsen data, although not employed in Dr. Besen's total hours regression, were employed in Dr. Besen's weighting of individual station results and thereby introduced bias to the extent previously found by the Tribunal. Furthermore, by its own terms the Besen study leaves 70% of distant signal programming changes unexplained. The Panel finds that the Besen study adds no reliable support to Program Suppliers' claim.

E. ANALYSIS AND AWARD WITH EACH CLAIMANT'S ADDITIONAL EVIDENCE.

1. PROGRAM SUPPLIERS

In addition to the Nielsen and Besen studies, Program Suppliers presented other evidence which they claim corroborates the high value that would be placed on movies and syndicated programming in a distant signal open market.

Program Suppliers point out that the breadth of the programming their claim encompasses is staggering, with over 30,000 feature films and 20,000 syndicated series available for syndication.[337] The over-100 claimants of all sizes which make up the Program Suppliers category hold the copyrights to 7,500 different works that are encompassed in their claims for royalties in this 1990-92 period.[338] The programming covers the entire gamut of storytelling, entertainment, news information, documentary, and a host of other subjects including talk shows, game shows and children's shows.[339] This broad range shows why these programs are valued on distant signal, both for mass appeal and for niche programming.

Howard Green, Executive Vice President of Sales Operations for Twentieth Television at Twentieth Century Fox, testifying for the Program Suppliers, explained the history and significance of syndication. Syndication refers to the licensing of programs on a market-by-market basis.[340] The syndication market has grown as more and more independent stations became operational. Independent stations do not have access to programs from the

networks and therefore needed to obtain programs from other sources, primarily "off-network" series.[341]

For a long time, syndication was done on a straight cash basis, meaning that a station pays a license fee directly to the syndicator.[342] The negotiations as to the fee revolve around ratings and the stations bear the risk that the program will be successful.[343] In the mid-1980's, first-run and barter syndication became more important. The change was due to the growth of satellite dishes which allowed the delivery of programs with advertisements integrated into them.[344]

Other witnesses explained that barter syndication means a syndicator negotiates with a station over the amount of advertising time that each will retain in a program.[345] A syndicator will market the retained advertising time to national advertisers. The sale of this time represents the only revenues received by the syndicator under the barter system.[346]

Jack Valenti, President of the Motion Picture Association of America,[347] testified that on almost any cable system in America, you will find the number of hours devoted to syndicated programming overwhelms all other categories.[348] Syndicated programming has a great deal of value because of the resources that are invested into the production. That programming requires a blend of imagination, talent and money that can bring to life a story idea in a way that attracts viewers.[349] Production costs are very high.[350] The upfront cost for producing theatrical feature films is also very high.[351] Despite the cost, most

series fail. Only about 1 in 20 series survives long enough in either network or first run broadcasts to have a chance to recoup those costs.[352] Only 2 in 10 films break even after theatrical runs.[353] The ones that do survive, however, have a proven track record for attracting audiences that makes them valuable in syndication.

The Program Suppliers note that in the 1989 proceeding, the Tribunal reduced the award for syndicated series because "although syndicated series had high totals in viewing, cable operators do not expect to have to pay that much for them."[354] The Program Suppliers presented the testimony of Henry Saperstein, Chairman and CEO of UPA Productions of America, who explained that some series and movies withstand the test of time and are continually valuable. These are referred to as "evergreen." That means that they continue to attract new viewers year after year.[355] They are often used to counter-program major events such as the Super Bowl because they have loyal, devoted audiences.[356] The programs are sold for what the traffic will bear and what the traffic will bear is determined by how many people in the market want to buy it.

Within the syndicated category there are a number of important programming groups that have appeal to particular audiences. Science fiction and children's programming are two examples. Another witness, Richard C. Thrall, Senior Vice President, Operations and Administration, Multimedia Entertainment, Inc.,[357] explained that first run programming,

including talk shows, grew increasingly important during the time period at issue.[358] Talk show viewers are avid viewers.[359] Distant importation allowed these viewers to create their own "virtual talk show channels" by switching back and forth to channels that carry such programs.[360] In comparison to the prices paid by TNT for a national rights NBA package, on which the Tribunal relied in the 1989 proceeding,[361] the rights fee paid for "Oprah" in 1991-92 was more than double ($630,916) the rights fee paid for the NBA games ($307,500).[362] According to Thrall, advertising revenues for talk shows grew from $1.2 billion in 1990 to $1.345 billion in 1992, a higher growth rate than was experienced in other areas of television advertising revenues.[363] Further, during the period 1986 to 1992, syndicated advertising revenues doubled from $650 million to $1.345 billion.[364]

Program Suppliers' Arguments

In addressing how this Panel can best "simulate the marketplace" for the purpose of distributing the royalties at issue here, Program Suppliers note that the basic cable network market offers a model for how distant signal transactions would be conducted in an open market.[365] The primary characteristic of such a market would be that the purchase transaction for programming would involve the copyright owner as seller and the distant signal as the buyer.[366] Program Suppliers further argue that in such a hypothetical open market the role of advertising

revenues cannot be underestimated (advertising revenues account for 60-65% of cable network revenues while distant signals receive 100% of their revenues from advertising).[367] Large amounts of viewing are necessary to sustain the advertising revenues and the Nielsen ratings data is the best measurement of that viewing.[368] Hence, according to Program Suppliers, the Nielsen ratings should be the key determinant of value to this Panel.

Program Suppliers also emphasize Sieber's testimony. He stated that on WTBS, movies and series each account for approximately 45% (or 90% combined) of the schedule, while sports made up only 5% of the time. According to Program Suppliers, Sieber's testimony established that the rights fees for syndicated series and movies were comparable or higher than the rights fees for the Atlanta Braves and Hawks.[369] The cost to WTBS for sports and for syndicated programming which was actually broadcast in 1990-92 was comparable. If value is equated with programming costs, there would be comparable value on an hourly basis between syndicated programming and sports. However, because WTBS broadcast far more syndicated programs than sports programming, the syndicated programming would have a greater overall value. According to Sieber, the viewing-to-time ratio of distant sports programming on WTBS was 1:1.[370] (In 1989, the Tribunal relied on JSC's viewing to time ratio of 10.5:1 in crediting them for viewer intensity.[371]) Program Suppliers also

point to Thrall's testimony regarding the growth in the first run syndication market during recent years.

The Program Suppliers conclude that the award they have requested is justified based on their evidence related to cable operator purchase behavior, cable subscriber viewing behavior, the vast array of syndicated programming, the working of the syndication marketplace, and the tools used by the most widely carried distant signal to achieve its success.[372]

Arguments In Opposition To Program Suppliers' Claim

In response to Program Suppliers' argument that the buyer/seller in the simulated market would be distant signals and copyright owners, other claimants first point out that this is contrary to Congress' intent in having the Panel substitute for direct negotiations between cable operators and copyright owners.[373] They further note that in the cable network market, which Program Suppliers contend is the appropriate "simulated market," its evidence demonstrated that sports would receive compensation that is consistent with the Bortz results and substantially in excess of viewing.[374]

Also with reference to Program Suppliers' "simulated marketplace" argument, other claimants respond that because stations cannot obtain advertising revenues for distant signal viewership, a key step in the Program Suppliers' syllogism simply is not true.[375] They also point out that even if the Program Suppliers' theory is correct, their Nielsen study does not

provide a relevant type of viewing data. The gross tuning percentages the Nielsen study reports are not national ratings, which is what cable networks and barter syndicators would sell, and they are not local market ratings, which is what cable operators would sell.[376]

The other claimants also contend Program Suppliers have not shown, and cannot show, that advertising revenues and ratings would be important to cable operators. They argue the value of programming to cable operators, in a simulated marketplace, would be entirely different than the value of programming to advertisers.[377] They contend it would be "legal error" to allocate royalties based on advertising when the revenues and concepts are both irrelevant to the retransmission of distant signals.[378] The hypothetical negotiations between the distant signal and cable operator, and between the distant signal and the copyright owners, will be driven by whether the programming benefits the cable operator in terms of attracting and retaining subscribers.[379]

Responding to Program Suppliers' reliance on the variety of syndicated programs available, other claimants point out the record establishes that much of the syndicated programs and movies available to cable operators on distant signals duplicated what was already available for free over-the-air in the cable operator's market.[380]

Analysis of and Award to the Program Suppliers

Nielsen assigned a viewing share of 80 to 83% to Program Suppliers for the three year period. The Bortz surveys allocated to this category 41.3 to 44.5%. The Tribunal in the 1989 proceeding awarded 60% of the basic fund to Program Suppliers. Program Suppliers request an award of 80% from the basic fund.

While, as we indicated, we find the Nielsen viewing statistics reasonably reliable, particularly for the larger categories, we question the strength of the correlation between viewing and market value. The corroborating evidence of the viewing statistics upon which the Program Suppliers rely is not persuasive. The evidence presented explains that the movie and syndicated markets are difficult and perilous to investors. However, the evidence presented does not respond to the observations of the Tribunal in the 1989 proceeding that although movies and syndicated series command high percentages of viewing, cable operators do not expect to pay much for them.[381]

Program Suppliers' response that the programming is "evergreen" and the audience responds to it lacks persuasion. First run programming, including talk and game shows, has considerable value as is reflected in its rights fees and advertising revenues. However, in relation to other programming, the Panel finds that it has not maintained its relative market position.

The most significant value of Program Suppliers is its volume. The vast majority of distant signal viewing is in the Program Suppliers category. While the demand is high, the

supply, as evidenced by the difficulty in the syndication market and relatively low prices for most syndicated programming, is more than sufficient. On a relative basis, we find circumstances have changed for the Program Suppliers since the last proceeding. The market value of movies and syndicated series has receded in comparison to other categories.

We allocate 55% of the basic fund to the Program Suppliers for each of the three years, and an additional 0.55% for 1990 because the Canadians have settled their claim for that year.

2. JOINT SPORTS CLAIMANTS

In addition to its primary evidence consisting of the Bortz surveys, the JSC presented other evidence to support its claim.

The JSC category includes more than 200 clubs, colleges and athletic conferences that are eligible to receive cable royalties attributable to professional and collegiate sports events.[382] Included within this claim are high profile sports such as Major League Baseball, NBA basketball, NHL hockey, college football and college basketball. The claim also encompasses other live professional and collegiate team sports, such as preseason NFL football, professional soccer and minor league baseball.

All of the programming of JSC is live and "first-run."[383] Unlike a movie or syndicated series, which may be shown many different times on different media (and thus compensated repeatedly), there is only the single opportunity to be compensated for a live sports telecast.[384]

James Mooney, the former President and Chief Executive Officer of the National Cable Television Association, testified that the cable industry has continued to support the compulsory license system "primarily to ensure continued access to the major sports events televised by superstations and other distant signals."[385] This is because sports fans "form the bedrock of the cable customer base" and they are the single largest group of cable subscribers.[386] It is a rule of thumb in the cable industry that not all cable subscribers are sports fans, but all sports fans are cable subscribers.[387] Sports fans are also

intensely loyal.[388] They identify personally with their sports and while other subscribers may like non-sports programming, they do not regard the program as part of their persona.[389] The cable industry is concerned that without the compulsory license, subscribers would lose access to sports programming. The compulsory license effectively permits retransmission of a team's games outside of its home territory.[390] Distant signal movies and syndicated programming have become less important to cable because of the proliferation of independent television stations and cable networks.[391] The only exception is major league sports.[392]

Tyrgve Myhren is the president of the Providence Journal Company which, until recently, was a multiple system operator with approximately 800,000 subscribers.[393] He testified that the cable industry considered sports programming the most valuable programming on distant signals, during the years 1990-92, far more valuable than movies and syndicated programming.[394] The economics of the cable business is focused on how to gain subscribers and keep them.[395] The key to doing that is to have a sufficient amount of programming that is enormously appealing.[396] Cable operators do not need distant signals for movies and syndicated programming; there are numerous other attractive sources.[397] Because sports is live and perishable, it has a deep appeal to subscribers who value sports.[398] Sports motivates people to sign up and to continue subscribing to cable.[399]

Jerry Maglio, a former senior vice president of United Artists Cable, the nation's third largest multiple system operator, testified in a similar vein.[400] Maglio testified that: "[T]he cable industry in 1990, 1991, and 1992 valued the sports programs on superstations and other distant signals more highly than is reflected in the Tribunal's 1989 awards."[401] He further stated that the cable industry "perceived sports programming on distant signals as the most valuable distant signal programming."[402] Further, movies and syndicated programs from distant signals do not generate the type of interest that causes people to become or remain cable subscribers.[403] Maglio explained that you can find movies and syndicated programming on other cable signals, but you cannot find a specific team with a steady presentation of its games. People anticipated their teams and were in the habit of being able to follow the fortunes of the team.[404]

The value that subscribers place upon baseball and other sports programming also was discussed by Ken Burns, an award-winning filmmaker. Burns testified that Americans endow their sports games with a significance well beyond their literal importance.[405] According to Burns, because of the intensity of emotion that sports telecasts in general can provoke among the viewing public, simply having access to a team's telecasts has a value in itself which cannot be gauged by counting the number of minutes spent in front of the television set.[406]

Bortz testified that he has been personally involved in negotiations for the rights to sports programming and has conducted a wide variety of research about the cable industry.[407] The results of the surveys he conducted in 1990-92 are consistent with his experience in the industry.[408] The value of distant signal programming lies in its ability to attract and retain subscribers. Sports programming on distant signals is considered by the cable industry to attract and retain subscribers to a greater degree than any other type of distant signal non-network programming.[409]

JSC notes the Tribunal in the 1989 proceeding found relevant the license fees that claimants received in free marketplace transactions.[410] In this regard, it relies on the testimony of David Stern, the Commissioner of the NBA. He was responsible for negotiating all of the NBA's cable television contracts as well as broadcast television contracts and has been doing so since 1978.[411] Stern described the license fees that the NBA received from TNT for the three years involved, as well as the fees for the last two litigated cases in 1983 and 1989. Those figures are as follows:

NBA NATIONAL CABLE
NETWORK RIGHTS FEES[412]

Season	Number of Games	Rights Payments
1982-83	100	$5,500,000
1983-84	100	$5,500,000
1988-89	81	$23,000,000
1989-90	81	$27,000,000
1990-91	80	$57,000,000
1991-92	80	$66,000,000
1992-93	80	$74,000,000

Other evidence presented by the JSC included a report by Kagan Media Appraisals, Inc., which compared the market price and quantity for both JSC-type programming and non-JSC programming on cable networks for 1990.[413] The study showed that in the subject years, cable networks spent between 24.9% and 26.3% of their budgets to acquire JSC-type programming and that programming generated 4.3% to 4.8% of the cable networks' total viewing hours.[414] Therefore, the ratio of cost to viewing for this programming is between 5.3:1 to 6.2:1.[415] Between 73.7% and 75.1% of the cable networks' budgets was spent for non-sports programming and the viewing was between 95.2% and 95.7%, producing a ratio of .77:1 to .79:1 of cost to viewing.[416] The Kagan study further demonstrated that cable networks paid more to acquire just a few hundred hours of JSC-type programming, than for thousands of hours of non-JSC-type of programming.[417] Those figures are as follows:

COMPARISON OF MARKET PRICE AND QUANTITY
FOR JSC AND NON-JSC PROGRAMMING — 1990[418]

	Quantity	Market Price
MLB on ESPN	500 Hours	$100 million
NBA on TNT	178 Hours	$57 million
NICK	8,570 Hours	$54 million
FAM	8,205 Hours	$37.5 million
LIFE	8,760 Hours	$65 million
TNT (excl. NBA)	8,582 Hours	$148 million
USA	8,760 Hours	$135 million

The Kagan report also shows that cable operators paid more to acquire cable networks that featured JSC programming than they did to acquire cable networks featuring other kinds of programming. While you cannot directly translate this data into shares of the royalty fund, since the programming on this group of networks, taken as a whole, is not directly comparable in mix or value to the programming on distant signals,[419] nonetheless, the data illustrate that cable operators paid consistently high prices for cable networks featuring sports programming. The expenditures are as follows:

CABLE SYSTEM OPERATOR EXPENDITURES
ON CABLE NETWORKS
WITH AND WITHOUT JSC PROGRAMMING[420]

Cable Network	1990	1991	1992
ESPN (Most JSC)	$284 mil.	$327 mil.	$350 mil.
TNT (Some JSC)	$205 mil.	$232 mil.	$251 mil.
CNN + HN (No JSC)	$145 mil.	$154 mil.	$167 mil.
USA (No JSC)	$102 mil.	$118 mil.	$143 mil.
Other 11 Networks	All less than $70 mil	All less than $81 mil.	All less than $88 mil.

The carriage of superstations and fees paid by superstations have continued to grow. The three original superstations accounted for 47% of the instances of carriage in 1989. Their share increased to 51.3% in 1992.[421] Collectively, the seven superstations went from 51.8% in 1989 to 55.1% in 1992.[422] WTBS, WGN, and WWOR accounted for 67% of the basic royalties in 1989 and 75% in 1992.[423] Collectively, the seven superstations accounted for 76.1% of the basic royalties in 1989 and 80.1% in 1992.[424]

During the years in question the Atlanta Braves went from last place to first place.[425] In 1991, the Braves came from 9½ games out of first place at the All-Star break to win the pennant in the last week of the season.[426] The Braves repeated in 1992.[427] Those games appeared on WTBS. On WGN, the Chicago

Bulls won three consecutive NBA championships and featured perhaps the most famous athlete in the world, Michael Jordan.[428]

During this period, there was an increased availability of movies and syndicated series on basic cable networks as opposed to syndication. The number of cable networks expanded greatly between 1989-92.[429] As an example, American Movie Classics had a very limited reach in 1989 but, by 1992, it reached 43 million households.[430] USA and Lifetime, cable networks, began acquiring pre-broadcast syndication rights to major movie packages in late 1989. These factors contributed to the declining importance of distant signal movies.[431]

Joint Sports Claimants' Arguments

JSC notes that in the 1989 proceeding, the Tribunal held that the results of the Bortz survey were given substantial weight where "corroborating evidence" existed.[432] The record in this proceeding, according to JSC, contains even more corroboration of the high value of sports programming, particularly the testimony of Mooney, Myhren and Maglio.[433] On the "viewer avidity" factor, JSC points to the testimony of Ken Burns as well as the subscriber surveys conducted by NAB in the 1983 proceeding and the surveys of cable operators' views presented by JSC and the Canadian claimants.[434]

License fees paid in market transactions provide additional corroboration, according to JSC.[435] Those fees are five to six times higher than one would expect if viewing measured value.

Further, the financial data presented in this proceeding accounts for the "seller's perspective."[436] In addition, the results of the Kagan report would result in an award to JSC of 32-42% of the royalty fund.[437]

The Tribunal has articulated a "changed circumstances" rule to justify a change in the amount of awards it has made.[438] In this regard, JSC emphasizes the "relative value" of sports programming on distant signals has increased, and the relative value of movies and series programming has declined.[439] In support of this conclusion JSC points out that (1) superstations, all of which featured sports, were more important to cable operators in 1990-92 than in 1989, accounting for a larger percentage of the instances of carriage; (2) the sports on superstations was more attractive in 1990-92 than in 1989, thanks to the Chicago Bulls championships and the Atlanta Braves move from last place in 1990 to first place in 1991 and 1992; (3) Program Suppliers' own witnesses admitted the market for syndicated programming slumped between 1989 and 1990-92; and (4) in 1990-92 cable operators had more alternative sources for movies and series than they did in 1989.[440]

Arguments in Opposition to Joint Sports Claimants' Claim.

Program Suppliers argue there is no valid comparison between the fees paid by TNT for national, exclusive rights to an NBA package of games and JSC's entitlement to royalties. The minimal royalty fees set by Congress is a fact that limits all

copyright owners.[441] Stern's testimony as to the increased fees for the NBA national package simply reflects that the number of cable subscribers grew from 4 million in 1979 to over 60 million in 1992.[442] JSC responds that the period of time cited by Program Suppliers is misleading because, while NBA's rights fees grew more than 200% from 1989-90 to 1992-93, TNT's subscriber base grew only 20%.[443] Further, Program Suppliers argue, the contract increases referred to by Stern involved either cable networks or commercial broadcast networks; none relate to sports carriage on television stations carried by distant signal. There are major differences between a package of NBA games licensed to a superstation and to a local station.

Program Suppliers further note the NBA master schedule for the 1990-91 season shows that approximately 70% of the games were available on regional cable sports networks and other local stations. The NFL sells all its games to the networks.[444] The NBA is the only sport to show a ratings increase during the period from 1980 to 1990.

Program Suppliers also suggest that the $900,000 per game paid by TNT in 1992-93 does not present a realistic picture of the fees paid by stations carried as distant signals. This is demonstrated by the fact that WGN in 1989-90 paid an average of $128,000 per game.[445] JSC responds that Program Suppliers have misleadingly compared the NBA's 1992-93 cable rights fees with the NBA's 1989-90 broadcast rights fees and that it also

improperly compares the $128,000 per game fee paid by WGN in 1989-90 with the $900,000 per game fee paid by TNT in 1992-93. The 1989-90 per-game TNT fee ($333,000) was roughly twice the 1989-90 WGN per-game fee, reflecting the fact that TNT has about twice the national carriage of WGN. JSC also notes that the only data on cable network license fees is that which was provided by JSC and that data shows that cable networks pay substantially more for JSC programming than syndicated programming on a per hour basis.[446]

According to the Program Suppliers, the proliferation of regional sports networks has also reduced the value of distant signal sports.[447] JSC responds that Program Suppliers fail to mention the fact that the average subscriber had access to only one regional sports network, that substantial numbers of games each year were available only on distant signal, and that subscribers often had to pay a premium for regional sports networks while distant signals were available as part of the basic package. As an example, while one package of Chicago Bulls games was available to about two million subscribers on a regional sports network, an entirely different package was available to about 35 million households only on WGN as a distant signal.[448]

In response to JSC's evidence regarding the growth of superstations, Program Suppliers point out that only WTBS and WGN had increases while the other superstations declined.[449] There

are a total of 59 flagship stations associated with professional sports teams. It would be fairly uncommon for a person who is far away geographically from a particular professional sports team to have a specific interest in that professional sports team. This is borne out by the relatively low carriage of flagship stations other than WTBS and WGN outside of their own region or an adjacent region. A sports program is typically of regional interest. Regional sports programming on the regional sports networks is generally available throughout the country. Responding, JSC points out that cable operators allocated two-thirds of their royalty payments to WGN and WTBS, and these two signals featured more sports programming than any other distant signal. According to JSC, the fact that WGN and WTBS were also the two stations with the largest increases in carriage and basic royalties confirms the importance of sports programming.[450]

Responding to JSC's "changed circumstances" argument, Program Suppliers note the fee generated data do not show a jump for sports.[451] They also note the "superstation" evidence does not prove anything because they are not the only sports flagship stations or the only distant signals that carry sports programming. It is thus impossible to make comparisons between sports and non-sports distant signals from this data.[452]

Responding to the fact that non-superstations have "clustered" in the geographic regions where the teams they carried are likely to enjoy their greatest popularity, Program

Suppliers point out that the regional distant carriage of sports competes against regional sports networks. The Cubs, for example, have a regional television station network on which Cubs games are available throughout the Midwest to approximately 3 million cable subscribers from a local station, not from WGN as a distant signal.[453]

Program Suppliers further contend that the prices paid by networks for programming does not offer a good indicator of the relative value of programming to cable operators and subscribers.[454] A table presented by JSC, which sets forth such prices, suggests that the 178 hours of NBA on TNT would be worth more to cable operators and subscribers than either The Family Channel or Nickelodeon. According to Program Suppliers, these "implausible results" highlight that the amount paid for programming by cable networks is, at best, a starting point.[455]

Analysis of and Award to the Joint Sports Claimants

Nielsen assigned a viewing share of 6-7% to JSC for the three year period. The Bortz surveys allocated to this category 36.3 to 38.8%. The Tribunal in the 1989 proceeding awarded 23.8% of the basic fund to JSC. JSC requests an award of 31 to 35% from the basic fund.

In addition to the evidence regarding the Bortz surveys, the JSC has provided corroborative evidence of the increased value of its programming. Much of JSC's evidence and arguments relates to

the price of programming on cable networks. However, there is a major distinction between the sports programming on distant signal and that shown on the cable networks. Atlanta's WTBS is the largest of the superstations, provides 45% of the basic fund royalties, and broadcasts games of the Atlanta sports teams. WGN, the second largest of the superstations, provides 20% of the royalties and broadcasts Chicago professional teams. In addition, WTBS broadcasts Southeast Conference football. All the programming on these superstations and the other independent stations is essentially local programming and its value derives from the fans in those regions. The cable networks are national in scope and command more national attention than distant signals. The programming of these superstations does not compare to the more broadly based programming on cable networks. Also, some of the more heavily watched NBA and NCAA basketball games, the playoffs, are not on distant signals but rather on broadcast network stations.

There is little doubt that JSC is far more important than its viewing numbers would indicate. The question rather is, how much more important. How much would cable systems have to pay for the 6-7% of viewing as reported by Nielsen? JSC uses a viewing statistic of 4.3 to 4.8% of JSC-type programming on cable networks. JSC contends that in relevant open market transactions, JSC's programming on TNT and ESPN sold for five to six times its viewing value, which JSC contends translates to 32-

42% of the royalty fund. These statistics are direct evidence of supply and demand, supplementing the Bortz surveys. JSC programming is presented in very desirable time slots that make it more appealing to sports fans who are more loyal viewers than most television viewers.

We believe circumstances have changed in favor of JSC. The evidence shows an intense viewer interest in and desire for distant signal JSC programming and that the cost for that programming has increased. Considering all of the evidence, JSC has demonstrated that the market value of its programming has increased and its relative market value has also increased since 1989.

We allocate 29.50% of the basic fund to JSC for each of the three years, and an additional 0.30% for 1990 because the Canadians have settled their claim for that year.

3. NATIONAL ASSOCIATION OF BROADCASTERS

By the definition previously given, NAB holds the copyrights for programs that are produced by or for a U.S. commercial television station and broadcast only by that one station. Broadcast television stations produce a great variety of shows. This is illustrated by station KTVU which, during the years at issue, produced a weekly public affairs talk show, a weekly business/finance show, a sports highlights program, a coach's show, parade coverage, sports specials, a funniest home video program, documentaries, a health and exercise special, a celebrity interview program, a holiday cooking show, an interview special with combat jet pilots, a report on Gulf War soldiers at Christmastime, and a special on the importance of staying in school, together with a number of news programs, including a daily 10 P.M. newscast, weekday morning and noon newscasts, and weekend news.[456] Many stations produce programs educational in nature, some designed specifically for children. KTVU also sells news footage for national broadcast to CNN or the national broadcast networks.[457] Some of KTVU's station-produced programs went into syndication.[458] WTBS, by far the most widely carried superstation, and the only station programmed to be a national rather than a local station, produced a number of programs that would be of interest to viewers all over the country.[459]

Dr. Richard Ducey was presented as a witness by NAB. Dr. Ducey testified that the news and informational programming on

the Cable News Network ("CNN") was similar in nature to station-produced programming.[460] CNN is licensed to cable operators for a monthly per subscriber fee. In 1990-92, CNN charged cable operators fees of $0.32, $0.33 and $0.35 per subscriber per month, respectively.[461] Using the license fees paid for CNN in 199[illegible]-92, Dr. Ducey calculated the following estimated royalty shares for station-produced programming:

1990	14.5%
1991	17.0%
1992	15.8%[462]

In accordance with the Tribunal's 1989 statement that it awarded shares higher than viewing percentages to claimant groups which had shown viewer intensity,[463] NAB presented testimony regarding subscribers' negative reactions when cable systems drop or threaten to drop distant signals, specifically the news and other programming produced by the station.

Dr. Ducey also testified that high viewer avidity for station-produced programming is also reflected in a comparison of subscriber valuation measures with measures of distant signal viewing.[464] Dr. Ducey compared certain quantitative evidence which was presented in the 1983 proceeding: the Nielsen viewing study and the ELRA cable subscriber survey.[465] The 1983 Nielsen study, as projected, showed that 7.24% of subscribers' distant signal viewing was to station-produced programming.[466] Dr. Ducey compared that figure to the 1983 ELRA cable subscriber

survey which asked cable subscribers for a constant-sum valuation of distant signal program types. The survey reported that the relative value cable subscribers assigned to station-produced programming was over twice as much -- 17.1%.[467] By contrast, syndicated series had a higher Nielsen percentage than the relative value assigned in the subscriber survey (51.87% of viewing and 15.8% of value).[468]

Beta Research Corporation's 1992 survey of cable subscribers placed CNN at or near the top for the "valuation" and "satisfaction" questions and consistently above the mostly entertainment-programming networks of USA, TNT and Nickelodeon.[469] For the same year, CNN ranked seventh in terms of average total day ratings, below USA, TNT and Nickelodeon.[470]

NAB contends direct evidence of cable subscriber avidity for station-produced programming is contained in the Opinion Research Corporation survey ("the ORC study"), commissioned by WTBS in 1991.[471] The ORC study asked a sample of cable subscribers who received WTBS to rank a list of 63 programming attributes.[472] Over 1,200 subscribers completed the surveys.[473] The attributes of "keep you informed through newsbreaks," "programs that make you think," and "late night news" all ranked near the top in the subscribers' ranking of programming attributes.[474] NAB notes these attributes describe station-produced news and public affairs programming.

Dr. Ducey also testified about two areas of independent communications research that he says further demonstrate subscribers have avidity for news and other station-produced programming.[475] The first area is the field of "uses and gratifications" research. Research has shown that motives for watching television programming can be grouped into the categories of (1) instrumental, and (2) ritualized.[476] Instrumental viewing is associated with active, goal directed, and content-oriented viewing while ritualized viewing is associated with passive, habitual, and medium-oriented viewing.[477] Instrumental viewing is usually linked with high satisfaction on the part of viewers, but not with high viewing levels.[478] Dr. Ducey testified that news programming consistently falls under the category of instrumental viewing.[479] The Program Supplier witness Dr. Rubin, confirmed the fact that instrumental viewing is associated with news, talk, and magazine types of programs.[480]

Dr. Ducey also described research in the "parasocial interaction" field as providing further evidence that subscribers have avidity for news and other station-produced programming.[481] An example of this phenomenon would be a viewer thinking of particular newscasters as "friends" or taking an interest in their welfare and success.[482] Drs. Ducey and Rubin testified that research shows parasocial interaction of viewers with station newscasters.[483] The NAB introduced into evidence a

number of letters to television stations exemplifying this phenomenon.[484]

Dr. Ducey further testified that the carriage pattern of distant signals provides indirect evidence of the avidity subscribers have for station-produced programming.[485] For the years 1990-92, 86-88% of the carriage for non-superstations was within 150 miles of the community from which the station was broadcasting.[486] Other than for WTBS, the superstation regional "clustering" was similar.[487] WGN in Chicago and WWOR in New York had 88% of their carriage within 150 miles. The figures for WSBK in Boston were 87%, KTLA in Los Angeles, 84%, WPIX in New York, 99%, and KTVT in Dallas, 100%.[488] NAB presented evidence that station KPLR in St. Louis was carried as a distant signal on 12 different cable systems in the Illinois and Missouri area and all were within 150 miles radius of St. Louis.[489] Similar evidence was presented regarding many other areas in the country.[490] The testimony was that the geographic clustering of distant signal carriage meant most cable subscribers were receiving news and other station-produced programming from stations that were relatively close by.[491]

Another pattern described by Dr. Ducey was that the vast majority of stations carried as distant signals were carried by cable systems that were in smaller viewing areas.[492] The station-produced news programming from regionally important cities or containing news relating to local sports teams, the

state capitol and the weather, were of regional appeal to the areas in which the programming was retransmitted.[493] One such example is superstation WSBK, which is the flagship station for the Boston Red Sox, and was carried almost entirely in New York and New England, where there is an avid following of Boston sports fans.[494] Other examples of similar phenomena were provided.

NAB'S ARGUMENTS

On the "simulated market" issue, NAB contends the Panel must examine the marketplace that actually existed rather than basing its allocations on a hypothetical open marketplace. According to NAB, this is analogous to determining relative value in a "forced sale" situation.[495]

NAB also argues its analysis comparing the monthly per-subscriber fees charged to cable operators for CNN, with the royalties cable operators pay for distant signals, provided indirect corroboration of the Bortz results.[496] In addition, the Beta Research studies show that cable networks offering news and informational programming, such as CNN, consistently received higher rankings in subscriber satisfaction and interest than their viewing rankings.[497]

The Tribunal in 1989 awarded NAB less than either its viewing share, as shown by Nielsen, or its cable operator valuation share, as shown by Bortz, based on the Tribunal's

findings that NAB had not provided corroborating evidence of the avidity of its viewers, or of license fees, or that its programming was a "special factor" to attract or retain subscribers, or of harm, or that increasing "clustering" of distant signal carriage involved station-produced programs.[498] NAB contends it has provided unrebutted evidence to address each of these factors and that it should receive an award based on the 12.4% shown in the Bortz survey.

On the subject of "avidity," NAB suggests the best evidence of this, as it relates to NAB's programming, is the fact that the Bortz surveys themselves demonstrate that cable operators value station produced programs out of proportion to their viewing figures. In addition, it notes the other evidence it introduced which demonstrates subscriber "avidity."[499]

On the "license fee" issue, NAB points to its evidence that the analogous CNN license fee is higher than those for a number of other types of channels and thus provides some indirect evidence of "valuable license fees" being paid for the type of programming that characterizes NAB's claim.[500]

On the "clustering" issue, NAB contends its analysis demonstrates a continuing increase, through 1992, in the number of distant signals carried within 150 miles.[501] The Nielsen measure of viewing of station-produced programming increased between 1990 and 1992, further demonstrating the value of such programming.[502]

Arguments in Opposition To NAB'S Claim

In response to the NAB's evidence, Program Suppliers first contend that NAB's license fees comparison overstates the comparable share of royalties to PTV and NAB by substituting a much higher rate from the cable networks for the actual amount paid to receive PTV or local programming.[503] This calculation makes no sense because it substitutes free market cable network fees for one party and keeps everyone else locked into the compulsory licensing arrangement. Program Suppliers note their exhibit[504] which used the same methodology to calculate hypothetical shares for the syndicated program category based on the per subscriber fees paid for USA and Nickelodeon. The results of those calculations show that the hypothetical shares for syndicated programs would be greater than the entire royalty fund. NAB responds that it was not urging that its license fee comparison be used to determine allocations from the royalty fund but merely as a basis for comparison, showing that NAB's programming would command a relatively higher royalty share based on the same analysis as used by PTV in its direct case.[505]

Program Suppliers further contend there is no evidence to support the NAB's theory that distant signal news has low viewership but high value. They suggest that the low viewership is probably more easily explained by a lack of interest on the part of distant subscribers in local events occurring far away,

i.e., why would a Los Angeles subscriber care about Chicago weather?[506] NAB responds that overall, with the exception of WTBS, between 84% and 100% of the distant subscribers receiving the top six superstations were located in the same region as the station or in an immediately adjacent region, and, further, that none of WTBS' station-produced programming is so focused on local Atlanta affairs that it might be even arguably unappealing to distant cable operators and subscribers.[507]

According to Program Suppliers, the NAB's theory that programs with high viewership have relatively low valuations for cable operators because there are so many similar programs on broadcast signals is similarly bereft of any empirical support. The same is true of the NAB's claim that there is no correlation between viewing studies and willingness to pay for programs by subscribers.[508]

Program Suppliers next argue the NAB's evidence regarding the "clustering" of distant signal carriage to demonstrate the greater interest in station-produced news and programming should be given little if any weight. First, the evidence excluded carriage of the five most widely carried superstations which accounted for 53-55% of carriage and 75-80% of royalties in 1990-92. In addition, while the percentage of clustering has remained about the same, the absolute instances of clustering dropped "precipitously" between 1989 and 1990-92.[509]

Program Suppliers similarly dispute the NAB's theory that programming locally produced by network affiliates is more attractive to subscribers than the programming carried on independent stations, as evidenced by the fact that network affiliates made up a greater percentage of the instances of carriage than non-superstation independents. Program Suppliers point out that when the superstations are included in the comparison, the percentage of instances of carriage of network affiliates is not all that substantial.[510]

In response to the NAB's profiling of the distant signal carriage of select U.S. broadcast stations to demonstrate the regional nature of their carriage and, hence, the assumed interest in station-produced programming, the Program Suppliers point out that independents in the same markets produce more carriage and more royalties than the stations selected by NAB. Thus, concludes the Program Suppliers, the independents, which carry more series and movies and less station-produced, local programs, are in greater demand.[511]

As for the NAB's evidence regarding viewer avidity for local programming, the Program Suppliers contend NAB ignores the fact that viewer avidity is found in high rated programming, particularly syndicated series and movies. Program Suppliers contend Nielsen ratings reflect intensity insofar as they show the extent to which viewers watch programs regularly.[512] NAB responds that Program Suppliers miss the point. NAB does not

argue its viewers are more avid than Program Suppliers; rather, it argues its evidence shows that the avidity of its viewers impels cable systems to respond to them out of proportion to their actual viewing.[513]

In response to the NAB's evidence regarding ritualized and instrumental viewing, Program Suppliers point out no evidence was offered to show that any one category has a greater share of instrumental viewing than does any other program category. Further, NAB's witness agreed that the phenomenon of "parasocial interaction" applies to personalities on program categories other than local news.[514]

Analysis of and Award to the NAB

Nielsen assigned a viewing share of 7 to 8% to NAB for the three year period. The Bortz surveys allocated to this category 11.9 to 14.8%. The Tribunal in the 1989 proceeding awarded 5.70% of the basic fund to NAB. NAB requests an award of 12.6% from the basic fund.

Considering the view that a central concept in determining market value is attracting and retaining subscribers, the question is what part does NAB assume in doing so? The Tribunal in 1989 found viewer intensity not as high for NAB as for other claimants and although it increased NAB's allocation, that allocation was still below both the Bortz and Nielsen figures.

NAB relies substantially upon the Bortz survey. As stated previously, we find Bortz highly valuable in determining market value. However, in contrast to JSC, NAB does little to corroborate Bortz. While apparently valued by cable system operators, the viewing statistics of between 7 to 8% shown by Nielsen for NAB programming do not support Bortz. NAB presented evidence of analogous market data comparing CNN which we related above. The Panel finds the comparison to be overstated for the reasons given by Program Suppliers which render this evidence of little value.

NAB responds to the Tribunal's previous criticisms of its claim, most significantly to "viewer avidity." There is evidence from the Opinion Research study that we find persuasive. That study highly valued programs that "make you think" and "late night news." We also credit NAB's evidence of strong attachment to news programs and personalities. There was also persuasive evidence that news programming from distant signals from the same state or from a larger market was particularly important.

Nonetheless, we do not find a change of circumstances for NAB's claim from the time of the last proceeding. The same type of evidence was presented by NAB in the 1989 proceeding. However, in our judgment, NAB's programming was previously undervalued. In our estimation there was more of a demand for NAB's programming than the Tribunal previously recognized. We

believe NAB attracted and retained subscribers at a level equal to its viewing.

We allocate 7.5% of the basic fund to NAB for each of the three years, and an additional 0.08% for 1990 because the Canadians have settled their claim for that year.

4. PUBLIC TELEVISION CLAIMANTS

The Public Television Claimants (PTV) urge that the Bortz survey results, with an adjustment, should be given controlling weight by the Panel. In addition, PTV contends that in making its award the Panel should further adjust the Bortz values to account for the fact that PTV does not participate in the 3.75 fund and must receive all of its share from the Basic fund.

The uniqueness of PTV programming, arising from its non-commercial educational objectives, wide range of innovative programs and heavy mix of original first-run productions which are expensive and require years of research and development, dovetails closely with the need of cable operators to offer programs appealing to a variety of subscriber interests. About 21 percent of all Form 3 cable systems carried one or more PTV distant signals during the years 1990-1992. Approximately 2.1 million households, or roughly 4.5% of all U.S. cable households, received their only PTV signal by distant retransmission, and another 5.6% of U.S. cable households received their second PTV signal by distant retransmission during this period.[214] During each of those years, PBS distributed approximately 3,200 hours of programming, of which more than 1,600 hours were original, first-run programming.[215] The total cost of those programs increased from $258 million in 1990 to $301 million in 1992, and local PTV

station programming expenditures rose from $279 million in 1990 to about $300 million in 1991 and 1992.[517]

PTV presented evidence of special factors that made its programming more valuable in 1990-1992 than in prior years. Significant new programming and promotional initiatives were commenced in 1990 under a newly-formed National Program Service of PBS, which placed increased emphasis on shows of special interest to television viewers and the uniqueness of PTV in comparison with "look-alike" cable networks such as Arts & Entertainment and the Discovery Channel.[518] A major programming effort called Children's Initiative, aimed at upgrading children's programming offered by PBS, made several new children's series available in consultation with educational experts,[519] appealing to parents who prefer to avoid exposing children to heavy advertising.[520] Such programming is important to cable operators in attracting and retaining subscribers.[521]

As quantitative measures of marketplace value, PTV relied on the Bortz survey and on three other, independent measures corroborative of the adjusted Bortz results. The Bortz survey (before adjustment) showed steady and substantial increases in PTV's relative value shares. Moreover, the Bortz respondents finding PTV programming "most popular" and used for promotional or advertising purposes also increased significantly:[522]

	1989	1990	1991	1992

Relative Value	1.3%	2.7%	2.9%	3.0%
Most Popular	1.1	1.6	5.3	7.3
Promotional Use	0.7	2.8	3.4	8.1

Dr. William B. Fairley, President of Analysis and Inference, Inc., a research and consulting firm, presented an analysis designed to adjust the Bortz values to correct for the underrepresentation of PTV found by the Tribunal in 1989 to arise from the Bortz methodology's automatic assignment of a zero value to PTV programming if the respondent did not actually carry a PTV distant signal during the survey year. The Tribunal had found, as early as its 1983 decision, that the fact that a cable system did not carry a public television signal meant only that the actual price (compulsory license fee) was too high, whereas there could have been some lesser price that respondent operators were willing to spend. This was not a fault in the Bortz survey design, the Tribunal found, since asking respondents to value a program category which they did not carry would have caused confusion, but nevertheless required an adjustment. The Tribunal applied a multiplier of 1.2 based on the ratio of program categories considered by those carrying a PTV distant signal compared to those not carrying one.[523]

Dr. Fairley testified that such an adjustment was reasonable, because a cable operator could obtain PTV programming only by importing an entire signal unlike commercial programming

that ordinarily includes a mix of commercial program categories. However, he found that the Tribunal adjustment did not adequately correct for the understatement and applied a statistical method based on the principle of estimating for "missing data" which he described as more rigorous. He found that the "threshold value" at which a cable operator would carry a distant PTV signal could be estimated at the average of the smallest share reported by each cable operator that did in fact carry a distant PTV signal during the survey year, averaged over all survey respondents, to which he then applied a statistical technique called "maximum likelihood estimation" to compute the average PTV share value for respondents that did not carry such a signal. The results of Dr. Fairley's analysis were the following adjusted PTV share values:[324]

1990	1991	1992
6.1%	6.3%	5.7%

Mr. Bortz acknowledged that a cable operator might assign a value to PTV programming even though it carried no PTV distant signal during the survey year, but had adhered to his zero-value methodology to avoid ambiguity in his survey results.[325] Earlier surveys of cable operators, conducted for the 1978, 1979 and 1980 proceedings, asked respondents to provide a relative value for PTV programming even if they had not carried a PTV signal during the survey year. PTV's share of relative value in

those studies ranged from 4.9% to 7.0%. Only in 1983, when the zero value methodology was adopted, did PTV's share drop significantly.[526]

The three independent measures corroborating the adjusted Bortz results were data on instances of carriage, an analogy to license fees charged for the Arts & Entertainment cable network, and 1993 studies of estimated license fees (Hecht/Kagan Study). Instances of carriage for PTV distant signals increased between 1989 and 1992 from 6.7% of all distant signals to 7.3%, and from 7.4% of basic signals to 8.0%.[527] Only PTV and the three original superstations experienced a growth in distant carriage over this period.[528] These data have particular significance for PTV because a cable operator decision to import PTV is an affirmative action to import an entire programming category, unlike distant commercial signals.

John W. Fuller, Director of Research for PBS, presented an analogy to license fees paid by cable operators for Arts & Entertainment, a cable network with "look-alike" programming that overlaps substantially with PTV's but includes far less original, first-run productions. Applying A&E license fees to the subscriber instances of carriage of PTV signals for 1990-1992, with a deflating adjustment to reflect loss of cable operator

advertising revenues, the estimated "licensing revenues" for a PTV distant signal carried in lieu of A&E would be:[529]

	1990	1991	1992
PTV % of Basic Fund	6.6%	6.8%	7.7%

While this analogy is not perfect, it illustrates a marketplace value for distant signal PTV programming that is close to the adjusted Bortz results.

A third quantitative corroboration was also presented by Mr. Fuller, based on a study by Norman Hecht Research, Inc., prepared in 1993 for NAB, of the potential license fees that broadcast stations could expect from cable operators. The Hecht study involved a survey of cable subscribers to two large Form 3 cable systems in a single "top ten" market. The results of that survey had then been translated by Paul Kagan Associates, Inc., a respected cable industry consultant, into estimated "license fees" that broadcasters could be expected to charge based on the Hecht results. The Kagan study was published in the trade press in 1993. Mr. Fuller multiplied those estimated license fees by the number of cable subscribers who received their first, second, or third (or more) PTV signal by distant retransmission, to derive a percentage royalty award for the years 1990 to 1992

(after adjusting to deflate for increases in license fees over the period). The results were:[530]

	1990	1991	1992
PTV % of Basic Fund	6.6%	6.8%	7.7%

Again, the results are close to the adjusted Bortz results for PTV.

PTV also contends that a further adjustment should be made in its award because its total share of the adjusted Bortz values must come entirely from the Basic fund, and the Bortz survey does not differentiate between the Basic fund and the 3.75 fund in which PTV does not participate. With pro rata adjustment for other claimants, PTV's relative share would then be 8.1 % in 1990, 8.3% in 1991, and 7.5% in 1992.[531] However, PTV's claim in this proceeding is 7% of the Basic fund for each of the three years at issue.[532]

Only Program Suppliers and the Canadian Claimants opposed PTV's claim, as they opposed any reliance on the Bortz survey. Program Suppliers assert that PTV's evidence largely disguises a claim based on quality of programming which has been rejected by the Tribunal as a criterion,[533] that the increase in "look-alike" cable networks has further eroded PTV's value in the cable marketplace, that PBS relies upon viewing data by altering its schedule to offer attractive programming and avoid fundraising drives during Nielsen sweeps periods, that the adjustment

proposed by Dr. Fairley has no factual basis, and that none of the independent corroborative data presented by Mr. Fuller has any weight. Program Suppliers would have the Panel rely on Nielsen data as useful indicators of value.[534] That data showed a viewing share of 4% for PTV in the four sweeps months of 1990, and full year viewing of 2% in 1991 and 4% in 1992. (It is not disputed that the 1991 Nielsen data for PTV are substantially incomplete.[535] The automatic-zero adjustment is merely speculative as there is no benefit or harm and therefore no marketplace value in not carrying a distant PTV signal, and Dr. Fairley's analysis fails to consider that among Bortz respondents that did carry such a signal, roughly 20% nevertheless assigned a zero value to PTV. The Canadians contend that Dr. Fairley's "missing data" analysis is unsuitable where no such data existed to be replaced.

Both Program Suppliers and Canadians observed that instances of carriage are not of equal value, and that percentages or averages of royalties paid are far more significant, particularly in light of the relatively low DSE rate accorded PTV. The analogy to A&E license rates is weak because the actual rates are generally only about two-thirds of the "top of the rate card" fees,[536] and to similarly substitute analogous free market cable network fees for all parties would produce a total amount well above the total royalty payments. PTV replied that the A&E analogy is primarily an illustrative proxy that has weight as an

independent confirmation of the Bortz results. The Hecht/Kagan Study was termed irrelevant by Canadian Claimants and criticized by Program Suppliers as based on a survey of only local subscribers, not distant signal viewers.

Analysis of and Award to the PTV

Nielsen assigned a viewing share of 2 to 4% to PTV for the three year period. The Bortz surveys allocated to this category 2.7 to 3.0%. The Tribunal in the 1989 proceeding awarded 4% of the basic fund to PTV. PTV requests an award of 7% from the basic fund.

The Tribunal found in its 1989 decision that by every measure PTV had declined in its proportional share of the distant-signal marketplace since 1983.[337]

By all available comparable measures, PTV's share of the marketplace has increased since 1989. Their Nielsen viewing data increased from 3.074% in 1989 to 4% in 1990 and 1992, with only the incomplete 1991 data below that level. Their unadjusted Bortz survey result increased from 1.3% in 1989 to 2.7% in 1990, 2.9% in 1991 and 3.0% in 1992, with even greater increases in the Bortz results for program popularity and promotional or advertising uses of PTV programming. Instances of carriage increased between 1989 and 1992 from 7.4% of basic signals to 8.0%.

Such consistently impressive quantitative results cannot be disregarded as reflecting merely the rejected criterion of quality per se, any more than the Tribunal could disregard the decline in those measures between 1983 and 1989. The Tribunal then agreed that the perception of quality by cable operators may be recognized as a factor inducing them to import PTV signals. Whether called quality or niche programming, PTV's rebound since 1989 is shown by every objective measure. The A&E analogy is overstated for the reasons give by Program Suppliers, but even allowing for defects in reliance on instances of carriage data, analogy to A&E license fees and applicability of the Hecht/Kagan survey results, those comparisons are likewise consistent with PTV's resurgence since the last distribution proceeding. As a credible explanation, nothing in the record contradicts the substantial evidence of new programming and promotional initiatives undertaken by PBS commencing in 1990. The increased entry of "look-alike" cable networks, rather than eroding PTV's share of the distant signal marketplace, with at least equal likelihood reflects perception of a valuable niche market established by PTV with potential for yet further expansion.

The automatic-zero adjustment proposed by Dr. Fairley troubles the Panel. Methodology aside, there appears little to distinguish PTV in this regard from other claimants that also were not carried at all by many respondents in some of the Bortz survey years. No other claimant has sought such an adjustment,

although Canadian Claimants, who vigorously oppose any reliance on the Bortz survey results, have provided in their post-hearing briefs a comparable calculation apparently made by their counsel to satisfy any "curiosity."[538] PTV program importation involves an entire distant signal, unlike all other program categories except Canadian, but the zero value accorded PTV by 20% of the respondents that did carry a distant PTV signal warrants closer examination. For immediate purposes, since no considerations have been presented that were not presented or available to be presented to the Tribunal, which addressed the subject explicitly in both its 1983 and 1989 determinations, we adhere to that Tribunal's allowance of the adjustment. No party having presented any alternative to Dr. Fairley's methodology, we accept it for purposes of this proceeding.

PTV's proposed further adjustment to allow for its non-participation in the 3.75 fund is rejected for the same reason given by the Tribunal in the 1989 proceeding.[539] Mr. Bortz specifically disavowed any intention or implication in his survey to have respondents answer based on their royalty payments.[540]

We allocate 5.75% of the basic fund to PTV for each of the three years, and an additional 0.06% for 1990 because the Canadians have settled their claim for that year.

5. THE DEVOTIONALS

In addition to the Bortz survey, the Devotionals presented other evidence which they claim corroborates the high market value of their programming.

Dr. David Clark, President of KMC Media, a witness for the Devotionals, testified regarding the religious programming that was available on broadcast stations carried as distant signals. For example, superstation WGN carried a block of religious programs.[541] Thomas Larson, another witness for the Devotionals, explained that Devotionals programming was also broadcast on religious "specialty stations" carried by cable systems as distant signals.[542] Some of the programming was telecasts of traditional religious services, other programs include The 700 Club, co-hosted by Pat Robertson and Ben Kenchlow, and children's programming such as "Superbook" and "The Flying House."[543] Robertson testified that these programs are not mere entertainment -- "they frequently speak to the center of peoples' concerns and being."[544]

The Devotionals also presented evidence demonstrating the avidity of their viewers. Dr. Clark testified that many viewers of religious programs have unusually intense loyalty to and interest in religious programming, and their decisions to purchase cable subscriptions are strongly influenced by their desire to obtain religious programs.[545] Viewers of the

Devotionals programming were willing to make voluntary contributions to the producers of those programs. For example, contributions to The 700 Club alone were more than $88 million in 1992.[546] This demonstrates the viewers' commitment to the programs.[547]

Thomas Engel testified that cable operators were aware of the value of religious programming on distant signals as part of their effort to attract and retain subscribers.[548] Engel's experience in the cable industry has shown that there is a universal demand for religious programming throughout the United States. Stanley R. Searle, a multiple system owner in Southern Colorado, testified that half or more of his subscribers believe the systems should carry stations with some religious programs and that it is the unique appeal of sports and religious programming that justified his importation of a distant signal from Denver.[549]

It was testified that the value of religious programming is demonstrated by the carriage of religious "specialty stations." These are stations whose programming consists of religious programming for both one-third of their total broadcast weeks and one-third of their prime time offerings.[550] The 43 religious "specialty stations" which were carried as distant signals,

generated the following royalties, as calculated by Cable Data Corporation:

YEAR	AVERAGE NUMBER OF SUBSCRIBERS	ROYALTIES
1989	820,641	$ 867,082
1990	984,161	747,850
1991	1,380,719	1,286,189
1992	1,367,221	1,451,617
1993	1,811,539	2,182,670[551]

Cable operators serving approximately 22 million homes chose to carry a cable network known as VISN or "Faith and Values," which was virtually all religious programming.[552] In addition, cable operators serving approximately 63 million homes were also willing to pay for the right to carry the Family Channel.[553] The Family Channel carried The 700 Club in prime time five days a week and also contained a substantial amount of other religious programming.[554]

Devotionals' Arguments

Devotionals contend the best evidence of marketplace value is the Bortz survey. Bortz measures the correct variable. The Nielsen results do not correlate with the preferences of viewers to subscribe or to retain their subscriptions to cable.[555] In addition, the viewing figures themselves are unreliable.

Devotionals argue the results of the Bortz surveys are confirmed by the other evidence described above, much of which, they say, was offered for the first time in this proceeding. This other evidence demonstrates that cable operators are

significantly benefitted by distant signal retransmission of Devotional programming.[556] They further contend cable operators maximize their revenues by seeking to attract and retain subscribers and this is done by providing a programming mix that will have special appeal to discrete and diverse niches of the universe of potential subscribers; cable operators use religious programming to capture niche subscribers.[557] The evidence demonstrated that the niche market for religious programming existed throughout the United States.

Devotionals also point to the evidence showing the growing royalties attributable to the carriage of religious "specialty" stations during the years at issue here.[558] They further emphasize the unusual loyalty of their viewers which is demonstrated in part by their willingness to make voluntary contributions to the ministries that produce the programs.[559]

Devotionals note the Tribunal's 1989 award to them was a share "far below" the Bortz survey result because the Tribunal believed "the price of such programs is much less than what the cable operator is willing to spend."[560] They contend the evidence in this proceeding specifically addresses this point and demonstrates that, in the cable marketplace, Devotional programming would generate a market price much as other programming. They contend that in the hypothetical open market, they have already accomplished their goal of having advertising-free programming and they would "negotiate up" to the cable

operator's value of programming in attracting and retaining subscribers.[561]

Arguments in Opposition to Devotionals' Claim

The Program Suppliers criticize the case presented by the Devotionals. They point out that the Devotionals rely solely on the Bortz survey and have not offered any other "quantitative, useable evidence."[562] With respect to Larson's testimony comparing the average number of subscribers and royalty fees generated for religious specialty stations for 1989 through 1992, other claimants argue that no guidance is provided regarding how this information is to be translated into the relative value of the Devotionals' programming.[563] They also note that the "specialty station" royalties for the three years at issue represent less than 1% of the total royalty pool, and are thus consistent with Devotionals' low viewing shares.[564] Other claimants further contend the Devotionals' evidence about the "quality" of devotional programming and about "viewer interest" in their programs cannot be quantified and is not beneficial to this Panel.[565] Finally, Program Suppliers point out that the Devotionals pay stations for air time and argue this practice indicates a lower value for devotional programming compared to other programs.[566]

Analysis of and Award to the Devotionals

Nielsen assigned a viewing share of 1% to Devotionals in the years it measured this category. The Bortz surveys allocated to this category 3.8 to 4.3%. The Tribunal in the 1989 proceeding awarded 1.25% of the basic fund to Devotionals. Devotionals request an award of 3.5 to 4.0% from the basic fund.

The Devotionals' basic claim is rooted in the Bortz results and supported by the argument that they provide niche programming to very "avid" viewers. The evidence supporting the claim is anecdotal or individual opinions, not quantified and/or not related to Devotionals' proportionate share of the royalty fund. Assuming that broadcasters accept payment for Devotional programming to offset absence of advertising revenues, we have no data on the amounts of such payments. Moreover, the question before the Panel is program value to cable operators, not to broadcasters. Our reservations concerning the Bortz surveys are particularly acute here. The lack of evidence of any price demanded by sellers is compelling. The Tribunal in 1989 found, as we do also, that the price of the programs is much less than what the cable operator is willing to spend. The cable operator's assessment is not supported by any new, persuasive evidence of avidity. We find no change in circumstances.

We allocate 1.25% of the basic fund to Devotionals for each of the three years, and an additional 0.01% for 1990 because the Canadians have settled their claim for that year.

6. CANADIANS

The Canadian claimants, cable systems near the Canadian border on both the east coast and west coast principally, carry Canadian broadcast stations as distant signals. The claim is for non-U.S. programming and includes both Canadian network and local programs of every type. The Canadians' claim does not include the programming that is part of the JSC claim. That is, it does not include the National Hockey League games, the Toronto Blue Jays and Montreal Expos Major League Baseball games. It also does not include programs encompassed by the Program Suppliers, that is, United States off-network syndicated series and movies.[567]

The Canadian Broadcasting Corporation (CBC) operates two national television networks, one in English referred to as CBC and one in French, referred to as Société Radio-Canada (SRC).[568]

The majority of the programming broadcast by CBC was produced in Canada. In 1990-91, 82% of CBC's prime time programming was Canadian. In 1991-92, the percentage rose to 89% and in 1992-93, it was 86%.[569] News is a very vital and important part of the English network. CBC carries national, regional and local news.[570] It carries a broad range of sports in addition to those previously mentioned.[571] It produces its own movies, arts and programs of general interest.[572]

The French network, SRC, also has much of its programming produced in Canada (86% of prime time programming in 1990-91, 84% in 1991-92, and 83% in 1992-93).[573] The remainder of the French broadcast programming comes from different countries.

For private Canadian network stations, 25-50% of the programming hours are included in the Program Suppliers' claim and they are not compensable to the Canadians.[574] For CBC network stations, approximately 25% of the programming is encompassed by NAB's claim. The same is true for the sports that are part of the JSC claim.[575] An exhibit introduced by the Canadians demonstrates that the Canadian stations with predominantly Canadian content are responsible for the lion's share of subscribers and fees generated by Canadian signals.[576] In 1991, the stations carrying the highest percentage of Canadian content are responsible for generating over 80% of the total fees and attracting almost 80% of the subscribers.[577] Canadian programming fills a unique niche in the channel line-up offered by U.S. cable systems along the Canadian border.

Three French language Canadian television stations were re-transmitted as distant signals by over 20 cable systems during 1991 and 1992. Several systems carried more than one of these stations. These systems had a total subscriber population of approximately 380,000 households.[578]

Dr. John E. Calfee, presented as a witness by the Canadians, testified that a feature unique to the Canadian claimants is the

fact that Canadian programming emanates from signals that carry relatively little non-Canadian programming.[579] Cable operators are expressing a demand for Canadian programs when they import Canadian signals. This suggests that the proportion of all fees paid for importing Canadian signals offers a superior starting point for allocating these fees to programming types.[580]

The total royalties paid by U.S. Form 3 cable systems for the carriage of Canadian distant signals for the years 1991 and 1992 was $5,471,794.[581] This amounts to 1.95% of all basic royalties.

The Canadians retained Cable Data Corporation ("CDC") to allocate the total basic royalties paid by a cable system pro rata to each of the distant stations carried according to the distant signal values of the stations. The calculation of the royalty fees by CDC is approximately the midpoint in a narrow range of what cable operators actually paid for distant Canadian signals.[582] For the combined years 1991-92, the average amount of basic royalties paid to carry Canadian distant signals, when using the methodology of CDC, was 1.95%.[583]

The Canadians also presented the Ford/Ringold survey of U.S. cable systems carrying Canadian distant signals. In the years 1991-94, Drs. Gary Ford and Debra Ringold conducted a study of the U.S. Form 3 cable systems which import English-language Canadian programming and the systems which import French-language Canadian programming.[584] Dr. Ringold is Associate Professor of

Marketing at Willamette University. The purpose of the study was to estimate the value of Canadian programming on Canadian distant signals retransmitted by Form 3 cable system operators in the U.S.[585]

The 1991 and 1992 surveys asked about the value of six different types of programming carried on a randomly chosen Canadian signal retransmitted by the cable system:

1. National Hockey League hockey and Major League Baseball;

2. Canadian-produced news, public affairs, documentaries and other programs produced by the station;

3. U.S. syndicated series and movies;

4. Canadian-produced sports programming such as Canadian Football League games, skating, skiing and tennis;

5. Canadian-produced arts and variety, drama, children's and other entertainment programming; and

6. Other programming.[586]

The 1993 and 1994 surveys introduced Canadian-produced children's programming as a separate and seventh programming category.[587] English-signal response rates ranged from 68% to 78%. French signal response rates ranged from 63% to 90%.[588]

The respondents were asked what percentage, if any, of the total value of programming carried on [station's call letters] is accounted for by each of the categories listed above.[589] The survey results indicated that cable system operators retransmit the Canadian signals primarily for their unique Canadian

programming rather than for NHL hockey and Major League Baseball or U.S. syndicated shows and movies already available on U.S. television.[590]

Beginning in 1992, respondents were asked their reasons for carrying the distant signals which were surveyed. An average of 81% of the respondents in 1992-94 agreed their system needed to carry an English-language Canadian signal in order to attract and retain subscribers.[591] An average of 68% agreed as to a French-language Canadian signal.[592]

The combined French and English results over the four year history of the study reflects cable operators gave 56.09% of the value to Canadian programming, 29.06% to NHL hockey and baseball and 15% to U.S. series and movies.[593]

David Bennett, Business Affairs & Corporate Development, Canadian Broadcasting Corporation, testified that in 1983, the carriage of Canadian distant signals accounted for 2.1% of the total. In 1992, the instances of carriage of Canadian distant signals amounted to 1.2%.[594]

The Canadians' Arguments

The Canadians argue that the continued carriage of Canadian signals by U.S. cable systems, and the payment of royalty fees for those distant signals, is a strong indicator of the signals' value. This is actual behavior - people making business decisions.

The Canadians take a unique position among the claimants in their proposed method for determining their award. They propose that this Panel first determine the amount of royalties that were paid for the carriage of distant Canadian stations, and, second, divide those royalties only among the three groups of claimants (Canadians, Program Suppliers and JSC) whose programming was actually carried by Canadian stations according to the relative values of each group's programming.[595] They argue that during 1991-92, 1.95% of all basic cable royalties were paid specifically for the carriage of Canadian stations.[596] Of those royalties, the Canadians claim no less than 56% and up to 100% or a minimum of 1.1% up to 2.0% of all basic fund royalties.[597]

Canadians further contend the "depth, breadth, quality and quantity" of their programming benefits cable operators who must offer their subscribers a variety of programming.[598] They point to the Tribunal's 1983 decision where the Tribunal stated, with regard to the Canadians' claim, "a nexus to marketplace value is still needed that is greater than already recognized and reflected in past awards."[599] The Canadians claim they have provided four types of evidence of market place value: First, the royalty payments paid for all Canadian stations. Second, content data showing most of the programming on Canadian stations is Canadian and that stations with more Canadian content are carried more and generate more royalties. Third, cable networks, which are the relevant marketplace, are eager buyers of Canadian

programming. Fourth, their cable operator studies showing that cable operators credit Canadian programming with most of the value of Canadian stations.[600]

The Canadians further contend they demonstrated that in 1991-92, Canadian programming constituted the majority of the programming on Canadian distant signals. In addition, much of the American programming was simulcasts of U.S. series and broadcasts which are available on the U.S. network stations. Those U.S. programs thus provide no additional value to cable operators.[601]

Arguments in Opposition to the Canadians' Claim

Program Suppliers note that in both the 1980 and 1983 proceedings the Canadians were awarded 0.75% of the basic fund. Here, the Canadians seek twice that amount despite the fact that the instances of distant cable carriage of Canadian-produced programming since 1983 has dropped by nearly 50%.[602]

Program Suppliers further argue the Ford-Ringold survey has both methodological and conceptual problems which render its conclusions unreliable.[603] They note that the survey frames the "value" of distant signal programming in terms of the cable operator's impression of its ability to attract or retain cable system subscribers but it does not measure subscriber opinions.

Program Suppliers argue Canadian programming is not valued as unique and that there is no interest in French

programming.[604] The Canadians respond that the testimony of numerous witnesses demonstrates that Canadian programming is different, original, distinct, and unique - particularly the French-language programming,[605] and that other many other witnesses testified to the value of "niche" programming to cable operators. Significantly, the Program Suppliers agree that a "logical starting point" to evaluate how much the Canadians should be awarded would be the royalties paid for their signals.[606]

PTV disputes the contention that the Canadians' award should be based on the amount paid in royalties for distant Canadian signals. PTV points out this approach is not based on the relative marketplace value of different distant signal programming.[607] PTV also disputes the Canadians' characterization of their calculation of ranges of payments as being "sufficiently specific" to allow an award to be made on that basis. PTV notes that the difference between the maximum and minimum points in the Canadian range, one percentage point, is greater than the total royalties ever awarded to the Canadians in past proceedings. (One percentage point in this proceeding is worth approximately $5 million.)[608] PTV further points out that under the statutory royalty structure, a cable operator does not have to decide how much it is willing to pay to import a particular distant signal. The operator pays a fixed fee that

could be substantially less than what it is willing to pay to import the particular distant signal.[60]

Analysis and Award to Canadians

The Bortz surveys allocated to the Canadians 0.3 to 0.5% in the years 1991-92. The Tribunal in the 1989 proceeding awarded 0.75% of the basic fund to the Canadians. The Canadians request an allocation between 1.1 and 2% from the basic fund. Their claim encompasses only the years 1991 and 1992. They settled their claim for 1990.

Cable system operators specifically carry either the Canadians or PTV. Claimants in all other categories have their programming presented by the superstations and all others in what has been referred to as a "bouquet," a mixed combination of programming. The Canadians argue, therefore, they can determine exactly what was paid for their programming and request that allocation. In this case it amounts to 1.95% of the basic cable royalties. There is one refinement to this calculation. After making that determination, the percentage of the programming for major league baseball, national hockey league games, U.S. college and team sports, and other programs owned by U.S. copyright owners must be deleted. The claims of the sports and other U.S. owned programs are encompassed by JSC or Program Suppliers. More specifically, the Canadians claim that approximately 1.95% of all basic royalties is for the carriage of Canadian stations. Of

that number, JSC should receive 29%, Program Suppliers should receive 15%, and the balance (56%) should be allocated to the Canadians. This 56% is equal to 1.1% of the basic royalties.

The Panel believes that the analysis for this category should be the same as for the other categories. The Bortz survey shows cable system operators value Canadian programming at .3%. This number is totally unreliable as Mr. Bortz suggests that the small numbers are incapable of being accurately measured. The other quantitative evidence we have is fees generated. While there is a great deal of criticism, particularly by PTV, concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians.

We allocate 1% of the basic fund to the Canadians for the years 1991 and 1992.

SUMMARY

The allocations are as follows:

	1990 (Percent)	1991-92 (Percent)	3.75 (Percent)	Syndex (Percent)
Program Suppliers	55.55	55.00	58.6	100
Joint Sports Claimants	29.80	29.50	32.6	
Commercial Television	7.58	7.50	7.5	
Non-commercial Television	5.81	5.75	--	
Devotional Claimants	1.26	1.25	0.95	
Canadian Claimants		1.00	0.35	

The majority is submitted and certified by:

Mel R. Jiganti, Chairperson

Ronald Wertheim, Arbitrator

The partial dissent of John Farmakides, Arbitrator, is as follows:

NOTE: Citations to the parties' proposed findings of fact and conclusions of law will be abbreviated as "F&C" or "Reply F&C."

1. 17 U.S.C. Sec. 111(d)(3), as amended, Pub. L. 103-198, 107 Stat. 2304 (1993).

2. There is a slight discrepancy between this figure and the number of Form 3 systems previously referred to due to a difference in data bases. JSC Ex. 2 at 4.

3. JSC Ex. 2 at 5, Table 3-2.

4. JSC Ex. 4 at 50.

5. Tr. 10782-83.

6. Green written direct at 1.

7. Pub.L. 103-198, 107 Stat. 2304, 1993.

8. 59 Fed. Reg. 2551.

9. 59 Fed. Reg. 63025.

10. 59 Fed. Reg. 64714.

11. 60 Fed. Reg. 14971-76.

12. See, 37 CFR Sec. 251.72; 60 Fed. Reg. 58680.

13. 17 U.S.C. Sec. 802.

14. 37 CFR 251.53.

15. "Stipulation of the Parties on the Issues of Program Categorization and Scope of Claims," at 1.

16. 17 U.S.C. 802(c).

17. H. Rep. No. 1476, 94th Cong. 2d Sess. 97, reprinted in 1976 U.S. Code Cong & Admin. News 5659, 5712.

18. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63035.

19. Id.

20. 45 Fed. Reg. at 63035.

21. *Christian Broadcasting Network v. Cable Royalty Tribunal*, 720 F.2d 1295, 1313 (D.C. Cir. 1983).

22. See, e.g., 1982 Cable Royalty Distribution Determination, 49 Fed. Reg. 37653, 37655 (1984)("the total number of hours of categories of programming on distant signals provides limited guidance to a reasonable allocation of cable royalties.").

23. 45 Fed. Reg. at 63036.

24. 45 Fed. Reg at 63037.

25. 45 Fed. Reg. at 63036.

26. 57 Fed. Reg. at 15303.

27. See, e.g., 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63035 (Tribunal concludes the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems is of material importance in the distribution of royalty fees); 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9679, 9692 ("the harm test is of limited utility in allocating royalty fees among categories of claimants."); 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12810 (gives Program Suppliers a "credit" for harm but finds nothing in the record to show any hard figures as to the degree of harm incurred).

28. 45 Fed. Reg. at 63035.

29. Id.

30. 47 Fed. Reg. at 9892.

31. 57 Fed. Reg. at 15302.

32. 45 Fed. Reg. 63026, 63036.

33. Id.

34. 1979 Cable Royalty Distribution Determination, 49 Fed. Reg. 20048, 20049 (1984); see also, 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15288 (1992)(the Tribunal's goal in "allocating the fund among various program types is to 'simulate market valuation.'"); *NCTA v. CRT*, 724 F.2d 176, 182 (D.C. Cir. 1983)("The Tribunal confronts the arduous task of 'simulating the subtleties of the cable marketplace within a one-year decisionmaking period.'").

35. 772 F.2d at 939.

36. 720 F.2d at 1306.

37. *National Association of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985).

63. Tr. 2854 (Lindstrom).

64. Tr. 8058 (Lindstrom).

65. Tr. 8096 (Lindstrom).

66. Tr. 8223 (Lindstrom).

67. Tr. 8194 (Lindstrom).

68. Tr. 8072 (Lindstrom).

69. Tr. 8073 (Lindstrom).

70. Lindstrom written direct, 10; Lindstrom amended written direct, 11-14.

71. Tr. 8210 (Lindstrom).

72. Tr. 8218 (Lindstrom).

73. Tr. 8126-28 (Lindstrom).

74. Tr. 8126-29 (Lindstrom).

75. Kessler written direct, 3.

76. Kessler written direct, 3-4.

77. Kessler written direct, 5.

78. Tr. 3730 (Sieber).

79. Sieber written direct at 1.

80. Sieber written direct at 1.

81. Sieber written direct at 2.

82. Sieber written direct at 2.

83. Sieber written direct at 7.

84. Sieber written direct at 8.

85. Sieber written direct, 7.

86. Sieber written direct at 7.

87. Sieber written direct at 7.

113. Tr. 4105-06 (Sieber).

114. Tr. 4105-06 (Sieber).

115. Tr. 3875-76 (Sieber).

116. Tr. 11707 (Miller).

117. Miller written rebuttal at 4.

118. Miller written rebuttal at 4.

119. Miller written rebuttal at 4.

120. Miller written rebuttal at 4.

121. Miller written rebuttal at 7.

122. Miller written rebuttal at 7.

123. Miller written rebuttal at 7.

124. Miller written rebuttal at 7.

125. Miller written rebuttal at 7.

126. Miller written rebuttal at 8.

127. Miller written rebuttal at 8.

128. Miller written rebuttal at 8.

129. Miller written rebuttal at 8.

130. Miller written rebuttal at 8.

131. Tr. 6702 (Salinger).

132. Tr. 10880 (Scheffman).

133. Tr. 5936 (Engel).

134. Tr. 5850 (Fairley).

135. Tr. 9383, 9391-92, 9402, 9453-56, 9458-61, 9474 (Fairley).

136. Tr. 9400-01, 9403-04, 9421-22, 9425-28, 9439-40, 9484-86 (Fairley).

137. Tr. 11845-49 (Miller); Tr. 7923, 7953-54 (Ringold).

163. See JSC F&C at 121.

164. PTV F&C at 86.

165. PTV F&C at 86; Dev. F&C at 43.

166. See JSC F&C at 114-15.

167. PS F&C at 144.

168. JSC Reply F&C at 47.

169. PS F&C 145-46.

170. Dev. F&C at 46.

171. JSC F&C at 145.

172. Dev. F&C at 35.

173. Tr. 11708 (Lindstrom).

174. Tr. 11710-11 (Miller).

175. Tr. 11708 (Miller).

176. PS F&C at 166.

177. Bortz direct testimony at 8.

178. Bortz direct testimony at 2.

179. Bortz direct testimony at 2.

180. Bortz direct testimony at 14.

181. Bortz direct testimony at 14.

182. See 57 Fed. Reg. at 15301.

183. JSC Ex. 3 at 13-22; Bortz direct testimony at 17.

184. 57 Fed. Reg. at 15301.

185. Tr. 768, 776 (Bortz).

186. 57 Fed. Reg. at 15300.

187. Bortz direct testimony at 21-22.

213. Tr. 984 (Trautman).

214. Tr. 1058 (Trautman).

215. Tr. 11245-46 (Axelrod).

216. Tr. 2547-48 (Wildman).

217. Tr. 11331-32 (Scheffman).

218. Tr. 6700, 6776-77 (Salinger).

219. Salinger direct testimony at 7.

220. Statement of Paul J. Much at 7.

221. Tr. 2353-54 (Much).

222. Tr.2351 (Much); Statement of Paul J. Much at 4.

223. Statement of Paul J. Much at 3.

224. Tr. 2348 (Much); Statement of Paul J. Much at 3.

225. Tr. 2349-51 (Much).

226. Tr.2347 (Much); Statement of Paul J. Much at 3,5.

227. Tr. 2354, 2366 (Much); Statement of Paul J. Much at 5.

228. Tr. 2354 (Much).

229. Tr. 2444 (Much).

230. Tr. 2445 (Much).

231. Tr. 2457 (Much).

232. Frankel written rebuttal at 8.

233. Frankel written rebuttal at 4.

234. Frankel written rebuttal at 6.

235. Frankel written rebuttal at 6.

236. Frankel written rebuttal at 7.

237. Frankel written rebuttal at 7.

238. Woodbury written rebuttal at 28.

239. Woodbury written rebuttal at 15.

240. Woodbury written rebuttal at 19-20.

241. Woodbury written rebuttal at 21.

242. Id. at 20.

243. Woodbury written rebuttal at 22.

244. Woodbury written rebuttal at 22.

245. Rubin written rebuttal at 2.

246. Rubin written rebuttal at 2.

247. Rubin written rebuttal at 2.

248. Rubin written rebuttal at 4.

249. Rubin written rebuttal at 4.

250. Rubin written rebuttal at 8-9.

251. Rubin written rebuttal at 11.

252. Rubin written rebuttal at 11.

253. Rubin written rebuttal at 11-12.

254. Ford rebuttal testimony at 1.

255. Ford rebuttal testimony at 1.

256. Ford rebuttal testimony at 1.

257. Ford rebuttal testimony at 1.

258. Calfee written rebuttal at 2, 3, 9.

259. Tr. 2295-97 (Ducey).

260. See, e.g., JSC F&C at 144-45.

261. PTV F&C at 80.

262. See, e.g., JSC F&C at 96.

263. JSC F&C at 96, citing Tr. 2428 (Much).

264. PS Reply F&C at 2-3.

265. See JSC F&C at 95.

266. JSC F&C at 148.

267. PS Reply F&C at 58.

268. See JSC F&C at 149.

269. See JSC F&C at 150.

270. PS Reply F&C at 10.

271. PS F&C at 116.

272. NAB Reply F&C at 25.

273. PS F&C at 123-27.

274. JSC Reply F&C at 24, citing 57 Fed. Reg. at 15295.

275. PS F&C at 119-20.

276. See JSC Reply F&C at 26.

277. PS Reply F&C at 60.

278. Dev. Reply F&C at 17.

279. Dev. F&C at 44.

280. PS F&C at 134.

281. PS F&C at 135.

282. See JSC Reply F&C at 26-30.

283. PS F&C 120-21.

284. See JSC Reply F&C at 22.

285. PS Reply F&C at 62.

286. PS Reply F&C at 63, citing JSC Ex. 3 at 18.

287. PS Reply F&C at 63.

288. See JSC Reply F&C at 23.

289. PTV Reply F&C at 14-15.

290. PS Reply F&C at 59.

291. See JSC Reply F&C at 20.

292. Can. F&C at 94.

293. Can. F&C at 94-95.

294. Can. F&C at 95.

295. See JSC Reply F&C at 32.

296. Besen written direct at 3-27.

297. Tr. 3790 (Besen).

298. Besen direct testimony, Table 1; Tr. 3677-79 (Besen); PS F&C at 182.

299. Besen direct testimony at 24-26, Table 1; Tr. 3623 (Besen)

300. Tr. 3673-74 (Besen).

301. Besen direct testimony at 26-27; Tr. 3624-25 (Besen).

302. Besen direct testimony at 26-28, Table 2.

303. Tr. 6414, 6418 (Besen).

304. Besen direct testimony at 3-5; PS F&C at 168-69; PS Reply F&C at 38-39.

305. Crandall rebuttal testimony at 9-10; Salinger rebuttal testimony at 1, 14; Tr. 8836-37, 8842-43, 8861 (Crandall); Scheffman rebuttal testimony at 12-13; Tr. 10909, 11461, 11469 (Scheffman); Schink rebuttal testimony at 15.

306. Tr. 3661 (Besen).

307. Salinger rebuttal testimony at 5, 10; Tr. 8669-70 (Salinger).

308. Tr. 8810-11 (Salinger).

309. Tr. 8836-37, 8861 (Salinger).

310. PS Reply F&C at 40-41.

311. Crandall rebuttal testimony at 6-8; Schink rebuttal testimony at 1-2, 7, 10, 14; Tr. 9981-82, 10076 (Schink); Salinger rebuttal testimony at 4; Tr. 8656, 8695-96 (Salinger).

312. Tr. 6324-25 (Besen).

313. Tr. 10741-42 (Scheffman); 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. at 9893.

314. PS F&C at 178-82; PS Reply F&C at 45-46.

315. See JSC Ex. 34-X.

316. Crandall rebuttal testimony at 11-13.

317. Tr. 3718 (Besen).

318. Crandall rebuttal testimony at 5-6, 13.

319. NAB 1990-1992 Ex. 5-X; 1989 Determination, 57 Fed. Reg. at 15290.

320. Tr. 6301-02, 6304-06, 6563 (Besen).

321. Dev. F&C at 38, 48.

322. PS F&C at 172.

323. JSC Reply F&C at 58-59.

324. Tr. 10092-93 (Schink).

325. PS Reply F&C at 42-43.

326. Schink rebuttal testimony at 1-2, 16-17.

327. Tr. 6453-54 (Besen).

328. Schink rebuttal at 13; Dev. Reply F&C at 48.

329. Tr. 9978-79 (Schink); Schink rebuttal testimony at 17.

330. Tr. 10012-13 (Schink).

331. Schink rebuttal testimony at 27-30.

332. See PTV Ex. 20 (revised).

333. Schink rebuttal at 26, 29.

334. Tr. 10107 (Schink).

335. Compare Lindstrom direct testimony at 10-18 with 57 Fed. Reg. at 15289-90.

336. See Crandall rebuttal testimony at 8.

337. Cooper written direct at 3.

338. P.S. Ex. ARC-1; Tr. 2822 (Cooper).

339. Tr. 2721 (Valenti).

340. Tr. 4317 (Green).

341. Tr. 4318 (Green).

342. Tr. 3218 (Green).

343. Tr. 4320-21 (Green).

344. Tr. 4321-22 (Green).

345. Tr. 4196 (Claster); Tr. 4858 (Thrall).

346. Tr. 4196 (Claster).

347. Valenti written direct at 1.

348. Tr. 2750-51 (Valenti).

349. Valenti written direct at 7-8.

350. Valenti written direct at 9-10.

351. Valenti written direct at 9-10.

352. Tr. 2727 (Valenti).

353. Valenti written direct at 10.

354. 57 Fed. Reg. at 15302.

355. Saperstein written direct at 1.

356. Saperstein written direct at 1.

357. Thrall written direct at 1.

358. Thrall written direct, 6.

359. Tr. 4862 (Thrall).

360. Thrall written direct at 10.

361. 57 Fed. Reg. at 15294, 15302.

362. Thrall written direct at 12-13.

363. Thrall written direct at 19-20.

364. Thrall written direct at 19.

365. PS F&C at 107.

366. PS F&C at 109.

367. PS F&C at 112, citing Tr. 1482 (Gerbrandt).

368. PS F&C 113-114.

369. PS F&C at 205, citing Sieber written direct at 16.

370. Sieber written direct at 18.

371. 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15302 (1992)("Sports' result in [the viewing-to-time ratio analysis study] was so impressive, it went beyond any difference between the reach of superstations and the reach of regional stations.")

372. PS F&C at 206.

373. See JSC Reply F&C at 1.

374. JSC Reply F&C at 2.

375. NAB Reply F&C at 4.

376. NAB Reply F&C at 10.

377. PTV Reply F&C at 13.

378. PTV Reply F&C at 14.

379. PTV Reply F&C at 14.

380. See JSC Reply F&C at 62-63.

381. 57 Fed. Reg. at 15302.

382. Stern Statement at 2.

383. Maglio written direct at 9.

384. Maglio written direct at 9.

385. Mooney Statement at 2-3.

386. Mooney Statement at 13; Tr. 1298 (Mooney).

387. Mooney Statement at 11.

388. Tr. 1315 (Mooney).

389. Tr. 1315-16 (Mooney).

390. Tr. 3964-69 (Sieber); 1990 Tr. 2063-75 (B. Burns).

391. Mooney Statement at 5-7; Tr. 1259-62 (Mooney).

392. Tr. 1261 (Mooney).

393. Myhren Statement at 1; Tr. 1128 (Myhren).

394. Myhren Statement at 3.

395. Tr. 1146 (Myhren).

396. Tr. 1146-47 (Myhren).

397. Myhren Statement at 5.

398. Myhren Statement at 4.

399. Myhren Statement at 4.

400. Maglio Statement at 1-2.

401. Id. at 5.

402. Maglio Statement at 9.

403. Id. at 10.

404. Tr. 1844-45 (Maglio).

405. Tr. 1664 (K. Burns).

406. K. Burns Statement at 4.

407. Bortz Statement at 8-9; Tr. at 509-16 (Bortz).

408. Bortz Statement at 34.

409. Bortz Statement at 34.

410. 57 Fed. Reg. at 15301.

411. Stern Statement at 3.

412. Stern Statement at 11-12.

413. JSC Ex. 4.

414. JSC Ex. 4 at 27-29.

415. JSC Ex. 4 at 30.

416. JSC Ex. 4 at 27-29.

417. JSC Ex. 4 at 54.

418. JSC Ex. 4 at 54; Tr. 1491-99 (Gerbrandt); PS Ex. 25-X.

419. Tr. 1478 (Gerbrandt).

420. JSC Ex. 4 at 50.

421. JSC Ex. 2 at 9-11.

422. JSC Ex. 2 at 9-11.

423. JSC Ex. 2 at 12-16.

424. JSC Ex. 2 at 12-16.

425. Tr. 3974 (Sieber).

426. Tr. 3974-75 (Sieber).

427. Tr. 3975 (Sieber).

428. Stern Statement at 4, 13; Tr. 119-20 (Stern).

429. Bortz Statement at 35.

430. Bortz Statement at 35.

431. Bortz Statement at 35.

456. Tr. 2654-56 (Chang); NAB 1990-92 Ex. 36.

457. Tr. 2662 (Chang).

458. Tr. 2657 (Chang).

459. Tr. 2323 (Ducey); Statement of Dr. Richard V. Ducey at 18; Tr. 3751 (Sieber); NAB 1990-92 Ex. 3.

460. Rebuttal Statement of Richard V. Ducey at 3.

461. Rebuttal Statement of Richard V. Ducey at 3.

462. Rebuttal Statement of Richard V. Ducey at 5.

463. 57 Fed. Reg. at 15302, 15303.

464. Tr. 1972-73; 2128-29 (Ducey).

465. Tr. 1972-78 (Ducey); Statement of Dr. Richard V. Ducey at 9.

466. Statement of Dr. Richard V. Ducey at 9.

467. Statement of Dr. Richard V. Ducey at 9.

468. Tr. 1977 (Ducey); Statement of Dr. Richard V. Ducey at 9.

469. NAB 1990-92 Ex. 45-R.

470. Testimony of Robert P. Sieber at 10.

471. Tr. 3734-39 (Sieber); Testimony of Robert P. Sieber at 3-6; Tr. 1979-80, 2003-07 (Ducey).

472. Tr. 2003 (Ducey); NAB 1990-92 Ex. 4 at IV-12.

473. NAB 1990-92 Ex. 4.

474. Tr. 2005 (Ducey); Testimony of Robert P. Sieber at 4; NAB 1990-92 Ex. 4 at IV-12.

475. Tr. 1981-91 (Ducey); Statement of Dr. Richard V. Ducey at 10- 14.

476. Tr. 1982-83 (Ducey); Statement of Dr. Richard V. Ducey at 11; Tr. 10606-07 (Rubin).

477. Tr. 1983 (Ducey); Statement of Dr. Richard V. Ducey at 11.

478. Tr. 1984-85 (Ducey); Statement of Dr. Richard V. Ducey at 11; Tr. 10608, 10614 (Rubin).

479. Tr. 1983-84 (Ducey).

480. Tr. 10609 (Rubin).

481. Tr. 1990 (Ducey); Statement of Dr. Richard V. Ducey at 13.

482. Tr. 1989 (Ducey).

483. Tr. 1989 (Ducey); Statement of Dr. Richard V. Ducey at 13; Tr. 10622 (Rubin).

484. NAB 1990-1992 Ex. 5.

485. Tr. 2029, 2054-55, 2104 (Ducey); Statement of Dr. Richard V. Ducey at 35.

486. Tr. 2042-45 (Ducey); Statement of Dr. Richard V. Ducey at 35.

487. Tr. 285-87 (Lemieux); Testimony of Dr. Peter H. Lemieux at 27-29, Table 9-2.

488. Testimony of Dr. Peter H. Lemieux at 28, Table 9-2; Tr. 445-46 (Lemieux).

489. Tr. 2022-27 (Ducey); NAB 1990-92 Ex. 13.

490. NAB 1990-92 Exs. 7-33.

491. Tr. 2029-30 (Ducey).

492. Tr. 2038, 2047 (Ducey); Tr. 2482 (DeFranco); Statement of Dr. Richard V. Ducey at 36; NAB 1990-92 Ex. 42.

493. Tr. 1997-98, 2029-39 (Ducey).

494. Tr. 2014 (Ducey).

495. NAB F&C at 136-37.

496. NAB F&C at 162.

497. NAB F&C at 72.

498. See 57 Fed. Reg. at 15301-02.

499. NAB F&C at 154-59.

500. NAB F&C at 161-62.

501. NAB F&C at 162-63.

502. NAB F&C at 163.

503. PS F&C at 215.

504. PS F&C at 216, citing Program Suppliers Ex. 18-RX.

505. NAB Reply F&C at 12-13.

506. PS F&C at 217.

507. NAB Reply F&C at 14.

508. PS F&C at 219.

509. PS F&C at 220-21.

510. PS F&C at 221.

511. PS F&C at 222-23.

512. PS F&C at 223.

513. NAB Reply F&C at 18.

514. PS F&C 224-26.

515. Fuller at 10; PTV Ex. 23; Tr. 5148-49 (Fuller).

516. Lawson at 1,16; Tr. 4646-47 (Lawson); Tr. 5386 (Downey).

517. Tr. 5407-08, 5412, 5415, 5426 (Downey); PTV Ex. 43.

518. Lawson at 7; Tr. 4669-72, 4675-78 (Lawson).

519. Tr. 4716-77 (Lawson).

520. Fuller at 15-16.

521. Tr. 1209-11 (Myhren); Tr. 2247-48 (Ducey); Tr.5173-74 (Fuller); Tr. 7050, 7052 (Howe); Tr. 7152-53 (Fournier).

522. Trautman at 31-32, 36-37; Bortz at 24-26, 31.

523. 57 Fed. Reg. at 15299-30; Fairley at 2-3.

524. Fairley at 6-10; Tr. 5738-72 (Fairley).

525. Tr. 606, 615, 657 (Bortz).

526. Tr. 969-71 (Trautman).

527. Fuller at 8; PTV. Ex. 22.

528. Tr. 459-61 (Lemieux).

529. Fuller at 20-24; Tr. 5189-90 (Fuller).

530. Fuller at 24-28; Tr. 5193-99 (Fuller).

531. Fuller at 5-6; Tr. 5125 (Fuller); PTV Ex. 21 (2d Rev.).

532. PTV F&C at 92.

533. 57 Fed. Reg. at 15303.

534. PS F&C at 226-31; PS Reply F&C at 68-81.

535. Tr. 9512, 9516 (Larson); PTV Ex. 5-R-X, 6-R-X.

536. Tr. 1758-59 (Gerbrandt).

537. 57 Fed. Reg. at 15303.

538. Can. Reply F&C at 33.

539. See 57 Fed. Reg. at 15300.

540. Tr. 590-97 (Bortz).

541. Tr. 6073-75, 6142 (Clark).

542. Dev. Ex. 7.

543. Dev. Ex. 1, p.3; Dev. Ex. 2, p.3.

544. Dev. Ex. 1, p.1.

545. Dev. Ex. 3, p.2; Tr. 6059 (Clark).

546. Tr. 6583 (Robertson).

547. Tr. 6065-66; 6196-97.

548. Dev. Ex. 8.

549. Dev. Ex. 1-R, pp. 5-7.

550. Tr. 6926, 6931-36.

551. Dev. Ex. 7, p.5.

552. Dev. Ex. 3, p.9.

553. Dev. Ex. 1, p.6.

554. Dev. Ex. 6, p.6.

555. Dev. F&C at 43.

556. Dev. F&C at 50.

557. Dev. F&C at 51.

558. Dev. F&C at 52.

559. Dev. F&C at 54.

560. Dev. F&C at 55, quoting, 57 Fed. Reg. 15286.

561. Dev. F&C at 56.

562. See, e.g., PS F&C at 231-32.

563. See, e.g., PS F&C at 235.

564. See, e.g., PS Reply F&C at 83.

565. See, e.g., PS F&C at 236-39.

566. See, e.g., PS F&C at 240.

567. de Freitas written direct at 2.

568. de Freitas written direct at 1.

569. Howe Direct at 3.

570. Howe written direct at 4; Tr. at 7025 (Howe).

571. Howe written direct at 4; Tr. at 7048 (Howe).

572. Howe written direct at 4-5; Exhibit CDN 2-C.

573. Bedard written direct at 2.

574. Tr. 7616 (Bennett).

575. Tr. 7636 (Bennett).

576. Bennett Direct at 2; Exhibit CDN 6-B.

577. Id.

578. Exhibit CDN 1-B; Exhibit CDN 6-F.

579. Calfee Rebuttal at 2.

580. Calfee Rebuttal at 10.

581. Exhibit CDN 6-D.

582. Bennett Rebuttal at 1.

583. Exhibit CDN R-1-A.

584. Tr. 7672 (Ringold).

585. Tr. 7671 (Ringold).

586. Ex. CDN 7 (Ford/Ringold Study) at 3.

587. Exhibit CDN 7 (Ford/Ringold Study) at 3.

588. Exhibit CDN 7 (Ford/Ringold Study) at 2, 10.

589. Exhibit CDN 7 (Ford/Ringold Study) at 14, 15.

590. Exhibit CDN 7 (Ford/Ringold Study) at 31.

591. Ex. CDN 7 (Ford/Ringold Study) at 4, Table 2.

592. Exhibit CDN 7 (Ford/Ringold Study) Tables 2, 7.

593. Ex. CDN 7 (Ford/Ringold Study) Tables 1a, 7a.

594. Tr. 7520-23 (Bennett).

595. Can. F&C at 76.

596. Can. F&C at 88-89.

597. Can. F&C at 96.

598. Can. F&C at 86.

599. 51 Fed. Reg. at 12813.

600. Can. F&C at 88-94.

601. Can. F&C at 90.

602. PS F&C at 241, citing Tr. 7521-23 (Bennett).

603. PS F&C at 246-48.

604. PS F&C at 244-45.

605. Can. Reply F&C at 14.

606. PS F&C at 248.

607. PTV F&C at 49.

608. PTV Reply F&C at 21.

609. PTV F&C at 50.

610. 51 Fed. Reg. 12792, 12814.

While I agree generally with the opinion of the majority, I can not accept the findings made on several key issues and, accordingly, I must dissent in part.

In summary, I differ as to three principal matters: I am persuaded that the Bortz survey is the best tool available for measuring relative values in the relevant marketplace and that it should receive far more weight than it does; I am not as concerned with the supply side aspects of the marketplace; and I find the direct cases of two of the claimants to be more persuasive and deserving of a greater share than that allocated.

As to the structure of the Bortz survey and its methodolo it seems clear to me that it focuses correctly on the cable operator as the key player, asks the economically significant question and accurately provides the best estimates of relative value in the marketplace that actually existed. In having to make programming choices that directly impact on the ability of the cable system to stay in business, the cable operators are required to evaluate programming on a routine, full-time, professional basis. This constant exposure enables them to answer questions involving both programming and a constant sum budget on relatively short notice, and to recall the choices made without difficulty.

Most of the expert witnesses who testified agreed that the Bortz survey was correctly designed and executed and whatever shortcomings it may have are relatively minor in comparison to its attributes. In response to suggestions and official Tribunal criticism over the years, it has evolved to measure the correct variable and to provide the most accurate results of relative marketplace value.

As we all agree, the Neilsen study, on the other hand, is specifically designed to measure viewing, not value. It is a useful tool for considering the "advertising" ingredient since most of the funds that underwrite the cost of all broadcast stations, superstations, independents and network affiliates alike, stem from advertising revenue. Viewing data is important as a means for providing needed perspective, and from which an indirect showing of "value" may be inferred, but it hardly supports the allocation requested by the Program Suppliers; especially in view of the technical issues and criticisms raised both as to the people-meter data and to the Dr. Besen regression study. Certainly, I agree with my colleagues that viewing has an impact on value, but the evidence in the record quantifying this point is far from persuasive. In the final analysis it is a question of judgment as to how much weight should be accorded to the viewing data, how it correlates with value, and how best to

consider it in an attempt to be as fair as possible to all the parties involved.

As to the matter of the "supply side" of the relevant marketplace, I am not persuaded that this factor deserves the importance it has received. First, I believe that the careful structure of the compulsory license itself plays a significant role in helping to define the marketplace, including the supply side. Further, I concur with the opinion of those witnesses who testified that the supply side of the marketplace is best likened to a "forced sale situation": there is no need to look at a sellers motivations or to speculate about the price that sellers would demand in a hypothetical market. Moreover, because of the relative insignificance of the market for distant signals compared to the market for all cable programming, even if the supply side is taken into account no significant adjustment is necessary.

I differ, too, from the majority in that I find the direct cases of two of the claimants to be more persuasive and deserving of a significantly greater share than that allocated. Specifically, I refer to the Devotionals and to the NAB.

The Devotional claimants emphasize the need by cable operators to diversify their program mix in order to attract and

retain subscribers. This places a key, critical importance on "niche" programming, which they clearly provide. They also show that viewers of religious programs have an unusually intense interest and loyalty in this type of programming. Their avidity factor is significantly high. One witness testified that the Devotional programming was in some respects much like that of sports programming: both are live, timely and first run. He noted that they present "live drama": wherein the message of ministers is substituted for the play of athletes.

Likewise, the testimony presented by the NAB provides persuasive evidence, in my opinion, that distant signal news and public affairs programming was especially important during the period 1990 through 1992. The high avidity enjoyed by news programming and the instrumental viewing of this type of programming during this period, show its high value relative to the other available programming. So, too, substantial evidence was presented to show that station-produced programs, such as CNN programming or the diverse evening news shows, establish strong, almost personal attachments to news shows and to news anchors and clearly elevate this type of programming to a high value above the actual viewing provided. It is this higher level of relative value which justifies a higher allocation of shares from that made by my fellow panel members.

In conclusion, while I assign the Bortz results greater weight, nevertheless in making a judgment on a final allocation to be made to a specific party, the need to evaluate and consider whatever additional clarification and support is presented by that party or provided in the record is fully recognized, including whatever value may be discerned from the viewing data. Based on the evidence of record, a fair and reasonable allocation of the royalties collected in the three relevant years in the Basic Fund should be made and distributed as follows:

Program suppliers	50.2
Joint Sports	30.5
NAB	9.5
PTV	5.8
Devotionals	3.0
Canadians	1.0

The Canadians share for the year 1990 should be distributed on a pro-rata basis to the other five claimants.

While not much evidence was presented on the 3.75% Fund, it is uncontroverted that 3.75% signals are relatively expensive and that their carriage by superstations increased over the relevant time period. Almost 4/5ths of the total funds received in the 3.75% Fund derive from payments made by the

superstations. It is also apparent that these signals are selected by the cable operators to be carried only where real value is clearly discerned. It seems clear, furthermore, as one witness testified, that sports is an extremely valuable asset that a cable operator looks for in carrying a superstation. Such factors, argue the JSC, point to the relative value of sports as greater in this 3.75% Fund than it is in the Basic Fund. Finding little evidence to the contrary, I agree. Therefore I would allocate the 3.75% fund for each of the three years as follows:

Program suppliers	48.8
Joint Sports	38.5
NAB	9.5
PTV	0.0
Devotionals	3.0
Canadians	0.2

The Canadian share for 1990 should be allocated pro-rata among the other four participating claimants.

Respectfully submitted,

John B. Farmakides
CARP Panel Member

2. Comparative Evaluations

Two studies have specifically addressed the question of the predictiveness of the constant sum measure in relation to other scaling techniques. The first study, conducted by Joel N. Axelrod, then with the Xerox Corporation, appeared following an exchange over the merits of comparative scales within the pages of a 1966 issue of the Journal of Advertising Research (Blankenship, 1966; Haller, 1966). The Axelrod study, entitled "Attitude Measures That Predict Purchase," appeared in a 1968 issue of the Journal of Advertising Research. Eleven years later in 1979, Russell I. Haley, a professor of marketing at the University of New Hampshire, and Peter B. Case, a specialist in advertising and media research with the General Electric Company, published a replication of Axelrod's study entitled "Testing Thirteen Attitude Scales for Agreement and Brand Discrimination" in the Journal of Marketing. Both studies are considered classic works by marketing specialists, and are often cited in marketing research texts (for example; Alreck and Settle, 1985; Churchill, 1983; Green and Tull, 1978; Hughes, 1971; Parasuraman, 1986; Peterson, 1988; Tull and Hawkins, 1987).

a. The Axelrod Study

Axelrod (1968) compared ten different survey research measures with respect to (a) their ability to discriminate among choice alternatives within a category (i.e., the property of sensitivity); (b) their ability to produce the same results over

different samples of respondents (i.e., the property of stability); and (c) their ability to predict subsequent behavior (i.e., the property of predictive power). The ten measures compared were: (1) the Lottery measure, (2) the +5 to -5 Rating Scale, (3) the Predisposition-to-Buy Scale, (4) the Constant Sum Scale, (5) Paired Comparisons, (6) Forced Switching, (7) Advertising Recall, (8) First and Second Choices, (9) Awareness, and (10) Buying Game.

In the constant sum procedure, subjects were asked to allocate "11 cards" among a predetermined set of brands to indicate the likelihood of brand purchase. A person's preference score was simply the number of cards allocated to each brand. Axelrod labeled each measure an intermediate criterion (I.C.), meaning that a psychological response to a stimulus measured in Time 1 is assessed relative to its predictiveness, or correspondence, with a measured response to the same stimulus in Time 2. In Axelrod's (1968, p. 3) words:

> The marketer needs a more immediate measure of the effects of manipulations -- a measure that reflects the immediate effect of a stimulus on a consumer but also predicts his subsequent purchase behavior. Such a measure is called an Intermediate Criterion, or I.C. for short.

In other words, the intermediate criterion (I.C.) is a proxy measure that validly predicts behavior.

To determine the short-term and long-term predictiveness of the measures, interviews were carried out with samples of 2,000

and 2,500 women from different cities. Short-term predictiveness was measured at three- and five-week intervals, while long-term predictiveness was measured after five months. Axelrod found that first brand awareness (i.e., name all brands that you can think of; also known as top-of-mind awareness) and the constant sum measure were the most stable and predictive measures of purchase behavior (i.e., of the 8 measures retained after the sensitivity phase of the study). In particular, Axelrod found that the constant sum was the best measure of repeat purchase, that is, the probability that a person will keep buying the same brand. From the aggregate data, Axelrod (1968, p. 17) concluded:

> In those situations where research users are concerned not only with short-term predictions, but also with providing diagnostic information -- what beliefs are held by those who are going to switch to various brands, what do they like, want, etc. -- the Constant Sum is superior because it spreads customers along a continuum.

In other words, the constant sum most accurately reflects how customers fall in relation to the various categories of possible behavior.

b. <u>The Haley and Case Study</u>

Haley and Case (1979) conducted a comparative study of thirteen popular rating scales to determine (1) which scales are related (i.e., consistency of the measures themselves; measuring the same thing), and (2) which discriminated best among brands of frequently purchased packaged goods. The thirteen scales,

including two versions of the constant sum measure, were culled from a longer list of testing scales partly on the basis of popularity and diversity.

The scales were tested across six packaged goods categories with relatively high purchase frequency and sales concentration among a small set of brands. The subjects were 630 women over age 18 who were responsible for family shopping. One constant sum scale asked subjects to allocate ten pennies among the selected brands as an indication of brand liking; the other measure, a paired comparison procedure, asked subjects to allocate 10 points among pairs of brands.

Haley and Case found that the constant sum measure was one of five scales to adequately discriminate among brand liking and to be strongly associated with current brand usage. In other words, the constant sum technique was one of the measures that most accurately reflected the brand preferences of the tested sample of respondents.

3. **Field Applications**

The pragmatic value of the constant sum technique for measurement purposes may be demonstrated by its application in the field. Though no industry-wide surveys are publicly available, large marketing research firms such as Decision Research, Eric Marder & Associates, Maritz Marketing Research, McCollum/Spielman Worldwide, Oxtoby-Smith, and Marketeam/Doane Marketing Research, use the constant sum technique in numerous

marketing surveys each year. The two industry-based applications described below are presented to illustrate the utility of the constant sum for the actual practice of marketing research.

a. The Assessor Model

The constant sum technique is incorporated as a fundamental measurement component of the ASSESSOR Model. The model was developed at the Massachusetts Institute of Technology, and first described by Alvin J. Silk and Glen L. Urban in a 1978 Journal of Marketing Research article entitled "Pre-Test-Market Evaluation of New Packaged Goods: A Model and Measurement Methodology."

According to Silk and Urban, the ASSESSOR Model and its measurement procedure were developed to estimate sales potential for new products before they are test marketed, in an effort to reduce product failures and test costs. As employed in the model, the constant sum measure is used to evaluate brand preference among a set of tested brands. The constant sum procedure was selected, as noted by Silk and Urban, because of its superior ability to elicit preference judgments from consumers. In practice, the ASSESSOR Model has been used by a number of major marketers to test more than 1,000 products.

b. Coca-Cola's QCT

Another example of a field application of the constant sum procedure is provided by Coca-Cola's QCT (Quantitative Copy Testing). QCT is an instrument that was developed and utilized by Coke to test advertising effectiveness. Included among the

cognitive and attitudinal scales is a constant sum scale designed to measure brand-purchase likelihood.

In the procedure, subjects are asked to allocate 10 points among a set of soft drink brands. Each point, as defined in the procedure, represents one future purchase. The total points allocated per brand is interpreted to mean likelihood of future purchase -- the more points given to a particular brand, the greater the likelihood that brand will be purchased.

It should also be noted that Coke has used the constant sum technique in non-advertising tests. In product tests, Coke uses the technique to measure brand preference. This application is similar to the use of the constant sum in the ASSESSOR Model.

B. <u>Nielsen Audience Data</u>

As noted above, the CRT favored the MPAA viewing study in part because the study measures "actual behavior" and was conducted in the relevant year. However, I do not believe the Nielsen data, which underlie the MPAA study, are immune to recall problems. Nor are the Nielsen audience data a direct measure of "viewing" behavior.

Diaries suffer from problems of nonresponse and response error. Though I will deal mainly with problems of response error in the following paragraphs, it should be noted that nonresponse error is particularly troublesome for diaries. Typically, diaries are completed by only 50% of those households sampled, and those individuals who fill out and return diaries tend to be

systematically different from nonrespondents in significant ways (e.g., younger people, especially males, are less responsive; blacks are less likely to complete and return; and heavy viewers are more likely to return diaries than are other viewer-types). The CRT's concerns regarding behavior and recall are problems of response error, and are inherently associated with the diary method of data collection.

The Nielsen-based MPAA study is the product of self-reported recall of past behavior; it is dependent upon individuals completing diaries of their viewing behavior. These diaries are often reconstructed from memory. When diaries are used to determine program ratings, viewing behavior is not directly measured; rather, viewers' recall of past viewing behavior is measured. As documented in the literature, diary-based audience data (such as those which underlie the MPAA study) reflect "faulty recall" and should not be equated with absolute viewing behavior.

One reason why Nielsen diary-based ratings are susceptible to recall problems is that viewers who complete Nielsen diaries have little involvement in the measurement process; they are not directly or professionally concerned with the process of measuring viewing. Furthermore, viewers may forget which programs they watched when completing diaries; they may make honest reporting mistakes; and they may enter false viewing choices in order to reflect more "socially acceptable" viewing

(Fletcher and Bowers, 1991; Ogles and Howard, 1990; Sissors and Bumba, 1989).

Perhaps even more important (given the nature of the CRT proceedings) is the fact that recall of viewing is a particular problem for cable TV subscribers. According to Ogles and Howard (1990) and to Sissors and Bumba (1989), audience data from cable TV homes tend to be inaccurate because there are too many stations for diary keepers to remember; it simply takes too much time and attention to detail for cable subscribers to complete diaries.

In summary, the CRT's concerns regarding behavior and recall apply also to MPAA viewing studies. Nielsen diary-based data neither directly measure actual viewing behavior, nor are they immune to faulty recall.

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Testimony of Robert J. Wussler
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1. Qualifications

Since September 1989 I have been President and Chief Executive Officer of COMSAT Video Enterprises, Inc. (CVE), a wholly-owned subsidiary of the Communications Satellite Corporation (COMSAT). CVE is the largest provider of satellite-delivered entertainment services to the U.S. lodging industry, and is engaged in sports and entertainment program acquisition, broadcast services, High Definition Television and Direct Broadcast Satellite development.

Prior to joining CVE, I served as Executive Vice President of Turner Broadcasting System, Inc. (Turner Broadcasting) from 1980 to 1987 and Senior Executive Vice President from 1987 to 1989. I also was a member of the Turner Broadcasting Board of Directors and executive committee, and held the position of President of Superstation WTBS.

Turner Broadcasting is a diversified entertainment company which owns and operates four programming services delivered to cable systems, home satellite dish owners and SMATV systems via satellite: (1) the Superstation WTBS, which is and has been for several years the most widely-carried distant signal; (2) the Cable News Network (CNN); (3) Headline News; and (4) Turner Network Television (TNT). Turner Broadcasting also is engaged in the business of syndicating feature films and television programming. Included within its library are more than 3,700 feature-length motion pictures (obtained as a result of Turner Broadcasting's acquisition of MGM/UA Entertainment Company in 1986), as well as a number of cartoon episodes, short subjects, television series and made-for-television movies. In addition, Turner Broadcasting owns the Atlanta Braves major league baseball club, and holds a limited partnership interest in the Atlanta Hawks professional basketball team.

During my tenure with Turner Broadcasting, I was involved in virtually every aspect of WTBS' daily operation, including the development and acquisition of programming for WTBS and the marketing of the superstation to cable operators. My responsibilities also required me to be generally familiar with the operations of other program services with which WTBS competed (such as other cable networks and superstations), as well as the cable television, broadcast, sports and syndication industries.

I spent 21 years with CBS, starting in the mail room and eventually becoming President of CBS Television Network and CBS Sports. I also have been active in several industry organizations. For example, I have served as Chairman of the Board of the National Academy of Television Arts and Sciences; Secretary to the Board of Governors of the National Cable Television Association (NCTA); Chairman of the NCTA National Satellite Network Committee; and Chairman of the NCTA Programming Conference. In addition, I have been a member of the Board of Governors of the National Academy of Cable Programming; the Board of Advisors of the Cable Television Public Affairs Association; and the Executive Committee of the Cable Television Advertising Bureau.

I received the NCTA President's Award in 1983 and Associate's Award in 1986. I also have received five Emmy Awards, four Awards for Cable Excellence and two international sports awards.

2. Opinion Concerning Distant Signal Program Values

The Joint Sports Claimants (Major League Baseball, National Basketball Association, National Hockey League and National Collegiate Athletic Association) have asked that I offer the Tribunal my opinion concerning the relative value of the non-network sports and syndicated programming on WTBS and other distant signals carried by cable in 1989.

I am aware that in the cable royalty distribution proceedings for 1978 through 1983, the copyright owners of syndicated movies, series and shows received from the Tribunal approximately 70 percent of the cable royalty funds. I also am aware that the copyright owners of live professional and college sports programming received less than one-quarter of the syndicators' award, or approximately 15-17 percent. I am advised that these awards were tied largely to the amount of distant cable "viewing" generated by each program category (that is, the number of hours that each program aired multiplied by the average number of cable households watching that program).

It is my opinion that the Tribunal's awards in the 1978-83 proceedings do not reflect the relative values that the cable industry placed upon distant signal non-network sports programming, movies, series and shows during those years. In my opinion, the Tribunal's past awards undercompensated the owners of live sports programs and overcompensated the suppliers of syndicated programs, based upon the comparative worth of these programs to the cable industry. I believe that, for the year 1989, the sports interest are entitled to a share of cable royalties which more closely approximates the share allocated to syndicators -- again, based on the comparative worth of these programs to the cable industry.

3. Discussion

There are several factors which help explain the importance that the cable industry has attached to live sports programming -- its uniqueness and originality; the fact that it is truly first-run; its relatively limited availability; its topical nature; its promotability; the loyalty of its followers. Because of these

factors, live sports programs are critically important to the cable industry's principal objective -- convincing consumers to subscribe to, and to continue paying $15 to $30 per month for, cable service. They are more important than syndicated movies and programs which typically do not appear on distant signals until after having had multiple runs in other media.

It is, of course, difficult to quantify these factors and to accord relative dollar values to the different types of non-network programs on distant signals. However, based on my experience in programming WTBS and marketing the superstation to cable operators, I believe that sports programming has a relative value significantly greater than that reflected in "viewing" data or past Tribunal awards.

The marketplace value of a program package can be seen in the amounts paid to acquire that programming from independent sources. The level of licensing fees may be quite different than the amount of "viewing" which the program generates.

For example, in December 1989 Turner Broadcasting agreed to pay Columbia Pictures Television approximately $10 million for the rights to televise 1,000 feature films during the years 1990-98 on WTBS and TNT. This was the largest movie package ever licensed from a single Hollywood studio in the history of basic cable. The package, which included many popular titles such as "Kramer vs. Kramer," "The Big Chill," "Tootsie," and "To Sir With Love," will give Turner some 14,000 thousand hours of programming over a nine-year period (assuming 7 runs per title).

At approximately the same time that it closed the Columbia deal, Turner Broadcasting agreed to pay the NBA a total of $275 million for the rights to televise up to 320 NBA games (about 800 hours) during 1990-94 on TNT. In other words, the amounts that Turner Broadcasting pays to televise the NBA games will be nearly 30 times greater than the amounts paid to televise the Columbia movie package -- even though that movie package will likely generate much greater "viewing" over the run of the contract.

It might be noted that much of the programming on WTBS in 1989 consisted of older off-network shows such as the "Beverly Hillbillies," "Gilligan's Island," "Brady Bunch," "Andy Griffith," "Leave It To Beaver," "Perry Mason," "Sanford & Son" and "Bewitched." Programs such as these, although they were popular and likely generated significant "viewing," were relatively inexpensive to obtain.

Consider also the amounts that WTBS received from the sale of advertising on sports programming. Major sports programming (Braves baseball, NBA basketball and SEC football) generated a significant portion of WTBS' total ad revenues in 1989, even though it accounted for a relatively small amount of broadcast time. Even those revenues did not reflect the full value of sports programming to WTBS.

For example, it does not take into account the significant promotional value of the sports programming. In 1989, a significant amount of WTBS'

advertising expenditures and promotion opportunities (including those on its sister networks of TNT, CNN and Headline News) related to Braves baseball, NBA basketball and SEC college football.

The reason for the emphasis on sports is easy to understand. A principal goal of WTBS is to gain access to as many cable systems as possible. We were, of course, quite successful in doing this; by 1989, WTBS reached some 93 percent of the nation's cable households. The sports programming on WTBS was and remains a key ingredient in convincing cable operators to carry the superstation. Indeed, Ted Turner recognized early on that sports programming would be key to the success of WTBS as a superstation, and thus he purchased the Braves shortly after acquiring WTBS in 1970. (Other superstation interests have recognized the same, e.g., Tribune (WGN/Cubs) and Gaylord (KTVT/Rangers)). Turner's ownership of the Braves assures WTBS of an important block of programming. It also ensures that this programming is available at a cost considerably less than outside licensing.

by not holding an evidentiary hearing on the attorneys' fees issue after the court decided to impose sanctions persuasive. This failure, Liddle & Robinson insists, violated due process because 28 U.S.C. § 1927 is a punitive statute and, hence, Liddle & Robinson should have been allowed to inquire at an evidentiary hearing into what expenses were actually incurred and how reasonable such expenses were.

Although a hearing may certainly be "useful" in some instances, *see Copeland*, 641 F.2d at 905, and "it is perhaps conceivable that due process could require a hearing on sanctions ... in certain circumstances," a hearing is not required in all circumstances. *McLaughlin*, 803 F.2d at 1205. Regarding sanctions under Federal Rule of Civil Procedure 11, the court stated in *McLaughlin:*

> The trial court, as a primary participant in the proceedings, had already observed those elements of the litigation most relevant to the criteria for imposing sanctions under the rule, most notably McLaughlin's conduct during the trial.... The opportunity the District Court provided McLaughlin to respond to the defendants' applications for fees and costs gave him ample opportunity to set forth whatever objections he had to the level of sanctions imposed.

Id. at 1205–06 (citation omitted). Here, as in *McLaughlin*, the party against whom sanctions have been imposed has had ample opportunity to set forth arguments in opposition to sanctions. Liddle & Robinson has no valid objection based in due process, and the district court did not abuse its discretion in deciding that a hearing was unnecessary.

Accordingly, we hold that the district court had jurisdiction to impose sanctions upon Liddle & Robinson and that in so doing it did not abuse its discretion, and we affirm.

"incurred" these costs (that is, actually paid its counsel for services rendered) is belied by a certificate filed by Kidder Peabody's counsel stating that Kidder Peabody paid its counsel $83,279.04. *See* FED. R.APP. P. 10(a); D.C. CIR. R. 30(b). Liddle & Robinson has introduced no contradictory evidence.

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

LIBRARIAN OF CONGRESS and Register of Copyrights,
Respondents,

Canadian Claimants, et al., Intervenors.

PROGRAM SUPPLIES, Petitioner,

v.

LIBRARIAN OF CONGRESS and Register of Copyrights,
Respondents,

National Association of Broadcasters,
Intervenor.

DEVOTIONAL CLAIMANTS, Petitioner,

v.

LIBRARIAN OF CONGRESS and Register of Copyrights,
Respondents.

Nos. 96–1449, 96–1450 and 96–1451.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 29, 1998.

Decided June 26, 1998.

Classes of copyright royalty claimants challenged distribution, by Librarian of Congress, of royalties collected from cable television systems. The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that: (1) Librarian's decision was entitled to unusually wide deference; (2) Librarian's order was adequate; (3) copyright arbitration royal-

ty panel's rejection of "harm" criterion was not improper; (4) first claimant could not challenge evidentiary findings of panel absent showing of how alleged errors affected that claimant; (5) Librarian's downward adjustment of panel's award to second claimant was not improper; (6) elimination of "harm" criterion did not warrant higher award to second claimant; (7) award to second claimant was not arbitrary despite assertion that panel improperly weighed evidence; and (8) Librarian's approval of award to third claimant was not arbitrary.

Denied.

1. Telecommunications ⟹449.10(1)

In reviewing decision of Librarian of Congress as to distribution of copyright royalties collected from cable television systems, pursuant to statute permitting Court of Appeals to modify or vacate decision only if Librarian acted in arbitrary manner, Court of Appeals will set aside royalty award only if it determines that evidence before Librarian compels substantially different award, and Court will uphold royalty award if Librarian has offered facially plausible explanation for it in terms of record evidence. 17 U.S.C.A. § 802(g).

2. Administrative Law and Procedure ⟹741

Standard to which Court of Appeals holds administrative decisionmaker may become more rigorous over time as decisionmaker acquires greater experience with particular administrative scheme.

3. Telecommunications ⟹449.10(1)

Judicial review of decision of Librarian of Congress as to distribution of copyright royalties collected from cable television systems, to determine whether Librarian acted in arbitrary manner, is not coextensive with Librarian's review of copyright arbitration royalty panel's proposed settlement for whether panel's determination is arbitrary or contrary to law. 17 U.S.C.A. § 802(f, g).

4. Telecommunications ⟹449.10(1)

In reviewing decision of Librarian of Congress as to distribution of copyright royalties collected from cable television systems, Court of Appeals reviews only Librarian's decision, not underlying decision of copyright arbitration royalty panel. 17 U.S.C.A. § 802(g).

5. Telecommunications ⟹449.10(1)

In assessing whether particular award of copyright royalties contravenes provisions of Copyright Act, interpretation, by Librarian of Congress, of ambiguous provisions that he is charged with administering is due deference. 17 U.S.C.A. § 802.

6. Telecommunications ⟹449.10(1)

If final award of copyright royalties collected from cable television systems that is made by Librarian of Congress to class claimant bears rational relationship to record evidence, is plausibly explained and is otherwise developed in a manner that does not plainly contravene applicable statutory provisions, appellate court's task is at an end and court must uphold the award. 17 U.S.C.A. § 802(g).

7. Telecommunications ⟹449.5(3)

Order of Librarian of Congress distributing copyright royalties collected from cable television systems was not inadequate for failing to discuss each stage of decisionmaking process or evidentiary basis for each award, as Librarian was not required to duplicate work of underlying copyright arbitration royalty panel decision, and there was no suggestion that Librarian discharged his review obligations in arbitrary manner. 17 U.S.C.A. § 802(f).

8. Telecommunications ⟹449.5(3)

Submission of questions to copyright arbitration royalty panel by Register of Copyrights for clarification of panel's reasons for proposing particular awards was not improper, in connection with Register's obligation to recommend to Librarian of Congress whether panel decision should be adopted or rejected, and, even if such action impermissibly lengthened Librarian's review period, missed deadline would not justify invalidation of Librarian's decision. 17 U.S.C.A. § 802(f).

9. Telecommunications ⇐449.5(3)

Copyright arbitration royalty panel's rejection of criterion considering harm caused to copyright owners by secondary transmissions of copyrighted works by cable television systems, in determining proper distribution of royalties collected from cable systems, was not improper, and Librarian of Congress did not act in arbitrary manner by approving such rejection, as Congress delegated to Librarian, Register of Copyrights, and panel responsibility for developing criteria by which claims were to be assessed. 17 U.S.C.A. § 802(c).

10. Telecommunications ⇐449.5(3)

Librarian of Congress was not required to adopt or reject decision of copyright arbitration royalty panel in its entirety, as to distribution of fees collected from cable television systems, but could adopt panel's decision in part. 17 U.S.C.A. § 802(f).

11. Telecommunications ⇐449.10(1)

Class claimant could not challenge evidentiary findings of copyright arbitration royalty panel in panel's distribution of royalties from cable television systems absent explanation as to how correction of alleged errors would benefit claimant. 17 U.S.C.A. §§ 801, 802.

12. Telecommunications ⇐449.5(3)

Fact that award of royalties to class claimant by copyright arbitration royalty panel represented compromise between differing expert views of value of claimant's programming was not sufficient basis for finding the compromise figure arbitrary. 17 U.S.C.A. § 802.

13. Telecommunications ⇐449.5(3)

Copyright arbitration royalty panel's process in calculating distribution of royalties from cable television systems met minimum constitutional requirements of due process clause. U.S.C.A. Const.Amend. 5; 17 U.S.C.A. § 802.

14. Telecommunications ⇐449.5(3)

Downward adjustment, by Librarian of Congress, of copyright arbitration royalty panel's award of royalties from cable television systems to one class claimant, to account for certain settlements panel overlooked in its calculations, was neither arbitrary nor irrational, even if panel found that claimant's circumstances had not changed from previous year. 17 U.S.C.A. § 802.

15. Telecommunications ⇐449.5(3)

Copyright arbitration royalty panel's elimination of criterion considering harm caused to copyright owners by secondary transmissions of copyrighted works by cable television systems, in determining proper distribution of royalties collected from cable systems, did not necessarily warrant higher award to class claimant that had been negatively affected by that criterion in the past, even if claimant's circumstances had not changed, since awards were based on combination of factors. 17 U.S.C.A. § 802.

16. Telecommunications ⇐449.10(1)

In reviewing decision of Librarian of Congress as to distribution of copyright royalties collected from cable television systems, it is not role of appellate court to independently weigh evidence or determine credibility of witnesses. 17 U.S.C.A. § 802(g).

17. Telecommunications ⇐449.5(3)

Copyright arbitration royalty panel's alleged failure to accord evidence proffered by one class claimant the same weight as it gave other claimants' similar evidence did not indicate that approval of award by Librarian of Congress was arbitrary. 17 U.S.C.A. § 802.

18. Telecommunications ⇐449.5(3)

Librarian of Congress did not act in arbitrary manner by failing to increase award of copyright royalties to one class claimant, notwithstanding alleged categorization errors made by Librarian and underlying copyright arbitration royalty panel in compiling survey results, as such evidence was weighed with other factors in determining claimant's award. 17 U.S.C.A. § 802.

On Petitions for Review of an Order of the United States Department of Justice.

Dennis Lane argued the cause for petitioner Program Suppliers.

John I. Stewart, Jr. argued the cause for petitioner National Association of Broadcasters. Jacqueline E. Davis, Jessica R. Herrera and Henry L. Baumann were on brief.

Barry H. Gottfried argued the cause for petitioner Devotional Claimants. Clifford M. Harrington, John H. Midlen, Jr., George R. Grange, II, Richard M. Campanelli and W. Thad Adams, III, were on brief.

Bruce G. Forrest, Attorney, United States Department of Justice, argued the cause for the respondents. Frank W. Hunger, Assistant Attorney General, and William G. Kanter, Attorney, United States Department of Justice, were on the brief.

Timothy C. Hester argued the cause for intervenors Canadian Claimants, et al. Michele J. Woods, L. Kendall Satterfield and Victor J. Cosentino were on brief.

Ronald A. Schechter argued the cause for amicus curiae Joint Sports Claimants. Robert Alan Garrett, Philip R. Hochberg and Judith Jurin Semo were on brief.

Before: GINSBURG, HENDERSON and RANDOLPH, Circuit Judges.

KAREN LECRAFT HENDERSON, Circuit Judge:

A cable television system must pay royalty fees to the Register of Copyrights (Register) in exchange for the privilege of retransmitting to its subscribers certain copyrighted programming. *See* 17 U.S.C. § 111(d). The Librarian of Congress (Librarian) then distributes the collected royalties to the copyright owners. *Id.* § 111(d)(4). In Phase I of the distribution process, royalties are apportioned among eight classes of claimants. *See* Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed.Reg. 55,653, 55,655 (1996) (hereinafter Librarian Decision). In Phase II awards are made to individual copyright owners within each of the classes. *Id.* If at either stage a controversy arises regarding the appropriate disposition of all or a portion of the royalties, the Librarian convenes a Copyright Arbitration Royalty Panel to propose a settlement. *See* 17 U.S.C. § 111(d)(4)(B); Majority Report of the Copyright Arbitration Royalty Panel (5/31/96) (hereinafter Panel Report). The panel's proposal is then forwarded to the Librarian, who, on the recommendation of the Register, adopts it or rejects it (in whole or in part) and distributes the disputed royalties accordingly. 17 U.S.C. § 802(f).

Each of the petitioners here is a disappointed class claimant challenging the Librarian's Phase I distribution of royalties collected for the years 1990, 1991 and 1992. Because our review of the Librarian's decision is limited, and because on our limited review none of the petitioners has established a basis to alter or modify its royalty award, we reject their challenges and affirm the Librarian.

I. BACKGROUND

In 1974 the Supreme Court ruled that a cable television system's retransmission of non-network copyrighted programing to markets distant from those to which it was originally broadcast was not a "performance" under the Copyright Act of 1909, 17 U.S.C. §§ 1 *et seq.*, (hereinafter 1909 Act) and therefore an action for copyright infringement did not lie against the cable system. *See Teleprompter Corp. v. CBS*, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974); *cf. Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968) (retransmission of non-network copyrighted programming to *local* markets did not give rise to infringement liability under 1909 Act). While it recognized the adverse effect the retransmissions could have on copyright owners, the Supreme Court concluded that "[d]etailed regulation of these relationships [between cable operators and copyright owners], and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Teleprompter*, 415 U.S. at 414, 94 S.Ct. 1129; *accord Fortnightly*, 392 U.S. at 401, 88 S.Ct. 2084 ("We have been invited ... to render a compromise decision in this case that would, it is said, accommodate the various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress.").

A. The Evolving Statutory Framework

In response to the *Fortnightly* and *Teleprompter* decisions, and having struggled with the matter since 1965, the Ninety-Fourth Congress enacted legislation to address the retransmission royalty problem. *See* The Copyright Act of 1976, Pub.L. No. 94-553 (codified as amended at 17 U.S.C. §§ 101 *et seq.*) (hereinafter 1976 Act); *see also* H.R.Rep. No.94-1476, at 89 (1976), U.S. Code Cong. & Admin. News at 5659, 5703-5704 ("The difficult problem of determining the copyright liability of cable television systems has been before the Congress since 1965.") (hereinafter 1976 House Report). The 1976 Act permitted recovery of royalties for non-network programming retransmitted to distant markets but not for other types of retransmitted programming:

> The Committee determined ... that there was no evidence that the retransmission of "local" broadcast signals [to the same markets served by the local broadcasters] threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in "distant" markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.
>
> By contrast, their [sic] transmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

1976 House Report at 90, U.S. Code Cong. & Admin. News at 5704-5705; *accord National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 373 (D.C.Cir.1982) ("The Act therefore was not intended to compensate network broadcasts or even local broadcasters whose programs are retransmitted locally by a cable system in the same area.") (hereinafter *NAB I*); *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1303 (D.C.Cir.1983) (similar) (hereinafter *CBN*).

Because the Congress believed "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system." 1976 House Report at 89, it established a centralized process for the collection and payment of royalties. *See National Broadcasting Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1291 (D.C.Cir.1988) ("The purpose of this regulatory structure is to facilitate the exploitation of copyrighted materials by removing the prohibitive transaction costs that would attend direct negotiations between cable operators and copyright holders, while at the same time assuring copyright holders compensation for the use of their property.") (hereinafter *NBC*). To administer the process, the Congress established the Copyright Royalty Tribunal (Tribunal) and authorized it to periodically adjust royalty rates and distribute collected royalties. *See* 17 U.S.C. §§ 111(d), 801-810 (1976).

Under the 1976 Act, if claimants could not agree on the proper distribution of collected royalties, the Tribunal declared a controversy as to the portion of royalties in dispute and conducted hearings to determine the appropriate apportionment of the funds. *Id.* § 804(d)-(e). The Tribunal had one year to complete its proceedings, *id.* § 804(e), and in its final determination it was to "state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination," *id.* § 803(b).

The Congress did not, however, prescribe the criteria or procedures according to which the Tribunal should assess a claim for royalties:

> The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty [Tribunal] in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty [Tribunal] should consider all pertinent data and considerations presented by the claimants.

1976 House Report at 97, U.S. Code Cong. & Admin. News at 5712. Accordingly, the Tribunal developed three primary criteria—"[1] the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems, [2] the benefit derived by cable systems from the secondary transmissions of certain copyrighted works, and [3] the marketplace value of the works transmitted," *NAB I*, 675 F.2d at 373—and two secondary criteria—"[4][the] quality of copyrighted program material, and [5] time-related considerations," *id.*—to assess each party's claims.

The 1976 Act also provided for judicial review of the Tribunal's distribution decisions:

> Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register, by an aggrieved party. The judicial review of the decision shall be had, in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal. No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.

17 U.S.C. § 810 (1976). Pursuant to this provision, this Court was called on to review the Tribunal's distribution of retransmission royalties for four of the first five years they were collected. *See NAB I*, 675 F.2d at 377–85 (challenges to Tribunal's distribution of 1978 royalties); *CBN*, 720 F.2d at 1305–19 (challenges to Tribunal's distribution of 1979 royalties); *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922 (D.C.Cir.1985) (challenges to Tribunal's distribution of 1979, 1980 and 1982 royalties) (hereinafter *NAB II*).

As time passed, however, there was insufficient work to justify the existence of a permanent body and therefore, some seventeen years after its creation, the Congress abolished the Tribunal and transferred most of its functions to an ad hoc Copyright Arbitration Royalty Panel. *See* The Copyright Royalty Tribunal Reform Act of 1993, Pub.L. No. 103–198 (codified in relevant part, as amended, at 17 U.S.C. §§ 801–803) (hereinafter 1993 Act). In so doing, the House Committee responsible for the legislation reasoned that

> ad hoc arbitration panels are better suited to handle the functions currently handled by the Tribunal. The experience with arbitration under the Section 119 satellite compulsory license was positive, and indicates that this approach can work for the other royalty schemes in title 17. Testimony of witnesses before both Houses on the proposal supports this conclusion.

H.R.Rep. No. 103–286, at 11 (1993), U.S. Code Cong. & Admin. News at 2954, 2958 (hereinafter 1993 House Report).

The 1993 Act also transferred certain of the Tribunal's functions to the Librarian of Congress and the Register of Copyrights:

> The Register of Copyrights and the Librarian of Congress will play important roles in convening and reviewing the decisions of the arbitration panels. The Copyright Office is currently the "front end" of the compulsory license system. Statements of Account [of royalties owed] for the section 111, 119, and 1005 licenses are filed with the Office. The royalties paid in under these licenses are then deposited by the Copyright Office into the United States Treasury. ... The Copyright Office also has authority to promulgate regulations for the administration of these functions. Section 806 of the Copyright Act requires the Library of Congress to provide the Copyright Royalty Tribunal with necessary administrative services, including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement.

> In short, the Copyright Office and the Library of Congress already have considerable involvement in the administration of compulsory licenses and in the work of the Tribunal. When combined with the Copyright Office's almost 100 year experience in copyright issues, assigning some of the duties formally carried out by the Tribunal to the Office and the Library makes good sense.

Id. (footnote omitted).

Accordingly, under the new distribution scheme established by the 1993 Act, an arbitration panel is now entrusted with initial responsibility for formulating a proposed distribution of disputed royalties. *See* 17 U.S.C. §§ 801–802. The arbitration panel has 180 days to hear evidence and develop the proposed settlement of outstanding claims. *Id.* § 802(e). It must "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)." *Id.* § 802(c). Within the same 180–day period the panel must include its proposed settlement in a report, setting "forth the facts that the arbitration panel found relevant to its determination," and it must forward the report and accompanying written record to the Librarian:

> Within 60 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel. The Librarian shall adopt the determination of the arbitration panel unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title. If the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 60–day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be. The Librarian shall cause to be published in the Federal Register the determination of the arbitration panel and the decision of the Librarian (including an order issued under the preceding sentence). The Librarian shall also publicize such determination and decision in such other manner as the Librarian considers appropriate. The Librarian shall also make the report of the arbitration panel and the accompanying record available for public inspection and copying.

Id. § 802(f).

The Librarian's decision can then be reviewed by this Court:

> Any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the publication of the decision in the Federal Register. If no appeal is brought within such 30–day period, the decision of the Librarian is final, and the royalty fee or determination with respect to the distribution of fees, as the case may be, shall take effect as set forth in the decision. ... The court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner. If the court modifies the decision of the Librarian, the court shall have jurisdiction to enter its own determination with respect to the amount or distribution of royalty fees and costs, to order the repayment of any excess fees, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the arbitration panel and remand the case to the Librarian for arbitration proceedings in accordance with subsection (c).

Id. § 802(g).

B. The Petitioners' Challenges

The petitioners are the first to challenge a decision of the Librarian under the new royalty distribution process established by the 1993 Act. Each represents a distinct class of claimants: Program Suppliers (Programmer) represents the copyright owners of syndicat-

ed television series, movies and television specials;[1] National Association of Broadcasters (NAB) represents the copyright owners of programs, like news and local interest material, that are produced and broadcast by only a single television station;[2] and Devotional Claimants (Devotional) represents the copyright owners of "[s]yndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions," Panel Report at 13, that do not fall within another category of programming.[3]

At issue is more than $500 million in royalties—the total amount collected for non-network programming retransmitted to distant markets in calendar years 1990, 1991 and 1992.[4] The disputed royalties consist of "Basic Funds," "3.75% Funds" and "Syndex Funds," which in turn are subdivided into 1990 collections and 1991–1992 collections. The Basic Funds include all of the royalties collected from small- and medium-sized cable systems as well as the royalties collected from large cable systems for retransmissions that were permitted under the now defunct, distant signal carriage rules of the Federal Communication Commission (FCC). *See* Librarian Decision, 61 Fed.Reg. at 55,654. The 3.75% Funds and Syndex Funds consist of royalties collected exclusively from large cable systems for retransmissions that are now permitted as a result of the FCC's repeal of its distant signal carriage and syndication exclusivity rules, respectively.[5] *Id.*

The Librarian declared a Phase I distribution controversy and convened a copyright arbitration royalty panel (Panel) on December 4, 1995. *Id.* at 55,655. The Panel conducted approximately 50 days of evidentiary hearings during which it heard the testimony of more than 50 witnesses and it reviewed over 200 exhibits and hundreds of pages of written testimony submitted by the class claimants. *See* Panel Report at 25. The record was closed on March 29, 1996, after which the claimants submitted over one thousand pages of post-hearing briefs. *Id.* at 17. The three-member Panel, with one dissent, reported its proposed distribution to the Librarian on May 31, 1996. *See* Letter from Panel Chair to Librarian of 5/31/96. In its report, the Panel proposed the following Phase I apportionment for the non-settling class claimants:

1. Syndicated series and specials consist of the following:

   (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 broadcast by two or more U.S. 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 video shows, cartoon shows, "PM Magazine," and locally hosted movie shows. Syndication refers to selling programming on a market-by-market basis to broadcast television stations in the United States. "Off-network" syndication refers to programming syndicated after having first appeared on a network. "Cheers" and "Roseanne" are examples. "First run" syndication refers to programs first appearing in syndication, such as talk and game shows.

   Panel Report at 11–12.

2. The Panel Report describes NAB's programming as follows: "[p]rograms produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart (3) of the 'Program Suppliers' definition." Panel Report at 12–13 (referring to subpart (3) quoted *supra* at note 1).

3. The Librarian also awarded a share of the royalties to five other classes of copyright owners—i.e., Joint Sports Claimants (JSC), Music Claimants (MC), National Public Radio (NPR), Public Broadcasters (PBS) and Canadian Claimants (CC). PBS and CC have intervened in this litigation, filing a joint brief in support of the Librarian's distribution decision. Each of the petitioners has also joined in the portions of the intervenors' brief that are not adverse to its claims. JSC has filed an *amicus curiae* brief, supporting the Librarian's decision and opposing certain of the arguments advanced by the petitioners.

4. The Tribunal, it appears, was in the midst of a distribution proceeding to determine the proper Phase I apportionment of 1990 royalties just before the Congress enacted the 1993 Act. *See* Librarian Decision at 55,655. When it became clear that the Tribunal would be abolished by the 1993 Act, the 1990 proceedings were suspended and, at the urging of the parties, the Librarian convened a panel to develop a proposed settlement for not only the 1990 royalties but also the 1991 and 1992 funds. *Id.*

5. The 3.75% Fund is named for the formula by which the royalties are calculated—i.e., 3.75% of gross receipts. *See* Librarian Decision, 61 Fed. Reg. at 55,654.

Table 1: Panel's Proposed Phase I Apportionment of Royalties

Claimants	Basic Fund (1990)	Basic Fund (1991-1992)	3.75 Fund (1990-1992)	Syndex Fund (1990-1992)
Programmer	55.55%	55.00%	58.60%	100.00%
NAB	7.58%	7.50%	7.50%	None
Devotional	1.26%	1.25%	0.95%	None
PBS	5.81%	5.75%	None	None
JSC	29.80%	29.50%	32.60%	None
CC	None	1.00%	0.35%	None

Source: Panel Report at 143.

The proposed awards differed significantly from those the Tribunal had last approved before its abolition:

Table 2: Tribunal's Phase I Apportionment of 1989 Royalty Funds

Claimants	Basic Fund (1989)	3.75 Fund (1989)	Syndex Fund (1989)
Programmer	60.00%	62.60%	95.50%
NAB	5.70%	5.70%	None
Devotional	1.25%	0.95%	None
PBS	4.00%	None	None
MC	4.50%	4.50%	4.50%
JSC	23.80%	26.00%	None
CC	0.75%	0.25%	None

Source: Certified Questions from the Register of Copyrights to the Copyright Arbitration Royalty Panel of 7/16/96, at 2 (hereinafter Certified Questions to Panel).

After reviewing the Panel's findings, the Register notified the class representatives of a meeting to discuss certain perceived shortcomings in the Panel's report:

> We have reviewed the Panel's report, the petitions to modify and the replies filed by the parties to this proceeding. It is evident that the report cannot be adopted by the Librarian in its present form, and would not be sustainable on appeal. Despite the report's length, there is a significant absence of findings of fact and conclusions of law supporting the Panel's specific determinations. The report consequently lacks adequate explanation justifying the Panel's awards. Without such explanation, the Librarian cannot evaluate the Panel's reasoning to determine if it acted in an arbitrary manner.
>
> We have also examined the record in this proceeding and have determined that the Librarian cannot engage in a *de novo* review of the merits of this case. First, as the Canadian Claimants aptly point out in their reply, *de novo* review cannot be completed in the 60-day time period. Second, and more importantly, the record is not

complete with respect to some issues. Without further development, there is no evidence upon which the Librarian can reach a conclusion, preventing him from making his own determination as to the royalty distribution.

The Copyright Act is silent as to the Librarian's authority to remand the [Panel] report for further development and explanation. We have determined, however, that a remand is the appropriate solution in this proceeding and will most likely produce an ultimate determination that will withstand judicial review.

Letter from Register of Copyrights to Phase I Cable Parties of 7/3/96.

At the meeting, the claimants generally expressed their reservations about the legality and wisdom of a remand to the Panel. *See* Meeting of 7/11/96 Tr. 6–58. The Register nonetheless determined that the best way to proceed was to submit a series of "certified questions" to the Panel so that it could elaborate on its reasons for specific percentage awards. *See* Certified Questions to Panel at 1 ("The questions are intended to probe the original intent of the Panel only. They are not intended to reopen any issues or invite any reconsideration."). The Panel responded to the questions on August 29, 1996, emphasizing that royalty shares could not be determined with mathematical precision and were inescapably dependent on the Panel's exercise of its informed judgment as to the relative merits of each class's claims:

The point is, after reviewing and weighing the surveys and all other relevant information, it is the Panel's function to make a final judgment as to the award of each party. There was a considerable difference of opinion in weighing all the evidence as is partly evident by the fact that the Panel was not unanimous in its judgment. To reach the judgment as it exists there had to be, and there was, a significant compromise. The above comments emanate from discussions with the Copyright Office and the tenor of certain questions which suggests that there is a precision [sic] or mathematical way to calculate these awards by placing weights on all the categories. The Panel can somewhat confine the awards by making observations on the surveys and observations on the other evidence presented. However, in its final aspect the Panel has to use its judgment.

... A great deal of pressure was placed on the Panel members, not only to analyze and consider [the evidence], but also to debate and agree on a judgment—one that by its very nature required a relatively precise quantification of the final results. Clearly, the most important element of the decision was the "judgment" of the Panel. The Panel assimilated this information and feels comfortable that it understood the evidence and arguments as presented. In writing the report itself, the Panel simply ran out of time. In the experience of at least one member of the Panel, the report, when issued, was about midway from where it would be if it were an opinion published in an appellate report. It needed considerable editing and tightening. The Panel wishes to emphasize, however, that it abides by its essential judgments in this proceeding.

Copyright Arbitration Royalty Panel Responses of 8/29/96 to Certified Questions from the Register of Copyrights, at 2–3 (hereinafter Panel Responses to Certified Questions).

After reviewing the Panel's substantive responses to each of the certified questions, the Register recommended adoption of the Panel's findings with adjustments to account for (1) the Music Claimants' and National Public Radio's settlement of their claims to the Basic and Syndex Funds and (2) the Panel's other errors, admitted and otherwise, in apportioning the 3.75 Funds. *See* Librarian Decision, 61 Fed.Reg. at 55,660–64. The Librarian adopted the Register's recommendation without modification: "Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1990–1992 cable funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part." *Id.* at 55,669. Accordingly, a summary of the final apportionment of royalties approved by the Librarian is as follows:

Table 3: Librarian's Phase I Apportionment of Royalties

Class Claimants & Collection Years	Basic Funds	3.75 Funds	Syndex Funds
Programmer			
-1990	52.6336250%	56.0125439%	95.5000000%
-1991-1992	52.5250000%	56.0131375%	95.5000000%
JSC			
-1990	28.2355000%	31.1605620%	None
-1991-1992	28.1725000%	31.2299325%	None
NAB			
-1990	7.1820500%	7.1688409%	None
-1991-1992	7.1625000%	7.1625000%	None
MC			
-1990	4.5000000%	4.5000000%	4.5000000%
-1991-1992	4.5000000%	4.5000000%	4.5000000%
PBS			
-1990	5.5049750%	None	None
-1991-1992	5.4912500%	None	None
Devotional			
-1990	1.1938500%	0.9080532%	None
-1991-1992	1.1937500%	0.9072500%	None
CC			
-1990	0.7500000%	0.2500000%	None
-1991-1992	0.9550000%	0.1871800%	None

Source: Librarian Decision, 61 Fed.Reg. at 55,669.

The petitioners timely appealed the Librarian's decision. NAB contends that it should have been awarded an 8.897025% share of the 1990 Basic and 3.75 Funds and an 8.815% share of the 1991–1992 Basic and 3.75 Funds, both of which increases should be effected by corresponding reductions in Programmer's award. Devotional claims that it should have been awarded a three per cent share of the Basic and 3.75 Funds, or at the very least, its awards should have been no lower than those proposed by the Panel; it does not indicate, however, from whose award or awards such increases should come. Finally, Programmer argues that it deserves a larger award, the amount and source of which can be determined only on remand to the Librarian.

II. STANDARD OF REVIEW

[1] As provided by subsection 802(g) of the 1993 Act, we may "modify or vacate a decision of the Librarian only if [we] find[ ], on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner." *See* 17 U.S.C. § 802(g). The corresponding provision of the 1976 Act, section 810, permitted review of a Tribunal decision "in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal." 17 U.S.C. § 810 (1976). Notwithstanding the difference in language between the 1993 Act and the 1976 Act, Devotional contends that our review of the Librarian's decision should be no different from our review of a Tribunal decision; in both instances, the Administrative Procedure Act (APA)—i.e., 5 U.S.C. § 706(2)—supplies the appropriate standard of review. Similarly, Programmer argues that the APA's arbitrary and capricious test, 5 U.S.C. § 706(2)(A), as interpreted in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), should control. Finally, NAB also claims that we should continue to review the Librarian's royalty distribution decision

under a variant of the APA's arbitrary and capricious test, *see Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. 2856 ("In reviewing [an agency's] explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment") (quotations omitted), although it concedes that APA review may now be more limited than in the past and that the "substantial evidence" test, 5 U.S.C. § 706(2)(E), no longer applies.

Conversely, the intervenors argue that the APA's arbitrary and capricious standard no longer applies: pursuant to subsection 802(f), the Librarian is obliged to adopt the Panel's proposed settlement unless he finds it "arbitrary or contrary to the applicable provisions of" Title 17; in turn, under subsection 802(g), we may modify or remand the Librarian's decision only if we conclude that he "acted in an arbitrary manner" in applying the section 802(f) standard; this "double arbitrary" standard is therefore narrower than APA review.[6] The Librarian goes even further, arguing that our "judicial review role in this case is at the outer edge of cases barely reviewable under a criterion of substantive correctness."[7] Librarian Br. 14.

We conclude that our review of the Librarian's distribution decision under subsection 802(g) is significantly more circumscribed than the review we made of Tribunal decisions under section 810. As a result, in applying the "arbitrary manner" standard set forth in subsection 802(g), we will set aside a royalty award only if we determine that the evidence before the Librarian compels a substantially different award. We will uphold a royalty award if the Librarian has offered a facially plausible explanation for it in terms of the record evidence. While the standard is an exceptionally deferential one, we think it is most consistent with the intent of the Congress as reflected in the language, structure and history of the 1993 Act.[8]

A. *The Congress's Intent*

Under the APA standards incorporated by section 810, judicial review of the Tribunal's royalty distribution decisions was already quite deferential. *See NAB II*, 772 F.2d at 926 n. 3 (noting that standard of review applied to Tribunal royalty apportionments is same standard "employed in ratemaking cases coming from the Federal Energy Regulatory Commission[ ], an area in which a highly deferential standard of review has traditionally been applied"). As we observed,

> the judicial task is not to weigh the evidence and fix what in our view would constitute appropriate percentages, for that would be to intrude into the function entrusted to the Tribunal. Our job, rather, is to determine whether the royalty awards are within a "zone of reasonableness"—not unreasonably high or unreasonably low—and that the CRT's decision is neither arbitrary nor capricious, and is supported by substantial evidence.

NAB II, 772 F.2d at 926; *accord CBN*, 720 F.2d at 1304 ("In acknowledging the need for substantial evidence, however, we emphasize

6. Any difference between a "double-arbitrary" standard and a "single-arbitrary" standard may well be illusory for if the Panel's proposed award is patently arbitrary or plainly contravenes another provision of Title 17, the Librarian's decision to approve the award without modification would constitute "act[ing] in an arbitrary manner" as well.

7. The Register's recommendation to the Librarian (which was apparently adopted by the Librarian without alteration) suggests that the Librarian's review of the Panel's proposed settlement is indistinguishable from this Court's review of Tribunal royalty distribution decisions. *See* Librarian Decision, 61 Fed.Reg. at 55,656 ("Neither the [1993] Act nor its legislative history indicates what is meant specifically by 'arbitrary,' but there is no reason to conclude that the use of the term is any different than the 'arbitrary' standard described in the [APA]."). Contrary to Programmer's contention, however, the Register did not assert that our review of the Librarian's decision had not changed. *See id.* at 55,656–57.

8. Even had the standard of review remained the same, we are doubtful that any of the petitioners' arguments would lead us to disturb the Librarian's Phase I apportionment. Nonetheless, given our past experience with the "highly litigious copyright-owner subculture," *NAB II*, 772 F.2d at 940, we think it useful to decide the standard of review question now. *But cf. Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 767–68 (D.C.Cir.1984) (declining to select standard of review because regardless of standard applied result would be same).

that the Tribunal's choice of a particular percentage allocation is not reviewable for exact precision, but simply for rationality; we are without power to set aside a particular percentage allocation provided that it is within a 'zone of reasonableness.' "); *NAB I*, 675 F.2d at 374 ("Claims of this sort are generally well beyond the expertise or authority of courts, however, and Congress made clear its awareness of our limitations by making the Tribunal the primary arbiter of these claims."); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S.Ct. 692, 95 L.Ed. 912 (1951) ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission.").

While the section 810 standard was "highly deferential," in enacting the 1993 Act the Congress apparently concluded that the standard was not deferential enough, as evidenced by the repeal of section 810 and the enactment of subsection 802(g)—a provision that contains no reference to the APA. We therefore reject Devotional's assertion that the Congress did not intend to change the standard of review applicable to royalty distribution decisions as to so hold would ignore plain evidence of the Congress's intent to the contrary, a disfavored construction. *See Brewster v. Gage*, 280 U.S. 327, 337, 50 S.Ct. 115, 74 L.Ed. 457 (1930) ("The deliberate selection of language so differing from that used in earlier Acts indicates that a change of law was intended."); *In re Request for Assistance*, 848 F.2d 1151, 1154 (11th Cir. 1988) ("When the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute."), *cert. denied*, 488 U.S. 1005, 109 S.Ct. 784, 102 L.Ed.2d 776 (1989). In light of the Congress's decision to remove from the judicial review provision of the 1993 Act any reference to the APA, we also conclude that Programmer and NAB err in suggesting that the arbitrary and capricious standard continues to control our subsection 802(g) review.[9]

Moreover, subsection 802(g) plainly does not evince a congressional intent to subject the Librarian's decision to more searching review than we have in the past applied to a Tribunal decision. Further, we cannot ignore the simplification of review language the 1993 Act achieved: we now ask simply whether "on the basis of the record before

9. The 1993 Act also repealed subsection 803(a) of the 1976 Act, which provided that, "[e]xcept as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act [] (... title 5, United States Code, chapter 5, subchapter II and chapter 7)." 17 U.S.C. § 803(a) (1976). The 1993 Act's sole reference to the APA is found in subsection 802(c), which requires the *Panel* to conduct its proceedings "subject to subchapter II of chapter 5 of title 5"—the notice and comment provisions of the APA. *See* 17 U.S.C. § 802(c).

We find these changes, together with the significant structural changes effected by the 1993 Act, to be compelling evidence of the Congress's intent to limit the applicability of the APA. Thus, to the extent the petitioners argue that the strong presumption in favor of applying the APA requires us to adhere to the review standards set forth in 5 U.S.C. § 706(2), we think this is one of those unusual circumstances in which the Congress's intent is sufficiently clear to overcome the presumption. Indeed, the Supreme Court reached a similar conclusion in somewhat analogous circumstances:

> Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express. ... But we cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.

Marcello v. Bonds, 349 U.S. 302, 310, 75 S.Ct. 757, 99 L.Ed. 1107 (1955); *accord Asiana Airlines v. FAA*, 134 F.3d 393, 396–99 (D.C.Cir. 1998) (finding APA notice and comment requirements inapplicable because their application would render superfluous statutory language specifying rulemaking procedures agency was to follow).

the Librarian, ... the Librarian acted in an arbitrary manner," 17 U.S.C. § 802(g), whereas formerly we asked whether the Tribunal's decision was

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of [Title 5] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). Thus, for us to conclude that acting in an "arbitrary manner" is synonymous with the list of administrative transgressions set forth in the APA would be absurd. *Cf. Steadman v. SEC*, 450 U.S. 91, 98–99, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) (finding significant difference between APA's "substantial evidence" test and statutory language requiring that agency's order be "supported by and in accordance with ... substantial evidence").

The 1993 Act also establishes a royalty distribution structure that differs from its predecessor in important respects. First, the 1993 Act inserts an additional layer of administrative review by the Register and the Librarian between the factfinder's conclusions and our review. *See* 17 U.S.C. § 802(e)-(f). The Tribunal, however, had both the first and last administrative word under the procedure established by the 1976 Act. *See* 17 U.S.C. §§ 801–810 (1976). Second, the two-stage decisionmaking process established by the 1993 Act must now be completed in 240 days whereas the Tribunal had 365 days to conclude its single-stage process under the 1976 Act. *Compare* 17 U.S.C. § 802(e)-(f), *with* 17 U.S.C. § 804(e) (1976). Third, the Panel's report must be accompanied by the written record and need set forth only "the facts that the arbitration panel found relevant to its determination," *id.* § 802(e), whereas the Tribunal was obliged to "state in detail the criteria that [it] determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its decisions," 17 U.S.C. § 803(b) (1976).[10] Fourth, and perhaps most significantly, the 1993 Act changes the paradigm for administrative decisionmaking: it replaces the Tribunal's quasi-adjudication with an arbitration undertaken by an ad hoc panel whose proposed settlement is then reviewed by final decisonmakers, the Register and the Librarian. *See* 1993 House Report at 11 ("The experience with arbitration under the Section 119 [of Title 17] satellite compulsory license was positive, and indicates that this approach can work for the other royalty schemes in title 17").

The foregoing structural changes are also perfectly consistent with the Congress's evident intent to facilitate expeditious and informal settlement of claims at the administrative level and to discourage resort to formal, protracted and costly judicial processes of resolving disputes.[11] *See id.* at 13 ("[T]he panels, with the assistance of the Copyright Office, must promulgate and be governed by clear procedural and evidentiary guidelines designed to ensure fundamental fairness. Rules of discovery that can expedite the parties' presentation of their cases are particularly important in this respect, since early discovery and clear evidentiary rulings can go far in facilitating settlements and a more streamlined arbitration process."); *cf. Devine*

10. While the legislative history of the 1993 Act states that "[a] clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress" in conducting his review of the report, a "clear report" is not required under subsection 802(e). 1993 House Report at 13.

11. Indeed, almost two years will have elapsed from the date of the Librarian's final decision to judicial resolution of the parties' claims for royalties that were collected, in some instances, more than eight years ago.

v. White, 697 F.2d 421, 436 (D.C.Cir.1983) ("Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, would substantially undercut the ability of arbitrators successfully to resolve disputes...."); *Office & Professional Employees Union, Local 2 v. Washington Metro. Area Transp. Auth.*, 724 F.2d 133, 137 (D.C.Cir.1983) ("If parties to arbitration could freely relitigate their complaints in the courts, arbitration would cease to be a method to achieve prompt resolution of conflict, but would instead become a new layer of review, and a new cause for delay.").

We find additional evidence of a legislative intent to narrow the scope of judicial review in the history of the 1993 and the 1976 Acts. The Senate bill that originally gave rise to the 1976 Act would have limited judicial review of a Tribunal decision to three circumstances: "(1) The determination was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in any of the members of the Tribunal, or (3) any member of the Tribunal was guilty of any misconduct by which the rights of any party were prejudiced." 1976 House Report at 179. This standard is materially indistinguishable from the one set forth in the Arbitration Act. *See infra* note 12. The House, however, concluded that the Senate's judicial review provision was "far too restrictive," 1976 House Report at 179, and thus it reported an amendment to the bill, providing "for the full scope of review provided by Chapter 7 of the Administrative Procedure Act," *id.* The House prevailed and section 810, providing for full APA review, became law. *See* H.R. Conf. Rep. No. 94-1733, at 81-82 (1976).

In enacting the 1993 Act, however, the House appears to have come around to something closer to the Senate's original proposal to limit judicial review of royalty distribution decisions to claims cognizable under the Arbitration Act. *Compare infra* note 12 (setting forth Arbitration Act review provision that authorizes court to set aside award where there is "evident partiality or corruption" by arbitrator), *with* 1993 House Report at 12-13 (1993), U.S. Code Cong. & Admin. News at 2959-2960 ("Given that many arbitrations will involve multiple parties, the Librarian of Congress and the Register of Copyrights must be scrupulous to avoid even the appearance of selecting arbitrators that may be believed, incorrectly or not, to favor one party.").

We agree nonetheless with the Librarian that there is insufficient evidence to conclude that the Congress, in enacting subsection 802(g), intended to adopt the extremely circumscribed review standard set forth in the Arbitration Act, 9 U.S.C. § 10.[12] The 1993 Act does not expressly refer to the Arbitration Act and the "arbitrary manner" language of subsection 802(g) is far from synonymous with the limited procedural and ethical infirmities supporting vacatur of an arbitration award pursuant to the Arbitration Act. *Cf. Office & Professional Employees*, 724 F.2d at 139 ("Because the statutory framework of the [Railway Labor Act (RLA)] and of the Compact [interstate agreement authorized by the Congress] are substantially dissimilar, we cannot assume, without any supporting evidence of legislative intent, that the mere presence in both statutes of the words 'final and binding' permits a court to superimpose the RLA's congressionally-enacted standard of review [for arbitration awards] onto the Compact."). Further, the structure of the royalty distribution system, interposing a layer of admin-

12. Under the Arbitration Act, a district court is authorized to set aside an arbitrator's award only in the following circumstances:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

istrative review between the "arbitrators'" decision and our review of that decision, further distinguishes the system established by the 1993 Act from arbitrations covered by the Arbitration Act. *See* Librarian Decision, 61 Fed.Reg. at 55,656 ("Typically, an arbitrator's decision is not reviewable, but the [1993] act created two layers of review: the Librarian and the Court of Appeals for the District of Columbia."). Finally, review of the merits of an arbitrator's decision is generally proscribed by the Arbitration Act, *cf. Timken Co. v. Local Union No. 1123, United Steelworkers of Am., AFL–CIO*, 482 F.2d 1012, 1014 (6th Cir.1973) ("[W]hile a court is empowered to determine whether an arbitrator's award exceeded the limits of his contractual authority ... it may not review the merits of an arbitration award."), whereas subsection 802(g) appears to permit some (albeit quite limited) review of the merits of the Librarian's assessment of the settlement.

B. Applicable Standard of Review

[2] Having sketched the general limits of our review, we must now give content to the "arbitrary manner" standard of subsection 802(g) and in so doing define more clearly the path we follow in reviewing decisions of the Librarian. *Cf. Steadman v. SEC*, 450 U.S. 91, 95, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) ("Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for it is the kind of question which has traditionally been left to the judiciary to resolve.") (internal quotations, brackets and citations omitted). As we have repeatedly emphasized in earlier royalty distribution decisions, any standard of review must be adapted to fit the administrative decisionmaking process to which it is to be applied. *See NAB I*, 675 F.2d at 375 ("Our assessment of the Tribunal's procedures must consider the difficulties facing the agency and the mandate given it by Congress."); *Recording Indus. Ass'n v. Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C.Cir.1981) ("[W]e must bear in mind that the thoroughness of the factual support an agency can supply for its decision will vary with the nature of the decision being made.") (hereinafter *RIA*); *National Cable Television v. Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C.Cir.1983) ("The tautness of court surveillance of the rationality of agency decisionmaking, however, depends on the nature of the task assigned to the agency. .... [I]f Congress entrusts a novel mission to an agency and specifies only grandly general guides for the agency's implementation of legislative policy, judicial review must be correspondingly relaxed.") (hereinafter *NCT*). Further, the standard to which we hold an administrative decisionmaker may become more rigorous over time as the decisionmaker acquires greater experience with a particular administrative scheme. *See CBN*, 720 F.2d at 1319 ("As the Tribunal continues to accumulate experience with royalty fee distributions, we continue to hope that the clarity of its decisionmaking will improve."); *cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) ("We are, in addition, obliged at this juncture to give weight to the unusual difficulties of the first area proceeding; we must, however, emphasize that this weight must significantly lessen as the Commission's experience with area regulation lengthens.").

More fundamentally, in framing the standard of review, we must respect the Congress's delegation of exceedingly broad authority to the Librarian, as advised by the Register and the Panel, to apportion royalties appropriately among the claimants, just as we earlier honored the expansive authority entrusted to the Tribunal to do the same:

> We emerge from our analysis of these inherently subjective judgment calls and rough balancing of hotly competing claims with one overriding conclusion: it is the Tribunal [now Librarian] which Congress, for better or worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders. .... [T]he broad discretion necessarily conferred on the Copyright Royalty Tribunal [now Librarian] in making its distributions is emphatically clear.

NAB II, 772 F.2d at 940; *accord NCT*, 724 F.2d at 182 ("In sum, Congress vested in the Tribunal legislative discretion greater than

that committed to regulatory agencies engaged in cost of service rate making. ... We must recognize the judgmental expertise of the Tribunal's members regarding copyright policy, ... and demand only an accounting adequate to assure us that the rates we review are not lacking in rationality.").[13]

[3] With respect to the particular administrative scheme established by the 1993 Act, we note that although the word "arbitrary" appears in both subsections 802(g) and 802(f), our "arbitrary manner" review of the Librarian's decision is not coextensive with the Librarian's "arbitrary and legal" review of the Panel's proposed settlement. *Compare* 17 U.S.C. § 802(g) (authorizing court to vacate or modify decision if "the Librarian acted in an *arbitrary manner*") (emphasis added), *with id.* § 802(f) (requiring Librarian to adopt Panel's proposed settlement unless it "is *arbitrary* or contrary to the applicable provisions of this title") (emphasis added). This is not a surprising administrative arrangement given the bifurcated review of royalty awards (first by the Librarian and then by this Court) and the deference to be accorded the Register's and the Librarian's expertise in royalty distribution. *Cf. Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 623, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) ("[A] reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference. This makes sense because in many circumstances the costs of providing for duplicative proceedings are thought to outweigh the benefits (the second would render the first ultimately useless), and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence."); *United States v. Morgan*, 313 U.S. 409, 416–17, 61 S.Ct. 999, 85 L.Ed. 1429 (1941) ("Another attack upon the Secretary's order is the conventional objection that the findings were not rooted in proof. To reexamine here with particularity the extensive findings made by the Secretary and to test them by a record of 1340 printed pages and thousands of pages of additional exhibits would itself go a long way to convert a contest before the Secretary into one before the courts.").

[4] Moreover, subsection 802(g) plainly limits our review to the *Librarian's* decision. That the *Panel* may have acted arbitrarily affords no basis for this Court to set aside a royalty award unless the Librarian "acted in an arbitrary manner" in ratifying the Panel's action. For example, we think the Librarian would plainly act in an arbitrary manner if, without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award.

13. To the extent the petitioners claim that the Librarian's decision is not entitled to deference because ad hoc arbitration members do not possess expertise in the area of cable royalties, we think their claim misapprehends the source of our solicitude towards the administrative decisionmaker's expertise. The Panel, as the initial factfinder, is in the best position to weigh evidence and gauge credibility. *See Concrete Pipe, infra; cf. Asociacion de Compositores Y Editores de Musica Latinoamericana v. Copyright Royalty Tribunal*, 854 F.2d 10, 13 (2d Cir.1988) ("[W]e must review a challenge to the Tribunal's evidentiary rulings with some deference, for the type of proof that will be acceptable and the weight it should receive lie largely in the discretion of the [Tribunal].") (internal quotations omitted). Moreover, by design, the expertise of both the Register and the Librarian are applied to the royalty distribution question through their review and approval or rejection of the Panel's proposed settlement of claims and thus the decision that is ultimately before us for review may fairly be said to be the product of specialized administrative expertise. *Cf. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276, 53 S.Ct. 627, 77 L.Ed. 1166 (1933) ("Dealing with activities admittedly within its regulatory power, the Congress established the commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the commission were defined, and definition is limitation. Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its actions, are appropriate questions for judicial decision.").

Cf. Northern Pac. Ry. v. Department of Pub. Works, 268 U.S. 39, 44–45, 45 S.Ct. 412, 69 L.Ed. 836 (1925) ("An order based upon a finding made without evidence, ... or upon a finding made upon evidence which clearly does not support it, ... is an arbitrary act against which courts afford relief.") (internal citations omitted); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431 (1913) ("A finding without evidence is arbitrary and baseless.... In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if ... the finding was contrary to the indisputable character of the evidence ... or if the facts found do not, as a matter of law, support the order made ....") (internal quotations and citations omitted); *Concrete Pipe*, 508 U.S. at 623, 113 S.Ct. 2264 ("And application of a reasonableness standard is even more deferential than [clear error review], requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true, whatever the required degree of proof."); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) ("To reverse the [Board of Immigration Appeals] finding we must find that the evidence not only supports [a contrary] conclusion, but compels it.").

[5] In addition, in reviewing the Panel's proposed settlement according to the "legal" half of the "arbitrary and *legal*" standard of subsection 802(f), we think the Librarian would act in an arbitrary manner if he approved an award proposed by the Panel that unmistakably contravened applicable provisions of Title 17 or if he himself transgressed unequivocal statutory commands. *Cf. Stark v. Wickard*, 321 U.S. 288, 309–10, 64 S.Ct. 559, 88 L.Ed. 733 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts."); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1327 (D.C.Cir.1996) ("'[A]cts of all [a government department's] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally grant relief. ... Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.'") (quoting *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110, 23 S.Ct. 33, 47 L.Ed. 90 (1902)). Of course, in assessing whether a particular award contravenes provisions of the 1993 Act, the Librarian's interpretation of ambiguous provisions that he is charged with administering is due deference. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); *NBC*, 848 F.2d at 1296 (finding Tribunal's adoption of presumption, "in the face of congressional silence, ... a permissible interpretation of the statute, to which we defer" under *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778).

[6] Accordingly, if the Librarian's final award to a class claimant bears a rational relationship to the record evidence, is plausibly explained and is otherwise developed in a manner that does not plainly contravene applicable statutory provisions, our task is at an end and we must uphold the award. While we acknowledge the deference that this approach accords to the Librarian's decision is unusually wide, it comports with the unusual character of the cable royalty distribution system that the Congress has devised. *See American Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1031 (D.C.Cir.1977) ("When regulation features novelty, in subject, technique, or both, the narrow scope of review established by conventional doctrine is further circumscribed.").

III. THE PETITIONERS' CHALLENGES

Applying the arbitrary manner standard of review to the individual claims raised by the petitioners, we conclude that none of them affords a basis for vacating or remanding the Librarian's decision.

A. *Programmer's Claims*

Programmer advances three reasons to remand the Librarian's decision: (1) his order did not catenate each award to substantial record evidence and he did not himself explain and assess the basis for each award; (2) he acceded to the Panel's illegal elimination of the "harm" criterion from the royalty apportionment calculus; (3) his order, adopting the Panel's proposed settlement as modified by the Register's recommendation, was arbitrary because it (a) endorsed the Panel's differential treatment of identically situated claimants, (b) did not remedy the Panel's improper reliance on certain evidence to determine JSC's award and (c) ratified the Panel's unduly large award to PBS, failing to take proper account of evidence suggesting a different result. None of these arguments is persuasive.

(1) Adequacy of Librarian's Order

[7] Programmer's first argument is that the Librarian's order should have discussed the evidence before the Panel and the way in which that evidence ultimately led the Panel, and subsequently the Register and the Librarian, to conclude that each award was appropriate. In other words, it was incumbent on the Librarian to duplicate the work of the Panel and the Register in a final order so that the reasoning underlying a particular award would be less caliginous. *See* Programmer Br. 6 ("The Librarian's failure to create a complete picture reflects a lack of reasoned decisionmaking."). Although Programmer has not cast its argument in these terms, its claim is essentially twofold: (1) subsection 802(f) required the Librarian to issue an order that fully discussed each stage of the decisionmaking process as well as the evidentiary bases for each of the awards; (2) even if subsection 802(f) did not require this of the Librarian, it was nonetheless arbitrary for him not to issue such an order on his own. We do not agree.

First, section 802 of Title 17 cannot fairly be understood to oblige the Librarian or the Register to duplicate the work of the Panel. The two-step *Chevron* framework guides our assessment of the Librarian's interpretation:

> Under this analysis, the court must first exhaust the traditional tools of statutory construction to determine whether the Congress has spoken to the precise question at issue.... If the court can determine congressional intent, then that interpretation must be given effect.... If, on the other hand, the statute is silent or ambiguous with respect to the specific issue, then the court will defer to a permissible agency construction of the statute.

Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122, 1125 (D.C.Cir.1995) (internal citations and quotations omitted).

Under step one of the *Chevron* analysis, we look to the statutory language and structure to determine the Librarian's obligations. *Cf. Steadman*, 450 U.S. at 97, 101 S.Ct. 999 ("The search for congressional intent begins with the language of the statute."). According to subsection 802(e), the Panel is to prepare and forward to the Librarian a "report" that is "accompanied by the written record" and that "sets forth the facts that the arbitration panel found relevant to its determination." Subsection 802(f) does not similarly oblige the Librarian to make a report of his findings. *See* 17 U.S.C. § 802(f), quoted *supra*. Indeed, the statute gives the Librarian only 60 days to review the Panel's report and within that time period he must adopt the proposed settlement unless he finds it arbitrary or illegal. *Id.* If he rejects the Panel's proposal, then, without any enlargement of the review period, the Librarian must "issue an *order* setting the ... distribution of fees." *Id.* (emphasis added). In either instance, the Librarian must arrange for *Federal Register* publication of his decision and "the determination of the arbitration panel" and he must also make available for public inspection and duplication the Panel's report and the record accompanying it. *Id.*

In view of these statutory requirements, we cannot conclude that the Librarian is required by subsection 802(f) to issue an order fully recapitulating the work of the Register and the Panel. Had this been the Congress's intent, there would have been no need to require the Librarian to make available the Panel's report and accompanying record, and according to well-established principles of statutory construction, we do not read subsection 802(f) in a manner that renders superfluous the final sentence of that provision. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

Moreover, we find nothing unreasonable or impermissible about the Librarian's understanding of his obligations under subsection 802(f). *Cf. NAB I*, 675 F.2d at 376 ("The Tribunal was free to structure its proceedings in a reasonable fashion, ... and deference is particularly due where courts review statutory interpretations by the agency charged with the responsibility of setting [the] machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."). Indeed, the virtues of the Librarian's interpretation are obvious: it avoids duplication of effort and better enables him to conclude his responsibilities within the 60 days subsection 802(g) allots for his review and (if necessary) modification of the Panel's proposed settlement. *See Puerto Rico Maritime Shipping Auth. v. Federal Maritime Comm'n*, 678 F.2d 327, 352 (D.C.Cir.1982) ("The Commission's Order, coupled with the ALJ's opinion, adequately informs us of its findings and its reasoning. In the context of these expedited proceedings, we ask no more.").

[8] Second, under the standard of review articulated in Part II, *supra*, we find nothing in the Librarian's decision to adopt the Panel's proposed settlement, as modified in certain particulars by the Register's recommendation, that suggests he discharged his review obligations in an arbitrary manner. *See CBN*, 720 F.2d at 1304 ("Accordingly, as we stated in [*NAB I*], the Tribunal's findings will be upheld, though of less than ideal clarity, if the path which the agency follows can reasonably be discerned.") (internal citations and quotations omitted); *id.* at 1306 ("It is well established that an agency may explain itself by incorporating by reference parts of the record....").[14]

(2) Elimination of Harm Criterion

[9] Programmer next argues that the Librarian acted in an arbitrary manner in approving the Panel's conclusion that the harm criterion is not a useful means by which to assess the merits of a class claim.[15] This argument, like the preceding one, has two parts: (1) the Panel violated subsection 802(c) and the Librarian did not take appropriate corrective action; (2) the Panel did not sufficiently explain or support by reference to the record evidence its decision to elimi-

14. Contrary to Programmer's suggestion, we find nothing improper in the Register's submission of questions to the Panel to clarify its reasons for proposing a particular award. As with the Librarian's decision, subsection 802(f) does not elaborate on the content of the Register's recommendation to the Librarian. In the face of such legislative silence, *Chevron* deference is due the Register's interpretation, which is plainly not unreasonable. Further, to the extent Programmer suggests that the Register's "remand" to the Panel impermissibly lengthened the Librarian's review period and that the Librarian's decision should be set aside on this basis, we disagree. Even if correct, a missed deadline in a case such as this cannot justify invalidation of the Librarian's decision. *See NCT*, 724 F.2d at 189 n. 23 ("It would be irrational and wholly unprecedented for a court to direct an agency to scrap a year's hearings and decisionmaking effort and start over because its proceeding did not conclude precisely on time.").

15. The Register's recommendation, adopted by the Librarian, described the Panel's rejection of the harm criterion as follows:

> It is clear from the Panel's answer [to certified questions about the harm criterion] that, rather than treating all parties as equally harmed and awarding equal shares of harm credit, the Panel effectively determined that the harm criterion was a complete nonfactor. The panel did not consider harm to be of any value in determining the distribution percentages, instead it emphasized the marketplace value criteria. As a result, all parties received a zero credit for harm, and the evidence presented by the parties regarding this factor was given no weight.

Librarian Decision, 61 Fed.Reg. at 55,658.

nate the harm criterion and the Librarian did not remedy the deficiency. The argument is meritless.

Contrary to Programmer's contentions, our past decisions make clear that the Congress delegated to the Tribunal (and now to the Librarian, the Register and the Panel) responsibility for developing the criteria by which claims are to be assessed. *See NAB I*, 675 F.2d at 376 ("The Act explicitly contemplates that the *Tribunal* will announce its decisional criteria in the 'final determination.'") (emphasis added); *CBN*, 720 F.2d at 1313 ("In light of Congress' evident intent to leave the development of 'particular, limiting standards for distribution' to the *Tribunal*, ... we have affirmed the Tribunal's five allocative factors as a reasonable interpretation of legislation by the agency charged by Congress with its enforcement.") (emphasis added); 1976 House Report at 97.

Moreover, we can find nothing in the language, structure or history of subsection 802(c) that evinces any intent to rescind the former delegation of authority to determine the appropriate criteria by which to gauge distribution claims. Subsection 802(c) merely states that "arbitration panels *shall act on the basis of* a fully documented written record, prior decisions of the Copyright Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under subsection 801(c)."[16] 17 U.S.C. § 802(c) (emphasis added). Similarly, while the ad hoc panel is now the initial factfinder, its decision is subject to scrutiny by both the Register and the Librarian and, if the latter do not concur in the panel's rejection of prior Tribunal practice, they may force compliance with that practice. *See, e.g.*, Librarian Decision, 61 Fed.Reg. at 55,-661 (concluding that Panel should have adhered to Tribunal practice of setting final percentage awards on basis of awards to all classes, regardless whether class settled its claims or litigated them before Panel). This arrangement also dovetails with the Librarian's obligations under the arbitrary and legal review standard of subsection 802(f) as well as his authority, pursuant to subsection 801(c), to issue orders establishing the procedures the Panel and claimants are to follow. Accordingly, we defer to the Librarian's reasonable and permissible interpretation of the requirements of subsection 802(c) under the second step of the *Chevron* analysis.[17]

Nor has Programmer given us any basis to conclude that the Librarian "acted in an arbitrary manner" in finding that the Panel's elimination of the harm criterion was neither arbitrary nor contrary to applicable law. The policy reasons Programmer advances to support retaining the harm criterion are misdirected; those are matters for the Librarian and his agents, not this Court. *Cf. NAB II*, 772 F.2d at 940. Similarly, the Panel's explanation for jettisoning the harm criterion, as refined by the Register's recommendation and the Librarian's decision, is more than adequate to survive scrutiny under the arbitrary manner standard; the Panel explained that the harm criterion was in fact simply a different expression of diminution in market value and that the evidence did not provide for any meaningful way to distinguish among the parties.[18] No more was required of the

16. Subsection 801(c) provides:

> The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel.

17 U.S.C. § 801(c).

17. Accordingly, we also defer to the Librarian's and the Panel's reasonable interpretation of the "harm" criterion as applied by the Tribunal in the past.

18. The Panel responded to the Register's certified questions regarding the harm criterion as follows:

> [T]he panel found that evidence of harm was not quantifiable and did not establish that any one party was entitled to a harm credit more than any other party. Other than identifying that a claimant whose program was transmitted without compensation has been harmed, it did not lend any appreciable information on relative market value. At least two expert witnesses testified that "harm" is merely another way of describing, or an aspect of, the supply side of the market, just as "benefit" is another way of describing, or an aspect of, the buyer's side of the market.

Panel Responses to Certified Questions at 4; *accord* Panel Report at 20–25 (concluding that "'market value' is the only logical and legal

Panel or of the Librarian in adopting the Panel's conclusion. Thus, having properly rejected the utility of such evidence, neither the Panel nor the Librarian was obliged to go further.

(3) Panel's Evidentiary Findings

[10, 11] Finally, Programmer claims that the Librarian acted in an arbitrary manner by approving the Panel's proposed awards as adjusted by the Register's recommendation even though the Panel (1) did not evaluate market value according to a uniform set of criteria with respect to the Devotional and NAB awards, (2) did not accord similar weight to comparable evidence with respect to the JSC award and (3) did not consider some evidence that plainly detracted from its conclusions with respect to the PBS award.[19] However, none of the asserted errors provides a basis for adjusting *Programmer's* award. Even if the awards to Devotional, NAB, JSC and PBS were arbitrary, Programmer does not explain how correcting the errors would benefit it. Indeed, to the extent Programmer's first claim suggests that Devotional's claim was undervalued, success on the claim could threaten only to reduce the Programmer award. Accordingly, because subsection 802(g) grants an appeal only to an "aggrieved party," and because Programmer has failed to show how it has been aggrieved by the Panel's allegedly arbitrary evidentiary findings regarding other classes' awards, we cannot hear the claims. *See Asociacion de Compositores y Editores de Musica Latinoamericana v. Copyright Royalty Tribunal*, 809 F.2d 926, 928 (D.C.Cir.1987) ("ACEMLA, however, is not aggrieved by the award to LAMCO. The two are, for our purposes, separate entities; ACEMLA thus has no statutory basis to challenge that portion of the [Tribunal's] decision that affects LAMCO.").

B. Devotional's Claims

Devotional requests that we adjust its award upward to correct for four errors that the Librarian allegedly made in approving Devotional's award, as it was adjusted by the Register's recommendation: (1) the Librarian failed to independently examine the record and make his own determination as to the appropriate share of the royalty funds to which each class was entitled; (2) the Panel awarded Devotional a share of the royalties that was nominally the same as its share of the 1989 funds, but the Librarian, without any evidentiary basis for his decision, adjusted downward the Panel's proposed award to account for certain settlements the Panel overlooked in its calculations; (3) the Librarian ratified the Panel's arbitrary failure to increase the Devotional's share as a result of the elimination of the harm criterion; (4) the Librarian acceded to the Panel's arbitrary failure to accord Devotional's viewership surveys and testimonial evidence the same weight as it gave other claimants' evidence of this kind. None of these claims warrants vacating or remanding Devotional's award.

(1) Librarian's Order

[12, 13] Devotional's first argument fails for the same reasons Programmer's similar argument failed. As discussed above, subsection 802(f) cannot reasonably be construed to require the Librarian to duplicate the

touchstone" by which to assess the merits of various class claims).

19. To the extent Programmer claims that subsection 802(f) allows the Librarian only two choices—adoption or rejection of the Panel's report *in toto*—we find nothing in the language of the provision that requires that interpretation and thus we accord the Librarian's reasonable interpretation deference under *Chevron*. *Cf. NBC*, 848 F.2d at 1296 ("This presumption by the [Tribunal], in the face of congressional silence, is a permissible interpretation of the statute, to which we defer."). Further, we think it plain from the Librarian's order that the Register (and thus the Librarian) adopted the Panel's proposed settlement, except for the technical adjustments the Register recommended. *See* Librarian Decision, 61 Fed.Reg. at 55,653 ("The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP). The rejection takes the form of making some adjustments to the distribution percentages."); *id.* at 55,669 ("[T]he Librarian of Congress fully endorses and adopts her [the Register's] recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. § 802(f) and is issuing an order setting the distribution of cable royalty fees.").

efforts of the Panel and the Register; here the path of decisionmaking is reasonably transparent and there is nothing unreasonable in the Librarian's decision to issue an order that addresses only the specific problems the Register (and thus the Librarian) identified in the original Panel report. *See supra* Part III.A.(1).[20]

(2) Librarian's Explanation of Adjustment

[14] The contention that neither the Librarian nor the Panel articulated a rational reason for reducing Devotional's award is also without merit. The Panel erroneously predicated its proposed settlement on the assumption that 100% of the royalty funds collected for 1990–1992 were in dispute. *See* Panel Responses to Certified Questions at 3–5 (acknowledging that Panel did not adjust proposed awards for NPR settlement and that award to Devotional was "based on a 100% scale"). Consistent with the Register's recommendation, the Librarian corrected this mistaken assumption by adjusting all of the class awards by an appropriate percentage to account for the settlement of certain claims. *See* Librarian Decision, 61 Fed.Reg. at 55,661. As a result, Devotional's final share of the royalty funds was slightly lower than its share of the 1989 funds. *Compare* Table 2 *with* Table 3. Specifically, the relative difference between the Panel's proposed award and the Librarian's final award was on the order of 5.62% for the Basic Funds and 4.275% for the 3.75 Fund, corresponding to an absolute difference of 0.06 and 0.04 percentage points, respectively.

Devotional argues that because the Panel found that its circumstances had not changed, the Panel intended to award Devotional the same amount that it received in the earlier distribution (after the settlements). Because the earlier amount was a *post-adjustment* figure, it seems to be arguing that the Librarian should not have reduced its award in adjusting for the Panel's omission of the settlement. In Devotional's view, the reduction gave it a post-adjustment award lower than its earlier award and this lower award does not make sense in light of its unchanged circumstances. (Its argument implies that it would be happy if the Librarian had acknowledged the settlement by adjusting every other party's award, but not its.)

Even if Devotional were correct that the Panel intended to award it the same percentage it received in the earlier distribution, we are reviewing the Librarian's decision, not the Panel's. The Librarian's method of correcting the Panel's mistake was neither arbitrary nor irrational. The Librarian understood the arguments made by each party and explained why he did not accept the Panel's original judgment. In making his ultimate decision, he made a reasonable judgment that it was not necessary to reconsider the relative entitlements of each party in order to correct the Panel's mistake. We need not decide whether the Panel had intended to give Devotional a post-adjustment award equal to its earlier award because the Librarian's final figure is only slightly changed from the earlier one and remains within the zone of reasonableness. *See NCT*, 724 F.2d at 182 ("There has never been any pretense that the [Tribunal's] rulings rest on precise mathematical calculations; it suffices that they lie within a zone of reasonableness."); *NAB I*, 675 F.2d at 379 (rejecting arguments regarding quantitatively *de minimis* interests).

(3) Elimination of Harm Criterion

[15] Devotional next argues that elimination of the harm criterion should have result-

20. Nor is the mere fact that Devotional's award represented a compromise between differing expert views of the value of its programming a sufficient basis for finding the compromise figure arbitrary. *See NAB II*, 772 F.2d at 940 (observing that percentage awards are "inherently subjective judgment calls" and require "rough balancing of hotly competing claims"); *NCT*, 724 F.2d at 187 ("In essence, it appears that the [Tribunal] attempted to 'split the difference.' We have upheld similar exercises of the [Tribunal's] expert judgment before."). Moreover, the suggestion that the Panel's process fell below the minimum constitutional requirements of the Due Process Clause is specious. *Cf. NAB I*, 675 F.2d at 376 ("Neither the Act nor the requirements of the due process were violated by the Tribunal conducting that apportionment with the open-mindedness that should accompany the performance of any task for the first time.").

ed in an enlargement of its award. This argument is also meritless. The harm criterion was but one factor in the Tribunal's five-factor distribution calculus. *See supra* Part I.A. Thus, the Panel's elimination of a single factor hardly compels a particular adjustment to a class's award based on the benefit or detriment the class may have derived from the factor in the past. Indeed, while the Panel eliminated the harm criterion, it also increased the weight given to the marketplace value criterion, *see* Panel Report at 23. The effect of eliminating the harm factor is therefore indeterminate; without knowing the relative magnitude of the change according to each factor and whether any of the assessments of other factors changed, it is well nigh impossible to predict what effect the elimination of the harm factor might have on a final award. *Cf. NAB II*, 772 F.2d at 935 ("Thus the issue is not whether the Canadians objectively improved the quality of their evidentiary submissions, but rather whether any such improvement was sufficient to warrant an award from the 1980 fund greater than the 1979 award, *in light of the submissions made by other claimants.*") (emphasis added). Accordingly, the fact that Devotional's award did not increase as a result of the elimination of the harm criterion does not suggest arbitrary action by either the Panel or the Librarian.

Moreover, the fact that the Panel found that Devotional's circumstances had not changed since the distribution of 1989 funds does not require a different conclusion. As in past distribution proceedings, the "changed circumstances" inquiry was only one factor influencing the amount of royalties to which a class of claimants was deemed entitled and therefore the fact that this variable remained constant is no reason to presume that all other variables did, that other classes' relative shares remained the same or that this factor alone should control a class's award. Indeed, in the past we have explained the significance of the changed circumstances factor in the following manner:

> We agree that, as the parties themselves recognize, *it would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of "changed circumstances."* The invalidity of this rigid approach is strongly suggested by our two prior opinions, which expressly contemplated that in the annual determination process the claimants would improve upon the quality and sophistication of their evidentiary submissions. At the same time, it is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award. But if a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.

NAB II, 772 F.2d at 932 (emphasis added); *accord id.* at 938 (rejecting similar argument that no change in circumstances should have resulted in no change in percentage awarded). We therefore find no reason to set aside the Devotional award.

(4) Weighing of Evidence

[16, 17] Finally, Devotional suggests that the Panel arbitrarily accorded less weight to some of Devotional's evidence than it accorded to similar evidence introduced by other class claimants. We do not agree. To begin, it is emphatically not our role to independently weigh the evidence or determine the credibility of witnesses—two duties entrusted solely to the Panel and, before it, the Tribunal. *See NAB II*, 772 F.2d at 926 ("[T]he judicial task is not to weigh the evidence and fix what in our view would constitute appropriate percentages."). Further, in view of the exceptionally deferential review we give the Librarian's awards, we can find nothing arbitrary in the Panel's treatment of the evidence to which Devotional refers. The fact that the Panel found that the Nielsen and Bortz survey results reinforced one another with respect to PBS's award but did not increase Devotional's award as a result of increased viewership of Devotional programming does not demonstrate that the Panel

(and subsequently the Librarian) arbitrarily discredited Devotional's evidence.[21] *Cf. NAB I*, 675 F.2d at 381 ("The argument once again comes down to methodology, and the Tribunal's refusal to rely blindly on the data put forward by [a claimant] was not unreasonable. The two approaches lead to a difference of only three percentage points of the Fund, and we cannot say that the Tribunal's choice falls outside a zone of reasonableness."). Moreover, both the cable operator testimony and the survey evidence to which Devotional refers fail to demonstrate that the award the Panel *ultimately* arrived at in each case was arbitrary. Simply because a claimant presented strong evidence of one type does not compel the conclusion that an award based on *all* of the evidence should have been different: the Panel's ultimate decision necessarily rested upon composite judgments as to the overall strength of the evidentiary case submitted in support of and against a class claim. Additionally, with respect to the cable operator testimony Devotional introduced, the Panel found the testimony less compelling than other operator testimony—which was well within its prerogative. *Compare* Panel Report at 130 ("The cable operator's assessment is not supported by any new, persuasive evidence of avidity"), *with id.* at 87–88 (describing JSC's operator testimony, in context of strong statistical and other evidence cumulatively corroborating operator testimony); *accord* Librarian Decision, 61 Fed.Reg. at 55,666 ("When a decision-making body weighs evidence, it may often decide to accept one piece of evidence but reject another, even though they appear similar. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)."). Accordingly, we find nothing compelling in the evidentiary record nor in the Panel's and the Librarian's assessment of that record that would enable us to conclude that the Librarian acted in an arbitrary manner in fixing Devotional's award. *See* Librarian Decision, 61 Fed.Reg. at 55,666 ("While the Panel's explanation was less than compelling, ... enough can be gleaned from it to support the conclusion that the Panel rationally weighed the differences in seemingly similar evidence.").

C. *NAB's Claims*

[18] NAB argues that the Librarian acted in an arbitrary manner by failing to adjust its award upward (and Programmer's award downward) for certain categorization errors that were made in compiling the Nielsen results for NAB programming. The argument proceeds from the premise that the Panel, and subsequently the Register and the Librarian, intended to award NAB a percentage of royalties within the range described by the lower bound of its Nielsen survey results. The Panel and the Librarian failed to effect this intent, however, because they relied on incorrect Nielsen numbers in fixing the amount of NAB's award at 7.5% of both the Basic Fund and the 3.75 Fund—the midpoint of the lower range described by NAB's Nielsen numbers, i.e., 7.0% to 8.0%. Instead, NAB contends that the Panel, and subsequently the Librarian, should have adjusted the Nielsen results for certain alleged miscategorization errors involving two programs—"National Geographic Explorer," a NAB program, and "National Geographic on Assignment," a Programmer program—resulting in a larger award to NAB. We can find nothing in these claims to suggest that the Librarian "acted in an arbitrary manner" in declining to adjust the NAB award.

21. The Nielsen and Bortz surveys were the principal and most important statistical evidence before the Panel. *See* Panel Report at 27–66. The Nielsen survey assesses the percentage of viewers each type of programming attracts whereas the Bortz survey calculates the value of the types of programming to cable transmitters—which does not correlate perfectly to shares of viewers because cable companies may be more interested in acquiring certain kinds of programming to diversify their offerings even though the programming may have a narrower following. *Id.*

In Devotional's case, the uncorrected Bortz numbers show no clear trend: for 1989 cable operators were willing to pay 4.3% of specified funds for the Devotional programming; for 1990 they paid 3.8%; for 1991 they paid 4.3% and for 1992 they paid 3.9%. Similarly, the Nielsen numbers for the same period do not reflect any meaningful trend: for 1989, the Nielsen number was 0.22% of viewers according to the survey methodology then in use; for 1990 the number, using a different methodology, was 1.0%; for 1991, the number was less than 1.0%; for 1992, the number was once again 1.00%.

To begin, because it is the Librarian's decision which is directly before us on review, not the Panel's, the Librarian's understanding of the Panel's intent with respect to a particular award is controlling unless patently implausible on the record before him. Here, it is plain that neither the Librarian nor the Panel intended to make the Nielsen results the sole determinant of NAB's share of the royalty funds. *See* Librarian Decision, 61 Fed.Reg. at 55,665 ("The Panel has clarified that it did not intend to award NAB its Nielsen viewing share, but was only using those numbers as a reference point for determining the award."). As a result, even if NAB is correct on its miscategorization claim, the claim fails to provide a basis for setting aside the award; the adjusted Nielsen figures were but one item of evidence that supported the Panel's calculation of fair market value of the programming, the "only logical and legal touchstone" for apportioning royalties. Panel Report at 23; *accord* Panel Responses to Certified Questions at 4 ("It was the Panel's assessment that 7.5% was the fair market value of [NAB] programming."); Panel Report at 44 ("We cannot quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant *when weighed with all other factors.*") (emphasis added).

Moreover, even if the Panel and the Librarian had intended to tie the NAB award to the lower limits of its Nielsen viewing share, we find nothing arbitrary in the Panel's and the Librarian's successive refusals to correct the Nielsen numbers.[22] It was well within the Panel's prerogative to weigh the miscategorization evidence and other testimony and conclude that, given the fact the Nielsen results were at best an imperfect proxy for market value, it did not make sense to attempt to refine the figures:

> Dr. Peter Miller, in testifying for the JSC, says the Nielsen figures should be looked at with some degree of caution. He says the numbers could be biased in one direction or another but that this cannot be quantified and that we should take those numbers with "a grain of salt." We do accept those numbers in that vein. We see no need to engage in a lengthy discussion about the Nielsen methodology in light of the fact that we accept these numbers merely as a reference point and not as an absolute value. Also, in addition to being unable to quantify their various criticisms, the claimants who dispute the Nielsen survey's accuracy present no alternative evidence as to viewing.
>
> The next question is, what do these numbers reveal about market value? Program Suppliers acknowledge that the Nielsen study does not measure value; rather, it measures tuning. Program Suppliers point out they did not ask Nielsen to interpret what the results meant, but left that to the other witnesses and the evidence. Program Suppliers agree that the Nielsen figures are not the sole determinant of market value.

Panel Report at 43; *cf. NCT*, 724 F.2d at 187 ("In sum, the Tribunal sought to estimate a market price in the absence of a functioning market. It used the best, indeed, the only, analogies available to it. It could not mathematically derive its ultimate decision. Inevitably, it used its expert judgment to make a 'best guess'; we are not positioned to offer a better one."). We believe this judgment to be an eminently reasonable one and it is far from the type of disconnect between the evidence and the award that could warrant our intervention under the "arbitrary manner" standard of subsection 802(g). *Cf. Association of Am. Publishers, Inc. v. Governors of United States Postal Serv.*, 485 F.2d 768, 773 (D.C.Cir.1973) ("It would, of course, be the *summum bonum* if we had accurate figures as to recent costs of carrying special fourth class mail. The only available figures were inaccurate, but were susceptible of rough adjustment. The Postal Service proposed one method of adjustment; the Chief Examiner, another. So the Commission more or less split the difference. No doubt it

22. We reject any suggestion by NAB that the Panel was obligated to correct the Nielsen figures simply because the Tribunal had undertaken such a task in the past. Just as the Panel was authorized to dispense with the harm criterion because it found the criterion unhelpful, it was not required to follow the Tribunal's lead on the miscategorization errors given its assessment of the imprecision of the evidence. *See supra* discussion, Part III.A(2).

would have been possible to straighten out some of the errors or supposed errors of adjustment in either the Postal Service's or the Chief Examiner's calculations. And if rate-making [or royalty distribution] were an exact science such a counsel of perfection would be mandatory. But, though courts hesitate to so admit, they know that in the rate-making area, John Selden was prophetic in declaring that in governing it is not juggling, but too much juggling that is to be blamed.").

IV. CONCLUSION

In summary, we conclude that the Copyright Tribunal Reform Act of 1993 significantly narrowed the standard of review applicable to the Librarian's apportionment of cable royalties. Under the applicable standard, we find nothing in any of the petitioners' claims that warrants modification or remand of the Librarian's Phase I awards. Accordingly, the petitions for review of the decision of the Librarian, as reported in Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed.Reg. 55,653 (1996), are

Denied.

UNITED STATES of America, Appellee,

v.

Arthur R. ANDREWS, Appellant.

Nos. 97-3035, 97-3036.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 23, 1997.

Decided June 26, 1998.

After corporation was ordered to pay $500,000 civil penalty in civil securities fraud action brought by Securities and Exchange Commission (SEC), grand jury indicted corporation's chief executive officer (CEO) and president for essentially same conduct. CEO and president moved to dismiss on double jeopardy grounds. The United States District Court for the District of Columbia, Lamberth, J., denied motion. CEO and president appealed. The Court of Appeals, Garland, Circuit Judge, held that: (1) CEO, but not president, presented colorable double jeopardy claim, but (2) CEO was not placed in jeopardy in civil suit.

Affirmed.

1. Criminal Law ⇐1023(3)

Under the final-judgment rule, the Court of Appeals ordinarily does not have jurisdiction to hear a defendant's appeal in a criminal case prior to conviction and sentencing.

2. Criminal Law ⇐1023(8)

The denial of a motion to dismiss an indictment on the ground that it violates the double jeopardy clause's prohibition against multiple punishments may be immediately appealable. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐1023(8)

A defendant cannot obtain interlocutory review of a motion to dismiss an indictment simply by characterizing his claim as one involving double jeopardy; rather, a claim of double jeopardy must be at least "colorable" to confer interlocutory jurisdiction on an appellate court. U.S.C.A. Const.Amend. 5.

4. Double Jeopardy ⇐188

Double jeopardy did not bar prosecution of corporate president for alleged violations of antifraud provisions of securities laws, even though corporation had previously been ordered in civil suit by Securities and Exchange Commission (SEC) to pay $500,000 civil penalty for essentially same conduct; president was never party to SEC civil suit, and was not named or even mentioned in complaint, and thus, he was not placed in "jeopardy" by that suit. U.S.C.A. Const. Amend. 5.

5. Double Jeopardy ⇐188

The constitutional protection against double jeopardy is "intrinsically personal";

by adding that the Office will process requests granted expedited processing status "as soon as is practicable." EFOIA sec. 8(a) (codified as 5 U.S.C. 552(a)(6)(E)(iii)).

E. Electronic Reading Room

The FOIA requires agencies to make available for inspection and copying statements of policy and interpretations not published in the **Federal Register**, and administrative staff manuals and instructions to staff that affect the public. 5 U.S.C. 552(a)(2). The Office maintains these materials in paper form in its Public Information Office. *See* 37 CFR 203.4. The EFOIA requires agencies to make available by "computer telecommunications or * * * by other electronic means" all reading room materials that are created on or after October 1, 1996. EFOIA sec. 4 (codified at 5 U.S.C. 552(a)(2). The statute envisions that agencies will develop both a traditional reading room and an electronic reading room. The Office proposes an interim regulation stating which materials are available on-line or in an accessible electronic format.

List of Subjects in 37 CFR Part 203

Freedom of Information Act, Policies and procedures.

Interim Regulations

In consideration of the foregoing, the Copyright Office is amending part 203 of 37 CFR, chapter II, in the manner set forth below:

PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES

1. The authority citation for part 203 is amended to read as follows:

Authority: 17 U.S.C. 702; and 5 U.S.C. 552, as amended.

2. Section 203.3 is amended by revising paragraph (i) to read as follows:

§ 203.3 Organization.

* * * * *

(i) The Copyright Office maintains an "electronic reading room" by making available certain documents and records on its World Wide Web page and by providing access to documents that affect the public in electronic format pursuant to 5 USC 552(a)(2). Copyright Office records in machine-readable form cataloged from January 1, 1978, to the present, including registration information and recorded documents, are available on the Internet. Frequently requested Copyright Office circulars, announcements, and recently proposed as well as final regulations are available on-line. The address for the Copyright Office's home page is: http://www.loc.gov/copyright; information may also be accessed by connecting to the Library of Congress' home page on the World Wide Web. The address is: http://www.loc.gov. Other Copyright Office documents may be provided on disk when so requested.

3. Section 203.4 is amended by revising paragraph (f) and adding a new paragraph (i) to read as follows:

§ 203.4 Methods of operation.

* * * * *

(f) The Office will respond to all properly marked mailed requests and all personally delivered written requests for records within twenty (20) working days of receipt by the Supervisory Copyright Information Specialist. Inquiries should be mailed to: Copyright Office, GC/I&R, P.O. Box 70400 Southwest Station, Washington, D.C. 20024. If hand delivered; materials should go to: Copyright Public Information Office, LM 401, James Madison Memorial Building, Library of Congress, 101 Independence Avenue, S.E., Washington, D.C. Office hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, excluding holidays. If it is determined that an extension of time greater than ten (10) working days is necessary to respond to a request due to unusual circumstances, as defined in paragraph (i) of this section, the Supervisory Copyright Information Specialist shall so notify the requester and give the requester the opportunity to:

(1) Limit the scope of the request so that it may be processed within twenty (20) working days, or

(2) Arrange with the Office an alternative time frame for processing the request or a modified request. If a request is denied, the written notification will include the basis for the denial, names of all individuals who participated in the determination, and procedures available to appeal the determination.

* * * * *

(i) The Supervisory Copyright Information Specialist will consider requests for expedited processing of requests in cases where the requester demonstrates a compelling need for such processing. The term "compelling need" means:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. Requesters for expedited processing must include in their requests a statement setting forth the basis for the claim that a "compelling need" exists for the requested information, certified by the requester to be true and correct to the best of his or her knowledge and belief. The Office will determine whether to grant a request for expedited processing and will notify the requester of such determination within ten (10) days of receipt of the request. If a request for expedited processing is approved, documents responsive to the request will be processed as soon as is practicable. Denials of requests for expedited processing may be appealed to the Office of the General Counsel, who will expeditiously determine any such appeal.

§ 203.6 [Amended]

5. Section 203.6(b)(6) is amended by revising the parenthetical at the end of the sentence to read "(at no less than $20.00 per hour or fraction thereof)."

Dated: October 21, 1997.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 97–28418 Filed 10–27–97; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 258

[Docket No. 96–3 CARP SRA]

Rate Adjustment for the Satellite Carrier Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the adjustment of the royalty rates for superstation and network signals under the satellite carrier compulsory license, 17 U.S.C. 119.

EFFECTIVE DATE: January 1, 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, or Tanya M. Sandros, Attorney Advisor, P.O. Box

70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380.

SUPPLEMENTARY INFORMATION:

Recommendation of the Register of Copyrights

I. Background

Congress passed the Satellite Home Viewer Act of 1988 to create a compulsory copyright license, codified at section 119 of the Copyright Act, for the retransmission of over-the-air television broadcast signals. 17 U.S.C. 119. Similar in many ways to the cable compulsory license enacted by Congress in 1976, the satellite carrier compulsory license permits satellite carriers to retransmit TV signals to their subscribers upon semiannual submission of royalty fees and statements of account to the Copyright Office. The royalty fees collected by the Copyright Office are deposited with the United States Treasury for subsequent distribution to copyright owners of programming retransmitted by the satellite carriers.

Section 119 identifies two types of television broadcast signals that are subject to compulsory licensing: superstations and network signals. A superstation is the signal of any commercial independent television station licensed by the Federal Communications Commission. Examples of superstations retransmitted by satellite carriers under section 119 are WTBS, Atlanta and WGN, Chicago. A network station is defined as follows:

(A) A television broadcast station, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or

(B) A noncommercial educational broadcast station (as defined in section 397 of the Communications Act of 1934).[1]

17 U.S.C. 119(d)(2). Examples of network signals carried by satellite carriers are ABC, CBS, and NBC. A station of the Public Broadcasting Service (PBS) would also be considered a network signal under the statute.

Under the section 119 license, satellite carriers can retransmit any superstation they choose to any subscriber located anywhere in the United States. However, such is not the case with the retransmission of network signals. Satellite carriers may only make use of the license to retransmit a network signal to a subscriber who resides in an "unserved household." An "unserved household" is defined as a household that:

(A) Cannot receive through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

(B) Has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

17 U.S.C. 119(d)(10). Service of network signals to subscribers who do not reside in unserved households is an act of copyright infringement, subject to the remedies of chapter 5 of the Copyright Act, unless the carrier is able to negotiate a private agreement with copyright owners to license all the copyrighted works on those network signals.

In creating the section 119 license in 1988, Congress established different royalty rates for superstation and network signals, based upon approximations of what cable paid for such signals under the section 111 cable compulsory license. 17 U.S.C. 111. The original rate for a superstation was 12 cents per subscriber per month. The original rate for a network was 3 cents per subscriber per month. Congress, however, authorized a rate adjustment procedure to change these rates in 1992.

II. The 1992 Rate Adjustment

At the time of passage of section 119, the Copyright Royalty Tribunal was still in existence. However, rather than invest the Tribunal with authority to adjust the section 119 rates, as was the case for all other compulsory licenses in the Copyright Act, Congress instead gave the task to an ad hoc arbitration panel assembled solely for that purpose. The Tribunal was given authority to review the decision of the arbitration panel, as is the Librarian in this proceeding, but under a different standard of review.

Congress also established a number of factors for the arbitration panel to consider in reaching its determination. The statute provided:

In determining royalty fees under this paragraph, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with paragraph (2),[2] and the last fee proposed by the parties, before proceedings under this paragraph, for the secondary transmission of superstations or network stations for private home viewing. The fee shall also be calculated to achieve the following objectives:

(i) To maximize the availability of creative works to the public.

(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 119(c)(3)(B) (1988).

The arbitration panel was given 60 days to reach its determination; it delivered its report to the Copyright Royalty Tribunal on March 2, 1992. The panel recommended that the royalty fee for network signals be raised from 3 cents to 6 cents per subscriber. 57 FR 19061 (May 1, 1992). For superstations, the panel recommended a two-tiered rate structure. The panel was impressed with Congress' consideration of the application of syndicated exclusivity protection on the satellite industry. With respect to cable retransmissions of broadcast signals, broadcasters may purchase exclusive rights to broadcast programming within their local market, and any cable operator importing the same programming into the broadcaster's local market is required to black it out. Congress directed the FCC in 1988 to consider adopting syndicated exclusivity rules for the satellite industry, but the Commission ultimately determined that it was not technically feasible for satellite carriers to black-out programming. See 6 FCC Rcd. 725 (1991). To make up for this technological deficiency, the panel imposed a higher royalty rate to compensate for the loss of exclusivity protection.

For superstations, if they had been retransmitted by a cable system rather than a satellite carrier and would have been subject to the FCC's syndicated exclusivity rules, the panel adopted a rate of 17.5 cents per subscriber per month. 57 FR at 19061 (1992). For

[1] This is the definition of a network signal after the 1994 amendments to section 119. The earlier definition was the same one appearing in section 111 of the Copyright Act.

[2] No such voluntary agreements were reached.

signals that would not have been subject to the syndicated exclusivity rules for cable (known as "syndex proof" signals), the panel adopted a rate of 14 cents per subscriber per month. *id.*

The Copyright Royalty Tribunal, reviewing the panel's decision only under a contrary to law standard, adopted the rates recommended by the arbitration panel. 57 FR 19052 (1992). The Tribunal did, however, substitute a new effective date for the rates, because it determined that the panel misapplied the statute. *Id.* at 19053 (rates effective on date of issuance of Tribunal's order, May 1, 1992, not January 1, 1993 date recommended by panel). No appeal of the Tribunal's order was taken.

III. Satellite Home Viewer Act of 1994

The rates adopted by the Tribunal in 1992 were to last only until the end of 1994, when the section 119 license was slated to expire. However, in 1994, Congress passed the Satellite Home Viewer Act of 1994, which extended the section 119 license another 5 years. In reauthorizing the license, Congress made several changes to its provisions. Another rate adjustment—this proceeding—was scheduled to take place, and the duty of conducting the proceeding was given to a copyright arbitration royalty panel (CARP), with review by the Librarian of Congress.

The most significant change to section 119 made by the 1994 amendments, for purposes of this proceeding, was a change in the factors to be applied by the CARP to determine the new royalty rates. Rather than focus on the price paid by the cable industry for similar retransmissions, Congress required that the royalty fees for superstations and network signals represent the fair market value. 17 U.S.C. 119(c)(3)(D) (1994).

Although Congress intended to replace the statutory criteria for adjusting the royalty rates from the 1988 Act with the new "fair market value" standard, a scrivener's error was made in the 1994 Act. The result was that the original provisions of section 119(c)(3)(B) remained, and the new provisions inadvertently replaced the subparagraph determining those parties subject to pay the section 119 royalty fees. Certain copyright owners to this proceeding requested clarification of the statute, and the Library issued an order prior to commencement of the CARP instructing the CARP to apply only the new fair market value provisions, and to disregard the old criteria of section 119(c)(3)(B). Order in Docket No. 96–3 CARP SRA (January 6, 1997).

The royalty rates adopted in the 1992 rate adjustment were incorporated into the 1994 Act, subject to adjustment in this proceeding. The rates adopted in this Order shall remain effective until December 31, 1999, the current date for the section 119 compulsory license.

IV. This Proceeding

Pursuant to section 119(c)(2), the Librarian of Congress initiated this proceeding with publication of a **Federal Register** notice on June 11, 1996, establishing a voluntary negotiation period and a precontroversy discovery schedule.[3] 61 FR 29573 (June 11, 1996). The schedule was vacated on September 19, 1996, at the request of certain copyright owner parties, Order in Docket No. 96–3 CARP SRA (September 19, 1996), and rescheduled on October 29, 1996. Order in Docket No. 96–3 CARP SRA (October 29, 1996). The CARP was convened on March 3, 1997.

The following parties submitted written direct cases to the CARP: (1) Joint Sports Claimants ("JSC"), representing national sports associations including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association; (2) the Public Broadcasting Service ("PBS"); (3) the Commercial Network Claimants ("Commercial Networks"), representing the National Broadcasting Co., Inc., Capital Cities/ABC, Inc. and CBS, Inc.; (4) the Broadcaster Claimants Group ("Broadcaster Claimants Group"), representing certain commercial television stations whose signals are retransmitted by satellite carriers; (5) the Program Supplier Claimants ("Program Suppliers"), representing various copyright owners of motion pictures, television series and specials; (6) the Music Claimants ("Music Claimants"), representing the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.; (7) the Devotional Claimants ("Devotional Claimants"), representing various copyright owners of religious programming; (8) the Satellite Broadcasting & Communications Association ("SBCA"), representing AlphaStar Television, Inc., BosCom, Inc., Consumer Satellite Systems, DirecTV, Inc., EchoStar Communications Corp., Netlink USA, PrimeStar Partners L.P., Prime Time 24 Joint Venture, Southern Satellite Systems, Inc., and Superstar Satellite Entertainment; and (9) American Sky Broadcasting L.L.C. ("ASkyB").

[3] The voluntary negotiation period proved unsuccessful as no agreements were reached.

The CARP held oral hearings on the written cases and evidence, and oral argument on the proposed findings of fact and conclusions of law. The CARP submitted its report to the Librarian on August 29, 1997.

The CARP concluded that rates for both networks signals and superstations should be adjusted upwards to 27 cents per subscriber per month. In addition, the Panel determined that no royalty fee should be paid for the retransmission of superstations within the superstations' local markets, and that it had no authority to set a royalty rate for retransmissions of network signals within their local markets. The Panel recommended July 1, 1997, as the effective date for the new rates.

Section 802(f) of the Copyright Act provides that [w]ithin 60 days after receiving the report of a copyright arbitration royalty panel * * *, the Librarian of Congress, upon the recommendation of the Register of Copyrights shall adopt or reject the determination of the panel." 17 U.S.C. 802(f). Today's order of the Librarian fulfills this statutory obligation.

V. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his narrow scope of review of CARP determinations. See 52 FR 6558 (February 12, 1997) (DART distribution order); 61 FR 55653 (October 26, 1996) (cable distribution order). The salient points regarding the scope of review, however, merit repeating.

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: the Librarian and the Court of Appeals for the District of Columbia Circuit. Section 802(f) directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but

there is no reason to conclude that the use of the term is any different than the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the caselaw applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

(1) Relies on factors that Congress did not intend it to consider;

(2) Fails to consider entirely an important aspect of the problem that it was solving;

(3) Offers an explanation for its decision that runs counter to the evidence presented before it;

(4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

(5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

(6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Manufacturers Ass'n v. *State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983); *Celcom Comm. Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp* v. *FAA*, 758 F2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is "arbitrary," prior decisions of the courts reviewing the determinations of the former Copyright Royalty Tribunal have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: provided that the Tribunal adequately articulated the reasons for its decision, specific determinations were granted a relatively wide "zone of reasonableness." See *National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network* v. *CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Ass'n of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

> To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Recording Industry Ass'n of America v. *CRT*, 662 F.2d 1, 9 (D.C. Cir. 1981). Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented with a detailed rational analysis of the CARP's decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103–286, 103 Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the CARP must "weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguished apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc.* v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

VI. Review of the CARP Report

Section 251.55(a) of the rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination. 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

The following parties filed petitions to modify: SBCA, EchoStar Communications Corp. ("EchoStar"), and commercial Networks. Replies were filed by JSC, Broadcaster Claimants Group, PBS, Program Suppliers, Commercial Networks, Music Claimants and Devotional Claimants (collectively, "Copyright Owners"), PBS, JSC and Broadcaster Claimants Group (collective, "Certain Copyright Owners"), and EchoStar.

Satellite carriers oppose the decision of the CARP, while copyright owners are generally supportive of it. SBCA offers numerous reasons why, in its view, the Panel's decision is arbitrary and contrary to law. EchoStar confines its comments to the Panel's decision not to establish a royalty rate for the local retransmission of network signals by satellite carriers, and Commercial Networks request a "clarification" of the Panel's ruling in order to construe it to mean that the 27 cent fee for network signals applies to any local retransmission of network stations to subscribers in unserved households. Certain Copyright Owners challenge EchoStar's standing to file a § 251.55 petition to modify in this proceeding.

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the Copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee * * *." 17 U.S.C. 802(f).

VII. Review and Recommendation of the Register

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this large proceeding, in the eyes of the petitioners, are areas where the Panel may have acted improperly, thereby requiring the Librarian to substitute his own determination. The law gives the Register the responsibility to make recommendations to the Librarian regarding the Panel's determination, 17 U.S.C. 802(f), and in so doing she must conduct a thorough review.

After reviewing the Panel's report and the record in this proceeding, the Register has determined that there are 6 primary aspects of the Panel's decision that warrant detailed discussion and analysis:

(1) Whether the Panel correctly interpreted and applied the statutory standard for determining royalty fees;

(2) Whether the Panel acted arbitrarily in adopting the license fees paid by cable networks as the benchmark for determining section 119 fees;

(3) Whether the Panel should have made certain adjustments in the benchmark rates it adopted;

(4) Whether it was permissible for the Panel to adopt the same rate for superstations and network signals;

(5) Whether the Panel correctly declined to adopt a royalty rate for local retransmission of network signals by satellite carriers; and

(6) Whether the Panel supplied the appropriate effective date for the newly established royalty fees.

SBCA has made additional arguments in its petition to modify as to why the Panel's decision should be set aside. These arguments, which primarily involve evaluation of the evidence and allege deficiencies in the discovery rules for CARP proceedings, are addressed at the end of this section.

A. Determination of Fair Market Value

1. Action of the Panel

A fundamental dispute between satellite carriers and copyright owners in this proceeding is the meaning of the term "fair market value" as used in section 119(c)(3)(D) of the Copyright Act. That section provides:[4]

In determining royalty fees under this paragraph, the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

(i) The competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

(ii) The economic impact of such fees on copyright owners and satellite carriers; and

(iii) The impact on the continued availability of secondary transmissions to the public.

17 U.S.C. 119(c)(3)(D).

The Panel examined this provision, and the legislative history, and determined that fair market value meant the prize that would be negotiated in a free market setting as compensation for the satellite carriers' right to retransmit network and superstation signals containing the copyright owners' copyrighted programming. The Panel stated that:

[T]he language, structure, and legislative history of the 1994 amendments to section 119 suggest the Panel is directed to determine actual *fair market value* and "in determining the fair market value * * * base its decision * * *" upon the non-exhaustive list of *considerations*. We interpret the phrase "base its decision" to require the Panel to *consider* each enumerated type of information but, the weight to be accorded each consideration must necessarily depend upon the quality and quantity of the evidence adduced and *its relative significance to a determination of actual fair market value*. All evidence falling within the enumerated types of information must be considered but the evidence which is more probative of *fair market value* must be accorded greater weight than less probative evidence * * *. The Panel agrees that the fair market value rate is that which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller.

Panel Report at 17 (emphasis in original).

2. Arguments of the Parties

SBCA asserts that the Panel misapprehended the meaning of "fair market value," and that it should have determined the section 119 fees in accordance with what cable operators pay for distant signals under the section 111 cable compulsory license. SBCA Petition to Modify at 12. "Fair market value is a Congressionally defined term, and thus cannot be considered under the 'traditional' sense, as urged by the [Copyright] Owners." *Id.* at 14. SBCA cites certain 1994 floor statements at length as evidence that Congress intended that section 119 royalty rates be set on a parity with cable rates.

DeConcini: Copyright license parity with cable is the central feature of the fair market standard articulated in this legislation. The inclusion of specific guidance to the arbitration panel to take into consideration the competitive environment in which satellite programming is distributed is essential to ensure that satellite carriers are not required to pay higher royalty fees than cable operators * * * I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value in this legislation will accomplish that objective. * * * The fact that the Senate agrees with the House on this compromise language is due to the criteria that defines fair market value in the bill. I have long opposed the imposition of royalty fees based simply on the mechanical application of some conceptual fair market value formula * * * The arbitration panel will take steps to ensure that the royalty fees paid by satellite carriers are on par to those paid by cable operators. The guiding criteria for the arbitration panel to establish fair market value will accomplish this objective.

140 Cong. Rec. S14105, 14106 (daily ed. Oct. 4, 1994).

Brooks: In the hard-fought compromise reached on this bill, the factors to be considered under the bill's "fair market value" determination have been made more specific. I would note that in determining fair market value, we intend that the copyright arbitration panel consider all the factors raised by the parties, including cable rates.

140 Cong. Rec. H9270 (daily ed. Sept. 20, 1994).

Hughes: [L]egislation contemplates that the panel will look to the competitive environment in which section 119 retransmissions are distributed as well as the costs of distribution of similar signals in similar private and compulsory license marketplaces, including the cable copyright fees under section 111. This will help ensure that there is vigorous competition and diversity in the video programming distribution industry.

140 Cong. Rec. H9271 (daily ed. Sept. 20, 1994).

Synar: I am also hopeful that any fee resulting from the fair market value standard does not disadvantage the delivery of satellite transmissions vis-a-vis the delivery of cable retransmission under the section 111 compulsory license * * * It is my hope that the fees set for satellite retransmissions under the fair market value standard will, among other things, reflect the competitive environment in which those retransmissions are distributed. There is little question that Congress would like to ensure that there is vigorous competition and diversity in the distribution of video programming and the determination of fair market value fees should reflect that intent.

140 Cong. Rec. H9272 (daily ed. Sept. 20, 1994).

According to SBCA, these floor statements provide clear Congressional direction that the royalty fees for section 119 are to be either identical or substantially similar to those paid by cable operators under section111. SBCA provided testimony demonstrating that cable operators pay 9.8 cents per subscriber per month for superstations, and 2.45 cents per subscriber per month for network signals, and submits that the Librarian should adopt these rates. SBCA Petition to Modify at 18.

Copyright Owners contend that the Panel acted correctly in attributing the plain meaning to the term "fair market value," and properly rejected SBCA's position that the rates paid by cable under section 111 is the governing factor in determining fair market value. Copyright Owners Reply at 12. Copyright Owners' note further that even one of SBCA's own expert witnesses, Mr. Harry Shooshan, conceded at the hearing that Congress intended to accord the conventional meaning to "fair market value." *Id.*

[4] As discussed above, section 119(c)(3)(D) is the appropriate statutory provision governing the adjustment of royalty rates. Section 119(c)(3)(B), which also prescribes royalty adjustment factors, was inadvertently left in the statute after the 1994 amendments.

Copyright Owners also submit that portions of floor statements delivered at the time of passage of the 1994 Satellite Home Viewer Act are not proper legislative history and must be given little, if any, weight. *Id.* at 14–15 (citing *Overseas Educ. Ass'n, Inc.* v. *FLRA*, 876 F.2d 960 (D.C. Cir. 1989); *In the Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989)). Rather, the text of the statute is the principle source for determining its meaning. *Id.* at 15 (citing *West Virginia Hosp.* v. *Casey*, 499 U.S. 83 (1991).

3. Recommendation of the Register

The Panel determined that the term "fair market value" should be accorded its plain meaning—i.e., the price a willing buyer and a willing seller would negotiate in a free marketplace—and that the economic, competitive, and programming information presented by the parties provided the evidence to determine what fair market value royalty rates would be under the satellite carrier compulsory license. The Register concludes that this decision is not arbitrary, nor is it contrary to law.

Both SBCA and Copyright Owners contend that the meaning of "fair market value" is a matter of statutory interpretation. Moreover, it is a well-established principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. Sutherland Stat. Const. § 46.01 (5th Ed.).

The express words of the statute charge the Panel with determining the fair market value of retransmitted broadcast signals by satellite carriers. *Id.* (plain meaning of the statute governs its interpretation). The Panel determined that "fair market value" meant the price that would be negotiated between a willing buyer and a willing seller in a free marketplace. Panel Report at 17. The Register determines that this is not an arbitrary interpretation of the meaning of "fair market value," nor is it contrary to law. See Black's Law Dictionary 537 (5th Ed. 1989) (definition of "fair market value").

In the 1994 amendments Congress stated that "[i]n determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties * * *" 119 U.S.C. 119(c)(3)(d). Congress then included in that amendment a nonexhaustive list of the types of "economic, competitive, and programming information" that the Panel must consider in fashioning royalty rates that represent fair market value. That the list is nonexhaustive is significant, for there may be other types of information presented by the parties that, while not falling within one of the enumerated categories, is nevertheless relevant to the issue of what the fair market value royalty rates should be. The Panel would be responsible for considering this type of information as well, if it were relevant to determining fair market value.

The Register does not interpret the enumerated categories of "economic, competitive, and programming information" (for example, costs in similar private and compulsory license marketplaces) as establishing criteria that define the meaning of "fair market value." To do so would, in the Register's view, run contrary to the plain meaning of the statute. Sutherland Stat. Const. § 47.07 (5th Ed.). Likewise, the Register does not see any support for the argument that one of the enumerated categories of information, such as the compulsory license fee paid by cable under 17 U.S.C. 111, must be accorded more weight than another. The House Committee Report to the 1994 amendments makes it clear that this should not be the case. See H.R. Rep. No. 703, 103d Cong., 2d Sess. 10 (1994) ("In order to aid the panel, the Committee adopted an amendment offered by Mr. Hughes directing the panel to consider economic, competitive, and programming information presented by the parties as well as the competitive environment in which such programming is distributed. This would, of course, include cable rates, but those rates are not to be a benchmark for setting rates under section 119; they are only one potentially [sic] piece of evidence in reaching the objective fair market value."). The Register, therefore, determines that the Panel did not act arbitrarily or contrary to law in determining the meaning of fair market value.

Although the Panel determined that its plain meaning of fair market value controlled their interpretation, the Panel nevertheless consulted the legislative history to the 1994 amendments and concluded that "[w]e find no support for the proposition that Congress did not mean what it said. The legislative history reveals no intent to attach a unique meaning to the commonly understood and well-established 'fair market value' term." Panel Report at 16.

A review of all floor statements offered at the time of passage of the 1994 amendments reveals considerable differences between the views of the two Chairmen and some of the members. These differences are accentuated by a later floor statement offered by Chairman Hughes when he introduced a bill that would make technical corrections to the 1994 Satellite Home Viewer Act. 140 Cong. Rec. E2290 (daily ed. November 29, 1994) (statement of Rep. Hughes).

The statement of Chairman DeConcini offers the greatest support to the argument that the rates established in this proceeding should approximate what cable pays under the cable compulsory license. 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994) ("I am confident that the arbitration panel will take steps to ensure that the royalty fee paid by satellite carriers are on par with those paid by cable operators"). Representative Synar's comments suggest his desire that a satellite rate adjustment produce rates comparable to the cable compulsory license, but he does not state that application of the fair market value standard should or must produce such comparability. The statements of Representative Brooks and Hughes provide that cable compulsory license rates are one of the factors to be considered by the Panel, but they do not indicate that they are the only or controlling factor.

The Register has consulted the caselaw in determining the weight to be accorded floor statements made by Congressmen during the passage of legislation. The caselaw provides that floor statements of legislators are to be given little weight *Garcia* v. *U.S.*, 469 U.S. 70, 78, (1984); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen"). The reasoning behind this principle was aptly described by the Federal Circuit Court for the District of Columbia:

> [I]t is necessary for judges to exercise extreme caution before concluding that statement made in floor debate, or at a hearing, or printed in a committee document may be taken as statutory gospel. Otherwise, they run the risk of reading authentic insight into remarks intended to serve quite different purposes. Furthermore, to the degree that judges are perceived as grasping any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to except * * *.

Int. Broth. of Elec. Wkrs. Loc. U. 474 v. *NLRB*, 814 F.2d 697 (D.C. Cir. 1987) (Buckley, concurring); see also *Overseas Educ. Ass'n. Inc.* v. *FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) ("While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision") (emphasis in original).

Of greater importance in discerning the intent of Congress, as opposed to the

statements of individual Members, is the fact that Congress changed the statute in 1994. When Congress decides to change a statute, the decision to do so signifies that it intended to change the meaning. *Brewster* v. *Gage*, 280 U.S. 327, 338 (1932); *United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991); *In re Request for Assistance*, 848 F.2d 1151, 1154 (11th Cir. 1988), *cert. denied sub. nom., Azar* v. *Minister of Legal Affairs*, 488 U.S. 1005 (1989). That is what occurred here. If Congress had truly intended cable compulsory license rates to govern the adjustment of fees in this proceeding, then it would not have amended the statute in1994 to provide for a fair market value determination.[5]

In sum, while floor statements by some Members indicate an intent that fair market value be determined in various ways, by looking at the statute, committee reports, floor statements and colloquies the Register does not find any special meaning or limitation attached to the term "fair market value" and, therefore, must rely on the plain language of the statute and the plain meaning of the term. The Panel, in the view of the Register, therefore, did not act arbitrarily, or contrary to law in its interpretation of the meaning of "fair market value."

B. The Cable Network Fee Benchmark

1. Action of the Panel

In order to determine fair market value royalty rates as required by section 119(c)(3)(D), the Panel considered the voluminous testimony and exhibits presented by the parties. Witnesses for PBS, JSC, the Commercial Networks, SBCA, and ASkyB sponsored economic analyses and testified as to their calculation of fair market value. The copyright owners used empirical data of license fees paid to certain cable networks by multichannel video programming distributors (principally cable operators), while satellite carriers focused primarily on the license fees paid by cable operators under section 111.

The Panel specifically endorsed the approach taken by PBS, and its principal witness, Ms. Linda McLaughlin. Using data supplied by an industry survey group,[6] Ms. McLaughlin examined the license fees paid by multichannel video programming distributors ("MVPDs") to license the viewing rights to 12 popular basic cable networks. These networks are A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA. Ms. McLaughlin testified that these basic cable networks represented the closest alternative programming to broadcast programming for satellite homes, and that studies indicated that consumers value networks and superstations as least as highly as popular basic cable networks. Direct Testimony of Linda McLaughlin at 2–5. She then calculated a "benchmark" rate for these networks to be used by the Panel as representative of the fair market value of broadcast signals retransmitted by satellite carriers:

> * * * I have calculated a basic cable network benchmark price and used it to estimate a minimum compulsory license fee for satellite-retransmitted broadcast stations. The average license fee of the 12 popular basic cable networks was 18 cents in 1992—when the maximum satellite compulsory rate was 17.5 cents—and has risen to 24 cents in 1995, an annual increase of ten percent per year. The license fees for these 12 basic cable networks are forecast to increase to an average of 26 cents in 1997, 27 cents in 1998 and 28 cents in 1999. This suggests that the compulsory rate for satellite retransmitted stations should increase at least correspondingly with the average prices for basic cable networks, to an average at least 27 cents for the 1997–99 period.

Id. at 7.

The Panel endorsed Ms. McLaughlin's approach because it determined that it represented the closest model, of those presented, to a free market negotiation for satellite carriage of broadcast signals, and because it was the most conservative approach offered by the copyright owners. Panel Report at 29–30. The Panel rejected the analysis of JSC (Testimony of Mr. Larry Gerbrandt) as too narrow,[7] and the analysis of the Commercial Networks (testimony of Mr. Bruce Owen) as too speculative.[8] The Panel also rejected the analyses of SBCA and ASkyB because it determined that their analyses did not comport with the plain statutory meaning of the term "fair market value." *Id.* at 29–30.

2. Arguments of the Parties

SBCA contends that cable network license fees are not an appropriate benchmark because cable networks are fundamentally different from retransmission of broadcast signals. It asserts that "[e]xtracting an accurate, or even representative license fee per subscriber is basically impossible because multiple programming services are included within contracts, there are ceilings on aggregate license fees for MVPDs in some cases, free subscriptions in others, marketing and launch support provided by the cable networks, purchases of advertising time by the cable networks from MVPDs, and equity investments by each in the other." SBCA Petition to Modify at 20–21.

In reply, Copyright Owners assert that the Panel acted properly by utilizing cable networks as the benchmark of fair market value, and accepting the analysis of Ms. McLaughlin. Copyright Owners not that they wished to examine the license fees paid by satellite carriers to cable networks in particular, as opposed to the fee paid by all MVPDs in general, but SBCA refused to disclose through discovery the amounts that satellite carriers paid. Copyright Owners Reply at 17. They further note that while SBCA's witness, Mr. Jerry L. Parker, stated that a meaningful license fee could not be determined from satellite/cable network contracts, SBCA never produced the documents to support that assertion. *Id.* at 18. Copyright Owners assert that Ms. McLaughlin testified that the license fees presented by her analysis demonstrated at least the minimum amount that satellite carriers would pay for cable networks, and that her analysis offered the best evidence that was properly accepted by the Panel. *Id.*

3. Recommendation of the Register

In the Register's view, the Panel's decision to use cable network license fees as a benchmark for establishing the fair market value of section 119 rates was the product of rational decisionmaking, and its decision to use the PBS/McLaughlin approach was not improper.

Having determined that "fair market value" meant the price that would be paid by a willing buyer and seller in a free marketplace, it was not illogical for the Panel to give careful consideration to evidence of markets that most closely resembled the licensing of signals under section 119. In fact, section 119(c)(3)(D)(i) requires that the Panel consider "the cost for similar signals in similar private * * * marketplaces." 17 U.S.C. 119(c)(3)(D).

All three of the evidentiary presentations of the copyright owners—PBS, JSC, and Commercial Networks—

[5] There is no question that the principal factor for determining rates under the 1988 legislation was the rates paid by cable. 17 U.S.C. 119(c)(3)(B) (1988) (the Panel "shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station * * *.").

[6] The data was supplied by Paul Kagan Associates, a leading information and data company in the video industry.

[7] Mr. Gerbrandt isolated the license fees paid for two basic cable networks: TNT and USA. Tr. 2025–2026.

[8] Mr. Owen used regression analysis in an attempt to demonstrate that MVPDs are willing to pay proportionally higher license fees for network signals which contain more expensive programming. Direct Testimony of Bruce Owen at 7–10.

focused upon the fees paid to cable networks by MVPDs. SBCA's evidence of fair market value, the cable license fees paid under section 111, was less relevant to the Panel's determination because the Panel had rejected the notion that cable fees equaled fair market value. Panel Report at 29–30. The Panel's adoption of cable network fees as the benchmark was not unqualified, however, because it stated that "we agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters." *Id.* at 29. Nevertheless, the Panel "adopt[ed] the copyright owners' *general* approach using the *most similar* free market we can observe." *Id.* at 30. After reviewing the record, the Register has determined that the Panel's conclusion is not "arbitrary" within the meaning of 17 U.S.C. 802(f).

SBCA contends that cable network fees are not a useful benchmark because the economics of cable networks are fundamentally different from those of broadcast networks and superstations. SBCA Petition to Modify at 20 (citing testimony of Mr. Harry Shooshan, Mr. John Haring and Mr. Edwin Desser). The testimony of Mr. Shooshan and Mr. Haring, in particular, suggest that there are some marked differences between the licensing of cable networks and broadcast signals. The Panel, however, took account of that. Panel Report at 29. Nevertheless, there was ample testimony that the two markets were also quite similar. Tr. 1202–04 (Mr. Robert Crandall); Tr. 1609 (Ms. McLaughlin); Tr. 1284 (Mr. Owen). The Panel weighed the evidence and accepted the copyright owners' approach using cable network fees because it was "the *most similar* free market we can observe." Panel Report at 30 (emphasis in original). Because this conclusion is grounded in the record, it is not arbitrary. *National Cable Television Ass'n, Inc.* v. *CRT*, 724 F.2d 176, 189 (D.C. Cir. 1983) (decisions grounded in the record within the zone of reasonableness).

Likewise, the Panel's decision to rely on the PBS/McLaughlin testimony to establish the cable network benchmark was adequately grounded in the record. Panel Report at 18–20. Again, the Panel stated that use of cable networks was by no means flawless and, to account for this, the Panel was adopting the "conservative" approach offered in Ms. McLaughlin's analysis. *Id.* at 31. The Register determines that the Panel's decision to accord the PBS/McLaughlin testimony controlling weight is consistent with its determination to utilize the plain meaning of "fair market value" as the proper standard for setting royalty fees. Further, it is well established that using evidence of analogous markets is the best evidence in determining market price. *See National Cable Television*, 724 F.2d at 187. For these reasons, the Register determines that the Panel did not act arbitrarily or contrary to the Copyright Act.

C. Adjustments to the Cable Network Fee Benchmark

1. Adjustment to the Benchmark for Delivery Costs

a. Action of the Panel. After establishing cable network license fees, as presented by Ms. McLaughlin, as the benchmark for determining the section 119 royalty rates, the Panel examined, *inter alia*, the special features and conditions of the retransmission marketplace to determine if an upward, or downward, adjustment in the benchmark was appropriate. One of the aspects of satellite retransmission of broadcast signals that differ significantly from the transmission of cable networks involved the costs of delivering the signals to the MVPDs. The Panel found this issue, along with that of advertising inserts (discussed *infra*), as being "among the most challenging issues for the Panel to resolve." Panel Report at 43.

The Panel found that the license fees charged for cable networks included the cost of delivering the cable network to the MPVD—i.e., making the signal readily available for reception by the MVPD for subsequent distribution to subscribers. *Id.* at 45. With satellite retransmission of broadcast signals, however, the satellite carriers absorb the costs of getting the broadcast signal from its geographic point of origin, and then delivering it to its subscribers. *Id.* The Panel considered whether the cost of delivering the signals should, therefore, be deducted from the benchmark.

The Panel declined to make such a deduction. The Panel found that there was no evidence presented to suggest that if satellite carriers and copyright owners negotiated in a free marketplace for the retransmission of broadcast signals, the copyright owners would offer satellite carriers a discount on license fees to accommodate delivery costs. The Panel discussed the testimony of Mr. Jerry L. Parker, an SBCA witness who offered testimony as to the history, nature and operation of the satellite industry:

> Mr. Parker was invited to demonstrate whether carrier costs impacted the rates negotiated between satellite carriers and cable networks. He could not. Indeed, Mr. Parker conceded, for example, that despite additional costs incurred by DBS[9] carriers (beyond those of HSD[10] carriers), DBS operators were unable to negotiate lower rates on that basis. Moreover, he declined to urge the Panel to set a discounted rate for DBS carriers to account for their higher costs than HSD carriers. We must similarly decline to discount the cable network benchmark to account for higher delivery costs of broadcast signals.

Panel Report at 45–46 (citations omitted).

b. Arguments of the Parties. SBCA vigorously contests the Panel's resistance to deducting delivery costs from the 27 cent benchmark figure, stating that "it must be recognized that all cable networks that are charging and receiving 27 cents have made the necessary investment and expense in distributing the signal * * *. None of the [c]opyright [o]wners or broadcasters in this proceeding incurred this necessary expense for satellite distribution of superstations or network stations." SBCA Petition to Modify at 22. SBCA cites the testimony of Ms. McLaughlin, who acknowledged that broadcast stations are not responsible, and do not incur the cost of, delivering their signal to satellite carriers for subsequent retransmission. *Id.* at 22–23. SBCA submits that "[t]he error in Ms. McLaughlin's analysis, implicitly accepted by the Panel, is that these expenses were basically the cost of the [s]atellite [c]arriers in distributing their own product." *Id.* at 23. SBCA asserts that the Panel understood that satellite carriers bore the cost of delivery, but then mistakenly categorized it as a "discount" to compensate carriers for their costs, when in fact it is a cost that must be borne by the copyright owners. *Id.* at 25–26.

SBCA submits that it demonstrated that the average delivery cost per signal, per subscriber, per month is 10 cents, and 6.5 cents for volume discounts. SBCA, therefore, contends that the 27 cent benchmark rate must be adjusted downward to between 17 and 21.5 cents. *Id.* at 23, f.n. 53.

In reply, Copyright Owners assert that SBCA mischaracterizes the transmission cost issue by suggesting that the major focus should be the structural nature of such costs, rather than whether they would result in any marketplace price adjustments. Copyright Owners Reply at 22. Copyright Owners cite Mr. Larry Gerbrandt's testimony that transmission

[9] "DBS" stands for Direct Broadcast Service, and is associated with high powered, high frequency direct broadcast satellite services. An example of a DBS operator is DirecTV.

[10] "HSD" stands for "Home Satellite Dish," and typically refers to satellite providers who operate at lower frequencies than DBS providers.

costs do not yield different cable network license fees in the marketplace, and note that Mr. Jerry Parker was unable to demonstrate otherwise. *Id.* at 22–23.

c. Recommendation of the Register. The Panel discussed the issue of transmission costs quite extensively, finding that the record was devoid of credible evidence demonstrating that transmission costs of satellite carriers affected the rates negotiated between satellite carriers and cable networks. Panel Report at 45–46. The Panel expressly found that SBCA's witness, Mr. Parker, could not offer evidence of such an impact, and conceded that despite additional costs incurred by DBS carriers, DBS operators were unable to negotiate lower rates on that basis. Tr. 2528. The Panel grounded its determination in the record evidence, which is the hallmark of rational decision making. *National Cable Television Ass'n.* v. *CRT*, 724 F.2d 176 (D.C. Cir. 1983).

SBCA's discussion of transmission costs fails to focus on what impact, if any, they would have on negotiated license fees, and instead relates to which party should bear the cost. Costs can be shifted between parties in a business relationship, and SBCA asserts that their costs, when comparing delivery of broadcast signals with delivery of cable networks, must be shifted to copyright owners to prevent a windfall. However, costs can also be absorbed by a party as part and parcel of doing business, and must be when one party cannot shift the costs (or a portion thereof) to the other. Where there is no credible evidence demonstrating a party's ability to shift a cost, no change in the negotiated price should occur. The Panel found that to be the situation with transmission costs, and the Register has no grounds on which to reject that finding.

2. Adjustment to the Benchmark for Advertising Inserts

a. Action of the Panel. In addition to delivery costs, the Panel considered the issue of advertising inserts very significant. Cable networks typically grant MVPD's a certain number of time slots during the programming provided—known as advertising inserts—for the MVPDs to sell to advertisers. The monies raised from these inserts are retained by the MVPD, and can defray the cost of the license fee for the cable network approximately 8 cents per subscriber per month. Panel Report at 43–44. The Panel found, however, that because section 119(a)(4) requires satellite carriers to retransmit the signals of broadcast stations intact, they do not receive any advertising inserts for the retransmission of broadcast signals. *Id.* at 44. The Panel considered whether this should result in a downward adjustment of the benchmark rate.

The Panel declined to make an adjustment:

> [T]he satellite carriers naturally argue that because the benchmark is based upon the rate paid by multichannel distributors to cable networks, we must deduct $0.08 to obtain the 'real cost' of cable networks. The copyright owners counter that most satellite carriers don't insert advertising into cable network signals anyway. Indeed, HSD carriers don't possess the technology to insert advertising. Moreover, multichannel distributors *appear* to pay the same cable network license fee regardless of whether they insert advertising.
>
> If this last assertion is accurate, one would expect that in a hypothetical free market negotiation, broadcasters would similarly decline to reduce their license fees to satellite carriers for their lack of advertising availabilities and no benchmark adjustment would be appropriate. Both Ms. McLaughlin and Mr. Gerbrandt opined that, based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers [sic] ability to insert, affects the prices that cable networks charge. They did not support this opinion with any documentary evidence or empirical data. However, the satellite carriers allowed this testimony to stand essentially unrefuted. Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined. In the final analysis, we accept the copyright owners' expert testimony and decline to deduct $0.08 from the benchmark as advocated by the satellite carriers.

Panel Report at 44–45 (citations omitted).

b. Arguments of the Parties. SBCA alleges that the Panel "completely misconceived the adjustment necessary to reflect the value for insertable advertising." SBCA Petition to Modify at 26. They note that the arbitration panel in the 1992 rate adjustment made a downward adjustment for advertising inserts. 57 FR 19058 (May 1, 1992). SBCA asserts that the "value of insertable advertising is significant," and that its value is "no less than 7.5 cents" per subscriber per month. *Id.* at 27.

As a "variation" on the advertising insert issue, SBCA offers that the increased national exposure of broadcast stations offered by satellite retransmissions increases the amount of revenue that copyright owners receive for the advertising slots that they retain. *Id.* at 28. SBCA submits that the Panel should have further adjusted downward for this value, and argues that it could not quantify the value because the necessary information was in the possession of the copyright owners who were not required to disclose it through the CARP discovery rules.[11]

In reply, Copyright Owners assert that the Panel fully considered the arguments of SBCA, and correctly rejected any downward adjustments for advertising inserts. Copyright Owners Reply at 23–24.

c. Recommendation of the Register. The Panel fully discussed what effect, if any, advertising inserts might have on the negotiated fee for retransmission of broadcast signals. Panel Report at 43–45. The Panel cited the testimony of Ms. McLaughlin and Mr. Gerbrandt that "based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers ability [sic] to insert, affects the prices that cable networks charge * * *. The satellite carriers allowed this testimony to stand essentially unrefuted. Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined." *Id.* at 44. SBCA did not offer any testimony which incontrovertibly rebuts the testimony of Ms. McLaughlin and Mr. Gerbrandt. Consequently, the Panel's determination that no adjustment should be made is not arbitrary because it is grounded in the record.

D. Equality Between Superstation and Network Signal Rates

1. Action of the Panel

As discussed above, Congress established different royalty rates for superstation and network signals when it created the section 119 license. The initial rate for superstations was 12 cents per subscriber per month, and 3 cents per subscriber per month for network signals. This 4 to 1 ratio reflected the payment of royalties under the section 111 license. Under section 111, only copyright owners of nonnetwork programming are allowed to share in the royalty funds. Cable operators pay full value for retransmitting independent broadcast stations (of which superstations are a subset), and only one-quarter value for retransmission of network signals. 17 U.S.C. 11(f). The one-quarter value reflects Congress' determination in 1976 that approximately 25 percent of the programming on network signals is compensable nonnetwork programming, while the remainder is not. Congress

[11] SBCA alleges throughout its Petition to Modify that the CARP discovery rules, and particularly the Panel's application of the rule, precluded it from obtaining vital information from copyright owners to support its case, which resulted in negative inferences by the Panel as to the sufficiency of its presentation. This argument is addressed, *infra* in subsection G.

carried over this 4 to 1 ratio in the 1988 Satellite Home Viewer Act when it set the 12 cent and 3 cent rates in the statute.

The 1992 arbitration panel that adjusted the section 119 rates took into account the 4 to 1 ratio, but found that the amount of network programming on network stations had declined to approximately 50 percent, down from the 75 percent contemplated by section 111. That panel, however, set the network station rate at 6 cents, which represented roughly a 3 to 1 ratio to the superstation rate it set, because it was concerned with disruption in the satellite industry of carriage of network signals if it established a network signal rate at half (a 2 to 1 ratio) that of the superstation rate. 57 FR 19052, 19060 (May 1, 1992). The Copyright Royalty Tribunal, in reviewing the panel's decision on this matter, stated that:

> The Tribunal believes that the Panel was not bound by either a 4:1 ratio or a 1:1 ratio. When the Tribunal issued its declaratory ruling concerning network copyright owners, we did not intend to prejudge any future ratesetting. We noted that in cable and satellite, the pay-in may not necessarily correlate to the pay-out. Therefore, a 1:1 ratio is not required. However, we do believe the Panel had the authority to take our declaratory ruling into account, so that it was entitled to adjust the 4:1 ratio downward to reflect that network copyright owners are entitled to receive satellite royalties.

Id. at 19052.

The Panel in this proceeding rejected the notion that it was required to set different royalty rates for superstations and network signals, respectively, because it was seeking the fair market value of these signals. The Panel stated:

> We find no credible evidence that retransmitted network stations are worth less than retransmitted superstations. Indeed, even assuming *arguendo*, we were to conclude that network programming is worth less, or even wholly uncompensable, we find no record support for any particular ratio—no evidence was adduced as to the *present day* average proportion of network to non-network programming. And imposition of the original 4 to 1 ratio by rote, merely to replicate section 111 rates, would not be consistent with a fair market value analysis.

Panel Report at 40.

2. Arguments of the Parties

SBCA challenges the Panel's refusal to apply the 4 to 1 ratio, asserting that such ratio is binding precedent upon the Panel. SBCA Petition to Modify at 38. SBCA contends that Congress determined, under section 111, that network programming is not compensable, and carried this rationale into the rate structure of section 119. The fact that networks are allowed to share in the section 119 royalties, but not the section 111 royalties, "does not mean that the network signals are to be paid for any differently under the satellite license than under the cable license * * *" *Id.* at 39. Furthermore, SBCA submits that satellite carriers give added value to network signals by carrying them to unserved households who would not otherwise receive such signals. *Id.* at 41. SBCA contends that, if anything, there should be no fee for network signals. *Id.* at 40.

Finally, SBCA argues that the Panel erred by creating a 27 cent royalty rate applicable to PBS (defined under the statute as a network) because "PBS signals are free on the satellite by law." *Id.* at 41. These signals, SBCA contends, cannot possibly have a market value, and there should be no royalty fee for PBS signals. *Id.*

Copyright Owners contend that the Panel correctly rejected the 4 to 1 ratio because the new law requires a determination of fair market value. Copyright Owners Reply at 32. Copyright Owners note that the binding precedent referred to by SBCA was an interpretation of the 1988 Satellite Home Viewer Act, not the 1994 Act, and that nothing in the 1994 Act requires assignment of different rates for superstation and network signals. *Id.* at 33–34.

With regard to SBCA's contention that retransmission of PBS signals should not be compensated at the 27 cent level, Copyright Owners argue that such a contention "flies in the face of the fair market value evidence," and that the PBS signal available for free on the satellite is not the signal of the member stations that are at issue in this proceeding. *Id.* at 35.

3. Recommendation of the Register

The Panel did not err by rejecting the 4 to 1 ratio and adopting a network signal rate that was equal to the value of the superstation rate. The Panel correctly observed that while the 1992 arbitration panel generally followed the ratio set by Congress in the 1988 Act, the 1994 amendments changed any reliance upon a pre-set ratio by directing the Panel to determine only the fair market value for network and superstation signals. Panel Report at 40. There is not evidence in the 1994 Act, or its legislative history, that Congress intended the Panel to set a rate for network signals that is one-fourth of that for superstations (or any other ratio, for that matter) if that rate did not represent the fair market value of network signals.

SBCA asserts that the 1994 amendments contemplate a CARP establishing two rates—one for network signals, and another for superstations—thereby inferring that Congress contemplated rate differentiation (i.e. that one rate would be less than the other). Such an inference is belied by language in the House Report, however, which states that the rates set by the CARP in this proceeding "should reflect the fair market value of satellite carriers' secondary transmissions of superstations and network stations." H.R. Rep. No. 703, 102d Cong., 2d Sess. 7 (1994). The statute does not require or suggest that the rate for network signals, or superstations, be set at anything less than fair market value.

There is no binding precedent that required the Panel to apply a ratio in value between network signals and superstations, and set network signal rates lower than superstation rates. The 1992 arbitration panel applied a different criterion (rates paid by cable under section 111) to determine section 119 rates, and its decision therefore does not serve as precedent for this proceeding. Furthermore, even if the 1992 arbitration were binding precedent, the final order of the Copyright Royalty Tribunal (which constituted the final agency action in that proceeding) clearly stated that no differentiation between network and superstation rates was required. 57 FR 19052 (May 1, 1992) ("The Tribunal believes the Panel was not bound by either a 4:1 ratio or a 1:1 ratio."). The Panel, therefore, did not act arbitrarily by rejecting application of the 4 to 1 ratio.

The Register has also examined the record to determine whether, under a fair market value analysis and regardless of application of a pre-set ratio, the evidence required a differentiation in network and superstation rates. The Panel determined that there was "no credible evidence that retransmitted network stations are worth less than retransmitted superstations." Panel Report at 40. It was wholly within the Panel's discretion to arrive at such a determination. SBCA presented evidence demonstrating that network viewer ratings have declined, SBCA Proposed Findings of Fact and Conclusion of Law at 39, but it did not offer evidence as to what impact such a decline had relative to superstations, nor did it quantify the difference in value between network signals and superstations under a fair market value analysis, except to insist that all signals should be free. *See* SBCA Reply Findings of Fact and Conclusions of Law at 7. The Panel, consequently, did not act arbitrarily by adopting the same royalty rate for both network signals and superstations.

Finally, SBCA argues that because the Panel failed to take account of the fact that PBS signals are free on the satellite by law, it was error to accord them the same royalty rate as other network signals.[12] Section 605(c) of the Communications Act, 47 U.S.C., prohibits encryption of programs included in the National Program Service of the Public Broadcasting Service, essentially making the National Program Service free to all satellite home dish owners. Member stations of PBS, however, are not subject to 47 U.S.C. 605(c), and satellite carriers may charge their subscribers for retransmission of these stations. Furthermore, the National Program Service is not a network signal as defined under section 119(d)(2). Member stations of PBS are network signals under section 119(d)(2). Presumably, there are PBS programs available on the National Program Service that are the same programs available from PBS stations, although no such evidence was adduced in this proceeding. There are also likely to be different programs, particularly those produced by member stations. SBCA did not quantify by how much, under a fair market value analysis, the same programs on the National Program Service and PBS stations should reduce the royalty fee for PBS stations, beyond a blanket assertion that all PBS stations should be free. SBCA Reply Findings of Fact and Conclusions of Law at 68–69. The Panel concluded that there was "no credible evidence" warranting a conclusion that network signals were worth less, which would include PBS stations. The Register cannot find credible evidence to the contrary, and therefore the Panel's determination must be affirmed.

E. Local Retransmission of Network Signals

1. Action of the Panel

In setting the satellite carrier compulsory license royalty rates for networks and superstations, the Panel was asked to distinguish between satellite retransmission of "distant" broadcast signals, and satellite retransmissions of "local" broadcast signals. The Panel did make this distinction, setting a royalty rate of 27 cents for distant retransmission of superstations, and zero cents for local retransmission of superstations. Panel Report at 54.

While the Panel adopted a 27 cent rate for retransmission of distant network signals, *id.*, it declined to adopt a rate for local retransmission of network signals because it determined that it lacked subject matter jurisdiction to do so. *Id.* at 48. The Panel considered section 119(a)(2)(B), which provides that the satellite compulsory license is "limited to secondary transmissions to persons who reside in unserved households," and examined the section 119(d)(10) definition of an unserved household. The Panel concluded that:

> [N]etwork signals generally may not retransmitted to the local coverage area of local network signals. The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to *served* households. Section 119 does not provide a compulsory license for these retransmissions. Hence, we lack subject matter jurisdiction to set a rate for local retransmissions of local *network* signals.

Panel Report at 48 (emphasis in original).

The Panel did acknowledge in a footnote that there may be "rare instances" where a household located within the local market of a network signal was, indeed, an unserved household within the meaning of section 119(d)(10). *Id.* at 48, f.n. 62. The Panel stated that "[t]hese households qualify as unserved but, under section 119, ASkyB would pay the conventional 'rate for non-local signals.'" *Id.*

2. Arguments of the Parties

EchoStar contends that the Panel committed reversible error in determining that it has no jurisdiction to set a royalty rate for local retransmission of network signals, and that the rate should be zero. EchoStar Petition to Modify at 1. According to EchoStar, the language of section 119 regarding the permissibility of local retransmission of network signals is nuclear, and the Panel should therefore have consulted the legislative history, rather than decide the matter on the basis of the statutory language. *Id.* at 7–8. EchoStar submits that the Congressional intent behind the unserved household restriction of section 119(a)(2)(B) was to protect the network-affiliate relationship from importation of distant signals of the same network, citing the recent Copyright Office Report on revision of the cable and satellite carrier compulsory licenses. *Id.* at 4. Because local retransmissions do not harm the network-affiliate relationship, EchoStar asserts that "[i]n light of the intent behind the compulsory license, therefore, the 'unserved household' limitation should be read as not precluding such local-into-local retransmissions—a form of retransmission which required technologies not in existence at the time of the legislation." *Id.* at 5.

In addition, EchoStar submits that the Panel should have interpreted section 119 flexibly enough to allow local retransmission of network signals, citing *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975). *Id.* at 10. Finally, EchoStar argues that, since the section 119 license was modeled after the section 111 license, and local retransmission of network signals is permitted under section 111, the two statutes should be interpreted similarly. *Id.* at 11 (citing *Northcross* v. *Board of Education*, 412 U.S. 427 (1973).

Commercial Networks seek a clarification of the Panel's ruling on local retransmission of network signals, albeit from a completely different perspective. Commercial Networks request the Librarian to make clear that where local retransmission of a network signal does not violate the unserved household restriction (a circumstance acknowledged by the Panel likely to be rare), the rate for such retransmission is 27 cents per subscriber per month. Commercial Networks Petition to Modify at 1.

In reply, EchoStar opposes Commercial Networks position, and argues that the same rationale that the Panel used in adopting the zero rate for superstations applies with equal force to network stations that are locally retransmitted to unserved households. EchoStar Reply at 2.

Certain Copyright Owners object to EchoStar's position, and contend that EchoStar does not have standing under the rules to file a petition to modify the Librarian's decision when it was not an active party in this proceeding. Certain Copyright Owners Reply at 1. Certain Copyright Owners contend that the Panel correctly interpreted section 119 as preventing retransmission of local network signals to served households, and that the legislative history does not warrant a different conclusion. *Id.* at 3–6.

3. Recommendation of the Register

Two separate issues are presented by the local retransmission of network signals. First, there is the retransmission of a network station within that station's local market. The Panel categorized this as local retransmission to served households, and concluded that section 119 did not permit such retransmissions. Second, there is retransmission of a network station within that station's local market to subscribers who satisfy the definition of an "unserved household" in section

[12] PBS signals are defined as network stations under section 119(d)(2).

119(d)(10). The Panel acknowledged that such retransmissions were permissible under section 119, though likely to occur in "rare instances," but was unclear as to what the proper royalty rate should be.

Local retransmission of network signals to served households presents a challenging issue. The Copyright Office declined to issue a declaratory ruling that such retransmissions are permissible, though it did not preclude addressing such a matter through a rulemaking procedure. Letter of the Acting General Counsel to William Reyner, August 15, 1996. Moreover, the Office has, in its recent report to the Senate on revision of the satellite and cable compulsory licenses, expressly endorsed the permissibility of such retransmissions, and requested Congress to "clarify" the statute on the matter: "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," Report of the Register of Copyrights at xx (1997) (hereinafter "Register's Report"). As the agency responsible for administering the Copyright Act, the Office believes that it retains the authority to conduct a rulemaking proceeding to determine the permissibility of local retransmission of network signals to served households, regardless of the Panel's determination in this proceeding.

Nevertheless, the Register must determine whether the Panel's decision that such retransmissions are not permitted under section 119 is contrary to the provisions of the Copying Act.[13] The Register reviewed the language of section 119, and its legislative history, both in the context of this proceeding, and in her report to the Senate. Such review confirmed the Register's belief that Congress simply did not consider the issue of local retransmission of network signals to served households at the time of passage of section 119, principally because the technology to make such local retransmission did not commercially exist. It is evident from the history surrounding adoption of the unserved household restriction in 1998 that adoption of the restriction was motivated by concerns expressed by network affiliate stations that importation of distant network stations affiliated with the same network would erode their over-the-air viewership. Register's Report at 103–104. This suggests that if Congress had considered the issue, it might have condoned local retransmissions to served households. On the other hand, the section 119(d)(10)(A) portion of the definition of an "unserved household" does not specify receipt of what network signal over-the-air triggers the prohibition in making retransmissions of network signals. The language of section 119(d)(10)(A) could easily be read to prohibit retransmission by satellite whenever the subscriber receives an over-the-air signal of Grade B intensity from any network affiliate, including the local network affiliate that the satellite carrier intends to retransmit to the subscriber. This is the position that the Panel took.

In sum, the Register determines that the law is silent on this issue. Consequently, the Register cannot unequivocally say that the Panel's decision is arbitrary or contrary to law.

The second issue is the local retransmission of network signals to unserved households. The Panel appears to have presumed that such retransmissions are permissible. Panel Report at 48. The Register determines that they are permissible, as provided by the express terms of section 119. The Panel failed to articulate what royalty rate would be applicable to such local retransmissions. It mentioned, in a footnote, that the number of unserved households within a network station's local market were likely to be few, and cited the testimony of ASkyB's witness, Preston Padden, that ASkyB would, in those instances, "pay the conventional 'rate for non-local signals.'" *Id.* at 48, f.n. 62 (quoting written direct testimony of Mr. Padden). The Panel did not expressly state what the rate should be for all carriers making local retransmissions of network signals to unserved households.

Commerical Networks urge that the rate for such retransmissions should be 27 cents. EchoStar[14] argues that the rate should be zero, consistent with the Panel's adopted rate for local retransmissions of superstations. To the extent that the Panel sought to impose the 27 cent rate on local retransmissions of network signals to unserved households, the Register determines that such action is arbitrary. The Register cannot find testimony in the record that supports the conclusion that local retransimssion of network signals to unserved households has a fair market value rate of 27 cents, particularly where the Panel determined that the fair market value of local retransmissions of superstations was zero. Panel Report at 52. Likewise, the record does not support a conclusion that there is any differentiation between the fair market value of local retransimssions of network signals vis-a-vis superstations. Commercial Networks do not cite any testimony to the contrary in their petition to modify.

To the extent that the Panel failed to adopt a rate for local retransmissions of network signals to unserved households, the Register determines that such action is inconsistent with its task in this proceeding, and recommends that the Librarian substitute his own determination. 17 U.S.C. 802(g). The dearth of testimony on this issue and, for that matter, the Panel's cursory discussion of it, is not surprising because local retransmission of network signals to unserved households, and served households as well, is undoubtedly an unattractive business proposition to satellite carriers. Nevertheless, the issue was before the CARP, and requires a resolution.

The Register recommends that the Librarian adopt a zero rate for local retransmissions of network signals to unserved households because the Register is persuaded that the Panel's conclusions with respect to local retransmissions of superstations are equally applicable to local retransmissions of network signals to unserved households. Panel Report at 52-53. As noted above, there is no conclusive evidence to suggest that locally retransmitted network signals are of greater fair market value than locally retransmitted superstations. Accordingly, the Register recommends adoption of a zero rate for local retransmission of network signals to unserved households.

F. Effective Date of the New Rates

1. Action of the Panel

In announcing the royalty rate of 27 cents for distant retransmission of network and superstation signals, and zero cents for local retransmission of superstations, the Panel stated that the time period for payment of the rates would be from July 1, 1997, through December 31, 1999. Panel Report at 54.

2. Arguments of the Parties

SBCA contends that the Panel acted contrary to law by setting an effective

[13] Because the Panel's decision on this point is a conclusion of law, the arbitrary standard is not applicable.

[14] The Register agrees with Copyright Owners that EchoStar lacks standing to file a petition to modify the Panel's determination, and recommends dismissal of the petition. Section 251.55(a) of the rules, 37 CFR provides that only parties to the proceeding may file petitions to modify, and makes no provision for nonparties. EchoStar, though a member of, and represented by SBCA, was not a party to this proceeding because it did not file a Notice of Intent to Participate as required by the rules. *See* 37 CFR 251.45(a).

Dismissal of EchoStar's petition, however, does not preclude consideration of the issues surrounding local retransmissions of network signals, and the Register has considered these as required by section 802(g).

date of July 1, 1997, for the new rates. SBCA states that the Panel did not have any authority to set an effective date because section 119(c)(3)(C) states that the rates become effective as set forth in the Librarian's order. SBCA Petition to Modify at 46. Further, SBCA argues that the effective date of the new rates must be prospective only. *Id.* at 47. It notes that section 119 contemplates prospective application by discussing the rates "to be paid." *Id.* at 48–49 (citing section 119(c)(3)(A) and the 1988 House Report to the Satellite Home Viewer Act). SBCA argues that the caselaw prevents retroactive application of agency rulemaking unless the enabling statute expressly states otherwise, and submits that the Librarian's order in this proceeding effectively constitutes a rulemaking because the Copyright Office's rules are being amended to reflect the new rates. *Id.* at 50–51.

Additionally, SBCA argues that applying the July 1, 1997, effective date would cause substantial harm to the satellite industry. *Id.* at 55. SBCA submits affidavits of representatives of the satellite industry discussing their inability to adequately inform their subscribers on a timely basis of the rate increase, and the difficulty of adjusting distribution contracts to accommodate fee increases. *Id.* at attachment A.

Finally, SBCA takes the Librarian to task for not complying precisely with the procedural schedule established in the statute for this proceeding. Specifically, SBCA contests the Library's decision to temporarily suspend the schedule to address issues raised by ASkyB, so that the CARP was initiated on March 3, 1997, as opposed to January 1, 1997, as contemplated in section 119(c)(3)(A). SBCA argues that because the Library violated the time requirement of section 119(c)(3)(A), and such delay caused substantial harm to satellite carriers, "the Panel's report should be invalidated on due process grounds, particularly with respect to the prejudicial effective date directly resulting from the Librarian's failure to comply with a critically important statutory requirement." *Id.* at 55 (citing *Baumgardner* v. *Secretary, Dept. of Housing and Urban Development*, 960 F.2d 572 (6th Cir. 1992).

Copyright Owners assert that they have interpreted section 119 from the beginning of this proceeding as requiring an effective date of July 1, 1997, for the new rates, and that SBCA never challenged that position until now, thereby estopping SBCA from raising the issue. Copyright Owners Reply at 42–43. Copyright Owners also argue that the Librarian's good cause delay in commencing this proceeding does not invalidate it, and that the cases cited by SBCA are inapposite. *Id.* at 44–45. Copyright Owners also attach an accompanying motion to strike the affidavits offered by SBCA to corroborate its argument that the July 1 effective date will cause undue hardship on satellite carriers. SBCA opposes this motion.

3. Recommendation of the Register

Section 119(c)(3)(C) provides that:

> The obligation to pay the royalty fee established under a determination which—
>
> (i) is made by a copyright arbitration royalty panel in an arbitration proceeding under this paragraph and is adopted by the Librarian of Congress under section 802(f), or
>
> (ii) is established by the Librarian of Congress under section 802(f) shall become effective as provided in section 802(g) or July 1, 1997, whichever is later. 17 U.S.C. 119(c)(3)(C). Clause (i) of section 119(c)(3)(C) described the situation where the Librarian adopts the decision of the CARP, while clause (ii) describes the situation where the Librarian has rejected the CARP's decision and substituted his own determination.[15] The effective date of the established rates is either July 1, 1997, or the date set pursuant to section 802(g), whichever date is later.

Section 802(g) governs judicial review of the Librarian's decision in this proceeding. The section gives "any aggrieved party who would be bound by the [Librarian's] determination," 30 days in which to notice an appeal with the United States Court of Appeals for the District of Columbia Circuit. The section then provides that "[i]f no appeal is brought within such 30-day period, the decision of the Librarian is final, and the royalty fee * * * *shall take effect as set forth in the decision.*" (emphasis added). Section 802(g) then provides that if an appeal is taken, "[t]he pendency of an appeal under this paragraph shall not relieve persons obligated to make royalty payments under section ( ) * * * 119 * * *" Nothing else is said in section 802(g) with regard to the possible effective date of royalty rates.

SBCA and Copyright Owners strongly disagree over the effective dates of the royalty rates established in this proceeding. SBCA believes that the effective date can be no sooner than 30 days after the Librarian's decision (i.e. November 26, 1997) at which time it will be known whether or not the Librarian's decision is final, while the Copyright Owners maintain that July 1, 1997, is the proper effective date. The Register has examined the governing language of sections 119(c)(3)(C) and 802(f), and notes an incongruity with respect to the July 1, 1997, date.

Section 119(c)(3)(A) provides that this proceeding was supposed to have started on January 1, 1997. Given the 180-day arbitration period, as provided by section 802(e), the latest the Panel could have delivered its report would have been June 29, 1997. The Librarian would then have the 60-day review period in which to either accept or reject the Panel's decision, which would place the date of final agency action at no later than August 28, 1997. This is almost two months after July 1, 1997. While Congress could have contemplated the Librarian completing his review in less than 60 days, it is hard to imagine that Congress could have expected him to complete it in just one day: the time period from delivery of the Panel's report on June 29 to the issuance of the Librarian's decision on July 1, 1997. The more likely explanation is that Congress envisioned the CARP delivering its report well before—at least two months—the 180-day deadline. Only in this manner could the Librarian have issued a decision that was before July 1, 1997, thereby justifying inclusion of the language "July 1, 1997," and "whichever date is later" in section 119(c)(3)(C).

Contrary to the assertions of the Copyright Owners, July 1, 1997, is not the statutorily prescribed effective date for the new royalty rates announced in today's decision. July 1, 1997, is only a contingency date in the event that this proceeding had ended before July 1, 1997, which it clearly did not. Rather, the Register must look to section 802(g), which provides that the effective date of the new rates is "as set forth in the decision." 17 U.S.C. 802(g). The Register interprets "decision" to mean the decision of the Librarian, and not the decision of the CARP, since section 802(g) only refers to the decision of the Librarian. Consequently, the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding, and it was contrary to law for the Panel to announce an effective date. *See* Panel Report at 54. The Register recommends that the Librarian reject the Panel's determination of an effective date.

The remaining issue is, if the Panel had no authority to set the effective date, what is the correct effective date for the Librarian to establish? Neither the statute, nor the legislative history, offers any guidance on this point.

[15] Interestingly, the statute does not address the situation, as in this proceeding, where the Panel's decision is accepted in part and rejected in part. Subclause (ii) most likely applies to this proceeding because the Librarian has established one of the royalty rates (the rate for local retransmission of network signals to unserved households).

Copyright Owners urge the July 1, 1997 date, and submit that SBCA is estopped from arguing for a later date since SBCA did not object to Copyright Owners' request to the Panel for a July 1, 1997, effective date. Copyright Owners Reply at 43–44. The Register recommends rejecting Copyright Owners' estoppel argument because the Panel did not have authority to set the effective date, and the matter is now being properly raised before the Librarian for the first time.

Copyright Owners also contend that July 1, 1997, must be the date because the evidence it presented to the Panel, particularly the PBS/McLaughlin testimony, was premised on a July 1, 1997, date. *Id.* at 42. According to Copyright Owners, if the Librarian adopts an effective date of January 1, 1998, he would have to increase the 27 cent fee to reflect the Panel's understanding of a thirty-month effective period for the new rates. *Id.* at 42–43.

The Register recommends rejection of Copyright Owner's contention for two reasons. First, the Panel accepts Ms. McLaughlin's testimony as a general matter to establish a workable benchmark. Panel Report at 31. The Panel did not accept her testimony, and its accompanying premises and assumptions, as *the* precise analysis of what the royalty rates should be. *Id.* Furthermore, although the Panel stated that "Ms. McLaughlin's analysis yielded a rate of $0.27 per subscriber per month averaged over the three year statutory period," Panel Report at 30, a July 1 effective date accounts for only half of the year, and Ms. McLaughlin did not so limit her testimony. PBS Proposed Findings of Fact and Conclusions of Law at 18–19.[16]

In the Register's view, an effective date later than July 1, 1997, does not significantly undermine the Panel's use of the 27 cent benchmark generally, or its later decision to adopt that figure specifically, nor does a later effective date require an upward adjustment.

The second, and most significant, reason for not setting the effective date at July 1, 1997, involves the issue of retroactive rulemaking. Although the Librarian's decision today involves review of the Panel's determination, it is also a final rule with respect to setting the rates. The Copyright Office has previously determined that it lacks the authority to engage in retroactive rulemaking. 54 FR 14217 (1989). The United States Court of Appeals for the District of Columbia Circuit, the only court with jurisdiction to consider an appeal of today's decision, has expressly held that the Copyright Act does not confer retroactive rulemaking authority. *Motion Picture Ass'n of America, Inc.* v. *Oman,* 696 F.2d 1154, 1156 (D.C. Cir. 1992). The Register does not believe that the Librarian has the authority to set an effective date for the new royalty rates which is prior to the issuance of today's decision.

Given this limitation, the issue still remains regarding the proper effective date. Copyright owners obviously desire an effective date as soon as possible, so that they may reap the benefits of the higher rates. There are, however, significant administrative considerations surrounding implementation of the new rates. Satellite royalty rates are calculated on a monthly basis, so that an effective date other than the first day of a month will require application of two sets of royalty rates (the old rates and the new rates) to one monthly calculation. The Register finds this not only burdensome to satellite carriers calculating the rates, but to the Copyright Office as well in administering the section 119 license and examining the statement of account. The Register, therefore, counsels against adopting an effective date that is other than the first day of a month.

Also, there are significant costs to the Copyright Office associated with implementing the new rates. New statement of account forms must be created and sent to satellite carriers, and staff must be trained to examine for application of the new rates. The Register notes that satellite statements of account for the second accounting period of 1997 are due to be filed no later than January 30, 1998. 27 CFR 201.11(c). An effective date in the second accounting period of 1997 would cause significant burden and hardship to the Copyright Office to prepare to collect royalties and issue and process statements of account generated by the new royalty fees by the January 30, 1998, due date. Consequently, the Register recommends that the new royalty rates, adopted in today's decision, not be effective until January 1, 1998.

In recommending a January 1, 1998, effective date, the Register draws support from section 119(c)(3)(C). As discussed above, Congress apparently contemplated the possibility of the issuance of a final decision in this proceeding before (perhaps even well before) July 1, 1997. Congress could have chosen simply to make the decision effective on the date of adoption, but instead chose July 1, 1997, as the later effective date. July 1 is the first day of an accounting period which, has the final decision issued on or before that date, would have allowed the Copyright Office ample time to prepare for implementation of the new rates. Because today's decision is issuing only two months from the end of the 1997/2 accounting period, a January 1, 1998, effective date is consistent with Congressional intent.

The parties have raised two other issues, discussed above, which the Register briefly addresses. First, SBCA alleges that because initiation of the CARP was delayed 2 months to enable the Librarian to rule on the matter of whether local retransmissions should be a part of this proceeding, the entire proceeding is invalid. The Register agrees with Copyright Owners that the cases cited by SBCA for this rather remarkable contention are inapposite. *United States* v. *Amdahl Corp.,* 786 F.2d 387 (Fed. Cir. 1986) involved a contract entered into by the Treasury Department that was statutorily outside the scope of its authority. Contracting outside the scope of authority differs significantly from postponing procedural dates for good cause. *Albenga* v. *Ward,* 635 F. Supp. 660 (S.D.N.Y. 1986) involved an agency that created rules beyond its authority. Again, this is significantly different. Finally, *Baumgardner* v. *Secretary, Dept. of Housing and Urban Development,* 960 F.2d 572 (6th Cir. 1992) involved the failure of an agency to timely deliver an accurate complaint. As SBCA notes, the court in this case did not find the agency action invalidated because the delay was not sufficiently prejudicial. The Register cannot find any convincing evidence of irreparable prejudice incurred by SBCA as a result of the brief delay, particularly where the Register is recommending a January 1, 1998, effective date.

Furthermore, the Register notes that the same claim of invalidity has been raised in a Copyright Royalty Tribunal proceeding, and expressly rejected by the D.C. Circuit. The Court stated: "It would be irrational and wholly unprecedented for a court to direct an agency to scrap a year's hearings and decisionmaking effort and start over because its proceeding did not conclude precisely on time." *National Cable Television Ass'n, Inc.* v. *CRT,* 724 F.2d 176, 189 n. 23 (D.C. Cir. 1983). The Register agrees with this view, and recommends rejection of SBCA's argument.

Second, in support of its position that satellite carriers would be unduly harmed by a July 1, 1997, effective date, SBCA submitted affidavits of satellite

[16] Ms. McLaughlin's testimony was based upon her projection of what the average cable network license fees would be for 1997 (26 cents), 1998 (27 cents) and 1999 (28 cents), not the actual figures. *Id.* at 19.

representatives. Copyright Owners moved to strike these affidavits, and SBCA opposed. The Register's recommendation of a January 1, 1998, effective date has mooted the issue. The Register does recommend, however, that the affidavits be stricken. The record is closed in this proceeding by order of August 14, 1997, section 251.55 does not permit submission of additional evidence. Although the matter of the effective date is for the Librarian, and not the CARP, to decide, such affidavits could only be accepted if the Librarian determined that the record needed to be reopened to take additional testimony. Since the matters discussed in SBCA's affidavits are moot, the Register recommends that they be stricken.

G. Additional Issues Raised by SBCA

SBCA raises several additional issues in its Petition to Modify. Because these issues all relate to evidence not adduced during the course of the proceeding, and the weight to be accorded evidence that was adduced, they are addressed together.

1. The first issue involves the history of retransmission consent negotiations under the communications law. Under retransmission consent, an MVPD must obtain the permission of a broadcaster before the MVPD can retransmit the broadcaster's signal to the MVPD's subscribers. Retransmission consent negotiations took place between the cable industry and broadcasters in 1993 and 1996. SBCA attempted to show that little compensation was obtained by broadcasters for permission to retransmit their signals in an effort to prove that the fees under the section 111 license represent actual fair market value. The Panel stated that "[w]e agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence. Unfortunately, the evidence adduced is so vague and replete with qualifiers as to provide little guidance." Panel Report at 34. The Panel noted cross-examination testimony of Ms. McLaughlin and Mr. Gerbrandt indicating that some compensation was paid, but also noted that Mr. Shooshan's and Mr. Haring's testimony discussed retransmission consent negotiations only in the context of local, and not distant, retransmissions. *Id.* at 35. The Panel concluded that the "testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis." *Id.*

SBCA submits that it could not present further evidence on the compensation received by copyright owners and broadcasters for retransmission consent negotiations because "discovery procedures do not allow the Carriers to determine those amounts." SBCA Petition to Modify at 35. SBCA asserts that the failure to present such information "should not be then turned against the Carriers to say that the retransmission consent negotiations cannot be properly quantified." *Id.*

Copyright Owners contend that the Panel correctly evaluated the evidence of retransmission consent negotiations and found it unavailing in making an adjustment to the benchmark. Copyright Owners Reply at 27–31.

2. The second issue involves the issue of the costs incurred by cable networks in assembling the clearances for their programming. SBCA attempted to show at hearing that copyright owners do not have costs in the broadcast signal retransmission context, and therefore an appropriate downward adjustment of the benchmark must be made. The Panel stated that the clearance costs in the cable network arena are unknown, but did not agree that a downward adjustment of the benchmark was required:

> In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH[17] distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of high clearance costs on fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required.

Panel Report at 41.

SBCA argues that it could not determine the costs to copyright owners for clearances of cable networks since such information was not within the scope of discovery, and therefore one should not assume, as the Panel did, that such costs could automatically be shifted to satellite carriers. SBCA Petition to Modify at 30.

Likewise, SBCA argues that it could not quantify at hearing the added benefit that satellite retransmission gives copyrighted programming (digital picture quality, inclusion in electronic guides) because of "the absence of any ability to take discovery." *Id.* at 31–32. The Panel determined that "no quantifiable benefit was identified and no evidence adduced" to demonstrate added value by satellite retransmission." Panel Report at 40. SBCA asserts that "the Panel held the Carriers to an unworkable standard of proof." SBCA Petition to Modify at 32.

[17] "DTH" stands for "direct to home."

In reply, Copyright Owners contend that the Panel acted correctly. Copyright Owners Reply at 24–27.

3. A third issue involves quantifying the effect on advertising revenues and superstation fees of satellite retransmissions of broadcast signals. SBCA asserts that they quantified "as well as could be in a regime which denies discovery" that advertising revenues are higher because copyright owners known that their programming reaches a wider audience due to satellite retransmission. SBCA Petition to Modify at 36. Likewise, SBCA asserts that "superstation taxes"—the amounts charged to broadcasters by copyright owners—are greater, particularly in the sports context, because copyright owners know that satellite retransmissions result in greater viewership. *Id.* at 37–38. SBCA presented evidence that both the professional baseball and basketball leagues extracted additional compensation from WGN in Chicago and WTBS in Atlanta—both superstations known to be widely distributed on satellite—though the amount was not quantified. SBCA Proposed Findings of Fact and Conclusions of Law at 72–73.

The Panel addressed the potential for increased advertising revenue due to satellite retransmissions, stating:

> The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues. At their own expense and risk, the satellite carriers developed a DTH market which expands the broadcasters [sic] reach at no cost to the broadcasters. However, we agree that no empirical evidence demonstrating an increase in advertising revenues was adduced. Though the broadcasters (and hence the copyright owners) clearly benefit from expanded reach, these benefits may not be amenable to measurement and quantification. The copyright owners further argue that because most basic cable networks also advertise, to the extent that broadcasters to benefit from expanded reach, the benefit is already reflected in the cable network benchmark. We agree *to a point*. Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price. Though some downward adjustment from the copyright owners *general* approach seems appropriate, we are unable to quantify such an adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

Panel Report at 36–37. The Panel did not use the term "superstation tax" in its discussion.

SBCA complains that the Panel ignored its evidence of increased revenues from satellite retransmissions, and that it is "no excuse that the [o]wners refused to divulge the extent of the compensation." SBCA Petition to Modify at 38. SBCA asserts that not subtracting this added value from the benchmark would result in "vastly overcompensat[ing]" copyright owners. *Id.*

In reply, Copyright Owners assert that the Panel correctly determined that, while such revenues might conceptually result in a downward adjustment, SBCA failed to quantify such an adjustment. Copyright Owners Reply at 31.

4. The fourth issue concerns the impact of increased royalty fees on the satellite industry and the continued availability of retransmitted broadcast signals. The Panel accepted Ms. McLaughlin's testimony that the 27 cent fee would not significantly adversely impact satellite:

> Although Ms McLaughlin did not perform a demand elasticity study, she testified that after the 1992 rate increases, the number of broadcast stations retransmitted and the percentage of satellite subscribers to retransmitted broadcast signals remained constant. She concluded that despite an increase in the compulsory license rate to $0.27 per subscriber per month, the number of subscribers to retransmitted broadcast stations would continue to grow at substantially the same rate as the number of satellite subscribers generally. Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to $0.27 per subscriber per month and *not* passed on to subscribers, those rates would constitute only 30% of the average retail prices charged to subscribers leaving sufficient profit margin for the satellite carriers to avoid significant adverse impact to them or their subscribers.
>
> Again, we recognize that *any* rate increase, particularly if rates are set above those paid by their entrenched competitor, tends to adversely impact the satellite carriers. However, the satellite carriers did not attempt to quantify the impact of increased rates and adduced no credible evidence that the availability of secondary transmissions would be interrupted. Accordingly, we conclude that a rate increase to $0.27 per subscriber per month would have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public.

Panel Report at 46–47 (citations omitted).

SBCA contends that the Panel had no evidence upon which to base its conclusion that a dramatic rate increase would not adversely affect satellite carriers and their subscribers. SBCA Petition to Modify at 42. Rather, SBCA asserts, the evidence, including that relied upon by Ms. McLaughlin, "shows that satellite carriers have yet to earn a profit, especially in the DBS market, and that the C-Band market is waning." *Id.* SBCA notes that Ms. McLaughlin did not perform a demand elasticity analysis for increased rates, and that her testimony that the 1992 rate increase did not impact subscriptions or the number of signals carried was not based upon anything in the record. *Id.* at 42–43. SBCA also mentions that the 1992 panel reduced its initial rate increase because of a concern for disruptive impact. 57 FR 19061.

SBCA also charges that the Panel ignored its evidence regarding the disruptive impact of a rate increase. It points to the testimony of Mr. Parker who stated that there is a limit on the package rate to be charged consumers, and that satellite carriers have traditionally gone back to cable networks to demand concessions in order to keep prices down. SBCA Petition to Modify at 44. SBCA argues that any increases in the rates should be examined in light of the impact lower fees would have on copyright owners. According to SBCA, there is no evidence that suggests that the current fees of section 119 have any adverse impact on the copyright and broadcast industries. *Id.* at 45.[18]

In reply, Copyright Owners assert that it was completely within the discretion of the Panel to accord weight to Ms. McLaughlin's testimony that satellite carriers would not be adversely impacted by the increased royalty rates. Copyright Owners Reply at 36. Copyright Owners argue that Mr. Parker's testimony is nonspecific, and that the testimony of Mr. Edwin Desser and Mr. James Trautman show that satellite carriers are owned by large corporate enterprises that can well afford the proposed rate increase. *Id.* at 39–40.

Recommendation of the Register

The Register is addressing these four arguments presented by SBCA together because they contain a common thread: the absence of evidence adduced before the Panel and, where evidence was produced, the weight and sufficiency to be accorded it.

Given the limited scope of the Librarian's review in this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." 61 FR 55663 (Oct. 28, 1996) (citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). In the case of the impact of a rate increase on the satellite industry, the Panel chose to accord weight to Ms. McLaughlin's testimony that her proposed rate increase would not adversely affect the satellite industry, rather than Mr. Parker's testimony. It was clearly within the Panel's discretion to do so. There is record testimony that supports the Panel's conclusion, and the Librarian's review need go no further. *Recording Industry Ass'n of America, Inc.* v. *CRT*, 662 F.2d 1, 14 (D.C. Cir. 1981) (decision must be upheld where decisionmaker's path may reasonably be discerned).

The remaining issues contested by SBCA—the impact of retransmission consent negotiations, added value from digital picture/electronic guides and avoidance of clearance costs, and increased advertiser revenue and compensation from expanded markets—predominately involve the matter of evidence not presented to the CARP. In essence, SBCA contends that if the discovery rule of 37 CFR 251.45(c)(1) were broader, if could have presented evidence to the Panel on these issues that would have caused the Panel to reduce the 27 cent royalty fee. Instead, according to SBCA, the Panel punished it for failure to present the necessary evidence to quantify the reductions, and the 27 cent rate, consequently, is unfairly high.

Section 251.45(c)(1) of the rules provides that, after the exchange of the written direct cases, a party "may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony." 37 CFR 251.45(c)(1). The Librarian has clarified that discovery is limited in CARP proceedings:

> Discovery in CARP proceedings is intended to produce only the documents that underlie the witness' factual assertions. It is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties.

Order in Docket No. 94–3 CARP CD 90–92, 1–2 (October 30, 1995). There are several reasons for the limited discovery practice. CARP proceedings are relatively short in duration (180 days) and, like this proceeding, begin and end according to statutorily specified deadlines. There is not sufficient time to conduct wide-ranging discovery,

[18] Regarding the economic impact of royalty fees on copyright owners, the Panel stated that "[t]he parties devoted little hearing time to this issue." Panel Report at 46. The Panel did "accept the obvious, general notion that higher royalty rates provide greater incentive to copyright owners while lower rates would render broadcast stations a '* * * less attractive vehicle at the margin for program supplies.'" *Id.* (citation omitted).

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REBUTTAL TESTIMONY OF JOEL N. AXELROD

I have been asked by the Joint Sports Claimants to respond to testimony of Dr. Stanley Besen, a witness for the Motion Picture Association of America in the 1990-92 cable royalty distribution proceeding. Dr. Besen criticized certain market research (specifically, constant sum surveys of cable operators) conducted by Bortz & Company. For the reasons I will discuss, I do not believe that Dr. Besen's criticisms are justified.

1. Qualifications

I am President of BRX/Global, Inc., an international market research and consulting firm. Founded in 1972, BRX/Global, Inc. conducts market research, primarily for Fortune 500 companies. Approximately 75% of its research is international in scope. BRX has frequently utilized the constant sum methodology to aid a variety of clients in making various business decisions, including pricing decisions.

I graduated from Brown University in 1954 with Honors in Psychology and in 1958 earned a Ph.D. in Social Psychology from the University of Rochester. From 1958 to 1963, I worked in advertising research for several major advertising agencies. I then became Manager of Advertising Research at Lever Brothers with responsibility for the development of improved techniques for measuring advertising effectiveness.

While at Lever Brothers, I conducted what has become a seminal study validating use of the "Constant Sum Scale" to predict purchase behavior ("Attitude

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Measures That Predict Purchase", Journal of Advertising Research, March 1968). The results of my study were later confirmed in research done under the auspices of the Advertising Research Foundation (Russell I. Haley and Peter B. Case, "Testing Thirteen Attitude Scales for Agreement and Brand Discrimination", Journal of Marketing (1979)).

In 1966 I joined the Xerox Corporation as Director of Marketing Research. For the next six years, I held a variety of positions including Corporate Planning Manager, Manager of Business Development and a Group Program Manager with P&L responsibility.

I was elected to the Conference Board Council on Marketing Research, and served as Chairman of the Association of National Advertisers Planning and Evaluation Committee. I have frequently spoken at meetings sponsored by the advertising Research Foundation, the American Marketing Association and the Canadian Professional Market Research Society. I have authored one book entitled, "Choosing the Best Advertising Alternative". I have a second book entitled "Brand Equity Systems(SM): The Warrior's Weapon" which will be published later this year.

2. Testimony

The purpose of the Bortz surveys was to determine the relative values that cable operators placed upon certain categories of "distant signal" programming they had carried during the preceding year. With the assistance of others both inside and outside his firm, Bortz designed a survey which utilized the constant sum scale; cable operators were asked to allocate a distant signal program budget among the different

program categories. Burke Marketing Research administered the survey over the telephone to nearly 200 cable operators each year.

Besen took the position that the responses to the Bortz surveys do not accurately reflect the relative values that cable operators attached to the program categories measured. He criticized the responses as "simply answers to questions". (Tr. 6343) He suggested that one could not expect to receive accurate answers in a short telephone interview which posed a "hypothetical" question. (Tr. 6376, 6381)

I do not agree with Besen's criticisms of the Bortz surveys. Short telephone interviews are widely used in business to business research. Often they are the only way to obtain information from a representative sample of busy executives.

Moreover, the respondents to the Bortz survey were not simply answering any sort of questions. They were responding to a constant sum question. The constant sum technique is widely used and its predictive validity for purchase behavior has been amply documented in my published research as well as research reported by Haley and Case.

The unique contribution of the constant sum scale is that it forces the respondent to think in terms of relative value, which precisely parallels the decision process that the business executive faces. Constant Sum questions are particularly appropriate when, as here, one seeks information about relative values. Use of the constant sum scale here was within accepted business practice.

Survey research is imperfect, and therefore it is invariably open to the type of criticism advanced by Besen. Nevertheless, survey research (including research using

constant sum scales) is routinely relied upon by the business world to make a variety of decisions involving substantial amounts of money. When conducted properly, surveys provide decision makers with useful information on which important decisions can be based.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: 13 February 1996

Joel N. Axelrod

TESTIMONY OF JAMES P. MOONEY

ON BEHALF OF THE JOINT SPORTS CLAIMANTS

IN THE 1990-1992 CABLE ROYALTY DISTRIBUTION PROCEEDING

AUGUST 1995

Qualifications

I served as the President and Chief Executive Officer of the National Cable Television Association ("NCTA") from July 1984 through June 1993. NCTA is the principal trade association of the cable television industry. During my tenure as President and CEO, the NCTA membership consisted of cable operators serving over 90% of the 57 million cable subscribing households in the United States, and over 60 nationally distributed cable programming networks. While at NCTA, I managed a staff of nearly one hundred employees and an annual budget of $30 million. I also served as a member of the Association's board of directors and executive committee.

As spokesman for the cable industry, I had frequent contact with senior executives of virtually every major MSO and cable network (including various superstation interests). I was personally involved in intra-industry discussions and strategizing concerning, among other matters, the cable television compulsory license.

I represented the cable industry, both in negotiations with other parties and before the Congress, on a variety of issues, including the compulsory license.

Prior to becoming President and CEO of NCTA, I served for three years as the Association's Chief Operating Officer. Before that I served as Chief of Staff to the Majority Whip of the U.S. House of Representatives.

Summary

I understand that this proceeding involves allocation of the 1990-1992 royalty fees collected pursuant to Section 111 of the Copyright Act. I further understand that, in past proceedings, these royalties have been allocated among the copyright owners based upon the relative value of the programming. The Joint Sports Claimants have asked for my views concerning the value the cable industry placed on distant signal sports programming (as opposed to distant signal movies and syndicated shows) during the 1990-1992 period.

For the reasons set forth below, it is my opinion that cable operators value distant signals, including "superstations," principally for their telecasts of major league sporting events. Other programming features of the standard superstation lineup, i.e. movies and syndicated shows, are plentiful on cable basic networks. Consequently, absent major league sports, I believe the economic and political disadvantages of the compulsory license system would otherwise lead the cable industry to forego continued support of the license, insofar as it affects carriage of distant (as opposed to local) signals. The cable industry has continued to support the

compulsory license -- notwithstanding the political consequences of that action -- primarily to ensure continued access to the major sports events televised by superstations and other distant signals.

Background

Cable television began to take its modern form in the late-1970's, when technological advances made possible the construction of systems with large channel capacities at practicable cost. Thus, traditional 6 and 12 channel "community antenna" systems could be rebuilt with sufficient bandwidth to accommodate 24, 36 and even 42 channels, and for the first time cable seemed attractive outside of rural areas. Blue sky euphoria ran high. As *Newsweek* magazine somewhat breathlessly announced in 1981, "The wire is bringing in a flood of new programs -- and new technology that could transform the American home." (*Newsweek*, August 24, 1981, p.44.)

But the fact is that until the mid-1980's cable was a medium without its own message. Elaborate program creation and distribution infrastructures had long existed to serve the broadcast and theatrical movie industries, but, apart from local access channels and a premium channel business pioneered by Time, Inc.'s HBO, cable-specific programming trailed far behind the creation of cable distribution plant. Indeed, notwithstanding the launch of over 50 nationally distributed cable networks between 1978 and 1985, made-for-cable programming did not really begin to make a mark until after basic service rate deregulation took effect in 1986. Deregulation led

directly to increased programming expenditures, and, increased programming expenditures led directly to quality improvements that increased subscribership, viewership, and ad revenues for the cable networks.

One important exception must be made to this commentary, however, concerning the role in cable played by the out-of-market, or "distant" broadcast signal. In the absence of cable-specific programming, the engine that drove cable subscriber penetration throughout the late 1970's and early 1980's was the distant signal, and in particular the "superstations." Whether overtly cable friendly, as in the case of Ted Turner's WTBS, or ostensibly involuntary, as in the case of WGN, WWOR and WPIX, the cable superstations provided the "added value" cable needed as it moved out of the rural areas and into suburban and urban settings.

The satellite delivered superstations (as well as other independent TV stations distributed regionally to cable systems by microwave), substantially increased the amount of syndicated shows, movies and sports available in a given television market, and, in effect, allowed the subscriber to bypass Federal regulatory policies which sharply limited the number of TV stations in most areas. Until the mid-1980's very few "independent" TV stations existed outside the top 50 markets. As a result of F.C.C. rules, the typical smaller market had no more than 3 stations, each of them an affiliate of one of the 3 major networks.

Cable in the 1990's: The Programming Revolution

The proliferation since the 1980's of new independent stations, the advent of the Fox network, and the maturation of cable as a video medium in its own right make the television universe of the 1970's seem a far away world, indeed. Since the late 1980's the typical American TV household has available to it several dozens of nationally distributed networks, including basic cable networks such as USA, TNT and the Family Channel which -- together with large parts of the schedules of networks such as A&E, Discovery, Lifetime, Nickelodeon and Bravo -- are frankly modeled on the "look" and program content of an independent broadcast station.

A look at the Washington, D.C. cable system's (D.C. Cablevision) lineup of channels -- which is typical in the industry -- illustrates the plenitude of syndicated programs and movies on cable basic networks, and the overall enormous number of programming choices available to basic subscribers as alternatives to the three traditional broadcast networks. During the week beginning July 16, 1995, subscribers to D.C. Cablevision's basic service tier could have chosen among more than 4 movies per evening shown among the 8 cable basic networks listed above, in addition to the back to back movie lineup on AMC, and the 4 evening movies available during the week on the 3 local independent broadcast stations.[1] Comparable prime time figures for syndicated programs during the same week were an average of 14.6 hours of

[1] All program scheduling information of D.C. Cablevision in this and subsequent sections of this paper are taken from *The Washington Post*'s TV Week magazine covering the period July 16-22, 1995.

programming per evening on the 8 cable networks and 5.5 hours per evening on the local independent broadcast stations (excluding in all cases the schedules of NBC, ABC and CBS affiliates). It requires little analysis to conclude that the unique role once played by superstations in these program categories is now a matter of history.

The cable programming revolution has not come inexpensively. Operator spending for programming roughly doubled between 1986 and 1993, from $2 billion to $4 billion, almost all of it in license fees to cable networks. Basic subscribers increased during the same period only from 42 million to 59 million. (*Cable Television Developments*, National Cable Television Association, 1994.) Cable networks, however, typically have softened disproportionate increases in program costs by providing cable operators with carriage incentives ranging from local advertising "avails" to licensing discounts on packages of commonly owned networks. Since channel capacity on most cable systems still falls short of the number of networks seeking carriage, the competition among networks seeking slots on cable systems can be fierce, with some of the newer entrants actually offering to reverse the customary direction of cash flow, and pay carriage fees *to* the operators.

Cash incentives offered to operators for network carriage still are relatively rare, but that such schemes exist at all illustrates both the abundance of cable programing available to operators, and the atypical circumstances which now characterize the business of distributing superstations signals. Satellite carriers offering these signals obviously can adjust the transport fees they charge to operators to fit specific competitive circumstances, but they have no control over the copyright

fees established by the government for operator use of these signals. Nor are they able to offer incentives such as local ad "avails" since the Copyright Act strictly forbids alteration of the signals' content. Superstation signals, therefore, increasingly are a commodity outside the normal rules of the burgeoning marketplace for cable programming. Just as they have lost much of their unique programming value in the face of proliferating cable networks, the commercial circumstances under which they are made available to operators have become, comparatively speaking, increasingly expensive and inflexible.

Controversy Over the Compulsory License

The legal, legislative and political history which gave rise to the cable compulsory license is beyond the scope of my testimony. It is sufficient for these purposes to say that in 1976 Congress validated the practice of cable operators retransmitting broadcast signals, local and distant, but imposed an obligation on them to pay a royalty fee for the use of distant signals.

Over time, the compulsory license became something of a political albatross for the cable industry. Beginning in 1979 representatives of the program production community, professional sports and the broadcasters formally asked Congress to repeal the compulsory license. In each of the six subsequent Congresses some or all of these groups reiterated their demands for the license's repeal, frequently in hearings convened for the purpose. Many of the industry's critics repeatedly cited the

license as a prime example of cable's "special treatment," and the cause of a perceived "uneven playing field."

The FCC joined the fray in 1988 when it established "syndex" rules allowing local TV stations which had purchased exclusive rights to specific syndicated programs to require cable operators to delete those programs from distant signals imported into the local station's market. Five months later, in an associated proceeding, the Commission voted to recommend to Congress that the license itself be repealed.

The actual political likelihood of the license being repealed during this period was no more than slight. The role played by the *controversy* over the license was substantial, however. The resentment within the broadcasting community at cable's ability "to compete with broadcasters using the broadcasters' own signals," whether strictly rational or not, grew rather than diminished during the 1980's, and played an important part in mobilizing broadcasting industry support of cable re-regulation in the early 1990's. Similarly, the long running "backyard dish" controversy of the late 1980's, in which C-band dish dealers sought a Congressionally legislated mandate to obtain distribution rights for cable program networks in the C-band market, pitted cable interests against the C-band dealers' claims that all they wanted was a fair analogue to the cable compulsory license. The dish dealers' insistence on "equal treatment" bore fruit when Congress included "access to cable programming" provisions in the 1992 cable re-regulation bill.

Of greater consequence, during this same period copyright holders of programming carried on distant signal stations raised repeated complaints about the compulsory license and sought to tar the cable industry as an "unregulated monopoly." This phrase was taken up as a battle cry by editorial writers around the country, and by the industry's critics inside and outside of Congress. It was, after the wounds the industry inflicted on itself through its pricing and service policies, the single most important factor leading to Congressional enactment -- over President Bush's veto -- of cable re-regulation in 1992.

During the period discussed the cable industry's leadership was for the most part aware of the diminishing commercial value of distant (as distinguished from local) signals, and of the growing political liabilities of the compulsory license system, at least insofar as it concerned distant signals. Why, then, did the license survive?

The answer to this question is that from the cable perspective, the principal impediment to reaching a settlement that would have called for the license's repeal was sports.

The Sports Difference

Sports programming represents the one peculiarly attractive attribute of distant signals, particularly superstations, which has remained constant since Ted Turner's WTBS went on the satellite in 1976. Unlike syndicated sitcoms,

action-adventure shows, talk shows, game shows and movies, major league sporting events are sold to television in accordance with teams' franchise agreements, which almost always require a degree of geographic exclusivity within the sport. Thus while any cable network can compete for national distribution rights to any package of movies or series programs, absent the compulsory license, a distant signal such as WTBS would not as a practical matter have the ability to contract for national distribution of an individual team's sports programming.

By virtue of the compulsory license, superstations, can overcome the practical obstacles to showing national sports programming and an invariable attribute of all superstations has been inclusion of major league sports in the program lineup. Indeed, the principal motivating factor in Ted Turner's 1976 purchase of the Atlanta Braves was protection of his capacity to nationally telecast major league baseball games, an advantage he would have lost had the Braves' then owners gone ahead with a plan to move the money-losing team out of Atlanta. The following year Turner purchased the Atlanta Hawks basketball team, citing the same reasons. (Goldberg and Goldberg, *Citizen Turner*, Harcourt Brace, 1995, pp. 174-178, 194). Had Turner not taken these steps, and lost the Braves and Hawks games, it is unlikely that WTBS ever would have gone beyond being a regional signal on cable systems, or that the entire superstation phenomenon would have occurred.

The continuing importance of superstation-delivered major league sports to cable companies can be seen, again, by looking at the channel lineup of the Washington, D.C. cable system during the week of July 16, 1995. D.C. Cablevision

subscribers had a choice of 15 games over the 7 day period: 5 were Orioles games, of which 3 were available off-air. Of the remaining 10 (out of market) games, 7 were on superstations. When it comes to major league sports, then, superstations quite clearly fulfill a radically more important role on the D.C. cable system than the one they now play in other program categories. This is typical throughout the industry.

Another way in which major league sporting events differ from other kinds of programming is the way in which fan loyalty strongly discourages removal of favorite teams' games from a cable system's menu of viewing options. It is a rule of thumb in the cable industry that not all cable subscribers are sports fans, but all sports fans are cable subscribers, and the easiest way to make them unhappy is to cut off their access to teams they follow. Another generally accepted rule of thumb is that sports fans are uniquely capable of outrage.

Tales of subscriber uproar over planned "drops" of superstations are legendary in the cable industry. When the Media General cable system in Fairfax Country, Virginia, decided to drop WGN in the middle of the 1988 baseball season, angry Chicago Cubs fans deluged the country council with phone calls and petitions demanding that the signal be restored. While the council had no authority to dictate the cable system's programming choices, it could -- and did -- immediately begin to deny otherwise routine requests by Media General dealing with buildout schedules, imposing daily fines when the company's construction crews couldn't keep up. After a group of subscribers calling themselves "Citizens for the Cubs" filed a lawsuit

against the company accusing it of failing to live up to its franchise requirements concerning, among other things, the buildout schedule, Media General capitulated and restored WGN to its lineup.

Similar controversies over planned drops of superstations (most of which, interestingly, also involved the Cubs) have occurred in other parts of the country, most frequently in the immediate aftermath of royalty increases ordered by the now disbanded Copyright Royalty Tribunal.

While serving as President of NCTA, on numerous occasions I was questioned by Members of Congress upset that cable systems located in their districts or states planned to drop distant signals carrying constituents' favorite teams. On more than one occasion Members of Congress publicly complained to me that the superstation televising *their* favorite team's games was unavailable on the cable systems serving their home in the Washington, D.C. area. Once a United States Senator whose local home was in Montgomery County, Maryland, and who apparently believed (ironically) that coverage of Cubs games was a peculiar feature of the Fairfax County, Virginia cable system, repeatedly asked me in a hearing why the Montgomery County cable system couldn't carry the Fairfax County system's programming. In the time it took me to elicit that it was the Cubs games on WGN he was after, the exchange had become somewhat murky to most others in the hearing room, but no one missed that he felt strongly about it. (Hearing, Committee on Commerce, Science and Transportation, Subcommittee on Communications, October 25, 1989, pp. 117-119.)

The ardor sports fans feel for their favorite teams was summed up by the Chicago native who led the Fairfax County citizens' effort to restore WGN to the Media General dial. "I have followed the Cubs since I can remember," said Larry Krakover. "I grew up with the team. It means a lot to keep up with them." (The Washington Post, July 1, 1988, Metro section, p.1.)

Conclusion

Cable operators tend to be hesitant to discontinue carriage of distant signals, particularly superstations, but their hesitancy is due to the importance to their subscribers of major league games carried on these signals, not the unique role superstations once played in adding movies and syndicated shows to the basic subscriber's menu of choices.

Movies and syndicated shows now abound on cable basic networks and on the hundreds of independent TV stations that have sprung up throughout the country in the wake of the FCC's liberalization of its licensing rules.

Given the political difficulties the cable industry has experienced in Washington as the price of defending the compulsory license for distant signals, repeal has seemed attractive. On balance, however, the continued commercial importance of major league sports carried on superstations has tipped the balance. It makes little sense to undermine the attractiveness of subscribership to an important demographic group -- sports fans -- who form the bedrock of the cable customer base.

HOULIHAN LOKEY HOWARD & ZUKIN

A SPECIALTY INVESTMENT BANKING FIRM

Statement of Paul J. Much

I am a Senior Managing Director of Houlihan, Lokey, Howard & Zukin, Inc., 175 North Franklin Street, Chicago, Illinois 60606. My curriculum vitae is attached. Houlihan Lokey is a professional services corporation providing corporate financial advisory services in the areas of financial consulting, financial and valuation opinions, middle market investment banking and financial restructuring. I am a member of Houlihan Lokey's Board of Directors as well as its Operating and Valuation Committees.

I have 23 years of experience in valuation consulting and have addressed a variety of valuation questions across many different industries. Such valuation questions have included the total value to be paid in an acquisition, merger or sale; the allocation of value in reorganizations; the relative values of various rights and privileges embedded in different classes of stock; the value of such intangible assets as media contracts, customer contracts, supplier contracts, player contracts and sports franchises; valuation-related solvency questions in leveraged restructurings; and the value of contingent assets and contingent liabilities. My clients have ranged from small closely held companies to major NYSE corporations; governmental agencies such as the Department of Labor, Department of Justice, the Internal Revenue Service, and the Office of Thrift Supervision; and foreign governments. From time to time, I have testified in court, published articles, co-authored or served as a contributing author to reference texts, and taught valuation courses.

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In connection with this testimony, I have reviewed the following documents:

1. Copyright Royalty Tribunal (Docket No. CRT 79-1) - 1978 Cable Royalty Distribution Determination;
2. Copyright Royalty Tribunal (Docket No. CRT 91-2-89CD) - 1989 Cable Royalty Distribution Proceeding;
3. Cable Operator Valuation of Distant Signal Non-Network Programming prepared by Bortz & Company, Inc. (August 1993);
4. Testimony of Stanley M. Besen (November 1991); and
5. Testimony of Robert W. Crandall, Ph.D. (August 1991).

In relation to the 1990-92 Cable Copyright Royalty Distribution Proceeding (Docket No. 94-3 CARP-CD90-92) (the "Proceeding"), I have been asked to address the following question regarding the allocation of copyright royalty payments:

Are cable operators' valuations of programs purchased as distant signals under the compulsory license an equitable and sufficient basis for the allocation of copyright royalties to the owners of those programs?

For the reasons stated below, an allocation of royalty payments consistent with the relative valuations placed on programs by the cable operators is both equitable and appropriate.

I understand that the rate or price at which cable operators pay to acquire distant signal programming is fixed by statute, that cable operators may retransmit any distant signals they choose, and that no copyright owner may refuse to allow the retransmission of its program. The pool of royalties at issue in the Proceeding is comprised of the total payments made by cable operators for the distant signal programs they actually purchased in 1990 through 1992 from the universe of alternative programming available to them. As I understand the circumstances surrounding the Proceeding, the total amount of royalties available for allocation is fixed, and only the copyright owners of programs that were actually retransmitted on a distant signal basis in 1990 through 1992 may be awarded any portion of those royalties.

The task of allocating copyright royalties to claimants is very similar to the task of allocating value to different classes of securities in a corporate acquisition where the total consideration to be paid for the company has already been determined. The allocation among the various classes of security holders is based on their relative economic rights and privileges which in turn form the basis for their relative market values. When asked to determine such an allocation, we would apply a standard of *"fair market value"*.

"Fair market value" is defined as *"the price at which a property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts"*. This definition is set forth in IRS Revenue Ruling 59-60 ("59-60") and is widely accepted in the investment/financial community as the basis for value.

In the marketplace, rational investors make their decisions based upon their expectations of future investment returns and their perceptions regarding the risk of those returns. As set forth in 59-60, Section 3.03, *"valuation of securities is, in essence, a prophesy as to the future and . . . the prices of stocks which are traded in volume in a free and active market by informed persons best reflect the consensus of the investing public as to what the future holds . . ."*

In the allocation of a fixed total value among classes of securities, the same principle of rational decision making holds. Different rights and privileges of different classes of securities drive investor assessments of relative returns and risk and therefore relative value. It is this assessment of relative value that must be considered when allocating the total consideration among classes of security holders. Under the premise of *hypothetical willing parties*, the determination of fair market value focuses on the economic attributes of the securities to be valued and not the individual motivations of the specific parties who hold those securities. Therefore, any circumstances unique to a particular security holder would not be considered relevant. Two extreme examples would be (1) a seller highly motivated by an immediate cash need and (2) a security holder unwilling to sell at any price. If both held the same security, both would be entitled to equivalent value and receive the same consideration. An unwilling seller would not be entitled to a premium.

In forced corporate transactions such as a merger, unwilling sellers do have available to them a dissenter process. In such proceedings the dissenting shareholders are still required to sell their shares, but at a court's determination of fair value. It should be noted, however, that a

determination of such fair value in no way entitles the dissenter to any more than a pro rata share of the total value of the enterprise which is the subject of such corporate action.

Applying these general valuation principles to the case here, the assessment of relative return and risk is made by the cable operator who is acquiring packages of programming as the revenue-generating assets to be used in attracting and retaining subscribers. The owners of such programming, the copyright holders, are required to sell when the cable operator selects its distant signal purchases. As in the corporate transactions described above, the appropriate basis to determine the allocation of relative value among different classes of sellers is driven by the buyer's economic assessment of their relative return potential and associated risk.

As the above points illustrate, an allocation based on the cable operators' relative valuations of programs purchased as distant signals under the compulsory license represents an equitable allocation in this marketplace. Also, as the above illustrates, it would not be appropriate to adjust the cable operator's relative valuations for perceived differences in the respective motivations of particular sellers.

Any allocation should be based on the practical realities of this marketplace. Here, cable operators made real economic decisions to purchase particular packages of programs, albeit within a regulated marketplace. If instead this marketplace had been free of all constraints, the transactions might well have produced a different mix of programs at a different total price. Since the task here is to allocate the monies actually paid among the programs actually

purchased, basing an allocation upon theoretical values in a hypothetical unregulated marketplace would produce correct results only by chance.

Considering the fact that this is a regulated marketplace, an allocation of the royalties in this Proceeding based on the results of the cable operator survey would properly follow equitable valuation principles commonly applied in other forced-sale situations.

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EXPERIENCE

1984-Present **Houlihan Lokey Howard & Zukin** Chicago, IL

Senior Managing Director, National Co-Director of Valuation Services, and member of the Board of Directors. Administrative responsibility for regional offices and investment management subsidiary. Specialist in valuation issues and corporate bankruptcy/solvency matters. Typical valuation assignments cover ESOPs, mergers and acquisitions, leveraged buyouts, going-private transactions, specialized securities and solvency questions. Bankruptcy-related assignments include pre-transaction solvency analysis and post-petition viability assessments. Clients range in size from start-up situations to NYSE corporations, governmental agencies and foreign governments. Nationally recognized authority on the economics of professional sports. Substantial expert testimony experience. Frequent speaker to professional groups.

1978-1983 **Duff and Phelps, Inc.** Chicago, IL

Group Vice President promoted from Vice President of Financial Consulting Division. Appointed to the firm's Senior Valuation Committee in 1981. Specialized in valuations of publicly and privately owned companies, strategic financial planning, and bankruptcy analysis.

1972-1977 **Harris Trust and Savings Bank** Chicago, IL

Assistant Vice President, Financial Services Division. Promoted from Corporate Services Officer in 1974. Consultant to Bank customers, specializing in financing-related decisions and valuation-related issues. Also involved in administration of the Bank's problem loans, including those in bankruptcy proceedings. Taught in-house courses on corporate finance and term-lending to Bank's commercial loan officers.

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1972 **Northwestern University**
Master of Business Administration, Finance and Accounting

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Articles:

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Financial Valuation: Businesses and Business Interests (1993 Update), Contributing Author, published by Warren Gorham & Lamont.

The Handbook of Employee Stock Ownership Plans, Contributing Author, Edited by Gerald I. Kalish and published by Probus Publishing in 1989.

Valuation of Businesses -- California CPA Foundation, Editor and Senior Instructor in 1984 and 1985. Received the 1984 National Award for Excellence from the American Society of Association Executives.

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In the Matter of 1990, 1991, and 1992 Cable Royalty Distribution Proceedings	)))))))	Docket No. 94-3 CARP-CD90-92

DECLARATION

I, Paul J. Much, declare under penalty of perjury that the Statement of Paul J. Much presented in the 1990-1992 Cable Copyright Royalty Distribution Proceeding is true and correct to the best of my knowledge, information and belief.

Paul J. Much

Dated: August 15, 1995

TESTIMONY OF DR. MICHAEL A. SALINGER

I. Qualifications

I am an Associate Professor of Economics in the School of Management at Boston University and a Special Consultant to the National Economic Research Associates, a firm specializing in microeconomic analysis for litigation, regulatory proceedings, and strategic planning. I received a B.A. Magna Cum Laude with Distinction in Economics from Yale University and a Ph.D. in economics from the Massachusetts Institute of Technology, where I was a National Science Foundation Doctoral Fellow. From 1982 to 1990, I was first an Assistant Professor and then an Associate Professor at Columbia University. From June 1985, through August 1986, I took a leave of absence from Columbia to work as an economist at the United States Federal Trade Commission, where I worked on antitrust enforcement.

My primary area of expertise in economics is the field of industrial organization. One of the industries I have studied is the cable television industry. In 1988, I wrote a paper about vertical integration between cable operators and pay cable networks, such as Home Box Office and Showtime. In May 1989, I testified before the Communications Subcommittee of the Senate Commerce Committee about that research. Three times, I have been retained by the Federal Trade Commission to give economic advice and, if appropriate, expert testimony concerning mergers in the cable industry. (In all three cases, the Commission chose not to challenge the mergers, so no testimony was required.) In 1994, I analyzed alternative treatments of "affiliate transactions" in the Federal Communications Commission's cable price regulations. Turner Broadcasting submitted these analyses as appendices to their comments on those regulations.

II. Background

I have been retained by counsel to Devotional Claimants to identify the appropriate method for the Distribution of the 1990, 1991, and 1992 Cable Royalty Funds.[1] My analysis considers two alternative procedures for allocating copyright fees paid by cable systems for retransmitted broadcast signals: the Bortz survey and the Nielsen study.[2]

The two studies identify completely different benchmarks for the distribution of copyright royalty fees. The Bortz survey, submitted on behalf of the Joint Sports Claimants, identifies the relative value, in terms of attracting and retaining subscribers, of different categories of distant signal programming. A telephone survey was conducted to determine how cable operators would allocate a fixed budget among the alternative classes of programming that are available on the distant broadcast channels that they carry.[3] Once the survey results were compiled, the Bortz survey identified the percentage of a fixed budget that would be allocated to each of the

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[1]60 Federal Register 14971 (1995).

[2]While I am aware that an alternative methodology has been suggested in the past, I will reserve judgment on any new studies until they are filed, if at all, in this newly consolidated proceeding.

[3]Cable Operator Valuation of Distant Signal Non-Network Programming, 1989, Bortz & Company, Inc., August 1991. In particular, question 4 of the survey asks the following:

> Finally, I would like you to estimate the relative value to your cable system of each type of programming carrier on the stations I mentioned, other than any national network programming from ABC, CBS and NBC. That is, how much do you think each such type of programming is worth, if anything, on a comparative basis, in terms of attracting and retaining subscribers. The stations we are interested in are, again...
>
> Assume you have a fixed dollar amount to spend on the non-network programming carried on these stations; in other words, a programming budget. Please think in terms of what percentage, if any, of the fixed dollar amount you would spend for each type of programming...

programming categories.[4] Thus, the Bortz survey offers a measure to distribute the copyright royalties based on a relative value for each type of programming to the cable operators, the same population which pays the royalty fees.

The Nielsen study, which was submitted on behalf of the Program Suppliers, however, attempts to measure how many viewers watch each show on distant signal channels. The Program Suppliers offered a viewing-to-time ratio that purports to indicate a program category's relative popularity and value. While the Nielsen study measures--to some degree--the viewing audience,[5] it is not a reliable surrogate for the determination of the value of programming to attract and retain subscribers to cable television systems.

My analysis of the problem of determining the appropriate allocation of copyright royalties among the programmers also considers the testimony filed by economists in the 1989 Cable Royalty Proceeding. Specifically, I have read the written testimony of Dr. Robert Crandall (August 1991) and the written rebuttal testimony of Dr. Stanley Besen (November 1991).

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[4]I have not addressed purely technical issues associated with the Bortz study such as whether the stratification was appropriate and so on. Rather, I have simply addressed the conceptual question of the relative value of viewership ratings and the answer to question 4 in the Bortz study to allocate the copyright royalties.

[5]Although I am aware from reading the Copyright Royalty Tribunal's ("CRT's") decision in the 1989 Cable Royalty Proceeding (57 Federal Register 15286 (1992)) that there are technical questions about whether the Nielsen study measures viewership accurately, I will assume that it does so.

III. Nielsen Ratings as a Measure of Market Valuation

The CRT articulated a number of reasons for using the viewership results of the Nielsen study only as a starting point in the 1989 Cable Royalty Proceeding. The final determination acknowledges that "viewing *per se* did not necessarily correspond to marketplace value" and that "cable's goal is to attract and retain subscribers, and [cable operators] will offer 'niche' services, often unrelated to the volume of viewing, to induce segments of the population to subscribe."[6] In particular, I believe measures of audience shares are a poor gauge of either the benefit to cable television systems of programming or the marketplace value of programming to be shown on cable television systems. Therefore, the Nielsen study results are an inadequate measure of market valuation for the purposes of allocating copyright royalties to distant broadcast programmers.

There are three fundamental aspects of the economics of cable television that support this conclusion. First, cable television systems make most of their money from subscriber fees, not from advertising. Unlike advertisers, which rely on the results of viewership studies to target its audiences, cable operators are motivated to invest in programming that attracts subscribers to the system regardless of subscribers' actual number of viewing hours. Indeed, since cable systems are not allowed to insert their own advertising into distant signals, none of the value of programming on these signals arises from advertising revenues. Thus, the value of distant broadcast programming to a cable system is that it attracts and retains more subscribers to cable television at a given price. Alternatively, the added value of the distant broadcast programming to a cable system is that it increases the monthly price that a cable system can charge if the

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[6] 57 Federal Register 15301 (1992).

number of subscribers remained unchanged, or were held constant.

Second, even if cable operators did make most of their money from advertising, the value of a particular distant broadcast show to a cable system would be its ability to increase the audience for the entire cable system. A program's audience share might be quite different from its contribution to the total cable-viewing audience. A show with a large audience share might contribute very little to the total cable-viewing audience if, were it not available, most of its viewers would have watched another show instead.

Third, cable television service is sold as a bundle rather than as a set of channels that can be purchased separately. A show with a small but loyal following might increase the number of subscribers more than some other shows with larger shares. The CRT recognized the relevance of an avid viewership when it increased allocations to certain claimants in the 1989 proceeding.[7]

Simply by observing the offerings of cable systems, it is plain that audience shares do not accurately measure the value of distant channels (and, in turn, the programming on that channel) to a system. Indeed, the most commonly viewed programs on cable systems tend to be network programs on local broadcast channels. In areas with good television reception, viewers do not need to subscribe to a cable system to receive these signals; they are free. Even if these channels account for most of the viewing time on a cable system, they are not the reason that people subscribe to cable. On the other hand, there are channels (e.g., The Weather Channel) that have extremely low audience ratings but are offered on many cable systems (and for which cable systems pay subscriber fees). Therefore, viewership, while a convenient measure (because such

[7]57 Federal Register 15301 (1992). The CRT seemingly endorsed this view in its actions and words: "The Tribunal has made these allocations upon a showing by a claimant group of the intensity or avidity of its viewers that drive cable systems to respond to them out of proportion to their actual viewing."

data are necessary for the networks and advertisers to determine their respective strategies), is an inadequate indicator of the value of specific distant broadcast programming.

IV. The Bortz Survey

The Bortz survey was conducted to offer a solution to the problems associated with using the Nielsen study's viewership information to determine the value of programming to cable systems. Instead of relying on the behavior of viewers once they subscribe to a cable system, the Bortz survey offers insight into the behavior of the cable operators--the entities making the decisions on which distant broadcast programming will be offered and paying the copyright royalty fees. To determine to relative value of the categories of distant broadcast programming, the cable operators were asked to allocate a fixed budget to the different classes of programming.

A. The "Ideal" Question

In evaluating the Bortz survey, it is important to begin with the basic problem confronting the Copyright Arbitration Royalty Panel ("CARP") in this matter. Cable operators have paid a fixed amount of copyright royalties into a fund, and the CARP must allocate these royalties among the copyright owners of the programs that were carried.

Dr. Besen, on behalf the Program Suppliers, presented two central criticisms of the Bortz survey as a means of solving this problem. One of Dr. Besen's criticisms is that the key question of the survey (question 4, see footnote 3, infra.), which asks cable operators to allocate a fixed

budget among types of programs, is not a well-posed economic question. Dr. Besen argued that it makes no sense to ask respondents to budget among categories without giving them the prices associated with each type of programming.

Dr. Besen is correct that the problem posed is not what might be termed a "classic budget problem," which is to choose quantities given a budget and prices. The answer to a classic budget problem would not, however, be relevant for this proceeding. The CARP does not need to determine quantities in its quest to determine the value of distant broadcast programming and to allocate royalties accordingly.[8] What needs to be determined are the prices. The following question is most relevant for solving the problem that the CARP faces in this case: "What prices of different types of programs would induce a cable system to purchase the programming mix that it actually showed?" This question is not a "classic budget problem," but it is nonetheless a well-formulated economic question.[9] These prices do represent the benefit of each type of programming.

The Bortz study asked respondents to choose budget shares, not prices. It is important to recognize, though, that the Bortz survey had to pose the problem in a way that made sense to the respondents. The question of what prices would induce operators to purchase what they actually aired makes sense to people with formal training in economics, but undoubtedly sounds odd, confusing, and difficult to answer to most people without such training. Given that the quantities are fixed, however, the budget shares imply the prices. I believe that question 4 in the Bortz

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[8]In this case, the "quantities" are the programming that was on distant broadcast signals that cable systems carried in from 1990 through 1992.

[9]This question is closely related to what is known as the "dual problem" in linear programming.

survey was a reasonable way to ask for the prices that would have induced cable operators to purchase the programming they carry in a way that would make sense to the respondents.

The Bortz survey suggests that the value of the Devotional Claimants' programming to cable systems is greater than its viewership might suggest. An additional piece of evidence supports this finding. Devotional broadcasters sometimes pay television stations to broadcast their shows. These broadcasters have an incentive to do so because viewers contribute money to the programmers to support the programming, much as viewers of Public Broadcasting Stations contribute to support the programming. The fact that viewers are willing to make contributions to support this programming suggests that they would be willing to make payments to subscribe to cable systems which offer the programming.

B. Average vs. Marginal Values

Dr. Besen's second criticism of the Bortz survey is that it measures the average value of a class of programming to cable systems, not the marginal value of each individual program. Given the interpretation of the Bortz survey given above, this criticism is not correct. If the responses to the question 4 in the survey are interpreted as reflecting the prices (using budget shares divided by quantities as the surrogate for prices) at which cable operators would purchase the quantities that they actually offered subscribers, then the answers represent the marginal value to the cable system, not the average value.

One might argue that, notwithstanding the interpretation of question 4 in the Bortz survey given above, at least some respondents interpreted it to ask for the total value of different types

of programming. Dr. Besen's criticism is based on this interpretation. For that criticism to support the position that the Bortz survey understates the marginal value of movies and syndicated television shows, Dr. Besen would have to show that the ratio of the marginal to the average value of movies and syndicated reruns was greater than for sports, devotional and religious broadcasts, and other classes of programming. I have no reason to believe that to be the case, and no party has presented evidence needed to support Dr. Besen's interpretation.

Dr. Besen's only support for the argument that the Bortz survey understates the marginal value of shows provided by the Program Suppliers is that the survey placed movies and syndicated television shows into separate classes, but kept sports as a single class. Dr. Besen's logic goes as follows. To place a value on movies, a cable operator would have to contemplate the effect on its profits of offering all of its existing programming except for the movies on retransmitted broadcast stations (but including the syndicated shows on those stations). Similarly, to place a value on syndicated shows, it would have to contemplate the effect of offering all of its existing programming except for the syndicated shows (but including the movies on those stations). If, instead, the two classes of programming were combined in the survey, the cable operator would have to consider the effect of offering all of its existing programming except for both the movies and syndicated shows on retransmitted broadcast stations. To the extent that there are households that would subscribe when at least one of those groups of programming is offered but would not subscribe if neither was offered, then the effect of eliminating both would exceed the sum of the effects of eliminating just one.

While this line of reasoning might come naturally to people with formal training in economics, I question whether the questionnaire respondents picked up on this subtlety. I find

Dr. Besen's assertion that combining movies and syndicated shows would have increased their combined percentage to be highly speculative. Indeed, as a matter of common sense, splitting movies and syndicated shows into two categories might well have increased their combined percentage.

Finally, for whatever merit this criticism may have had more than ten years ago, its force is now greatly diminished. Since 1983, there has been substantial growth in the number of satellite signals carried by cable systems. A substantial portion of the programming on these signals is the same sort of programming that is on the distant broadcast signals carried by cable systems. Question 4 of the Bortz survey asks cable operators to allocate a budget to pay for the non-network programming on the distant broadcast signals that they carry. It does not ask them to allocate a budget among categories of programming on all the signals that they carry. The amount that a cable operator would willingly pay for the devotional and religious programming on distant broadcast stations depends on whether he considers the devotional and religious programming available on satellite networks and local broadcast signals to be sufficient. This amount reflects, therefore, the marginal value of devotional and religious programming on distant broadcast signals over the devotional and religious programming on satellite signals and local broadcast signals. At most, therefore, Dr. Besen's criticism is that the marginal value of all the devotional and religious programming on distant broadcast signals is different from the marginal value of a single devotional or religious program. The magnitude of this distinction is directly related to the distant broadcast signals' share of all devotional and religious programming available on a cable system.

V. Payments for Air Time

The implications, if any, of payments made for air time is another point to consider in the analysis of the value of programming. Devotional and religious broadcasters, which do not allow advertising during its programs, pay for air time. I do not believe that these payments have any implication for the marginal value which cable systems receive from devotional and religious programming on distant broadcast signals that they carry.

Unlike television stations that make money by selling advertising, devotional and religious programs do not interrupt their programs for commercials. Since television stations do not receive payments from advertisers during devotional and religious shows, the only way for television stations to make money during those broadcasts is to receive payment for the air time from the programmers. The National Football League would have to pay to get the Super Bowl on the air if it banned advertising during the broadcast. These payments made by, in this case, devotional and religious programs for air time reflect the peculiar economics of broadcast television rather than consumer demand for the product--devotional and religious programming.

To assess whether payments for air time have any implications for the "marketplace value" of the programming, it is important to be specific about the market setting in which the value would be established. I can think of two distinct market possibilities. The first possibility is that cable systems would have been required to purchase the programming on distant broadcast signals that they actually carried in a given year, such as 1989. The marketplace value would then refer to the prices that would have induced the cable systems to purchase those programs. Under this interpretation, the responses to the Bortz study measure the marketplace value of programming.

An alternative setting is a market in which the distant broadcast stations could charge for retransmission consent. While this interpretation might seem natural given that the copyright royalty fund exists because of mandatory licensing, it poses several conceptual problems. Most important, if distant broadcast stations were free to set prices for retransmission, then both the stations cable systems carry and the programming available on different stations might be different. The CARP must, however, allocate funds to the programs that were carried, not the ones that would have been carried under different rules.

VI. Conclusion

To assess the value of each program to a cable system and the marketplace value of programming, the CARP should want to know the prices for programs that would have induced cable systems to offer the mix of programming that they actually offered in each of the years under review, 1990, 1991, and 1992. The cable operators' responses to the Bortz survey can be used to infer that information. That information, however, cannot be inferred from the Nielsen study's measures of audience viewing. Thus, there is a stronger economic foundation for using the Bortz survey to allocate copyright royalties to programmers than for using Nielsen measures of audience shares.

Declaration

I, Michael A. Salinger, declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

Michael A. Salinger

Date: August 16, 1995

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PUBLICATIONS:

"Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases?" (with M. Klass), *Antitrust Bulletin*, forthcoming this fall.

Zipf Plots and the Size Distribution of Firms" (with M. Stanley, S. Buldyrev, S. Havlin, R. Mantegna, and G. Stanley), *Economics Letters*, forthcoming.

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MAJOR CONSULTING ACTIVITIES:

Analysis of treatment of affiliate transactions in cable price regulations for Turner Broadcasting. 1994.

Written testimony on behalf of Devotional Claimants before the Copyright Royalty Tribunal. Testimony concerned appropriate procedures for allocating royalties paid by cable operators among different classes of programs on retransmitted broadcast signals. 1993.

Deposition testimony for Long Lake Energy Corp. in monopolization suit against Niagara Mohawk Corporation. Testimony concerned appropriate market definition. 1991.

Affidavit concerning class certification in a class action suit against bottlers of Coke and Pepsi. Affidavit argued that a conspiracy to raise the price of colas sold on promotion to grocery stores affected soft drink prices in general. 1989.

Testified as to damages on behalf of Record Club of America in a breach of contract suit against United Artists. Testimony concerned distinction between marginal and average cost and econometric projection of sales. 1988.

Retained by Federal Trade Commission three times as potential expert in merger cases in the cable television industry.

OTHER PROFESSIONAL ACTIVITIES:

Co-Director, Boston University Telecommunications Policy Project.

Paper presentations (last five years): CREST Conference on Wireless Communication, Charles River Associates Conference on Antitrust in Today's Economy; Winter Meetings of the Econometric Society (1992); Telecommunications Policy Research Conference (1991, 1992); American Enterprise Institute Conference on Regulation of Network Industries; Boston University; Chicago; Columbia; Connecticut; Dartmouth; GTE Labs; Harvard; MIT; NBER; and New York University.

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August 1995

TESTIMONY OF MR. EDWIN S. DESSER
PRESIDENT OF NBA TELEVISION VENTURES
ON BEHALF OF THE NATIONAL BASKETBALL ASSOCIATION

I am presenting this testimony before the arbitration panel convened pursuant to the Satellite Home Viewers Act of 1988. My testimony is presented in support of the copyright owners' request for an increase in the statutorily prescribed license fees. I believe that the fees should be increased to better accord with the value of the programming in the open market and to accurately reflect the important contributions that copyright owners have made, and will continue to make, to the development and growth of the home satellite dish (HSD) industry.

NBA and Other Sports Programming on
Retransmitted Superstations and Network Stations

During the 1991-92 season approximately 120 NBA games will be retransmitted to HSD owners nationwide on five different superstations -- WGN, WTBS, WWOR, KTVT, and KWGN. Superstations now distribute more NBA games nationally than either NBC or TNT -- nearly as many as the League's two national carriers combined.

In addition, the NBA has contracted with the NBC television network for the telecast of approximately 50 games per season (including the NBA Finals) and 36 telecasts of the show "Inside Stuff," all of which is also retransmitted to HSD owners.

The superstations and network signals distributed to HSD owners also provide a substantial amount of sports programming belonging to Major League Baseball, the National Football League, the National Hockey League, the National Collegiate Athletic Association and other groups. For example, the superstations will televise more than 600 Major League Baseball regular season games in 1992. HSD owners also will receive in 1992 the Major League Baseball All-Star Game, League Championship Series and World Series, as televised over the CBS network.

Attached to my testimony are copies of various advertisements and brochures highlighting the sports programming on superstations and network stations delivered to HSD owners.

Value of Comparable NBA Programming

It has been my experience over the past twenty years as a broadcaster and programmer that the best way to ensure a copyright owner a fair return and a distributor a fair income is to allow the parties to reach an arms-length agreement. Accordingly, in order to establish a license fee which would be acceptable to both copyright holders and "copyright users," and one that would compensate both parties for their relative creative and technological contributions and financial investments, it is necessary to analyze comparable transactions consummated in the free market.

There are at least three recent examples where NBA programming, like that retransmitted over superstations, is televised outside of local team markets. However, in these cases, the NBA and the television carriers have negotiated a fee per subscriber that provides each with a satisfactory return, and provides home satellite viewers around the country with NBA programming.

First: The closest parallel to the retransmission of a distant signal to satellite viewers is the distribution by a regional sports network of NBA programming to satellite viewers outside the local market of the local NBA team. Twenty-three (23) different regional sports networks have negotiated with the NBA for this right. Each has agreed to pay the NBA, as copyright holder, 15¢ per satellite subscriber for each game carried by the regional sports network to home dish owners outside of the local territory of the team (the "extended market fee"). Since the average regional sports network carries about 50 games per season, the NBA receives approximately $7.50 per year (or 62¢ per month) for each HSD owner subscribing to a regional sports network.

Applying this rate to, for example, the 30 Chicago Bulls' games on WGN which are retransmitted to satellite viewers outside of Chicago would mean that the NBA alone would receive $4.50 per year (or $0.37 per month) with respect to each WGN subscriber.

Second: Satellite Sports Network ("SSN") distributes regional sports network programming to satellite dish owners, including on average 50 NBA games per season. For the right to resell the SSN service, distributors pay SSN a wholesale rate of $83 per year (or $6.92 per month) per satellite subscriber. (SSN,

through the regional sports networks it carries, pays the NBA the applicable extended market fee with respect to its satellite subscribers outside the local market of an NBA team).

Third: Under the NBA's TNT agreement, TNT has the right to nationally distribute to satellite dish owners and cable viewers a package of up to 80 NBA games per year. TNT has paid the NBA $66,000,000 with respect to the 1991-92 season. This works out to 1.5¢ per satellite/cable subscriber per game, given TNT's current combined subscriber level of 55,176,000. Thus, just to the NBA, TNT is paying approximately 10¢ per subscriber per month.

Marketplace Rates Are Appropriate and Necessary For the Development and Growth of Satellite Television Industry

As President of NBA Television Ventures, I am charged with studying new television-related business opportunities for the NBA. In particular, I am responsible for recognizing the viability of various emerging television technologies and evaluating the market factors which may affect our ability to exploit such new technologies.

Based on my experience, it is my opinion that the copyright holders are the driving force behind both the explosion of available programming and the technological advances that currently mark the fledgling TVRO industry. If, for example, the NBA did not undertake the risk and invest the money to hire players, coaches, and referees, lease arenas, sell tickets, market the NBA to sponsors, stage exhibitions and, most importantly, license broadcasts to telecasters willing to pay a market value, there would be no major league basketball programming available to dish owners. Similarly, because it must be televised live from wherever a sporting event is being held, sports programming has contributed to the widespread use of satellite technology.

In contrast, satellite carriers make use of existing technology developed for other uses. For example, satellites were launched, programming channels developed, and marketing software and hardware created for, and by, the cable, broadcast, and other industries. Even advances in satellite scrambling and decoding equipment, originally developed largely at the behest of copyright owners to protect their property rights,

cannot be credited to the research and development initiatives of satellite carriers.

In addition, although the NBA is committed to evaluating the potential for a DBS service that could provide NBA programming directly to the public, distribution of NBA programming via satellite poses significant risks to various existing NBA businesses. Every satellite consumer who views an NBA game is not buying a ticket, is not parking a car, and is not buying concessions. Nor is that dish owner watching or listening to that game on the local radio or television station that negotiated with the NBA for the broadcast rights to that game. Moreover, satellite carriers are not subject to FCC and league rules designated to preserve exclusive rights, such as the FCC's Sports Blackout Rule.

Similarly, an artificially low rights fee severely compromises the NBA's ability and incentive to create and market new delivery options, like a package of DBS games, for the public. Based on my experience, it will be difficult, if not impossible, to successfully developed a new DBS distribution service in competition with retransmitted distant signals if the NBA television product is already available to satellite distributors through those distant signals at far below market prices.

Conclusion

The NBA is eager to see the satellite industry flourish. Our concern, however, is with satellite carriers who, myopically, wish to expand and promote their businesses by taking advantage of an artificially low price on valuable NBA and other programming. By refusing to negotiate or pay a market price, satellite carriers, in the long run, are doing the satellite industry harm. Unless satellite carriers either participate in the free market for programming or are at least required to pay a prescribed fee that approximates the actual value of the programming aired on superstations and network affiliates, copyright owners will have no incentive to continue to foster the development and growth of the home satellite industry.

DIRECT TESTIMONY OF STEPHEN D. SILBERMAN
BEFORE
THE COPYRIGHT ROYALTY TRIBUNAL ARBITRATION PANEL
February 6, 1992

My name is Stephen Silberman. I am a principal in Microeconomic Consulting and Research Associates, Inc., a private economics consulting firm. I have been asked by counsel for the Copyright Owners to analyze whether the current statutory rate paid by satellite carriers for distant signal programming that they distribute to TVROs under a compulsory license reflect, or are consistent with, what the likely market value of that programming would be in 1993 if the copyright holders were able to charge satellite carriers directly for distant signal programming. As explained below, in my opinion the current statutory rates are substantially below the market rates that the copyright owners would earn if they were not subject to a compulsory license.

I. Qualifications

After receiving my Ph.D. in economics from Yale University, I worked in the Antitrust Division of the U.S. Department of Justice from 1974 to 1982, first as a staff economist in the Economic Policy Office and then as assistant director for regulated industries. In the latter capacity, I was involved in several matters related to the broadcast industry. Since leaving the Department of Justice, I have been employed as a private consultant, spending much of my time on antitrust matters and

regulatory proceedings involving competition policy. Among the matters that I have worked on in the broadcast industry are the Financial Interest and Syndication Rules, cable deregulation, and Turner Broadcasting System's attempted acquisition of CBS. As a result of this work, I am generally familiar with the program production and distribution industries. My vitae is attached to this testimony.

II. Per Subscriber Rates for Similar Programming Not Subject to Compulsory License

Both satellite carriers and cable operators currently compensate copyright owners for programming distributed under compulsory license at rates set by statute as adjusted by the Copyright Royalty Tribunal. I am informed that satellite carriers currently pay royalties equal to $0.12 per month per subscriber for each superstation they distribute and $0.03 for each signal broadcast by a network station.[1] New rates for this programming are scheduled to take effect in 1993. I have been asked by the Copyright Owners to analyze whether the current rates are less (or more) than the satellite carriers would pay for the programming broadcast by distant signals if that programming was not subject to a compulsory license.

To estimate the market price per subscriber that satellite

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[1] According to information from the Copyright Office for 1991-1, six satellite carriers offered a total of 16 distant signals to TVRO owners. Of these, 6 were commercial network affiliates, 9 were national or regional "superstations," and one was a public television station. For 1991-2, an additional public television station was offered, for a total of 17 stations.

carriers would pay, I have considered the prices that cable programmers, who are not subject to compulsory license, charge cable operators for programming similar to that broadcast by these distant signals. The market prices per subscriber that cable operators pay for this programming can serve as an estimate of the market price that satellite carriers would pay for distant signal programming distributed to TVRO owners under a compulsory license provided that (1) the programming is of comparable value to viewers and (2) cable operators and satellite carriers can be expected to pay similar market prices per subscriber for programming distributed under compulsory license.[2]

As to the second of these two caveats, there are two reasons to expect entities that distribute programming to TVRO owners to pay a market price per subscriber similar to (if not greater than) that paid by cable operators. First, I am informed that under the Satellite Home Viewer Copyright Act of 1988 a satellite carrier may be legally prohibited from discriminating between the charges to TVRO distributors and to cable operators.[3]

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[2] I understand that satellite carriers themselves typically distribute distant signal programming to dish owners, in which case the satellite carrier stands between the programmer and the subscriber in the same way a cable operator does. Satellite carriers sometimes distribute the programming to home dish owners through third-party TVRO distributors. Regardless of how the satellite carrier chooses to distribute the acquired programming at the retail level, the (wholesale) market price paid by the satellite carrier to acquire that programming would be the same.

[3] The Federal Communications Commission is currently investigating whether satellite carriers have engaged in illegal discrimination.

Specifically, if discrimination is unlawful, then the prices TVRO distributors pay inclusive of the compulsory license fee must equal the prices cable operators pay, after adjusting for any net difference in the distribution (as distinct from programming) costs per subscriber.

Second, in my opinion it is reasonable to assume that TVRO and cable households place similar values on a given television signal. That is, I would expect cable operators and satellite carriers to charge retail subscribers similar prices for the same programming, net of the charges for delivering the signal.

Of course, many TVRO owners reside in areas where their viewing options are very limited if they do not have satellite service. This suggests that, if anything, TVRO owners may value distant signals more than cable subscribers.[4] If this is the case, and if discrimination is not prohibited by law, the market price that satellite carriers would pay for programming distributed to TVRO owners may well exceed the market price paid by cable operators. This is because the price a distributor (cable operator or satellite carrier) will pay for programming is related to the price that it can charge viewers. (In economic parlance, a distributor's demand for programming is "derived" from the demand of its retail customers.) Hence, if

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[4] See, for example, Federal Communications Commission, First Scrambling Report, Gen. Docket No. 86-336, 2 FCC Rcd. 1669 (1987), para. 135. Only TVRO owners who reside in "white" areas can legally receive network broadcast signals via satellite. Hence, unlike many cable customers, those TVRO owners who purchase network broadcast signals cannot receive them free over the air.

discrimination is not illegal, the assumption that cable operators and satellite carriers will pay the same market price per subscriber for program license fees may result in an underestimate of the market value of broadcast signal programming distributed to TVRO owners by satellite carriers.

I turn now to the question of which of the cable program services (sold at market-based prices to cable operators) have programming that is comparable in value to the distant signal programming distributed under compulsory licenses. Because the programming offered by cable systems is highly diversified, not all cable program services charge the same price per subscriber, and not all cable services offer programming comparable to that found on broadcast signals. However, the composition of programming carried by several cable services, particularly USA Network, TNT, Nickelodeon, and A&E, appears similar, taken as a whole, to the programming carried on distant signals.

The programming found on a commercial distant signal is comprised to greater or lesser extent of syndicated off-network series, older theatrically distributed films, original series and first run syndication, sports, news, and public affairs programming, and the music that runs through that programming. Excluding sports, public broadcasting stations carry similar categories of programming, although with more emphasis on public affairs and other cultural programming. My impression is that the bulk of the programming carried by each of the cable services listed above falls in several of these same categories. For

example, on the one hand, USA Network has off-network syndicated programs, theatrical releases, sports and original programming, but little, if any, news. Nickelodeon and A&E, on the other hand, carry little if any sports.

Table 1 shows the "top of the rate card" license fees per subscriber that Paul Kagan estimates these four cable services will charge cable operators in 1993.[5] The "top of the rate card" fee is the list or suggested price to smaller cable operators. The weighted average license fee per subscriber for these four cable services is $0.279 per month.[6]

It is my understanding that these fees include transponder costs; that is, cable operators do not have to pay the program service or a satellite carrier any additional fee for delivering the signal. To find the value per subscriber of the programming,

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[5] A note accompanying the source for the table 1 data indicates that the estimated 1991-93 fees for TNT includes a "surcharge" for National Football League games. The broadcast networks also offer affiliates National Football League games.

[6] The average is calculated using the number of subscribers per service as weights.

I considered using the average actual per-subscriber payments made by cable operators to cable programmers, which are lower than the fees in table 1. However, the market price paid by satellite carriers for distant signals in 1993 would likely be significantly higher than the average reported payments by cable operators. First, current cable operator payments to programmers reflect contracts that were signed in the past under different market conditions than either those existing today or those that will exist in 1993. Indeed, I suspect that the older the contract, the less the operator is paying relative to a similarly situated operator who signs a contract today. Second, the average actual payments for which I have data are for 1990. Hence, even ignoring the higher prices that programmers will receive under new contracts, the 1993 average will be higher as a result of inflation.

Table 1

1993 LICENSE FEES FOR CABLE PROGRAM SERVICES WITH PROGRAMMING MOST LIKE DISTANT SIGNALS

(Top of the rate card fees)

Service	1993 Fee	1991 Cable Subscribers (million)
TNT	$0.42	54.7
Nickelodeon	0.27	55.5
USA	0.25	56.9
A&E	0.17	51.0

Weighted average fee: $0.279

Sources: Paul Kagan, Cable TV Programming, March 25, 1991
NCTA, Cable Television Developments, September 1991

it is necessary to subtract the cost per subscriber of delivering the signal. I estimate that the cost to these program services of leasing transponders is less than $0.01 per subscriber per month.[7] Therefore, using the average net license fee for these four cable services to approximate the average market value of distant signal programming, a market-based copyright fee that the satellite carrier would pay for a distant signal would be in the neighborhood of $0.27 per TVRO subscriber.

Table 2, which shows the license fees for other cable program services, provides additional evidence that in 1993 the market value to satellite carriers of distant signals would significantly exceed the current $0.12 compulsory license fee per subscriber. Several widely distributed "specialty" program services, such as ESPN, CNN and MTV, charge significantly higher fees per cable subscriber. The services that are forecast to sell for less than $0.12 (such as BET and CNBC) do not have wide audience appeal and reach relatively few subscribers.[3] In addition, they spend substantially less on programming than

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[7] Sources at Satellite Business News and Video Technologies, Inc. report that single C-Band transponders lease for between $50,000 and $200,000 per month, depending on the nature of the satellite service. Cable program services ordinarily use one to two transponders to deliver service to the entire country. At $200,000 per month, the transponder cost per subscriber for a cable program service with 50 million subscribers and two transponders would be $0.008.

[3] NCTA, Cable Television Developments, September, 1991, reports that CNN, ESPN and MTV had 58.9, 58.8 and 56.6 million subscribers, respectively, and that CNN and MTV were carried on 10,963 and 6,405 systems, respectively. BET and CNBC had 31.2 and 43 million subscribers, respectively, in 2,400 and 3,000 systems.

TABLE 2

CABLE NETWORK LICENSE FEES
(Top of the Rate Card)

NETWORK	1990	1991	1992	1993
BET	0.06	0.07	0.08	0.09
CMT	0.05	0.08	0.08	0.09
CNBC	0.08	0.09	0.10	0.11
CNN[a]	0.32	0.33	0.35	0.37
COMEDY CHANNEL[b]	0.07	--	--	--
DISCOVERY[c]	0.07	0.08	0.11	0.13
ESPN[d]	0.35	0.38	0.38	0.38
FAMILY CHANNEL	0.08	0.11	0.12	0.13
FNN	0.065	0.08	0.09	--
COMEDY TV	--	0.07	0.09	0.11
HEADLINE[e]	0.32	0.33	0.35	0.37
LIFETIME	0.12	0.13	0.14	0.15
MTV[f]	0.24	0.25	0.26	0.27
TLC	0.06	0.07	0.08	0.09
TNN	0.20	0.20	0.25	0.25
TWC[g]	0.085	0.099	0.099	0.099
VH-1[h]	0.03	0.04	0.05	0.06
VISN	0.03	0.03	0.03	0.03

Source: Paul Kagan, Cable TV Programming, March 25, 1991, No. 155.

a. Discounts available if system also carries TBS Headline News and/or TNT.

b. Comedy Channel and HA! TV merging 4/1/91

c. Rates are for systems signed up by 1/87 (90% of systems). 1989-1992 rates for new affiliates are $0.016, $0.185, $0.22 and $0.22 respectively.

d. Does not include NFL surcharge.

e. Free if carried with CNN.

f. Performance discounts available for multiple coverage of MTV network services.

g. Rates based on DMA location, not size of system.

h. Rates are for VH-1 if MTV is also carried.

superstations. For example, Paul Kagan estimates that WTBS incurred $105 million in program expenditures for 1991, whereas BET, CNBC, Comedy TV, and Country Music TV spent $14, $32, $50, and $2 million, respectively.[9] These factors suggest that cable operators value this programming less than they value distant signal programming.

It is true that cable operators have the right to sell a small quantity of time within cable service programs to local advertisers, whereas they cannot sell any advertising time on the broadcast signals they distribute. Therefore, cable operators receive some advertising revenues from cable program services but not from distant signals. All else equal, this additional advertising revenue should increase slightly the amount per subscriber that cable operators will pay for cable service programming relative to distant signal programming.

In principle, the 1993 market price for distant signal programming distributed to TVRO owners could also be somewhat below $0.27 per subscriber because the transactions prices paid

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[9] Paul Kagan, Cable TV Programming, January 22, 1991. The average per-service program expenditure (weighted by 1991 subscribers) for USA Network, Lifetime, A&E, and TNT was $133 million in 1991, or moderately higher than WTBS's program expenditures. USA's expenditures were estimated by Cable TV Programming as $175 million; TNT's were $240 million; and Nickelodeon's were $65.4 million. A&E spent the least of the four services on programming ($46 million). As might be predicted, A&E's estimated 1993 per subscriber charge to cable operators of $.17 (table 1) is lower than that for USA, TNT, and Nickelodeon. However, it is somewhat higher than Comedy TV's $0.11 fee (table 2), and, of the four alternative cable services mentioned in the text, Comedy TV is expected to spend the most on programming.

by some cable operators may be below the "top of the rate card" list prices shown in tables 1 and 2. However, other evidence -- found in the record of the Federal Communications Commission's "Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming"[10] -- provides additional support for the conclusion that the market price to satellite carriers per TVRO subscriber for the average distant signal substantially exceeds the present statutory fee of $0.12.

The National Rural Telecommunications Cooperative (NRTC) markets programming to TVRO owners. The NRTC reported to the FCC that Eastern Microwave offered it a contract under which the NRTC would pay Eastern $1.34 per month per subscriber for the signals of WWOR and WSBK, or $0.67 per signal.[11] The NRTC further stated that Southern Satellite charges it $0.79 per subscriber per month for WTBS.[12] Subtracting the copyright royalty fees which Eastern Microwave and Southern Satellite pay, these carriers earn $0.55 to $0.67 per TVRO subscriber per month to cover transponder costs and other costs (including profit) associated with marketing the signal through NRTC. Similarly, the NRTC reported that Netlink charged it $3.25 (or $0.65 per signal) for five Denver stations,

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[10] See FCC Report, General Docket 89-88, released December 29, 1989.

[11] Although the NRTC did not accept the contract, Eastern told the FCC that its offer "would effectively be the lowest per signal base rate paid by any third-party distributor for WWOR and WSBK." See FCC, General Docket No. 89-88, Report, Released December 29, 1989, pp. 27-28.

[12] Id.

including three commercial network affiliates, and a public broadcasting station. Even after subtracting the compulsory license fee paid by satellite carriers, these fees are still approximately twice the top of the rate card fees for attractive cable program services.

I have suggested that the value to households of programming on distant signals is similar to the value of certain cable programming services. I am informed that the copyright owners have taken the position that satellite carriers should pay the same license fee per subscriber for both superstation and network signals. By law, satellite carriers may sell network station signals only to "unserved households," that is, to households that cannot receive a network station over the air. 17 U.S.C. sec. 119(a)(2)(B). If satellite carriers are complying with this legal requirement, all households that receive a network station through the Section 119 compulsory license receive their first network station on that basis. Since dish owners are receiving programming on network stations that is not available to them over the air, there is no a priori economic basis for setting the compulsory license for these stations at a lower rate than for satellite-delivered superstations.

III. Conclusion

In my opinion, the evidence described here clearly supports the conclusion that the market value of the programming distributed under compulsory license by satellite carriers to TVRO owners far exceeds the current $.12 statutory license fee.

Further, it appears that if the compulsory license fees are not increased, satellite carriers may earn substantial net revenues from TVRO owners that in a free market would be paid to copyright holders and would likely further improve the programming available on distant signals. For example, if the TNT and USA networks had been allowed to charge cable operators only $0.12 per subscriber per month in 1990, their operator license fees would have been on the order of $68.8 and $76.3 million, respectively.[13] Since Kagan estimated that their actual 1990 license fee revenues were $205 and $102 million,[14] respectively, TNT and USA Network would have lost approximately $136 million and $26 million in revenues, respectively, if they had been forced to charge the $0.12 compulsory license fee.

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[13] These figures are calculated by multiplying the number of each network's cable subscribers (see table 1) by $1.44. Of course, if TNT and USA had been forced to charge lower license fees, the number of subscribers might initially have increased slightly, since neither service was carried by every cable operator. However, over time the revenue reduction could result in lower program expenditures which, in turn, could be expected to reduce program quality and the total number of subscribers.

[14] Paul Kagan, Cable TV Programming, January 22, 1991.

CURRICULUM VITAE

STEPHEN D. SILBERMAN

Principal
Microeconomic Consulting and Research Associates, Inc.
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Education

1975 Ph.D., Economics, Yale University
areas of primary interest: Industrial Organization, Microeconomic Theory and Regulation
1968 M.A., Economics, Yale University
1967 B.A., Economics, Oberlin College

Experience

Dr. Silberman has been with MiCRA since its inception in 1991. He is not only a principal but a founder of the firm.

Previously, he was a Vice President with ICF Consulting Associates, Inc. He specializes in antitrust economics and regulation. His experience includes:

- Providing economic analysis in merger investigations involving, among others, the following industries: television broadcasting, chemicals, pharmaceuticals, banking, leisure products, retailing, food processing, containers, soft drink bottling, medical imaging, tires, transportation, waste management, hospitals, electric utilities, and building products.

- Providing economic analysis in monopolization, price discrimination, and vertical restraints cases involving beverages, hospitals, communications, gasoline, tires, and insurance.

- Evaluating the competitive effects under regulation of an acquisition of a gas

utility by a competing electric utility.

- Analyzing the competitive effects of a joint venture between United Technologies Corporation and Rolls Royce to produce a new generation commercial jet engine.
- Critiquing and preparing damage and market share studies in dealer and agent termination cases, antitrust cases, and product liability cases.
- Testifying before juries on behalf of defendants in Robinson Patman cases brought by a retailer of men's clothing and an independent gasoline station.
- Evaluating the economic impact of repeal of the FCC's Financial Interest and Syndication Rule.
- Analyzing the economic and financial implications of network television audience share loss.
- Evaluating the consequences of Bell Operating Company Diversification in the Post-Divestiture Telecommunications Industry.
- Evaluating the economic consequences of substituting rate cap for rate of return regulation of telecommunication carriers.
- Analyzing the FCC's proposal to deregulate CATV rates in markets served by three or more broadcast stations.
- In Section 482 tax proceedings, analyzing whether a company's transfer prices were consistent with arm's-length bargaining.
- Analyzing risk sharing between television producers and networks to determine how investment tax credits for programs should be awarded.
- Testifying about the economic characteristics of franchises in a tax court proceeding.
- Analyzing the rationale for and effects of the Federal Home Loan Bank Board's rule limiting direct investments by S&L's.
- Analyzing the competitive effects of proposed rules for railroads to reimburse one

another for the use of boxcars under a car pooling agreement.

Prior to joining ICF, Dr. Silberman worked for eight years at the Department of Justice where he was a Senior Economist and an Assistant Director in the Economic Policy Office of the Antitrust Division. As an Assistant Director from April 1981 to September 1982, his responsibilities included the following:

- Supervised staff economists conducting investigations and preparing cases in the fields of banking, communications, transportation, energy, and foreign commerce.

- Participated in drafting and reviewing Antitrust Division filings before the Federal Communications Commission, Interstate Commerce Commission, Federal Reserve Board, and Securities and Exchange Commission on topics that included the sale of satellite transponders, the MTS/WATS rate structure, deregulation of rail rates for export coal and an end to ceilings on interest rates.

- Acted as lead economist for certain cases and investigations, including U.S. v. Virginia National Bankshares.

As a senior Economist in the Economic Policy Office, Dr. Silberman's accomplishments included the following:

- Served on the trial staffs in U.S. v. AT&T, U.S. v. American Bar Association, U.S. v. American Society of Anesthesiologists, U.S. v. United Technologies and U.S. v. Tracinda.

- Analyzed the competitive effects of mergers, joint ventures, and business practices in a wide variety of industries including ocean shipping, rail and airline transportation, the delivery of health care services, motion picture production and distribution, and jet engines.

- Testified before the Civil Aeronautics Board concerning the continuation of antitrust immunity for IATA rate making.

- Drafted Antitrust Division filings concerning ocean shipping conferences and the Railroad Revitalization and Regulatory Reform Act of 1976.

Honors

Antitrust Division Special Commendation for Outstanding Service, 1982
Outstanding Performance Ratings, 1980-1982
Special Achievement Award, 1978

CABLE TV PROGRAMMING

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Sports tops top-100..p.6
CNN is January champ..p.8

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No. 155
March 25, 1991

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Almost lost in the current debate over reregulating basic cable rates has been eight years of double-digit increases in system programming costs.

In 1983, top-of-rate-card fees for 16 primary basic networks totaled $1.20/sub/month. By 1991, the list grew to 24 networks, with top-of-card fees costing over three times as much--$3.73--a compounded growth rate of 15.2%/yr.

Volume discounts, multi-network packages (i.e., Headline News free for CNN affiliates) and long-term contracts allow larger MSOs to bring the total down somewhat, but even a 20-network package costs the average system at least $2.20/sub/month in license fees--before superstation charges.

While the chart on P. 2 details the top-of-rate-card trends, the analysis at right goes a step further and shows what the "average" system is paying per sub per month.

To arrive at this figure we took our estimates of network license fees and then divided by average full-time equivalent (FTE) subs.

The FTE figure is designed to reflect the average number of fee-paying subs actually reported to the networks by systems (as well as rate card breaks for part-time carriage). Total universe counts --based on A.C. Nielsen counts and including illegal hookups--would be about 15% higher.

There is about a 20% gap between the "average" monthly fee and the top of the rate card--though a 40%-50% discount is not uncommon. This is especially true of multi-service providers such as Viacom and Turner, which offer rate card breaks in exchange for carrying two or more of their networks.

LICENSE FEE ANALYSIS--SELECTED BASIC NETWORKS

	Total Annual License Fees		Average FTE Subs*		Avg. License Fees/Sub/Mo.	
	1990	1991	1990	1991	1990	1991
	(mil.)	(mil.)	(mil.)	(mil.)		
TNT	$163.0	$212.0	37.9	45.6	$0.36	$0.39
ESPN	210.0	224.7	47.6	49.8	0.37	0.38
CNN	145.0	151.0	47.0	49.4	0.26	0.25
USA	102.0	108.1	44.5	47.3	0.19	0.19
NICK	68.0	74.1	43.8	46.1	0.13	0.13
MTV	58.0	62.6	43.5	45.9	0.11	0.11
A&E	45.0	50.0	38.9	43.3	0.10	0.10
TNN	47.1	50.9	42.6	44.8	0.09	0.09
LIFE	38.0	46.4	41.5	45.6	0.08	0.08
DISC	32.0	44.0	42.6	47.8	0.06	0.08
NOST	7.6	10.6	8.6	11.8	0.07	0.08
FAM	24.0	34.6	42.4	45.5	0.05	0.06
E!	10.2	11.8	13.5	16.7	0.06	0.06
BET	11.8	14.0	23.5	26.2	0.04	0.04
FNN	11.1	16.0	29.2	31.0	0.03	0.04
TWC	20.0	21.3	38.0	41.7	0.04	0.04
TLC	6.2	9.1	17.0	20.0	0.03	0.04
CMT	1.5	2.2	9.5	11.6	0.01	0.02
VH1	0.5	0.6	31.4	35.4	0.00	0.00
Tot.	$1,301	$1,144	33.8	37.1	$2.09	$2.19

* Full-time equivalent subs
©1991 Paul Kagan Assoc., Inc. estimates.

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NETWORK LICENSE FEES (TOP OF THE RATE CARD)

Network	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	% Chg. 1989-90	% Chg. 1990-91
A&E (a)	--	$0.050	$0.050	$0.060	$0.070	$0.100	$0.110	$0.120	$0.130	$0.150	$0.170	9.1%	8.3%
BET	$0.030	0.030	0.030	0.030	0.030	0.030	0.050	0.060	0.070	0.080	0.090	20.0	16.7
CHT	0.000	0.000	0.000	0.000	0.000	0.000	0.030	0.050	0.080	0.080	0.090	66.7	60.0
CNBC (b)	---	---	---	---	---	--	0.070	0.080	0.090	0.100	0.110	14.3	12.5
CNN (c)	0.200	0.220	0.220	0.250	0.280	0.280	0.300	0.320	0.330	0.350	0.370	6.7	3.1
Comedy Ch.(d)	---	---	---	--	---	---	--	0.070	--	---	---	---	--
Comedy TV	--	---	---		---	---		-	0.070	0.090	0.110	---	-
DISC (e)	-	-	0.000	0.000	0.050	0.050	0.060	0.070	0.080	0.110	0.130	16.7	14.3
ESPN (f)	0.100	0.190	0.200	0.230	0.270	0.280	0.320	0.350	0.380	0.380	0.380	9.4	8.6
FAM	0.000	0.000	0.000	0.000	0.060	0.060	0.080	0.080	0.110	0.120	0.130	0.0	37.5
FNN (g)	0.000	0.000	0.010	0.050	0.050	0.035	0.055	0.065	0.080	0.090	---	18.2	23.1
Hal TV (d)	---	--	---	--	---	-	--	0.050	-	-	-	---	---
Headline (h)	0.200	0.220	0.220	0.250	0.280	0.280	0.300	0.320	0.330	0.350	0.370	6.7	3.1
LIFE	0.000	0.000	0.000	0.060	0.070	0.100	0.110	0.120	0.130	0.140	0.150	9.1	8.3
MTV (i)	0.150	0.150	0.150	0.150	0.150	0.220	0.220	0.240	0.250	0.260	0.270	9.1	4.2
NICK (i)	0.150	0.150	0.150	0.150	0.150	0.220	0.220	0.240	0.250	0.260	0.270	9.1	4.2
TBS	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.0	0.0
TLC	---	---	0.040	0.040	0.050	0.050	0.050	0.060	0.070	0.080	0.09	20.0	16.7
TNN	0.000	0.000	0.000	0.100	0.100	0.150	0.150	0.200	0.200	0.250	0.250	33.3	0.0
TNT (c, f)	---	--	--		---	0.000	0.150	0.200	0.370	0.400	0.420	33.3	85.0
TWC (j)	0.000	0.050	0.050	0.050	0.070	0.085	0.085	0.085	0.099	0.099	0.099	0.0	16.5
USA	0.070	0.090	0.090	0.090	0.120	0.130	0.180	0.230	0.240	0.250	0.250	27.8	4.3
VH 1 (k)	---	--	0.000	0.000	0.000	0.000	0.000	0.030	0.040	0.050	0.060	---	33.3
VISN	--	--	---	-	---	0.030	0.030	0.030	0.030	0.030	0.030	0.0	0.0
WGN	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.0	0.0
WOR	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.100	0.0	0.0
Total/Avg.	$1.200	$1.450	$1.510	$1.810	$2.100	$2.400	$2.870	$3.370	$3.729	$4.019	$4.139	17.4%	10.7%
% Change	---	20.8%	4.1%	19.9%	16.0%	14.3%	19.6%	17.4%	10.7%	7.8%	3.0%	---	---

Notes: Carriage fees for superstations--TBS, WGN, WOR--are collected by their common carriers and do not go to stations themselves. Most offer flat fee deals. (a) Applies to new affils after 3/88. Systems prior to 3/88 have top rate card fee of $.08; (b) Charter affil rates. Affils signing up after April launch will pay rates $.01 higher per year; (c) Discounts available if system also carries TBS Headline News and/or TNT; (d) Comedy Channel and Hal TV merging as of 4/1/91; (e) For systems signed up by 1/87 (90% of systems). 1989-92 rates for new affils are $.160, $.185, $.220 and $.220 respectively; (f) Does not include NFL surcharge; (g) Good from July through June of following year. Contracts expected to be honored at current rates after buyout; (h) Free if carried with CNN; (i) Performance discounts available for multiple carriage of MTV network services; (j) Rates based on DMA location, not size of system; (k) Free if carried with MTV prior to 1990. Rates for 1990 forward for VH 1 if MTV is also carried; (l) 1990 figure for TNT does not include Major League Baseball surcharge which, however, is included in rate cards in succeeding years. *© 1991 Paul Kagan Associates, Inc., Carmel, CA.* *PKA analysis of cable network data*

TESTIMONY OF SAMUEL H. BOOK, Ph.D.
PRESIDENT, MALARKEY-TAYLOR RESEARCH

August 1991

1. Introduction

I am president of the market research division of Malarkey-Taylor Associates, Inc. (MTA), the country's oldest, most experienced consulting firm specializing in cable television, with over 25 years of continuous consulting and research service to the cable industry. During the past five years, I have designed and conducted more than 100 statistically projectable surveys for cable operators, cable programmers, wireless cable companies and major international firms and governments contemplating entry into cable TV. Previously, I spent four years as research director for a Los Angeles market research firm; I designed and conducted hundreds of motion picture surveys for movie studios and independent producers. A copy of my resume is attached to this testimony.

The following companies, among others, have used and relied upon survey data and analysis which I provided while at Malarkey-Taylor: Continental Cablevision, Comcast Cable Communications, Jones Intercable, Time-Warner, American Television & Communications, Tele-Communications, Inc., Hughes Communications, Showtime Networks, Tribune Broadcasting, United Video, and Times-Mirror Corp. These studies included telephone surveys and personal interviews among cable consumers and cable operators.

I have been asked by the Joint Sports Claimants (JSC) to provide my opinions concerning the Bortz & Company constant sum survey of cable operators that has been submitted to the Copyright Royalty Tribunal (CRT) in the 1989 cable royalty distribution proceeding. (Cable Operator Valuation of Distant Signal Non-Network Programming, 1989, dated August 1991). I also have been asked to present my views of the criticisms made of a similar JSC constant sum survey during the 1983 cable royalty distribution proceeding.

2. 1989 Bortz Survey

Based on my market research experience and training, I would accept the 1989 Bortz survey results as valid and reliable, within the margins-of-error and confidence levels stipulated in the survey report. I believe the study provides accurate estimates of the relative amounts that cable operators would have spent in 1989 on the different categories of distant signal non-network programming they carried.

The constant sum method utilized in the Bortz study is appropriate for the purpose of assessing how cable operators would have allocated programming budgets among distant signal non-network programming categories. In fact, I do not believe there would have been any better way of determining how cable operators would have allocated their programming budgets. Constant sum surveys are often used in cable industry market research, and they are relied upon in the cable industry, especially in research situations where respondent trade-offs must be considered.

The Bortz study was competently designed and implemented. It utilized generally accepted methods of sampling, questionnaire design and interviewing. In addition, the survey response rate was outstanding at nearly 80 percent for the key survey question, thereby ensuring a high degree of confidence in the projectability of survey data to cable operators-at-large. Consistency of the 1989 survey data with prior constant sum survey data submitted to the CRT provides further confirmation of the 1989 study's acceptability.

3. Survey Criticisms Raised in 1983 Proceedings

During the 1983 cable royalty distribution proceeding, several parties presented a number of surveys of cable operators and cable subscribers. Professor Alan Rubin, a consultant retained by the Motion Picture Association of America, criticized each of those surveys. The CRT relied upon Professor Rubin's testimony in part as a basis for discounting the weight to be accorded to JSC's 1983 constant sum survey. In my opinion, the various criticisms advanced by Professor Rubin and relied on by the CRT do not provide a valid basis for discounting the 1989 Bortz constant sum study.

a. Recall

I agree with Professor Rubin that the reliability of survey data decreases when there is a long time lag between the survey and the behavior in question. Professor Rubin correctly pointed out that "[w]e cannot expect to gather meaningful information from people about how they would have acted two years ago." (Rubin, p.4) The Tribunal also accepted this criticism. (Fed. Reg. 12795)

However, the 1989 constant sum survey of cable operators was conducted at the end of 1989 and beginning of 1990. Therefore, the two-year lag in the 1983 cable operator survey does not apply to the 1989 survey. In the 1989 Bortz survey, some respondents, surveyed in 1989, were asked how they would allocate their program budgets for 1989. Other respondents, surveyed in early 1990, were asked how they would have allocated their programming budgets in 1989. Whereas consumers cannot be expected to recall their behavior in the recent or distant past, cable operators would be expected to recall what they would have done as part of their professional responsibilities a few months ago. Consequently, recall criticism of the 1989 constant sum survey of cable operators does not have the validity of Professor Rubin's criticism of the 1983 survey.

b. Constant Sum Techniques

Professor Rubin testified that the constant sum technique was "inappropriate" because ["[o]perators and subscribers were asked to do something completely abnormal to their routine cable television behaviors. They were asked to break out specific categories of programs and to report how valuable each type of program was to them." (Rubin, p.5) The same issue was raised in the Tribunal's 1983 Final Determination, where it was stated that Rubin found the constant sum survey "to be an activity that neither cable operators nor subscribers do in actuality . . . ." (Fed. Reg. 12795).

It may be abnormal for subscribers and TV viewers to break out categories of programs and report on their relative value, but it is not an abnormal task for cable operators. Although cable operators typically "program whole signals" (Fed. Reg. 12795), they engage in exercises similar to constant sum allocation when evaluating those signals. Cable operators are frequently called upon to assess the value of alternative types of programming--sports, movies, series, documentaries, news, etc.--when deciding to carry a new program service or drop an existing service. The 1989 Bortz survey asked cable operators to do what they often do as part of their jobs, namely to allocate percentages

of a fixed budget to different program categories based on the value of those categories in attracting and retaining subscribers.

The 1989 constant sum survey improved upon the 1983 survey by a small but significant change in the wording of the constant sum question. In 1983 cable operators were asked to allocate the value of program categories, while in 1989 cable operators were asked to allocate their 1989 program budget across program categories. The 1989 research exercise was more realistic than in 1983, since cable operators are used to thinking in terms of budget allocations.

c. The Interview Process

Professor Rubin questioned whether respondents could reliably recall values placed on program categories "in the very few minutes provided by a telephone interview." (Rubin, pp. 5-6) The Tribunal likewise noted Professor Rubin's testimony that "this type of exercise conducted in a few minutes over the telephone could not accomplish the goals of the survey." (Fed. Reg. 12795; see also p. 12809).

I believe such concerns are unwarranted. The survey instrument was appropriately designed to be easily administered and understood on the telephone. The questions were clearly worded and the instrument was concise and narrowly focussed on the key constant sum questions. I believe the questionnaire would have captured and held respondents' attention for sufficient time to complete the constant sum exercise accurately and reliably.

The respondents were cable system executives. In my opinion, they should have had no difficulty understanding and answering the questions posed in the survey. They also should have been familiar with the terminology and definitions used in the surveys.

Malarkey-Taylor and other cable research firms with which I am familiar have conducted numerous telephone surveys of cable operators in recent years, and the results have been relied upon by our clients. These surveys usually require 15 to 20 minutes to complete on the phone. My experience has been that cable operators are typically able to understand the questions and to respond in a thoughtful, meaningful and reliable manner to questions posed in a brief telephone interview.

The survey process used by Bortz, as well as the design of survey instruments, was up to professional standards. An independent, third-party research firm, the highly respected and experienced Burke Marketing Research, administered the surveys, thereby minimizing the possibility of interviewer bias and strengthening confidence in the survey results.

4. Conclusion

Malarkey-Taylor has conducted many different types of cable industry surveys during the past few years, including studies for seven of the top-ten cable industry MSOs, scores of surveys for smaller cable operators, in-depth market studies for cable programmers and dozens of surveys for firms introducing new technologies. I have also reviewed and analyzed numerous surveys of cable consumers and operators conducted by other research organizations.

I believe that the 1989 Bortz study was well designed and professionally implemented, and I believe it can be relied upon to determine how cable operators would have allocated programming budgets among various program categories. Professor Rubin's criticisms of the 1983 surveys of cable operators are, in my opinion, not valid as a basis for discounting the results of the 1989 Bortz constant sum study. The Bortz 1989 study rectified a few deficiencies in the 1983 study, especially by eliminating the time lag between the surveys and the behavior which cable operators were being asked to recall and by changing the allocation exercise to focus on program budgets rather than program value. These improvements overcame some of Professor Rubin's criticisms, while other criticisms emanating from the 1983 proceedings were simply not justified.

SAMUEL H. BOOK, Ph.D.

Dr. Book is president of the research division of Malarkey-Taylor Associates. He is a professional economist and market researcher, specializing in the design and implementation of consumer studies and economic analyses of telecommunications, cable television, and related technologies. Dr. Book has extensive experience in conducting focus groups, designing and managing statistically valid consumer surveys, writing in-depth reports on business, economic, and consumer aspects of cable television, wireless cable, direct broadcast satellite, home video, and other technologies. He has developed and used analytical models for cost-benefit studies and economic feasibility studies.

From 1970 to 1979 Dr. Book was a university professor in Toronto, where he developed and taught courses in economics and management at the MBA and undergraduate levels. From 1980 to 1984, as research director of The National Research Group, he produced over 300 market research studies for the movie industry using a variety of data collection and sampling methods, including focus groups, telephone surveys, and audience research.

Qualifications and accomplishments include:

- ◊ Ph.D. in Economics, Columbia University, New York, NY.
- ◊ Research Director, National Research Group, Los Angeles, CA.
- ◊ Assistant Professor, Faculty of Administrative Studies, York University, Toronto, Ontario, Canada.
- ◊ Senior Research Consultant, The Ontario Arts Council.

Speeches and presentations:

- ◊ Spoke on "The Economics of Cable System Overbuilds" at The Florida Cable Television convention, The Eastern Cable Show and Florida Public Service Board, and The Western Cable Show.
- ◊ Speech, "Cable Rate Sensitivity" presented at the Great Lakes Cable Convention.
- ◊ Spoke as panelist at PKA Associates Overbuild Seminar.
- ◊ Spoke on techniques of cable viewership research at a CTAM seminar.
- ◊ Presented studies of cable system overbuilds at:
    - o City Council meeting in Naples, FL,
    - o County Commissioners hearing in Reston, VA.

TESTIMONY OF ROBERT W. CRANDALL, Ph.D.
SENIOR FELLOW, THE BROOKINGS INSTITUTION

August 1991

I. QUALIFICATIONS

Since 1978, I have been a Senior Fellow in Economic Studies at the Brookings Institution. My participation in this proceeding, however, is as a private consultant to the Joint Sports Claimants, not as an employee of the Brookings Institution. My views should not be taken to reflect those of the Brookings Institution, its staff, or its trustees.

From 1966 through 1974, I was on the faculty of the Massachusetts Institute of Technology, serving as Assistant Professor and Associate Professor of Economics. For the next year, I served on the staff of Commissioner Glen Robinson of the Federal Communications Commission. From late 1975 through January 1978, I was with the Council on Wage and Price Stability in the Executive Office of the President, where I served as Assistant Director, Deputy Director, and Acting Director.

I have served as a consultant to several government agencies and participated in a variety of government advisory panels. In 1967-68, I was a consultant to the Justice Department on a variety of network television and motion picture issues. In 1978-79, I served as a consultant to the Federal Communications Commission on

the deregulation of signal carriage rules for cable television. I have also served as a consultant to several clients on matters relating to copyright and product licensing issues -- including the National Cable Television Association, the three major television broadcast networks, and other cable and broadcast industry clients.

My research has focused on a number of regulatory issues affecting a variety of industries. I have published books and articles on the steel industry, the telephone industry, the automobile industry, health-safety-environmental regulation, broadcast regulation, and cable television regulation. In 1971 and 1972 I published articles on the financial-interest/syndication rules in The Journal of Law and Economics and the Bell Journal of Economics. In 1974, I coauthored an article on cable television profitability that also was published in the Bell Journal of Economics, and I published another article on cable television profitability in The Journal of Business. In 1974, I also published an article on the economics of network television in Public Policy. In 1978, I published an article on the economic effect of television broadcast regulation in Regulation. In 1981, Stanley Besen and I coauthored a paper on cable television regulation that was published in Law and Contemporary Problems. In 1990, I conducted a number of empirical studies of the cable television industry that were submitted in various FCC proceedings on behalf of TCI and are being incorporated into a chapter in Bruce Owen and Steven Wildman, Video Economics to be published by Harvard University Press in 1992.

A copy of my curriculum vitae is attached.

II. INTRODUCTION

I have been retained by the Joint Sports Claimants to express my views on the criticisms of the 1983 Browne, Bortz & Coddington (BBC) study raised by Dr. Stanley Besen on behalf of MPAA during the Tribunal's 1983 proceeding. I have also been asked to evaluate, in light of those criticisms, the 1989 study by Bortz and the study of distant-signal viewing presented by the MPAA in the 1983 proceeding.

A. The BBC and Bortz Studies. In the 1983 proceeding, the Joint Sports Claimants submitted a constant sum study by BBC that reflected the results of a survey of cable operators. This survey was designed to elicit directly from cable operators their comparative valuation of various programming types on the distant broadcast signals imported for retransmission on their systems in 1983. The BBC study showed that cable operators allocated 36.1 percent of the value of the programming they received on these signals to live professional and collegiate sports, 30.2 percent to movies, 18.6 percent to syndicated series, 12.1 percent to news and public affairs programming, and 3.1 percent to public-television programming. Similar results were obtained in the 1989 survey and reported in the Bortz study.

B. The MPAA Viewing Study. The results of the BBC survey contrasted with the results of a study of cable viewing submitted by the MPAA in the 1983 proceeding. This study used A.C. Nielsen data on the size of the audience generated by various program types on distant signals imported by cable systems throughout the country. Viewing was defined as the number of distant cable households watching each program type multiplied by the number of hours of that programming type. The study tabulated in this manner the total number of household hours of viewing of each program category on 117 imported distant signals during each of four Nielsen sweep periods. This MPAA Viewing study concluded that approximately 80 percent of the hours of distant-signal viewing by cable households was represented by the viewing of movies and syndicated series, 10.75 percent by viewing of sports, and under 10 percent by viewing of all other program types.

C. Criticisms of the BBC Study. Dr. Stanley Besen testified in the 1983 proceeding that the BBC study did not provide an adequate framework for estimating the "marketplace value" of the various program types. Besen criticized the BBC study for two reasons. First, the cable operator survey responses reflected allocations of total program values, but he contended that the appropriate measure of market value is the marginal contribution of each program to the value of the cable system's offering. Second, the BBC cable operators' study did not account for market

supply effects, particularly those related to the fractionalization of audiences caused by distant-signal importation.

In its 1983 decision, the Tribunal agreed with Besen's criticism. The Notice of Final Determination stated at FR 12809:

> " We agree with Dr. Besen's criticism of attitudinal surveys that asking cable operators and/or subscribers to [evaluate] programs does not take supply into account, so that all we are measuring is the benefit side of the equation, not marketplace value. We also agree with Dr. Besen's belief that the respondents were probably basing their responses on the total value of these programs to them, and not the marginal value of the programs to them on distant broadcast signals."

In the same Final Determination at FR 12811, the Tribunal recognized that the supply effects are more likely to impact the Joint Sports Claimants than other programming interests:

> " We note, however, that Dr. Besen's view about the critical role supply plays in the marketplace equation probably affects sports more than most claimant groups. The attitudinal surveys do not ask operators or subscribers to take into account the limit on the supply of major league and college

> games, so that we believe the respondents, free from that consideration, express a desire for more sports programming than available. The Nielsen data, which is made up of the actual supply of sports programs, and the actual viewing behavior, continues to provide a ballast for what might be a higher consideration for sports."

Partly because of Besen's criticisms, the Tribunal gave greater weight in its 1983 Final Determination to the MPAA viewing study than to the BBC cable-operator valuation study.

III. SUMMARY OF CONCLUSIONS

The Bortz survey provides information that an economist would consider useful in assessing the relative value of distant-signal programming categories. It measures the relative "total value" of each type of programming. Total value is related to marginal value by the price sensitivity or "elasticity" of cable operator demand for each program type. If the price sensitivity of cable operators' demand for distant-signal programming is the same for all programming types, the relative total values will be equal to the relative marginal values of these programming categories. I am unaware of any evidence suggesting that the price sensitivity of cable operator demand for programming varies across program types. Therefore, I believe that the Bortz study provides the best

available measure of relative marketplace values of the distant signal program categories.

Furthermore, and regardless of the relative elasticities of cable operator demand for programming, the Bortz study's estimates of total value are a valid measure of marketplace value if the cable operator is faced with an all-or-nothing choice for each program type. In other words, if each "Phase I" group of program suppliers were allowed to bargain collectively with cable operators, the maximum license fees each could obtain from the cable industry would be equal to the total value of each program type (as reflected in the Bortz study).

In contrast, the MPAA viewing study conveys no information that is relevant to the estimation of either total or marginal value of program types. It simply looks at audiences and the quantity of programs broadcast. Such viewing data are not a measure of marketplace value.

I agree with Besen that the effects of supply on marketplace value were not measured in the BBC operator survey. However, the MPAA viewing study also ignores supply effects. Moreover, Besen presented no evidence that the supply effects are more important for movies or syndicated programming than for sports. In fact, I believe that these supply effects are likely to be more important for sports than for movies and syndicated series because the loss of exclusivity in the initial exhibition of a sports event cannot be recaptured in frequent reruns of the event. I therefore believe that any consideration of supply effects would not reduce the value

of sports vis-a-vis movies and syndicated programs (as reflected in the Bortz study).

In sum, I do not believe that there is any proper basis on which an economist would accord greater weight to the MPAA viewing study than to the Bortz study as a measure of marketplace value. The MPAA viewing study is in fact vulnerable to the very criticisms raised by Besen in the 1983 proceeding. Moreover, the Bortz study (unlike the MPAA viewing study) does provide useful information about relative values of the various program types.

IV. DISCUSSION OF CONCLUSIONS.

The compulsory copyright license for imported distant signals was imposed by Congress as a substitute for direct bargaining between cable systems and individual copyright owners over a very large number of programs that could be retransmitted by cable systems. I agree with Besen that the allocation of the royalties collected from cable systems should reflect the Tribunal's judgment of how a market would distribute the royalties in the absence of a compulsory license. Under traditional economic theory, this requires an analysis of the demand by cable sytems for, and the supply by copyright owners of, various program types to cable systems.

A. Demand

1. The Concepts of Marginal Value and Total Value. A cable system obtains its revenues from basic cable subscriber fees, premium service subscriber fees, pay-per-view fees, and advertising. Imported distant broadcast signals may be offered on either a basic tier or an enhanced basic tier of service, but they are not generally offered as premium (pay) services nor in pay-per-view format. Moreover, cable systems do not offer their own advertising spots on imported distant broadcast signals.

The value of an imported distant program to a cable operator, therefore, must be measured in terms of the additional or "marginal" subscriber revenues it generates less any costs of importing that program. In a free market, absent compulsory licensing, each cable operator would be willing to pay each program's copyright owner an amount not exceeding this marginal contribution to net subscriber revenues. The sum of these marginal values across all imported programs would then equal the total amount that a cable operator would be willing to pay for all distant signals.

It should be noted that these marginal program values are related to the total value of all such programs. In his testimony in the 1983 proceeding, Besen used a numerical example to demonstrate that the total value of all "entertainment" or "informational" programs scheduled by a cable operator is not simply the marginal value of each type multiplied by the number of

programs carried because the marginal value of an hour of any program type to the cable operator declines as he increases the number such programs that he carries. However, as Besen noted, the total value of such programming is equal to the sum of the marginal values of all such programming. A simple graphical exposition of Besen's point will assist in understanding its relevance.

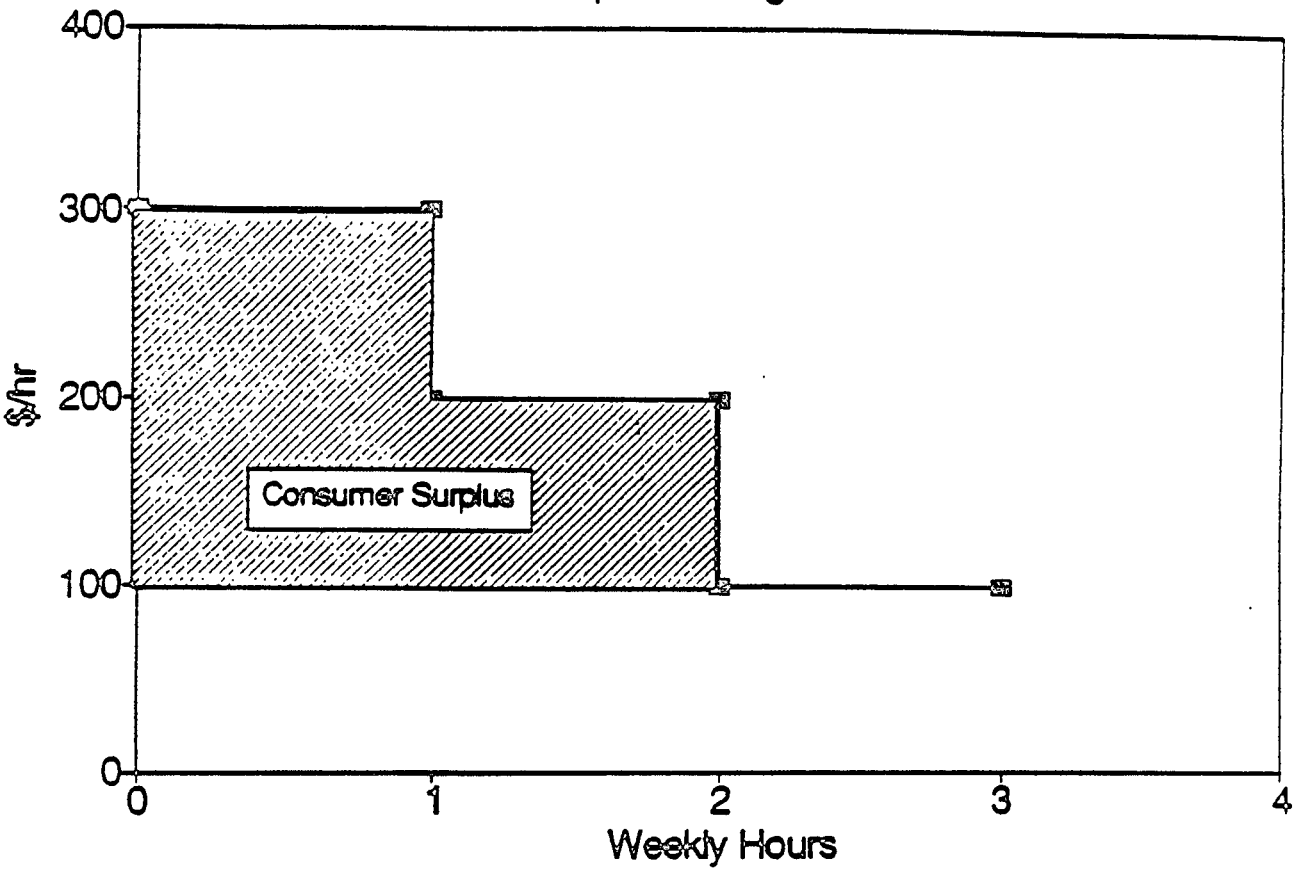
In the attached Figure 1, the downward-sloping line reflects a hypothetical example of the relationship between the marginal value of weekly "sports" program hours to a cable operator and the number of hours of sports carried by the cable system per week. This "demand curve", in the economist's parlance, provides a representation of how much sports the operator will schedule at various market prices for an hour of sports programming. In Figure 1, the demand curve is shown as a stair-stepped line because in this hypothetical case I assume that sports programs can only be bought in one-hour segments. It is downward sloping because I have invoked the usual assumption that the marginal value of additional hours of sports (or any other program type) declines as more and more of it is exhibited.

For instance, Figure 1 shows that at a price of $300 per hour, the cable operator will accept only one hour per week. If the price falls to $200 per hour, he takes two hours of sports per week and pays the copyright owners $400 ; if it falls to $100, he takes three hours per week and pays $300 to the copyright owners.

The marginal value of the third hour of sports in Figure 1 is $100, and if the price is $100 per hour, the cable operator pays

Figure 1

Cable Operator's Demand
for Sports Programs

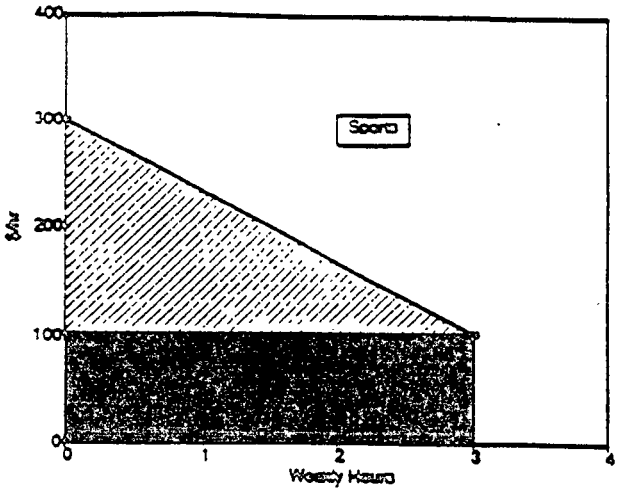


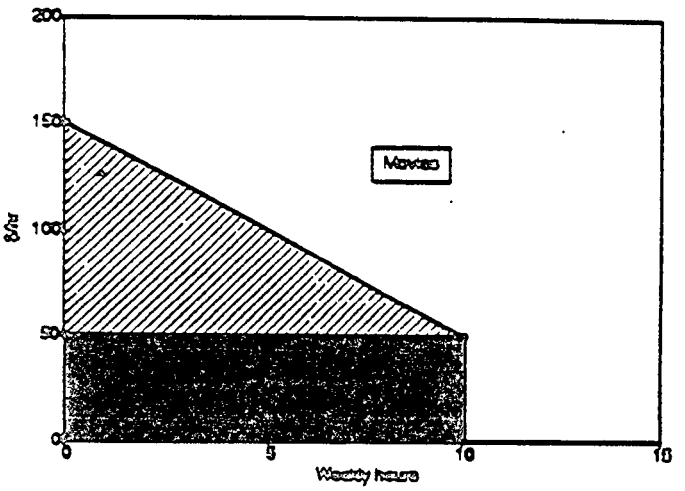
$300 for three hours of sports per week. However, the total value of sports to the operator is equal to $300 for the first hour plus $200 for the second hour plus $100 for the third hour, or $600 in total for three hours per week. If a single copyright owner controlled all sports available to the cable operator, he could demand and get $600 from the cable operator for the three hours per week. Thus, marginal value and total value are quite directly related. The $300 by which total value exceeds the total copyright payments for three hours at $100 per hour is referred to as "consumers' surplus" and is shown in Figure 1 by the area under the demand curve above the $100 price. Consumers' surplus is the amount that consumers (in this case, the cable operators) would be willing to pay over and above the marketplace value if they were confronted with an all-or-nothing choice for the programs.

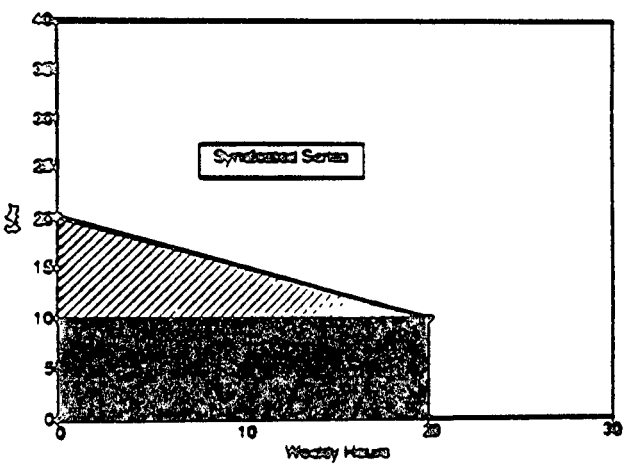
It is a simple matter to repeat this analysis for the cable operator's decision across three program types -- sports, movies, and syndicated series -- as in Figure 2. In this example, I assume that programs can be bought in any length desired; hence, the demand curves are smooth lines.

In the hypothetical case shown in Figure 2, sports programs are priced in the market at $100 per hour; movies at $50 per hour; and syndicated series (reruns) at $10 per hour. The cable operator chooses three hours of sports, ten hours of movies, and twenty hours of syndicated series. His total program payments equal $1000 per month, of which 30 percent ($300) represents the relative marketplace value of sports, 50 percent ($500) represents the

FIGURE 2:
Total Value and Marginal Value of Different Program Types Imported by Cable Operators







relative marketplace value of movies, and 20 percent ($200) represents the relative marketplace value of syndicated series.

If each program type is offered by numerous sellers independently, the market prices of sports, movies, and syndicated series in Figure 2 are equal to $100, $50, and $10 per hour, respectively. If, however, the cable operator is asked how much he would pay for each on an all-or-nothing basis, he would offer $600, $1000, and $400 for three hours of sports, ten hours of movies, and twenty hours of syndicated series, respectively. These amounts are equal to the areas under the respective demand curves for the three hours of sports, ten hours of movies, and twenty hours of syndicated series. They may be calculated by summing the marginal values of each additional hour over all hours of each program type.

It is this latter measure of value -- the total value as represented by the area under the demand curves -- that is captured by the Bortz survey.

2. <u>The Relationship Between the Bortz Study and Marketplace Value</u>. The estimates of relative total value in the Bortz survey are related to the measure of marginal value that Besen sought in determining marketplace value. The missing link in such a relationship is a measure of the elasticity of the various demand curves -- <u>i.e.</u>, the rate at which the quantity demanded increases with a given rate of decline in price. If these elasticities are the same for each program type, the relative total values will be equal to the relative marginal values. Note that, as drawn in

Figure 2, the relative total values are equal to the relative marginal values -- 30 percent, 50 percent, and 20 percent for sports, movies, and syndicated series, respectively. This result obtains because I have drawn the three demand curves under the assumption that they are linear and have identical price elasticities at the equilibrium market prices.

The relationship between the total and marginal values for each program category can be demonstrated graphically in Figure 2. The marginal value is given by the price of each program; marketplace value is equal to the price multiplied by the quantity of programs carried -- or the rectangular shaded area under the demand curve. Total value is equal to the sum of this shaded rectangular area and the cross-hatched area under the demand curve. Thus, the ratio of total value to marketplace value is equal to the sum of the two areas divided by the shaded area alone. This ratio will be the same for all program types if their price elasticities of demand are identical.

The Bortz estimate of relative total value will be greater than the marketplace value of a given program type only if cable operators' demand for this type of programming is less price elastic (i.e., less price sensitive) than the demand for other program types. Therefore, any conclusion that the Joint Sports' share should be less than the estimate of relative total value from the Bortz survey must rest upon the implicit belief that cable operators' demand for sports programming is less price sensitive than the demand for other programming. Put another way, such a

judgment must reflect the view that the market's offering additional sports programs would drive the price of these programs down more rapidly than would similar proportional increases in movies, syndicated series, informational programs, or devotional programs.

I am unaware of any evidence that suggests that cable operators' demand for sports is less price sensitive than their demand for other programming. Nor am I aware of any evidence that would indirectly support such a proposition -- for instance, that subscribers' willingness to pay for additional sports programming declines much more rapidly than their willingness to pay for an expansion in other programming types. In light of the foregoing, I believe that the Bortz study estimates of relative total value are a good measure of relative marketplace value of the various program types.

Furthermore, the same conclusion may be reached even if there were significant differences in the elasticity of demand for sports and other programming. Total value is the amount that the cable operator would pay for a program type if offered an all-or-nothing choice. It is therefore relevant to the calculation of a copyright royalty in a situation in which the suppliers of each program type bargain collectively with cable operators. If each "Phase-I" program supplier group were allowed to bargain collectively with cable operators, the marginal values of the different program types would equal their total values (as measured in the Bortz study).

3. The MPAA Viewing Study and Marketplace Value. The MPAA viewing study offers evidence on the audiences attracted by various types of programs imported by cable operators on distant signals as well as the amount of time those program types are broadcast. But the cable operator does not sell audiences in these programs because his revenues do not derive from advertising sales on imported distant signals. The marginal value of these programs to cable operators derives from the additional subscriber revenues they generate. These additional revenues are not necessarily related to the audiences they attract. A simple example demonstrates this lack of correspondence.

Assume that a cable operator were able to attract a 10 percent increase in subscribers by offering a sports channel that provided nothing but one hour per month of championship boxing matches that, in turn, were only watched by 25 percent of the cable system's subscribers during this single hour per month. Furthermore, assume that this additional 10 percent subscribed to cable solely because of the boxing channel.

Now, suppose that the operator could also import a distant network-affiliated broadcast signal that offered only a few hours a week of old syndicated programs in addition to the network fare already available on the local station carried by the cable system. The imported network broadcast station might actually attract fairly large audiences averaging, say, 2 percent of the cable system's subscribers over a monthly broadcasting schedule of about 500 hours. Few if any additional subscribers would likely be

attracted to the cable system by this duplicate network signal, but its total viewing per month, as measured by the MPAA viewing study, would be forty times (2 percent times 500 hours compared to 25 percent times 1 hour) as great as that of the boxing channel despite the fact that its value to the cable operator is very close to zero. On the other hand, the low-audience boxing channel could have a marginal value of as much as 9 percent (10 percent additional subscribers divided by 110 percent) of the cable system's total monthly subscriber revenues, depending on the cost of attaching new subscribers to the system. The above example was constructed to demonstrate a point: the marginal value of a program to a cable operator is not necessarily related to the audience of the program. A program is valuable because it attracts new subscribers or raises the rate that the operator may charge existing subscribers.

Because average program audiences do not reflect the marginal value of programs to cable operators, the MPAA viewing study fails to provide a reliable estimate of marketplace value. This study falls prey to Besen's own critique.

B. Supply

Dr. Besen's second criticism of the BBC cable operator study was that it failed to account for the effects of "supply." Besen points out quite correctly that a copyright owner would not offer his program to a cable operator unless the royalty offsets his

potential loss of income in that cable market from other media. In essence, this means that a cable operator would have to compensate the copyright owner for an amount at least equal to the reduction in the value of the program on other media caused by the cable importation. To the extent that one type of programming is impacted more heavily than the others by such importation, he argues that its royalty share should be adjusted to reflect it.

For at least two reasons, however, Besen's argument provided no basis for reducing the relative value assigned to sports vis-a-vis movies and syndicated programs as measured in the Bortz study.

First, Besen felt that the supply impacts were likely to be of the same importance for sports, movies, and syndicated series. Thus, he could find no basis for adjusting the comparative valuations of these three program types because of such supply effects.

Second, Besen's conclusion on the equivalent impact of supply effects on movies or syndicated series and sports does not account for the ephemeral value of a live sporting event. Most sports programs do not have a large number of reruns. As a result, any dilution of audience during the first or second exhibition is likely to have a more damaging impact than the dilution of audience of, say, the fourth television exhibition of a motion picture. Since the film may be exhibited another four or five times on cable, network television, or local television, the effect of

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HOW GOOD IS THE A. C. NIELSEN PEOPLE-METER SYSTEM? A REVIEW OF THE REPORT BY THE COMMITTEE ON NATIONWIDE TELEVISION AUDIENCE MEASUREMENT

J. RONALD MILAVSKY

Although the volume and stridency of charges and countercharges in the public and trade press have diminished recently, there is still considerable dissatisfaction with the national television audience measurement system produced by the A. C. Nielsen Company. The public tiff between Nielsen and clients was instigated by drops in ratings for all television in the final quarter of 1990, which the three major commercial networks believed to be artifactually related to the people-meter methodology employed in the audience measurement system. The ratings have rebounded but not back to where some think they ought to be.

No one knows whether these bounces in ratings are artifactual or real, but there is ample reason to suspect the system is faulty thanks to the publication of a remarkable study of national ratings methodology conducted by Statistical Research, Inc. (SRI), sponsored by the Committee on Nationwide Television Audience Measurement (CONTAM).

This report took about 2 years to prepare. Input for the planning and execution of the studies and for the writing of the report was provided not only by members of the three networks who form CONTAM but also by the Association of National Advertisers (ANA) and the American Association of Advertising Agencies (the Four A's), the Committee on Nationwide Cable Audience Measurement (CONCAM), and the American Syndicated Television Association (ASTA). The A. C. Nielsen Company cooperated with the study by supplying information and answering many of the questions posed by SRI. However, all information that they considered proprietary was withheld. In addition, some relevant information was not provided either because it was not available or because Nielsen did not choose to share it. Nevertheless, many methodological details were provided that have never before been made public.

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The study grew out of the changeover from one ratings system to a very different one. The replaced system combined two methods. One method used a "passive" household meter attached to every working television set in a household sample to gather set-tuning data for the household. The other method was a diary sent to a separate sample of individuals to collect persons-viewing data and demographics. The data from the two separate samples were then "fused" to report household viewing data with persons demographic characteristics. The fusion process, still in use today in some local markets, weighted the household meter data for each program by the average number of viewers to that program per viewing household within demographic categories as reported in the diary sample. Any differences between the overall character of the meter sample and the diary sample were ignored.

The current system of gathering nationwide ratings data relies on the "people meter." In this method, sample households are provided "active" meters, meters that record the same information the previous "passive" meter collected but that also record the viewing of individual household members. Individuals in the people-meter sample make a commitment to do things that ordinary viewers do not do. When their TV set is turned on, a red light on a device that rests on it goes on. Each person watching then should press an assigned button on a remote control or on the unit on top of the TV. When one or more have pressed their buttons, a light flashes until an "OK" button is pressed to indicate that the individual buttons are registering correctly. This light flashes and demands response again when channels are changed and when the set stays tuned to the same station for 70 minutes to verify that a person is still watching. Each individual is supposed to push the button whenever he or she stops watching—permanently, or even temporarily to answer the phone, use the facilities, or inspect the refrigerator. Household members are asked to undertake this commitment for 2 years. Thus the design can be described as a continuous measurement panel.

Evaluating ratings methodology is not a cut-and-dried task because many important details about the process are not described in print or in writing. The CONTAM report is seven volumes of about 100 pages each. One is a summary volume, which also treats subjects not covered in other volumes, notably, the difficulties in conducting a study of nonresponse, and the effects participation over time have on the quality of the data provided by panel participants. A second volume reports changes in the data before-to-after the changeover from the household system to the people-meter system. Four volumes are devoted to specific aspects of the complex system that generates the ratings numbers. The system reports cover: (1) sample selection, recruitment, and replacement, (2) contacts between Nielsen staff and people in the sam-

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ple, (3) data editing and processing, and (4) an engineering report evaluating the hardware. A seventh volume is a report of exit interviews with people who had served as data providers and were no longer in the sample. (All seven volumes are available as a set from SRI for $50.00.)

This review will summarize the major findings. For the most part, attention will be on the Nielsen ratings data-gathering and processing system, as revealed by the SRI study, rather than on the SRI study itself. The SRI study is of high quality, is constructive about ways to improve people-meter methodology, and offers enough suggestions for worthwhile methodological studies that need to be done to keep a small army of methodologists busy for years. It is about as fine a detailed description of this ratings methodology and its special problems as has ever existed.

Volume: Review of National Television Audience Data

CONTAM FINDINGS

This volume provides a detailed report of the changes in ratings data that occurred in the changeover from the old to the new methodologies, that is, from 1986–87 to 1987–88. The main changes were a drop in the percentage of homes using television and in household ratings of the three broadcast networks. There was a gain in household ratings for cable. Viewing data for persons indicated increased viewing in the late-night time period and decreased viewing in the Saturday morning, children's time period.

The report points out that without an independent standard, there is no way of knowing whether the data emerging from the new method are more or less accurate than the data from the previous method.

DISCUSSION

The drop in television ratings was, of course, of concern to the whole industry because any drop in ratings could lead to a drop in advertising revenues

The CONTAM report concludes that the increase in persons viewing in late night is most likely due to applying the so-called 70-minute editing rule to persons' data. This rule is that up to 70 minutes of viewing of the same channel gets credited to the person and that, at 70 minutes, verification that the viewer is still watching is required. At that point a light flashes on the meter and if the person does not press the OK button, the viewing stops being recorded. The late-night period

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is characterized by people falling asleep while watching TV. When this happened under the old system, only the set tuning counted for up to 70 minutes. The new system not only credits the set tuning, which the old system also did, but additionally credits viewing to the person or persons who logged in before falling asleep. The increase in persons viewing in late night tends to undermine the credibility of the system because it indicates that the new system can register more viewing than is actually done. It also points to the key role played by the rating system's editing rules.

The remainder of this volume is addressed to probing the available data further to see if the observed ratings change between the old and new systems can be explained through such mechanisms as sampling error; changes in weighting the sample to universe estimates of demographic or video characteristics; the increase in VCR penetration that occurred over the period; and changes in the makeup of the Nielsen sample itself. The analyses reported are fragmentary and often based on assumptions about extreme case conditions. This is necessary because data are not readily available that would allow empirical analysis rather than deduction from assumed parameters. For example, persons' data classified by such household characteristics as VCR ownership were not available to the CONTAM researchers.

The report concluded that factors such as sampling error, universe estimates, differences between sample and universe estimates, changes in cable penetration, definitional changes, and VCR use could account for some, but not all, of the drop in the observed households using television (HUT), ratings, and share. However, the rest was left unexplained. Having exhausted the explanatory power of existing data, the investigation turned to a close examination of the system itself—sampling procedures, contacts with the sample families, editing and processing, and the hardware that collects the basic data.

Volume: Sampling and Field Implementation

FINDINGS

The sampling plan uses standard area probability sampling procedures down to the household recruiting stage, at which point it departs. The procedure is to attempt to recruit the randomly selected household units, called "Basic units." If Basic units cannot be recruited, attempts are made to recruit adjacent households matched on cable status and presence of children as Alternates. Another departure from randomness is that new housing units are added to the sampling frame in such a way as to balance the installed sample to universe estimates to try

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to compensate for high refusal or turnover rates in certain geographic areas.

In practice, the field staff that does the recruiting is given considerable flexibility and more effort goes into recruiting Basic households than Alternates, which results in ratings differences between the two. It is reported that Alternate households register more television viewing than Basic. (Possibly because easier recruits are more interested in television viewing?) Differences in their relative patterns of program viewing are not reported.

Ideally, the recruited sample must be representative of the population's ownership of television sets of all types, cable subscription, and other relevant television equipment such as VCRs and satellite reception. The more complex the household's equipment, the harder it is to recruit the household, the more difficult and time consuming it is to install metering equipment, and the more likely something will go wrong with this equipment, either the meters or the monitored sets. However representative of such factors the originally recruited sample is, such representativeness must also be maintained over time because the sample is maintained as a panel. Thus, changes in a household's equipment inventory and sample turnover become important factors in determining the probabilistic nature of the sample over time.

The survey industry in general has been experiencing dropping response rates and so has the Nielsen Company. In July 1987 the installation rate dropped to about 55 percent When people meters were introduced, there was a clear step drop in the trend line to 50 percent, after which the trend line continued to drop until June 1989, where the line stops at about 47 percent. The usable data response rate is lower than that, since those households installed in the sample have to go through editing checks before their data are considered usable, and some households and persons fail to pass the checks The report estimates the response rate for usable data from the initial installation to be about 35 percent, which is low enough to call into question the initial sample's representativeness.

SAMPLE TURNOVER

Households are always being added to maintain a sample size of 4,000 in the face of planned and unplanned deactivation of households from the sample. It is thus a dynamic panel. Scheduled deactivation occurs after a household has served for 2 years [1] Unscheduled turnover occurs when a sample household moves, drops out, or is forced out.

1 There are those who believe that 2 years is too long for the present system because of "panel fatigue" (see below).

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Total turnover, that is, scheduled and unscheduled deactivations, is high. In one analysis, turnover was estimated at 62 percent in a year with one-third leaving on schedule and two-thirds leaving on an unscheduled basis. Most of the unscheduled losses are due to the household moving to a new residence, and about one-third to drop-out.

When households leave the sample they are replaced. Since the housing unit is the sampling unit, the replacement rules are as follows: if a Basic household moves, recruit the new occupants. If the new occupants refuse, recruit an Alternate. If the household remains vacant, recruit no one. If a Basic household leaves the sample but does not move, recruit an Alternate. If an Alternate household moves, try again to recruit the Basic household. If this fails, recruit an Alternate with the same cable and child status as the original Basic household.

The above procedures of necessity imply a time lag, but once the difference between Basics and Alternates and the sample balancing by cable and child status are accepted, the procedures for replacement are standard for good panel samples.

Discussion

Statistical Research, Inc., describes the sampling procedures as "professional," a judgment with which I generally agree. Nevertheless, as SRI also points out, implementation could be improved. There are several places where expediency and costs are the driving force responsible for undermining the probabilistic nature of the sample. In this regard one would list the lesser efforts made to enlist Alternates, the flexibility given the field staff that has an as yet unknown impact on the sample, and, of course, the rate of noncooperation and the unscheduled turnover rate, which are both very high.

With a low initial response translating to 35 percent of persons providing usable data and such high turnover rates, there is considerable reason to question sample projectability both initially and as the sample ages. Without evidence of the comparability of replacements to the originally intended sample, there is reason to be skeptical of the adequacy of such ratings to characterize U.S. viewing. A basic question is whether the response rate can be improved enough to provide confidence in projections to the universe.

The steep drop in response rate at the introduction of the people-meter methodology is most probably traceable to the added burden this methodology places on household members compared to the previous system. It is not discussed, but one wonders how much more effort and resources have gone into recruitment procedures and respondent

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incentives in the new methodology than was the case before and how these levels were determined. Clearly, given the nature of the task, a greater expenditure of effort should be required. But there is no evidence presented in the CONTAM report that the effect of effort and incentives on response rate is known. There is therefore no reason provided in those pages to make one believe that response rates can be improved.

Maintaining the projectability of a sample over time is always a problem and the more turnover, the greater the problem. One-third of nonscheduled turnover is due simply to dropping out. What are the viewing characteristics of those who do not want to cooperate anymore compared to their replacements? If they are different, can anything be done to compensate? No data are provided on these questions because a sound study of nonresponse and sample turnover has not been done.

Volume: Household Contacts

FINDINGS

As far as household members are concerned, the people meter consists of a device that is placed on top of the TV set and one remote control for each TV set. The unit on the top of the TV contains numbered buttons and red and green lights corresponding to those buttons, while the remote only has numbered buttons. Each household member has a number assigned corresponding to the numbered button. Training consists of instructions about when each household member is supposed to push buttons.

Definition of the task. There is considerable inconsistency and ambiguity in the definition of the task provided to household members at different points during the recruitment and training process. In the recruitment stage, there is a script that can be used by the field representative in the personal recruitment visit that describes the task as pushing the button every time "you enter the room to view television. When you leave the room we ask that you log yourself out." In other materials instructions refer to "watching" generally.

The instructional booklet left in the home introduces another ambiguity—this one about who should press the button. It stresses the need for everyone who watches TV to press the button assigned to them but also states that other members of the family who neglect the task should have their buttons pressed for them whenever they start or stop watching. This is an attempt to give each household member the responsibility of providing viewing data for other members.

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Although they are given the responsibility, an operational definition of "watching" is not provided to anyone in the household. Questions that deal with what to do when viewing is intermittent or transitory, or done as a secondary or even tertiary task, are not addressed. Thus, by default, "watching" is left for each individual to define and to apply not only to themselves but possibly also to neglectful members of the household.

As described above, the task involves more than simply pushing buttons at the onset and cessation of viewing. Household members must learn about the prompting role of the red and green lights associated with each household member's number and of the OK button, which must be pressed to verify that the registered audience is correct. The OK button must be pressed on four different occasions, after checking in, after any channel change (think of what remote control tuning does to this task), after any one person checks out, leaving others watching, and after the same channel has been tuned for 70 minutes.

Finally there are instructions that deal with how the people-meter remote works and how to register visitors. Each TV watching visitor must be assigned a separate number and must register viewing just like any member of the family except that visitors also must enter age and sex using buttons provided. Each visitor to the home, including any cable company workers, represents a potential breach in system security. The device that rests atop the TV set, with its red and green flashing lights, would attract attention on its own. But since visitors must log in and out when the TV set is on during a visit, they are in fact actively informed that they are visiting a Nielsen household

Children. All children 2 years of age and older are supposed to be data providers, and special materials—which include an instructional videotape, a coloring book, and animal stickers to aid button identification—are provided to make the task easier or less onerous for children. Parents and older siblings are asked to monitor their children's performance and to take special responsibility to see that children's buttons are pressed when required.

AMOUNT OF CONTACTS

All contacts between Nielsen staff and household members have the potential of influencing viewing measurements in both intended and unintended ways. This system requires many contacts between Nielsen office and field staff during recruitment, installation, and training and throughout the sample household's tenure in the sample Many contacts revolve around the compensation system consisting of money and gifts designed to motivate household performance. The report esti-

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mates that there are over three contacts per month for each household excluding recruitment, installation, and cancellation. Such a large volume heightens concerns about the possibility of influence.

DISCUSSION

The task required of household members is made burdensome by the red and green light system, the OK button, and the requirement to push buttons whenever a channel is changed. It is not clear from the CONTAM report how this particular system was developed and settled upon. Considering its intrusiveness, and until it becomes possible to detect people's viewing without their own active participation in the process, there is reason to rethink the present system. Perhaps research can help develop a simplified task structure that might lead to greater compliance with little loss of data accuracy.

Children pose particular problems for the system and raise social issues as well. There are commercial interests and social needs and sometimes they are not the same. Given the task load, it strains credulity to believe that the people-meter system is producing accurate children's data. And indeed data from other sorts of studies conducted by CONTAM, for example from so-called telephone coincidental studies, indicate problems with children's data.

In spite of calling attention to the need to do more methodological research in general and more particularly on using the opportunity to influence programming as a recruitment enticement, the CONTAM report is fairly critical of the practice. It assumes that the net effect on the data will be negative, moving the ratings data more toward a preference measure and away from a strictly behavioral viewing measure. Even though the report suggested testing alternate appeals, and noted the possible beneficial effect on response rate of asking people to vote for their favorites, it was critical enough for Nielsen to announce a cessation of the practice almost immediately after the CONTAM report was published. Here is an example of SRI making a judgment without data in a manner very similar to the way Nielsen made their many judgments in the process of developing the system, and possibly with similar negative consequences for the overall effort. The questions are: How much does the measure become a preference measure? How much of an improvement in response rates results from offering prospective respondents the chance to influence programming? And, are there opportunities to use the same kind of appeal in recruiting while also using language that makes it clear that a viewing behavior measure rather than a preference measure is required? All these questions are researchable.

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Volume: Editing and Processing

The new viewing data are collected in a central microprocessing unit in the household, and these data are retrieved by an automated phone call from the household's microprocessor unit to the central computer. Once they reside in the central computer, the data are checked for consistency and accuracy. Nielsen has a complex set of rules that govern data editing and processing. They determine which data are complete and accurate enough to tabulate as is and how to "process" incomplete and imperfect data so that they can be included in tabulations without distorting results. If these editing rules are drawn very tightly, only households and persons providing perfect data are allowed through, and the in-tab rate, that is, the percent of the whole installed sample whose data are tabulated on a given day, is low. If the rules are loosened, the consequence is high in-tab rates.[2]

It should be clear from the above discussion that any changes in the editing rules over time will have a direct impact on the data. If these changes are associated with letting through or restricting particular kinds of households, there will be an impact on the viewing measures.

Editing checks are done at the household level first and then on the persons level. Thus in-tab rates for persons are always lower than for households. The CONTAM report demonstrates that in-tab rates vary considerably both by the number of adults and children in the household and by the complexity of the household's equipment. For example, the household type with the highest in-tab rates (94 percent for the household, 92 percent for persons) had no children and have only adults 55 or over with two television sets or fewer; the households with the poorest rates (93 percent for the household, 79 percent for persons) had children and three or more television sets. This means that the heavier viewing households contribute less than they ought to the daily ratings number. It also shows that the ratings system has more difficulty in measuring viewing as household makeup and equipment increase in complexity.

The report provides data showing that in-tab rates improved over time. However, the improvements were not attributed to greater effort or efficiency on Nielsen's part but to liberalization of editing rules.

VOLUME: ENGINEERING REVIEW

One of the volumes is an evaluation of the metering equipment conducted by an engineering firm to which this task was subcontracted.

2. Nielsen is held to performance standards by contract to data subscribers, and these performance standards specify a minimum level of data in-tab. Hence there is always a tension between the quality or accuracy of data and the level of the in-tab rate.

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Their conclusion was that the metering equipment was accurate and met high standards of reliability. However, since no equipment is 100 percent reliable, the more household equipment monitored, the more unreliability in the total set of monitoring attachments. Once again, the result is understatement of viewing in multiequipment households, which is where viewing levels are highest

VOLUME: EXIT INTERVIEWS

This volume is based on interviews with 197 people living in 121 households who had participated but no longer participate in the Nielsen people-meter sample. In general, the exit interviews tend to support concerns that the viewing data produced by the people-meter system are underreported, inaccurate, and biased toward socially desirable programs, and that children's viewing data are in worse shape than adult data These are suggestive, not conclusive, pieces of evidence. Deficiencies in the design of this exit interview study do not allow stronger statements.

Volume: Final Report

Much of this volume is devoted to summarizing the findings, implications, and recommendations reported in the other volumes. Two subjects are treated for the first time in it and are worthy of reporting.

STUDY OF NONRESPONSE

Because nonresponse in the people-meter sample is high, there is ample reason to determine what causes it so that strategies may be developed to improve response. However, the CONTAM report points out that thus far, none of the possible ways of conducting a study of nonresponse has been completed.

The discussion of nonresponse clearly indicates that good studies of nonresponse are extremely difficult to do Statistical Research, Inc., argues rightly that, therefore, more than one of these studies ought to be done. Doing so would increase the chances of gleaning some useful knowledge.

ANALYSIS OF AGE EFFECTS

The current practice of keeping a family in the sample for 2 years is more a function of the economic costs of recruiting, installing, and training than of good methodological practice. In fact, the original plan

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called for keeping people in the sample for 5 years. This was cut back to 2 because of worries by network researchers that a process of fatigue may lead to less and less button pushing the longer a household is part of the system. As was seen in the exit interviews, there was some suggestive evidence that compliance to the task diminished as time in service progressed.

To test this more rigorously, SRI conducted a special study to determine what happens to households' and persons' usage levels as tenure in the sample increases. A separate database was used, the NPM Information System, which was designed and maintained by SRI on behalf of the television networks.

The analysis converted hours of viewing to index numbers, which revealed that there is a small decline in reported viewing from the initial to the final point at the household level, and a similar small decline in persons' viewing. The overall slight pattern of decline in persons' viewing hides much larger declines in visitors' viewing and in children's viewing and the very economically important 18–34-year-old women (10 percent) and 18–34-year-old men (2 percent). On the other hand, men and women aged 50 and over, who are audiences not especially sought by most advertisers, actually increase their reported viewing over time.

Statistical Research, Inc., reports percentages of declines, but since these are in index numbers not hours, it is not possible to tell exactly how much viewing declines in units of time.

Conclusions

Precision measurement of television viewing among masses of people always has been difficult to do. Different systems were used over the years as flaws were found in each and new systems were developed to correct them. But in their time each system held sway by consensual agreement among the different parties involved in the buying and selling of television commercials and programs and was changed only when it no longer could maintain its credibility among the key players. The present system of measurement is now in a time of eroding confidence among the users.

But this historical time is different from all the past times. Conditions are such now that it may not be as easy as before to develop an alternate system that serves all masters. The proliferation of television signals and the consequent splintering of the audience require larger samples of data providers than ever before, and looking ahead to direct broadcast satellite systems, we can anticipate the need for even larger

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samples in the future. This is because small audience segments are increasingly important to some of the ad-supported program networks, and the smaller the audience segments for which stable measurements are required, the larger the sample sizes needed. But program networks with small audiences are not as apt to pay for large samples as are large audience networks. Technological changes that have led to portability of equipment, remote controls, and VCRs have both increased people's ability to view and led to increasingly idiosyncratic viewing "styles" from one individual to another. Each individual can customize viewing by different ways of flitting about the channels, going back and forth between tape and TV, or broadcast and cable All this increasing complexity of choice makes it harder and harder for the individual to keep track of and record what was viewed.

There are as yet no high-tech solutions to audience measurement in this low commitment, multisignal, complex equipment, fragmented viewing age of television. Unobtrusive systems that can accurately relate specific viewers to their viewing without the active participation of the viewers do not yet exist. These have been and are being developed, but so far are not foolproof. And one should not fall into the trap of thinking that this could be the solution even if such systems were shown to work technically. There is no guarantee that anything approaching a random sample of people would let such systems into their homes. Rather, it is more likely that the sort of people who would invite in an electronic system that can detect who is in the room with the TV set would be very atypical in some ways that might be related to particular viewing patterns. Thus any system that really works might suffer from nonprojectibility to all viewers It is necessary to keep these factors in mind as context in evaluating the Nielsen people-meter system as it is revealed in the CONTAM report.

It is clear that the Nielsen people-meter system has severe faults. Many of these problems have been addressed by Nielsen and changes reportedly have been made. But there has been no publicly circulated report describing the changes or the rationale behind them or the evidence that suggests that the changes are in fact improvements Such a report might go a long way toward increasing confidence that the system is indeed providing better data.

Without such a report, the CONTAM study supplies a valuable record of a complex system of audience measurement, a record that casts considerable doubt on the system's ability to reflect data that is projectable to national television viewing behavior.

The description of the people-meter system in the CONTAM report raises a number of methodological questions that are worth discussing.

1. Can the biases identified in this CONTAM report be compensated for by weighting?

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2. Do the arguments in favor of keeping a panel design outweigh those against?

3. Can one judge whether there is in reality more viewing or less viewing than is being recorded? Given the complexity of the system described, there probably is no way to make a precise estimate overall. There are many compensating sources of error in the sampling, maintenance, editing, and processing system, and the amount from each source is not known. If forced to judge, probably late-night viewing is overestimated, children's viewing is underestimated, and households with many people and with complex video equipment are also underestimated. How it all nets out is anybody's guess

4. Does the report provide insight into whether the across-the-board drop in ratings that occurred last year was real or an artifact of the ratings methodology? There is no smoking gun in this CONTAM report that points to any particular feature of the ratings system as responsible. However, the report surely describes a system that consists of any number of features that could lead to artifactual changes in reported viewing levels.

The key question the CONTAM report raises but does not answer is, if all the corrections to the system that are possible were done, would that system provide valid data of viewing levels for all the different television signals and be representative of the U.S. population including children?

In the past we have lived with ratings systems designed to serve the interests of the buyers and sellers of advertising time. But there was widespread, if not universal, confidence that these systems also measured what people actually were watching Broadcast television uses public airwaves and, despite the inroads in viewing made by other television delivery forms, broadcast television is still the largest part of the industry. It is important that the industry provide a ratings system that can help assess whether the "public interest, convenience, and necessity" is being served by the television industry. The CONTAM report indicates to me that we probably do not have such a ratings system. What requires more debate is whether an adequate system is possible in this increasingly complex television world. I look forward to the A. C. Nielsen Company taking a leadership position in that debate.

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C · O · N · T · A · M

METHODOLOGICAL RESEARCH ON TELEVISION AUDIENCES

Nielsen Procedures

Sampling and Field Implementation

August 1989

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2. Nonresponse

Nonresponse refers to the possibility that information sought in a survey, in full or in part, is not collected from some of the units that were predesignated for the sample. This may result from failure to contact the predesignated unit, or the unit's refusal to cooperate, or the cooperator's submission of unusable data.

Nonresponse leads to bias based on (1) the extent to which nonrespondents exist and (2) the extent to which they differ from respondents with respect to the characteristics of interest in the survey, in this case, television behavior. It was reported earlier that the recruitment/installation rate in the national ratings measurement may be estimated to be slightly over 40 percent, and that, when the tabulation rate is factored in, the response rate is about 35 percent. The remaining 65 percent are not providing information on an average day. A response rate in that range is troubling.

It is important to point out that declining response rates have become a general problem in survey research; the problem is not confined to the national television ratings system. Moreover, the decline in response rate with the introduction of the people meter was to be expected; when you increase the burden on survey respondents, cooperation is less easily achieved. That does not mean that the problem should not be addressed to every extent possible.

In fact, these additional downward pressures on the response rate suggest the wisdom of a careful review of the procedures that are currently in place and creative thought about how they might be enhanced to meet the new challenges.

Conceptually, a researcher should never give up in the effort to obtain information from a predesignated sample. In the extreme, one could enlist the aid of influential intermediaries or resort to other extraordinary measures to convert refusals. At the other extreme of attempt structure, one could accept a "no answer" or a "not interested" and move on to the next household on the list. Usually, practice is somewhere between these extremes.

A question is whether or not Nielsen is extending enough effort to recruit a rigidly defined predesignated sample. For example, should the field representative initially be given the address of only the predesignated housing unit? When Alternates are to be given, should they be doled out sparingly? Both actions might be taken in order to exert pressure to try harder to recruit the predesignated unit, or if that fails, the first or second Alternate.

3. Substitution: Basics and Alternates

The Nielsen sample design provides for substitution, that is, replacement of the predesignated sample (Basic) household with another household (Alternate) selected from the same sampling point. Effort is made to match the Alternate to the Basic with respect to presence of a child under 18 and cable/noncable status.

Substitution is one of several procedures that may be adopted to compensate for nonresponse. It has been the subject of debate for decades. Nielsen's major argument for employing substitution in the sample is "that the substitute (Alternate) household is recruited from the same area, perhaps in the same building or an adjacent building, to take advantage of the homogeneity of households located in the area. This homogeneity can increase the probability" that the predesignated and substitute households have the "same over-the-air television reception capability, access to the same cable system" and cable services, if any, "and demographic characteristics, especially income, race, ethnic origin and renter/owner status." However, matching in this way does not necessarily insure that you are matching on television usage by household members, which is, in the final analysis, of paramount importance.

The renowned statistician, W. Edwards Deming, has stated that "substitution does not solve the problem of nonresponse."* The major argument advanced by Professor Deming and other statisticians in opposition to substitution is that it is likely to include "more of the same" in a survey. That is, the procedure is likely to recruit only a larger sample of those in the population who are inclined to participate in the study. It leaves untouched those who are disinclined to participate, the nonrespondents. In practice, there is a danger associated with substitution procedures: they make it easier for survey personnel to give up on a predesignated sample, and go on to substitutes. So substitution may worsen the bias of nonresponse.

This classic argument against substitution seems particularly relevant to the differential effort expended in recruitment of Basics and Alternates. In the standard recruitment process, Basics, the predesignated sample units, are the subjects of a five-step recruitment effort, followed by a minimum of two additional procedures if they initially refuse. Alternates, on the other hand, in the standard recruitment process, receive a telephoned or personal request for participation; if they refuse, the telephone interviewer or field representative moves on to the next

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* Deming, W. Edwards. Sample Design in Business Research, John Wiley & Sons, Inc., New York, 1960, p. 67.

specified Alternate. This represents a remarkably different attempt structure for a group that now constitutes over three-fifths of the daily reporting sample.

One result is that while about two-fifths of predesignated households are recruited, about one-fourth of the first eligible Alternates are recruited, and a similar proportion of each successive group of eligible Alternates. It should be noted, however, that a somewhat lower recruitment rate is to be expected for Alternates than Basics. This is so because, in areas where recruitment is difficult, it will be difficult for both Alternates and Basics.

It was pointed out in the report on Household Contacts that Alternate households have the potential to remain in the sample as long as Basics, and their viewing behavior has the same impact on audience data. However, their experience with recruitment differs substantially from the experience of Basic households, a circumstance that may or may not be related to their continued cooperation and performance accuracy.

Moreover, despite the fact that they match the Basic household on cable and child status, their willingness to participate after one or two contacts suggests that they could differ from refusing Basic and Alternate households in other characteristics or attitudes, in particular, their viewing behavior.

Data that were presented on the effect of substitution on the composition of the sample suggest that Alternates are similar to Basics. Does this indicate that they are "more of the same"? Their presence, however, brings the composition of the installed and tabulated samples slightly closer to universe estimates. Does this mean that they are helping to compensate for nonresponse?

Data on HUT levels for prime time and total day indicate that the presence of Alternates tends to increase HUT slightly over what it would be with Basics alone. Does this mean that Alternates are compensating for nonresponse, or does it mean that the truncated process that is applied to Alternates yields more people who are heavy television viewers?

There is no practical way currently to answer these questions. Neither is there information relating to the effect of Alternates on program ratings. As compared to Basics, Alternate households tend less often to be large households, to include children, to have a young lady of house. Such households are likely to exhibit different patterns of television usage than their counterparts; these differences would be reflected in program ratings.

In considering the data in this report on the effect of substitution, it is important to maintain perspective on their limitations. They relate only to sample composition and HUT; they do not address other aspects of television behavior, such as programs

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HEADLINE: CONTAM continues criticism of Nielsen; Committee on Nationwide Audience Measurement criticizes Nielsen Media Research's techniques for gathering people-meter data

BYLINE: Goldstein, Maureen

BODY:

CONTAM Continues Criticism of Nielsen

Studies show a pattern that's "becoming painfully familiar"

Appropriately enough for October, Nielsen Media Research and the Committee on Nationwide Audience Measurement are haunted by lingering doubts over national TV ratings and methods used to validate numbers. CONTAM is critical about what it considers serious flaws in NTI's people-meter methodology. And Nielsen appears skeptical about the telephone coincidental technique used by CONTAM to verify Nielsen's ratings.

These issues surfaced at a recent meeting at which CONTAM presented results of its Coincidental Study conducted by Statistical Research Inc. on the Spring 1991 primetime. The study was designed to establish a benchmark against which to compare actual people-meter data provided by Nielsen.

CONTAM's Coincidental Study was conducted in cooperation with Nielsen. SRI conducted the study between March 18 and April 14 of this year, during primetime over 28 evenings between 8 and 10 p.m. on a Monday-through-Sunday basis.

The study findings followed a pattern that didn't surprise media researchers--data indicated that viewing was understated in the younger demos and over-represented by older viewers. However, Nick Schiavone, CONTAM chairman and vice president of media and marketing research for NBC, certainly doesn't applaud Nielsen's consistency. "We're seeing a pattern that's becoming painfully familiar, and things are not getting better," he says.

Compared with the information on primetime viewing collected by SRI, Nielsen's people-meter data for that same period appears to be off 9 percent overall in VPVH estimates. This number compares with the 6 percent overall decline in VPVH estimates revealed by a previous coincidental study conducted in 1990.

But of greater concern to the networks are the greater differences in VPVH

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estimates in a number of key demographic groups. For example, children 6-11 are off by 15 percent and children 12-17 are off by 20 percent. Furthermore, men 18-34 are off by 23 percent and men 35-49 are short 4 percent. Women 18-34 reported shortfalls in VPVH estimates of 18 percent; women 35-49 are off by 8 percent.

At the same meeting, SRI discussed another project undertaken as part of its long-term contract with CONTAM: it plans to form an industry task force to explore universal program encoding.

Barry Cook, senior vice president, chief research officer at Nielsen, also discussed some ideas presented at client forum meetings held this summer to get clients involved in the planning of three upcoming studies. The studies are considered the first step toward completing the 19 objectives outlined by Cook in an ambitious research plan mailed to clients this past summer.

One of the studies happens to be on developing a pilot test for a platinum standard for telephone coincidental study design. Telephone coincidental studies are considered good techniques for validating research results. Nielsen frequently uses the method to validate findings in its local and national measurements. It also happens to be a method used by SRI on behalf of CONTAM as a benchmark against which to verify Nielsen numbers.

Cook also presented client feedback from other meetings, discussing the development of two additional studies dealing with the ongoing problems of non-cooperation and measuring children and teen viewing.

Also noted by the CONTAM coincidental study were differences in rates of cooperation of individual household members, especially among young adults living at home with their parents and those living independently. The study indicated that young adults living on their own were more likely to push people-meter buttons than those living en famille. This has caused CONTAM to question Nielsen's ability to manage the people-meter panel and train each household member to understand the task of pushing people-meter buttons.

Jack Loftus, vice president of communications at Nielsen, says that Nielsen makes every effort to go back into the households for additional training when it spots lagging cooperation. But he asks, "Where do you draw the line between interfering with ratings? If you go back into the household, and members still don't want to do it push buttons , what do you do? How do you factor that into the equation?" Loftus says these are some of the issues that Nielsen and the industry have to decide.

"Nielsen cooperated with measurement and analysis. They are open to learning. But the confounding factor," says Schiavone, "is that they have known and appear to do nothing. It has a dramatic impact on viewing levels and dramatic downside for the advertiser."

How does Nielsen react? "What you've got is you've taken one methodology and used it to take a snapshot in time and compare it to another methodology. You can't assume that because the results are different, one method is right or wrong," says Loftus. "The coincidental done by SRI is a substantive piece of research, which can lead to a better understanding of how people watch TV. We have the same objectives to provide the best possible TV audience measurement."

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Loftus says that Nielsen is still analyzing the study findings and has some "specific questions concerning the methodology."

These concerns reference Nielsen's interest in designing a pilot test for a platinum standard for doing telephone coincidentals.

"There has to be agreement within the industry about what methodology you're using," says Loftus. For example, a consensus is needed on such issues as how to count telephone answering machines.

"The dilemma that we have," says Joe Philport, senior vice president, worldwide media research director, Young & Rubicam. "is that we don't know which of the numbers are truly correct. In spite of the rigors SRI uses, it's difficult to conduct coincidentals and for that method to be 100 percent accurate."

"But the most meaningful part of the meeting," says Philport, "was the shift away from the coincidental study and the discussion of the issue to enhance program clearances." Philport is referring to the next SRI project: a push to develop universal program encoding. "We've been focusing too much on people, and less on the complexities of the channel environment."

SRI and CONTAM are in the process of developing an industrywide task force made up of agencies, cable, network, advertisers and syndicators to develop a universal encoding system. George Hooper, senior associate at SRI, is coordinating the effort. "If we can get a program code, it will be simpler to determine what people are watching for audience measurement," he says. It will be up to the committee to decide the method of encoding, which company should undertake the procedure and placement of the code.

While most media researchers are in favor of devising universal program encoding, some are wondering about CONTAM's timing. Some have suggested that the networks anticipate the rules change that will allow them to syndicate more of their programming and want to iron out the wrinkles of tracking syndicated programming sooner, rather than later.

But Schiavone says, "We see this as something needed to measure television in the year 2000; now is the time to begin research and development."

While Nielsen's Automated Measurement of Lineup system, which monitors shows by tracking codes embedded in a program, does a good job tracing network programs, AMOL's track record for monitoring syndicated shows is not nearly as good. Syndicated shows are often shifted around by stations looking to fill gaps in programming and so are more difficult to monitor. Nielsen has been working to improve AMOL's accuracy and is in favor of universal program encoding. But Nielsen's Loftus underlines the need for agreement. "It impacts reporting issues. Who will set the ID codes and what happens if not everybody cooperates?"

PHOTO : America's watching, but how good is the measurement?

GRAPHIC: Photograph

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People meter rerun: doubts about its accuracy linger as TV season opens. (television ratings)

Lynn G. Coleman

People meter rerun: Doubts about its accuracy linger as TV season opens

The network are mad as hell, and they're not going to take it anymore - ratings screwups, that is.

A.C. Nielsen's people meter system has been under fire from the Big Three TV networks for more than a year and a half, but little progress has been made toward solving the problems, said Nicholas P. Schiavone, vice president of media and marketing research, National Broadcasting Co., New York.

With the new TV season approaching, NBC is doing business "as usual," he said, and offering its normal upfront guarantees, "but that doesn't mean we're happy with Nielsen."

In his opinion, Nielsen still has failed to adequately explain the dramatic decline in viewership it reported for the first quarter of 1990 (Marketing News, Sept. 17, 1990). And because that same rating system is still in place today, Schiavone sees it as "an accident waiting to happen."

The most recent "accident" occurred in the Washington, D.C., market, where ratings were credited to the wrong stations because of procedure used by cable companies called channel mapping, according to Advertising Age.

Channel mapping, or switching a station to a different frequency, has added "one more layer of complexity" to the ratings game, Schiavone said. "It's a substantial measurement challenge."

But it's a challenge Nielsen thinks it has met "better than our competitors," said Jack Loftus, vice president of public relations for Nielsen Media Research in New York.

He admits there have been errors, but they have been human errors, not system errors. And Nielsen's position on the missing viewers of

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early '90 is that viewership did indeed drop during that time period.

In December 1989, the network group CONTAM (Committee on Nationwide TV Audience Measurement) - of which Schiavone is chairman - issued a seven-volume study report airing the network's gripes and recommending actions Nielsen should take to improve ratings data collection.

Last year CONTAM released its Principles of Nationwide Television Audience Measurement which suggests, among other things, increased expenditures on research to maintain accuracy levels.

Because the measurement task has become so complex, Schiavone said more and different elements may be required to ensure accuracy. This may mean using a combination of traditional diaries and people-meter technology, or some other combination of elements, depending on the situation.

He sees two alternatives to the current system that could improve accuracy right now: Cut a household's participation time from two years to one to address the problems of fatigue, and return to a good tuning system.

To get viewing data, Nielsen has sacrificed tuning measurement, Schiavone said. "What we need is a high-quality tuning measure and then the viewing data on top of it.

"The people meter is not a quantum leap, by any means; it's just an electronic diary."

With that in mind, Schiavone said the notion of using paper-and-pencil diaries in some instances doesn't seem that outrageous.

He said Nielsen should take a more intelligent, principles-oriented approach to the problem, rather than being technology-centered. Regarding the missing viewers of '90, for example, Sciavone said, "My feeling is that they didn't have the right proportion of multiset households" in the panel.

CONTAM also has charged that Nielsen no longer measures all of the sets in a household and is violating the basic principles that govern research effectiveness.

Nielsen has cooperated with CONTAM in every way possible, Loftus said, including participating in the '89 study and contributing to the report. "We opened ourselves up to inspection like no one in this business ever has," Loftus said. The CONTAM report did not find that the system was flawed, only that it needed improvements.

The problem is not that Nielsen doesn't want to improve the system,

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he said, but that CONTAM's recommended dual-system measurement - people meters, tuning, and telephone coincidentals - did not sit well with all of Nielsen's customers.

"We brought all of our customers [cable networks, independents, etc.] into the discussion," Loftus said, to address all of their differing needs.

Implementing CONTAM's proposals will cost everyone more, but may not be useful to everyone. The picture looks a lot different if you "put on your cable TV hat," he said.

In addressing some of the "principles" charges, he maintains that Nielsen does have a good tuning system and meters all usable sets in a household.

Loftus said the people meter is a tremendous advance over traditional diaries because it reflects the changes in the way people watch TV.

"If you look at the [television] pie, clearly there are more slices today than there were 10 years ago." The people meter shows how the slices of that pie "are shaping up," he said. Since the advent of this technology, advertisers have been able to buy commercial time more intelligently.

While Nielsen and the networks agree to disagree, the passive people meter is looming in the horizon. Will this put the issue to rest? Schiavone doesn't think so.

First, he doesn't believe it is a "truly passive device." Even the fact that people know it's in their home violates passivity, he said.

Second, Schiavone doesn't think the ratings companies will get better cooperation rates than they're getting now, particularly with such an intrusive device. He's waiting to see if Nielsen can get people to agree to having passive meters installed in their bedrooms and other private areas.

"Talk about Big Brother," he said. "Would you want a seeing device in your bathroom?"

---- INDEX REFERENCES ----

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Nielsen identifies 'Voyager' glitch. (**Nielsen Media** Research; United Paramount Network's 'Star Trek: Voyager' ratings)
Wayne **Friedman**

Nielsen Media Research says it has uncovered the cause of a ratings snafu that boosted ratings of the United Paramount Network show, "Star Trek: Voyager." The glitch, according to Nielsen, occurred when homes from the Nielsen Hispanic Television Index were inadvertently added in, resulting in household ratings being inflated by 11 percent rate. (IM, Aug. 2, p. 4).

From the shows debut on Jan. 16 through July 23, Nielsen has been overstating the ratings that UPN provides to national advertisers. "Voyager's" ratings, under a special Gross Average Audience classification of the Nielsen Television Index, was released as a 10.3 household rating during that period, but it really should have been recorded as a 9.3.

Nielsen made the error, according to Jack Loftus, vice president of communications, because a data processing mistake had mixed the two national TV samples together - data from NTI and **NHTI**.

While the mistake is relatively small, executives at UPN and the agency community are concerned that the nature of the error could lead to similar problems.

"I was upset with them," says Brian Fiori, vice president of research for UPN. "It doesn't inspire confidence. I have no idea why [the NTI and **NHTI** samples] were even sitting on the same computer."

Fiori adds: "I was joking with them [because in the past] when I ask them to compare certain things, they say, for instance, 'NSI [Nielsen Station Index, a local station service] doesn't know what NTI is doing. They are different services; we couldn't possibly put those things together.' Yet, look at this. They are sitting on the same computer."

Nielsen says the mistake only occurred in "Voyager" and just in the GAA category. GAA ratings are the sum of two airings within a week. (AA, or average audience, covers a single airing.) Before the launch of "Voyager," UPN made a special request to Nielsen that the show get not just an AA, but a GAA, rating as well. By airing the show twice in a given week, UPN can charge national advertisers more. Prior to UPN's

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request, all network shows had been calculated under the AA grouping. "Voyager's" AA rating for the season was a 5.8 rating/9 share.

GAA is used extensively in measuring syndication programming. Paramount Television Group, for instance, a partner in UPN, regularly uses GAA ratings for its syndicated sister "Star Trek" shows, "Star Trek: The Next Generation" and "Star Trek: Deep Space Nine," to sell to national advertisers.

Fiori says Nielsen caught the problem after tweaking the new GAA programming software. While household ratings were overestimated, he says, demographic ratings yielded higher, as well as lower, results. Fiori says the discrepancy is being corrected via make-goods to advertisers.

"What worries me is that people from one sample could inadvertently or accidentally be placed into the other sample," says Jon Swallen, senior vice president and director of media research at Oglivy & Mather." Somewhere, column B got mixed up with column A. Their data processing is supposed to be set up in a way that column A never gets mixed up with column B. It raises the obvious question, 'Gee, if it happened once, couldn't it happen again?"'

"It turned out to be not a big deal," says Fiori. "It could have been a lot worse. I wanted them to go to an audit of everything else they do." Nielsen says the glitch did not affect any ratings of other TV programming.

---- INDEX REFERENCES ----

ORGANIZATION: **NIELSEN MEDIA** RESEARCH

KEY WORDS: STAR TREK: VOYAGER (TELEVISION PROGRAM) TELEVISION PROGRAMS MARKETING RESEARCH FIRMS

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Nielsen snafu ties up TBS. (Nielsen Media Research; TBS Superstation)

Wayne Friedman

Sales executives at Turner Broadcasting's TBS Superstation are irate over a ratings glitch that may have cost them millions of dollars. An error by Nielsen Media Research appears to be at the root of the problem that has seen Turner deliver makegoods that it may not have really owed to advertisers, resulting in an attendant depletion of its upfront and scatter inventory.

The exact nature and extent of the problem isn't completely known. But according to executives, Nielsen has been inadvertently placing home satellite coverage in with WTBS local Atlanta ratings, when it should have gone into TBS Superstation numbers. Mike Proper, senior vice president of research at Turner Broadcasting Sales, won't comment.

"It doesn't impact any of the syndicated reports," says Jack Loftus, vice president of communications for Nielsen Media Research. "Whatever it is may impact the special report we provide to Turner. Apparently, it affects some satellite homes, not cable homes. I don't know the extent. It was not a significant increase or decrease in the numbers, but define significant. I don't know." Loftus says Nielsen is continuing to investigate.

"They have been underreporting Turner by tremendous amounts," says one source. "Turner [executives are] nuts because the numbers have been wrong for a couple of quarters." This source believes the problem started about March of this year.

Sources say some TBS programs have been underdelivering by 125,000 homes. For a TBS show that gets 600,000 homes, that amounts to a 21 percent shortfall. Even if the underdelivery is small, say 2-3 percent, advertising executives say it could be significant in terms of dollars given that the error has occurred over many months. Usually, national TV sellers provide makegoods or bonus units to advertisers almost immediately after the shortfall has been revealed.

Since Turner has been handing out makegoods all along, it turns out the company has given advertisers too many units because Nielsen was underreporting the network. For Turner sales executives, this amounts

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to lost money.

One advertising agency staffer believes the problem extends beyond Turner. "Nielsen is sitting there saying, "This is only a Turner issue.' But if they say [Turner's] viewing is off by a million homes, it has to be coming from somewhere else. Maybe Lifetime's down, maybe NBC."

"[Nielsen] is saying the HUT [Home Using Television] levels didn't change, [but] all of a sudden they are going to give [TBS] hundreds of thousands of more homes," this person continues. "[This means] the HUTs had to go up. If the HUTs didn't go up, then every number that Nielsen has reported since March has been wrong."

For years, Turner has had two feeds: one local for WTBS-TV in Atlanta, and another for TBS Superstation, which covers all markets outside Atlanta. Being excluded from Atlanta doesn't concern most national advertisers. They can buy WTBS locally to complete their national buy, but they generally don't because they can't compete with local sponsors that can pay the station higher rates. Additionally, national advertisers aren't too upset in not getting Atlanta because the channel already skews heavily in Southern markets.

Until this year, the measurement company, in its Nielsen HomeVideo Index, combined TBS Superstation ratings and the local WTBS station ratings into a single number. (WTBS also has its own separate listing; its local ratings in Nielsen's Station Index.) To give national advertisers what they pay for, Turner executives had factored out local WTBS ratings from the NHI number. But this formula, however, has never been very accurate in determining exact viewership per program.

Earlier this year, Nielsen helped TBS clear up the confusion. TBS Superstation would have its own national ratings without its local station, called TBS-C (the 'C' stands for cable). But sources say Nielsen did this incorrectly. Advertising sources and those close to the company say home satellite coverage was put into local WTBS ratings, not into the TBS-C numbers.

There are around 2 million satellite homes in the U.S., almost all of which receive TBS Superstation, which reaches 67 million U.S. homes. That would represent about 3 percent of its total audience.

---- INDEX REFERENCES ----

ORGANIZATION: NIELSEN MEDIA RESEARCH TBS SUPERSTATION

KEY WORDS: MARKETING RESEARCH FIRMS CABLE TELEVISION BROADCASTING INDUSTRY

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Broadcasters lash out at Nielsen

Ratings company comes under attack at TVB; Pappas organizing industry-owned alternative

By Steve McClellan

Anger and frustration at Nielsen Media Research for questionable accuracy and poor customer service bubbled over last week at a conference sponsored by the Television Bureau of Advertising in New York.

At one session, TVB Senior Vice President Tom Conway told Nielsen executives that many local broadcasters are fed up with the service and feel it's time for a palace revolt against the research firm, which holds a monopoly on the local TV ratings business.

Enter Harry Pappas, the Visalia, Calif.-based TV group owner, who outlined plans for an industrywide cooperative to develop a competing service.

A chorus of Nielsen executives attending the ratings conference, including Ronald Meyer, senior vice president and director of marketing for Nielsen's local TV ratings service, said they understood the concerns, but called for patience as Nielsen sorts through problems and adapts new techniques to measure ratings in an era of media convergence.

"Broadcasters are your customers," Conway told Meyer in one exchange, "and they are not happy with the way things are going right now. It's in our best interests as an industry to control our own destiny" as to how best to do business in the future. "That may include another ratings service [or] it may include no ratings service at all."

Conway and others at the conference criticized Nielsen for the many discrepancies in its many ratings services, including the local and national indices, the cable index and the new Hispanic service.

He also charged Nielsen with failing to correct inaccurate interpretations of Nielsen ratings by some of its clients and the press.

Television stations represent Nielsen's largest single revenue stream, Conway said, and if stations decide "that this system is not the system we want to work with in the future because it is not in our best interest, that's a situation you have to address."

Although Meyer was sympathetic to some broadcaster concerns, particularly the discrepancies between different sample bases, he stressed that Nielsen thinks "the current approach we're using is the best approach to address the needs of our entire client base, recognizing that no matter what we do it is not going to be perfect."

Pappas charged Meyer and other Nielsen executives with using the "mushroom method of client relations: keep them in the dark and feed them a lot of bovine excrement."

Pappas said that Nielsen undermeasures most broadcast dayparts at a cost of hundreds of millions of dollars to the industry. As a result, he is spearheading the Coalition for Accurate Audience Measurement, a broadcaster-funded cooperative to develop alternatives to the Nielsen ratings system.

Initial members, he said, include Fox, TVB, Malrite, River City Broadcasting, LIN Television and Pappas Telecasting. The cooperative, he said, would be busy in the coming months hiring researchers and developing standards, specifications and the technology to be employed in the new system. ◻

Affiliate group considers replacing Nielsen

By Steve Coe

By the end of the year, Nielsen may be forced to drastically change the way it gathers ratings information or it may see a new entity take over the television-ratings-measurement business.

A coalition led by Harry Pappas, president, Pappas Telecasting, is looking for a Nielsen alternative. The coalition has 100 members and is growing, says Pappas, adding that most are Fox affiliates, but more than 25 are affiliated with other networks or are independent. Several station groups, including Malrite Communications, also are represented. Pappas says the "immense" response from Fox stems from his presentation at the recent Fox affiliates meeting.

Coalition members hope that by the end of the year or in early 1996 they will solicit proposals from a number of entities for a new measurement system.

"A lot of broadcasters in the country have had serious concerns about the accuracy of the measurement system for years," Pappas says. "Not just [concerns] that we have a monopoly provider...but concerns about the methodology and technology of the current system....

"If Nielsen chooses to respond, then that's great. If another company does, that's fine as well." At stake, Pappas says, "is a $35 billion industry that is relying on one service that offers three services—and all are under question."

One alternative being considered is a cooperative that would be operated by the as-yet-unnamed coalition, Pappas says. "One option might be to design a stand-alone, nonprofit organization with pristine standards and integrity. This is a service that needs to be relied upon by everyone in the industry."

According to Pappas, the coalition was formed more than a month ago when he was approached by a group owner. The owner used the example of the success of the Fox Children's Network, a cooperative of affiliates, to suggest "that we develop an industry-wide cooperative to look at the overall measurement system," Pappas says.

The Television Bureau of Advertising (TVB) soon may join in the coalition's activities. "If Harry [Pappas] is at the forefront of a venture, we'd certainly be interested and will talk with him," TVB President Ave Butensky says.

Butensky says that the Electronic Media Ratings Council, of which TVB is a part, has been meeting with Nielsen to discuss its service: "Our meetings have run the gamut from A to Z on how Nielsen does its business. Our last meeting with them was a week or so ago and they recognized our concerns."

At the Fox affiliates meeting two weeks ago, Fox TV Chairman Chase Carey chided some non-metered–market affiliates for their performance. He later acknowledged that some of those markets may have been experiencing difficulties as a result of Nielsen's diary system.

A coalition council will be formed in the next few weeks, and a complete membership list will be made public at the end of this month or early next month. ▫

Spot spotter

Competitive Media Reports, which monitors TV commercials and advertising expenditures, has signed NBC and its O&Os to a five-year contract. The network's previous CMR contract expired earlier this year. CMR recently signed Fox to a similar deal and has contracts with CBS, ABC, station, cable, print and ad clients. The company measures ad exposures and expenditures for more than 90,000 brands across 14 different media. —SM

Bell Atlantic allocates VDT channels

Bell Atlantic last week divvied up the channel assignments for its commercial video dialtone network.

Rainbow Programming Holdings appears to be the big winner, receiving channels 1 through 192, while FutureVision of America gets 200-295. Other video providers are Playboy Entertainment Group, Graff Pay-Per-View, International Tele-Commerce and two groups that declined to be identified.

Only weeks ago Bell Atlantic won a tariff for its VDT network in Dover Township, N.J., that plans to pass 38,000 homes. The first 2,000 test households will have access to the system by late summer, after which BA plans to pass 1,500 homes per month during the two-year construction project.

Although Rainbow controls half of the channels, questions remain about its plans in Dover Township. However, the company has made a $345,000 down payment to reserve its 192 channels.

One complicating issue is that video information providers (VIPs) such as Rainbow and FutureVision are responsible for digitizing their programing. All programing must be digitally encoded into MPEG-2 video so that it can run over BA's switched digital video network.

Earlier this year, FutureVision bought 96 digital encoders from DiviCom (one for each of its channels) at $100,000 each, for a total of some $10 million, according to Marty Lafferty of FutureVision.

"We're looking into the costs of digitally compressing the programing," says Andrea Greenberg, Rainbow senior vice president, business affairs.

There still are 79 channels not assigned by BA for its 384-channel network. Those channels are available on a first-come, first-served basis, according to Mitchell. —MB

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Monday, April 4, 1994

BIG 4 CALL RATINGS POWWOW. (BROADCAST TELEVISION NETWORKS CALL MEETING TO DEVELOP NEW RATINGS MEASUREMENT AND REPORTING SYSTEM)

By Michael Freeman

The broadcast TV networks have summoned cable networks, syndication companies and advertising agencies to a meeting in New York this week designed to accelerate their efforts to develop an alternative to NIELSEN Media Research's system for measuring and reporting ratings.

Looking for feedback on what kinds of new methodology will more effectively measure audiences, the networks have also invited NIELSEN and Arbitron to the April 5 meeting. A lot is on the line for NIELSEN, whose ratings research takes in an estimated $50 million per year.

The networks announced in February that they will develop an experimental ratings lab (called SMART, for System for Measuring and Reporting Television) designed to improve ratings research. Gale Metzger, president of Statistical Research Inc., retained by the networks to develop SMART, said that the meeting will cover how a planned 1995 lab test will develop methodology for tracking what programming audiences are watching and in what venue the programs are airing.

"[SMART's] first concern is what program is being tuned in by viewers," Metzger said. "Then, using independently compiled research material and having it encoded creates a more efficient one-step rather than the two-step process under the current system." The networks are seeking better verification of which members of the "NIELSEN family" are using the "active" PEOPLE METERS and watching a specific program and channel.

When asked if the invitation to NIELSEN to this week's meeting indicates an opportunity for NIELSEN to partner on the project, Metzger said: "There are no plans for joint ventures."

NIELSEN spokesman Jack Loftus said the research giant is "going to the meeting with an open mind." Loftus said NIELSEN will continue its won research and plans to invest "millions of dollars" toi introduce a passive PEOPLE METER system and encoding of programming.

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NIELSEN has been developing several versions of passive PEOPLE METER boxes, but network and syndication executives have become increasingly vociferous about what they see as foot-dragging by NIELSEN in not immediately addressingg alleged undercounting of viewers, particularly on children's programming. Lotus said NIELSEN plans to begin field testing on a passive PEOPLE METER box within a year.

Nicholas Schiavione, NBC vp/media and marketing research, said: "SRI's version for a working research lab is closer to what we're looking for an offers us a tool to break into this multi-channel environment."

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New recruiting method enlarges Nielsen family

New recruitment technique boosts acceptances

By Steve McClellan

More families are saying yes to Nielsen Media Research when asked if they'd like to become "Nielsen families." After two years of research, Nielsen has developed a new method for recruiting peoplemeter households that it says boosts the cooperation rate for the national household sample by almost 20 percentage points.

Nielsen's sample has been expanded by 300 households.

The ratings company has been criticized for having an initial cooperation rate of 50%—that is, every other household initially contacted in the 4,000 national peoplemeter sample declines to participate.

Network researchers have questioned whether a sample with such a high refusal rate truly represents all viewers. But during the past six months, the company has expanded the sample by more than 300 households (with plans to expand to 5,000 homes by year's end) using a recruitment method with a cooperation rate of 68.5%. Nielsen is vague about the details of the new recruitment training program, even to clients, who say they're impressed with the results but nervous at the same time.

"They're changing this sample of 5,000 homes that dictates the viewing habits of 200 million viewers," says one network researcher. "And they're not telling us what they're doing. Yeah, we're a little nervous."

Nielsen says it wants to keep the recruiting method proprietary, although it might consider licensing it to others. Generally, the new pitch tries to get viewers to think of their participation as a voluntary "membership," rather than an incentive-based situation.

John Dimling, president and CEO, Nielsen Media Research, says: "While it is too early to fully evaluate the ongoing [cooperation] rate in the expansion sample, signs are encouraging." Meanwhile, Nielsen will meet with clients next month to brief them on the new recruitment method as well as advancements in its commercial verification technolgy and progress in the development of its passive meter system. ▫

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Friday, September 9, 1994

Television (A Special Report): What We Watch

Keeping Track: If measuring TV audiences is inaccurate today, critics Ask, what happens when things get really complicated?

By Thomas R. King

It's 1999, a little before 8 p.m., and the multimedia, interactive big-screen television in the Smith house has just been turned on. The Smiths are a "NIELSEN family," one of a few thousand nationwide whose tastes in programming still dictate which shows get renewed and how billions of advertising dollars are spent.

But unlike NIELSEN families of the mid-1990s, who had to keep track of their choices by laboriously pushing buttons or making entries in a viewing diary, the Smiths need do nothing but vegetate in front of the set. They have a "passive PEOPLE METER," which has a sensor buried inside that takes "pictures" of all those watching. If Junior stays tuned for all of "The Brides of Beverly Hills, 90210," the system knows. If Dad leaves during a commercial of "The Tonight Show Starring Martin Lawrence," the system notes that, too.

The TV-ratings gurus at A.C. NIELSEN Co. say this may be one of the main ways to track viewing in the future. NIELSEN'S critics, however, argue that the concept has serious flaws. They say that it raises alarming privacy issues that will keep consumers from accepting it, and that it falls far short of what will be needed to track viewing as the audience splinters among new kinds of viewing choices in the 500-channel age.

The search for a more reliable ratings system is a serious quest. Advertisers buy more than $30 billion of television time annually based on NIELSEN'S national and local ratings. They, along with TV stations and ad agencies, have criticized NIELSEN'S methods for years, but now their complaints are reaching a feverish pitch. Their longtime worries -- that NIELSEN has faulty sampling methods and flawed recruitment procedures that produce defective data that doesn't accurately report who's watching TV -- are now being replaced with what may be a far more dire concern:

If NIELSEN can't accurately track TV viewing today, its critics ask,

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how will it be able to keep pace as the nature of television changes rapidly tomorrow?

NIELSEN rejects the premise of the criticism. "Our data isn't perfect and probably never will be," says John Dimling, president and chief operating officer at NIELSEN Media Research U.S.A., the New York-based unit that runs the company's ratings operation. "But it's better than any commercial data that's available, and we're working to make it better and better." As for the 500-channel future, he adds, "certainly the technology will change, but not the fundamentals" of audience measurement.

NIELSEN'S harshest critics say the multimedia age may enable other companies to provide better audience information. The builders of the information superhighway promise technology that will report exactly who watched what programs when. Supersmart set-top boxes might be able to spit out information that could be used to produce a complete census of precisely who watched what -- not simply a sample of the audience, as NIELSEN has done for so long.

But executives of NIELSEN, a unit of Dun & Bradstreet Corp. of Westport, Conn., say they fully expect to be the principal assessors of TV audiences well into the future. Their current system is already compatible with the superhighway, they claim, pointing to NIELSEN'S tracking of a Time Warner Inc. 150-channel Quantum system in New York. That system is a "near video-on-demand" service in which subscribers can "access" movies and special-events programs -- and NIELSEN meters connected to set-top boxes record each request as it's made.

That doesn't mean NIELSEN won't have to make some adjustments. Mr. Dimling says the company is making significant improvements in its current methodology. Over the next several months, it will expand the number of households it uses for national ratings by 25%, to 5,000. It says it has also improved training of NIELSEN families to get more accurate data from them.

For the customers that buy its information, NIELSEN is investing heavily in a state-of-the-art system to deliver ratings data faster and in more detail. Mr. Dimling also says NIELSEN is "sharing information" with an assortment of companies that are designing tomorrow's program pipelines, with an eye toward hooking up to viewers' set-top boxes or other equipment.

Still, many industry officials are skeptical of NIELSEN'S promises. Nicholas Schiavone, vice president of media and marketing research at General Electric Co.'s NBC television unit, says: "I hate to invoke my mother here, but she used to say to me, 'Actions speak louder than words. And you know, Nick, talk is cheap."'

The problem, Mr. Schiavone says, is that NIELSEN has been doing

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business the same way for decades. And since Britain's AGB Television Research, its only competitor, folded its U.S. operations in 1988, NIELSEN has had a monopoly on the business and little incentive to make improvements.

In 1989, the Committee on Nationwide Television Audience Measurement, or Contam, whose members include the three major TV networks and the National Association of Broadcasters, concluded in a study that the company's "PEOPLE METER" was producing seriously flawed data. The committee said the PEOPLE METER, which requires each viewer to press some buttons when he or she starts or stops watching television, demanded too much effort to be accurate.

But NIELSEN, members of Contam say, didn't bat an eyelash. "Nothing of significance or substance has changed," says NBC's Mr. Schiavone, who also serves as Contam's current chairman. "There was no midcourse correction on their part, and we have the same measure we had four years ago. There's one difference: The TV environment is much more complex now than it was in 1989, and it's only going to get more so."

NIELSEN executives are betting that the information highway's developers -- perhaps ventures between cable-TV companies and telephone companies or engineers of two-way cable systems -- won't elect to plunge into the business of audience measurement. Beware the hype, they say; there may be so few people hooked up for many years that it would be hard to get a legitimate sample just from the superhighway. In which case, who would measure homes that choose to stay off the superhighway? And even if every home is wired, what about TV sets that aren't wired within those homes?

NIELSEN executives see other basic problems if huge cable-telephone-studio ventures try to create a measuring service. "Why would advertisers and their agencies want to have audience data supplied to them by the very same companies who are selling the time?" Mr. Dimling asks. "I think there is an implied conflict of interest in that arrangement."

NIELSEN believes the cable-telephone ventures will instead be a provider of data to NIELSEN, which in turn will crunch the numbers and come up with the census. This would make manipulation of data by program providers less likely, Mr. Dimling argues. NIELSEN, he says, is uniquely positioned to decipher information from multiple sources and present it to its customers in a meaningful way.

For now, the many companies scrambling to design the television set-top boxes say they aren't interested in getting into audience measurement -- but suggest that their expertise might help NIELSEN do a better job. "Our boxes are going to give NIELSEN a vastly improved tool set," says Geoff Roman, vice president of technology and business development at General Instrument Corp. of Chicago, a leading maker of

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cable-converter boxes. "But I wouldn't see us as a competitor to them."

NIELSEN may face new competition anyway. Contam executives, undaunted by NIELSEN'S snub in 1989, are returning with another effort. They recently hired Statistical Research Inc., a research company in Westfield, N.J., to run a "laboratory" that late next year will test a ratings system the networks believe will produce more-accurate data. Contam says the lab will be open to NIELSEN and hopes the research giant will adopt some of the techniques it tests. Though Contam officials say they know it will be costly and complicated to start a rival system, they add that they're prepared to do so if NIELSEN doesn't adopt some of the strategies they plan to showcase.

At least publicly, NIELSEN doesn't profess to be concerned about such threats. Instead, it prefers to talk about the passive PEOPLE METER, created to tell more about who is watching television, the aspect of audience measurement that NIELSEN regards as something akin to the Holy Grail.

The passive PEOPLE METER, which NIELSEN plans to test in a small market at the end of the year, has an imaging system that takes digitized "photographs" of all those watching. The meter's memory is programmed to recognize the faces of everyone in a household and to record what each person watches.

Many media executives, however, say the passive meter will be sunk by privacy concerns. Critics say consumers won't go for a system that takes pictures of them in their bedrooms -- where, statistics show, Americans do a significant amount of TV viewing.

"Could they get 4,000 homes to sign up to try it?" Mr. Schiavone asks. "Probably. But what you'd end up with is a sample of exhibitionists. I'm simply saying they're not representative." Calling the passive PEOPLE METER "a Faustian bargain, a deal with the devil," he adds: "NIELSEN just doesn't seem to understand that this is a measurement system that amounts to a wholesale invasion of privacy."

NIELSEN says the critics are overreacting. "Any kind of Big Brother intrusion is really far beyond the passive meter's capability or purpose," Mr. Dimling says. "The only information collected and transmitted is that 'person No. 1' is watching television." Mr. Dimling says the passive meter represents an advance because it eliminates the effort NIELSEN families now must make to record what they watch.

The information gathered and reported by the passive PEOPLE METER will be completely different from the data NIELSEN currently reports. Because of the continuous nature of the meter's data -- it tracks images of the viewers on a second-by-second basis -- NIELSEN says it will finally be possible to see whether viewers stay in the room or turn the channel when, say, "Seinfeld" goes to a commercial break.

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NIELSEN says the passive meter will represent a particular advance in tracking viewing by children and teenagers, who have been the most difficult to measure because they aren't as reliable as adults in filling out diaries or working the traditional PEOPLE METER. What's more, NIELSEN says, the passive meter should erase any lingering concerns on the part of broadcasters that "button-pushing fatigue" from the traditional PEOPLE METER skews ratings.

Says Mr. Dimling, "It doesn't require that people in the sample wear a badge, a wristwatch or wrap an antenna around their head."

Mr. King is a staff reporter in The Wall Street Journal's Los Angeles bureau.

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Volume 3 of 3

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Rebuttal Testimony of
Dr. Peter V. Miller
Northwestern University

I am submitting this testimony on behalf of the Joint Sports Claimants (Major League Baseball, National Basketball Association, National Hockey League and National Collegiate Athletic Association) in the 1990-92 cable royalty distribution proceeding. My testimony responds to testimony presented by Paul Lindstrom of the A.C. Nielsen Company ("Nielsen") and Allen Cooper of the Motion Picture Association of America ("MPAA").

Qualifications.

I am Associate Professor of Communication Studies and Journalism at Northwestern University. I teach, research and write in the areas of survey methodology, mass communication and public opinion. During my tenure at Northwestern, my research has focused primarily on issues involving survey research.

In recent years, a considerable portion of my work has been devoted to analyzing methods of measuring television audiences, including through Nielsen ratings data, by parties inside and outside the electronic media industry.

Prior to coming to Northwestern in 1983, I was on the faculty of the University of Michigan, where I served as Assistant Professor of Sociology and Communication. While there, I also served as an Assistant Research Scientist in the Survey Research Center of the Institute for Social Research, and participated in methodological reviews of the National Health Interview Survey and the National Crime Survey.

Between 1985 and 1991, I consulted periodically with the A.C. Nielsen Company. Some of the projects I worked on with Nielsen during that time period included developing questionnaires, training interviewers for telephone surveys, and examining the Nielsen diary methodology. I also conducted exit interviews with respondents in Nielsen's NTI people meter sample, and worked with Nielsen for a time period during the Committee on National Television Audience Measurement's analysis of Nielsen's people meter system. I also participated in a NOVA documentary on television ratings (a portion of which was devoted to the Nielsen people meter) that first aired on public television in February, 1992.

I have been active in professional associations in the area of survey research. I am a member of the American Association for Public Opinion Research, and served the association as Standards Chair. I am a member of the Research Quality Council of the Advertising Research Foundation. In addition, I am on the editorial board of Public Opinion Quarterly, and serve as editor of the "Poll Review" section, which is devoted to analysis and criticism of survey practice. My resume, containing a list of my publications, awards and professional activities, is appended as Attachment A.

Background.

In prior royalty distribution proceedings the MPAA sponsored studies of distant signal "viewing" in cable households. The studies were based upon the Nielsen Station Index ("NSI") database. NSI uses both diaries and meters to collect audience information in each of approximately 200 markets, during the four "sweep" periods (February, May, July and November). The MPAA studies relied upon diary (but not meter) data from NSI cable households. According to Cooper, there were approximately 200,000 NSI cable households that returned diaries underlying the MPAA's 1989 study (Copyright Royalty Tribunal, Final

Determination in the 1989 Cable Royalty Distribution Proceeding, Federal Register, vol. 57, No 81, p. 15295 (1992)).

In the 1990-92 royalty distribution proceeding the MPAA has switched to a "viewing" study based upon Nielsen Television Index ("NTI") data. The NTI uses people meters to collect audience information on a continuous basis. During the 1990-92 period, the daily people meter sample consisted of approximately 4000 households, 60 percent (or 2400) of which were cable households. On any given day, about 3500 people meter households (and about 2100 cable meter households) reported usable data.

According to Lindstrom, a total of approximately 4400 different people meter households had some distant signal viewing during each of the years 1991 and 1992 (Lindstrom written testimony at pp. 36-37). Some of these households, however, may have been in the 1991 or 1992 sample for as little as one day, while others may have been NTI households for the entire year or for both years. Lindstrom presents only "sweeps" data for 1990. Those data indicate that a total of approximately 3700 different people meter households had some distant signal viewing during the 1990 "sweeps" (Lindstrom Written Testimony at p. 35). Again, some of these households may have been in the 1990 NTI sample for as little as one day, while others may have been NTI household during all four 1990 "sweep" periods.

According to Lindstrom, Nielsen recommended that MPAA switch to an NTI-based study for these proceedings because: "We felt that all things considered, Nielsen People Meter was a superior data collection method." (Lindstrom Written Testimony at p. 2). See also Lindstrom Transcript at p. 8044 ("The best technique to use would be the meter.") Lindstrom also testified that Nielsen's clients --"advertisers and their agencies, networks, TV stations, program producers, cable systems and cable networks" -- consider the 4000 household sample

"adequate." (Lindstrom Written Testimony at p. 4). He also testified that, "...measuring a television audience is as simple in principle as counting beads." (Lindstrom Written Testimony at p. 5).

The MPAA people meter studies measure the number of "household viewing minutes" generated by different categories of distant signal programming during the years 1990-92. The MPAA studies count each minute that a metered television set is tuned to one of the distant signal programs, regardless of whether anyone in the people meter household actually watched that program. Thus, the MPAA studies are properly considered "tuning" studies. Lindstrom Transcript at p. 8187.

MPAA's Cooper testified that the studies show the value of the different categories of distant signal programming. Cooper Written Testimony at p. 3. Lindstrom, however, testified that, "we are not measuring value, we are measuring viewing." (Transcript at p. 8126).

Summary of Conclusions.

1) Lindstrom's testimony suggests that there is general satisfaction on the part of the television industry with the people meter sample and that the task of measuring television audiences is straightforward and simple with the people meter. Both of these suggestions are erroneous. There are significant, industry-recognized problems with the Nielsen people meter system. In particular, substantial concern has been expressed over whether the achieved people meter household sample is representative of the nation's television households. While there are significant problems with the NSI diary-based surveys as well, it cannot be said that the people meter system is, on the whole, a better technique for providing information for this proceeding.

2) The "household/minutes" data presented by Lindstrom are not relied upon for typical transactions involving audience information in the television industry. The "household/minutes" measure is significantly different from the usual measures relied upon by the industry, including "ratings" and "shares" for all households, and for different demographic groups.

3) The household/minutes data presented by Lindstrom do not measure the relative values to cable operators of the different categories of distant signal programs. To obtain an indirect measure of such values one would need audience data different from that which Lindstrom has offered.

1. **The People Meter Controversy**

The Nielsen people meter system began as a response in the mid-1980s to a competitive challenge (by Audits of Great Britain (AGB) to Nielsen's monopoly status in national electronic audience measurement. After installing its people meter sample, Nielsen "unplugged" its long-standing NTI meter-diary measurement system. AGB then went out of business and Nielsen was left as the monopoly supplier of national audience information again, but this time as a people meter service.

This major change in the method of television audience measurement caused an unprecedented furor in the broadcasting industry, and the controversy continues to this day. The broadcast networks, which relied upon the old NTI system for negotiating with advertisers, adopted new criteria for estimating audiences for upcoming seasons (see Attachment B). The abruptness of the change led broadcast networks to charge that Nielsen's people meter service was more the result of commercial expediency than scientific judgment.

A significant outcome of major client dissatisfaction with the people meter service was their sponsorship of a $1 million independent evaluation of the new system, completed in 1989. The evaluation, conducted under the auspices of the Committee on Network Audience Measurement (CONTAM), was put forward as methodological research that Nielsen should have done prior to introducing the people meter system. The CONTAM report was a public vote of "no confidence" in Nielsen's ability and motivation to scientifically evaluate its new product. (See Attachment C).

The CONTAM review of sampling and recruitment, field, engineering, editing and tabulation, and audience data pointed to some areas where the people meter system was satisfactory (e.g., meter engineering), but also noted a number of areas of significant concern. In particular, CONTAM reported that the people meter sample had a high nonresponse rate for predesignated households, a fact that directly affected the representativeness and adequacy of the sample. The CONTAM report estimated that in mid-1989, approximately 35 percent of predesignated households were providing usable data. (See Attachment D). In his testimony for this proceeding, Lindstrom reports that the predesignated household response rate for the people meter surveys used in this proceeding was approximately 45 percent. Lindstrom Transcript at p. 8223. This response rate is about half of the response rate usually achieved in studies conducted by the Bureau of the Census, and is well below the typical response rates achieved by major academic survey organizations in household surveys. A response rate of this kind would normally be unacceptable for surveys sponsored by the federal government. It raises significant concern over the representativeness of the sample.

Subsequent telephone coincidental measurement sponsored by CONTAM in 1990 and 1991 further documented problems with the people meter sample. (See Attachment E). Moreover, between 1990 and 1995, the people meter system has continued to suffer criticism by

major segments of the television industry. (See Attachment F). These studies and criticisms highlight the fact that, as in any survey, the total error in a people meter survey is only partly sampling error (the error calculated in "standard error" measures). The remaining portion of total survey error includes such components as nonresponse error (e.g., refusal to participate in the study).

Following the coincidental studies, CONTAM in 1994 began to sponsor the System for Measuring and Reporting Television ("SMART") project, an ongoing research and development operation that generates measurement alternatives to the Nielsen people meter system. (See Attachment G). To date, the project has conducted a number of studies, has developed new recruiting and training methods for people meter respondents, has developed a new meter and has patented a new program identification method. A test market sample of households are now recording their viewing with the SMART methods. Responding to criticism, Nielsen has recently introduced a program to improve its recruiting methods for people meter panel participation. (See attachment I). In addition, Nielsen has decided to increase the size of the sample from 4000 to 5000.

In summary, from its inception, the Nielsen people meter has been a controversial development. Major clients were opposed to its introduction, and viewed it as a fait accompli. These clients independently evaluated it and found it wanting in several areas. They now continue to critique the system by funding a research and development effort that generates alternative methods of audience measurement. The Nielsen people meter has a monopoly status as supplier of national audience information; this fact does not imply that clients of the service are satisfied with it.

There is also substantial dissatisfaction in the industry with the diary-based NSI survey. Serious problems of nonresponse and response error are well documented. Despite these problems, however, NSI data have certain advantages. One advantage is the very large market-based sample (around 200,000 cable households per year), that permits more reliable measurement of small regional audiences. Another advantage is the fact that diary participants are only in the panel for a week, as opposed to up to two years. In basing its viewing study on NTI over NSI, MPAA has simply traded one set of problems for another.

2. Household/Minutes And The Audience Information On Which The Industry Relies

The assumption underlying Lindstrom's testimony is that, since the television industry relies on its data in making decisions about the purchase and sale of advertising and programming, the Nielsen people meter survey is a good source of information for this proceeding. But the data offered by Lindstrom here are unlike the data that Nielsen normally supplies to the industry. And the valuation decisions made by cable operators with regard to distant signals are quite different from the valuation decisions for which the television industry relies on viewing data.

Viewing data are commonly relied on in the industry in connection with the sale of advertising time or with the sale of programming on which advertising time will be sold. Advertisers, naturally, are concerned about who will see their ads, and viewing data are thus important. However, when cable operators purchase distant signals, they do not acquire the right to sell advertising time on those signals. Cable operators are concerned with whether the distant signal programs will help attract and retain subscribers.

Moreover, there are important differences between the household/minutes data presented by Lindstrom and the viewing data used in the television industry. Lindstrom's data do not differentiate among those who are viewing, how often they view, when they view, or even which particular programs they view. Instead, Lindstrom offers an analysis that combines household/minutes in broad program conglomerates and provides no information on audience characteristics.

In contrast, the audience data used by buyers and sellers of television advertising time include:

- identification of the program source (e.g. station);
- identification of the program and broadcast time;
- audience size estimates (e.g. "ratings," "shares," average audience);
- audience demographic information (e.g. sex, age); and
- cumulative audience data (e.g. how many different people or households view a program over time, and with what frequency).

This kind of detailed information is important to the utility of viewing data in the industry. However this sort of information is not presented in Lindstrom's testimony and cannot even be derived from the data produced by Lindstrom. To provide such information, the size of the sample must be large enough to garner a sufficient number of observations of viewing within desired audience categories. While the NTI sample is large enough to provide this kind of information for many nationally distributed program offerings, it is not large enough to offer the same sort of information for most distant signal programs, as Lindstrom acknowledges. Lindstrom Transcript at pp. 8077-8086.

3. Household/Minutes and Program Values

As I understand it, the purpose of this proceeding is to determine the relative values of different distant signal program categories to cable operators. I agree with Lindstrom that household/minutes do not reflect those values. Lindstrom Transcript at pp. 8125-8128.

The sheer availability of programs in the syndicated program category insures that its share of household/minutes will outstrip all other categories, regardless of its market worth. Indeed, Cooper indicates that a factor in commissioning the "viewing studies" was that they would produce a larger share of royalty payments for MPAA. Cooper Transcript at p. 2819.

No audience information directly gauges the relative values of program types. At best, audience data might be useful as an indirect measure of value if it shed light on the factors that make distant signal programming valuable to cable operators -- the ability to attract and retain subscribers. The types of data that one would consider include:

- -- program level measures of audience size;
- -- program audience characteristics that relate to cable subscribership (e.g. head of household status);
- -- "qualitative" assessments of the level of audience appreciation for programs;
- -- measurement of program viewing over time to assess audience reach and repeat viewing.

Lindstrom has not provided such data.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Peter V. Miller, PhD.

2/13/96

CURRICULUM VITAE

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Education

Ph.D., Mass Communication, The University of Michigan, 1977.

AB with distinction, highest honors in Journalism, The University of Michigan, 1971.

Academic Experience

1988-1993	Director, Institute for Modern Communications, Northwestern University.
1988-	Associate Professor of Journalism, Northwestern University.
1984-	Faculty Affiliate, Center for Urban Affairs and Policy Research, Northwestern University.
1983-	Associate Professor, Department of Communication Studies, Northwestern University.
1982-83	Director, Detroit Area Study, The University of Michigan.
1982-83	Assistant Professor, Department of Sociology, The University of Michigan.
1979-83	Assistant Professor, Department of Communication, The University of Michigan.

1979-83 Assistant Research Scientist, Survey Research Center, Institute for Social Research, The University of Michigan.

1977-79 Research Assistant Professor, Institute of Communications Research, and Assistant Professor of Journalism, University of Illinois, Urbana-Champaign.

1976-77 Assistant Professor, Department of Communication, Purdue University.

1976 Research Associate, Survey Research Center, Institute for Social Research, The University of Michigan.

1975-76 Lecturer. Department of Journalism, The University of Michigan.

Administrative Activities

Northwestern University

University Administration

Member, University Program Review Council, 1994-
Chair, Program Review Subcommittee for the School of Music, 1994-1995.
Chair, Program Review Subcommittee for the Office of Student Affairs, 1995-1996.

Member, Program Review Committee for Political Science, 1992-1993.

Member, Review Committee for Dean Zarefsky of the School of Speech 1992.

Organizer, "Communicating Complexity" Workshops and Proposal Writing, 1992-1993.

Organizer, Student Workshop on Telecommunications Policy, Annenberg Washington Program, 1991.

Chair, Faculty Committee to Design Joint Speech-Journalism Freshman Course.

Member, Medill School of Journalism Dean Search Committee, 1989.

Organizer, University Women's Board Seminar, "Changing Media in a Changing Society," 1989-1990.

Member, University Administration Seminar on the Field of Communication, 1988.

Department of Communication Studies

Associate Department Chair, 1992-93.

Search Committee Member, Interpersonal Communication, 1991-92.

Search Committee Member, Interpersonal Communication, 1990-91.

Chair, Search Committee, Mass Communication, 1988-89.

Chair, Search Committees, Mass Communication and Telecommunication, 1987-88.

Search Committee Member, Interpersonal Communication, 1987-88.

Admissions Committee Member, 1984, 1986, 1988, 1994-96.

Chair, Search Committee, Mass Communication, 1983-84.

The School of Speech

Co-Chair, Speech/Journalism Search Committee, 1995-

Member, Ad Hoc School Committee on Media Studies, 1987.

Member, Academic Affairs Committee, 1984-87.

Institute for Modern Communications Planning, 1983-87.
Chair, Mass Communication and Culture Committee.
Member, Steering Committee.
Member, Communication and Public Policy Committee.

Professional Associations and Organizations

American Association for Public Opinion Research
Chair, Committee on Human Subjects Reviews of Surveys, 1989-90.
Standards Chair, 1988-89.
Associate Standards Chair, 1987-88.

Gannett Center for Media Studies
Leadership Institute Fellow, 1989.

Advertising Research Foundation
Member, Research Quality Council, 1985-

Association Memberships

American Association for Public Opinion Research
International Communication Association
World Association for Public Opinion Research

Professional Service

Public Communication Advisor, Electoral Commission of Malawi, 1994.

Participant on Great Lakes Protection Fund's Technical Review Panel, 1991.

Participant in production of PBS NOVA documentary on television ratings, 1991.

Authored AAPOR Statement on the Risks of Participating in Surveys for distribution to Institutional Review Boards, 1991.

Grants/Contracts

"Communicating Complexity in the Age of the Soundbite" Hearst Foundation, 1991, 1994 (with Dean Michael Janeway).

"Data and Decision-Making in Media Organizations," Institute for Modern Communications, Northwestern University, 1986.

Alternative Questionnaire Designs for the National Crime Survey (with Robert Groves), Department of Justice, 1980-82.

Telephone and Personal Interview Differences in the Health Interview Survey (with Charles Cannell and Robert Groves), National Public Health Service, 1979-81.

Teaching

Undergraduate

Theories of Mass Communication
Public Opinion
Mass Communication and Campaign Strategies
Research Methods in Communication

Voted One of Ten Best Teachers, 1988-89, Northwestern Associated Student Government

Graduate

Theory Construction
Techniques and Problems of Survey Research Measurement
Intellectual Foundations of Mass Communication Research
The Business of Public Opinion

Awards/Honors

Van Zelst Professorship, Northwestern University, 1993.
Fellow, Annenberg Washington Program, Northwestern University, 1991.
Faculty XL Summer Grant, Purdue University, 1977.
Rackham Dissertation Fellowship, 1974-75.
Leo G. Burnett Fellowship, 1971-72.
Phi Beta Kappa, 1970.
James B. Angell Scholar, 1968-69.

Publication Activities

Editorial

Editorial Boards
Communication, 1985-
Public Opinion Quarterly, 1992-
Poll Review Editor, 1993-

Series Editor
Sage Annual Reviews of Communication Research, 1980-87

Ad Hoc Reviewer
Public Opinion Quarterly
Communication Research
Human Communication Research
Journal of Official Statistics
Journal of the American Statistical Association

Books

Lavrakas, P., Traugott, M. and Miller, P., eds., Presidential Polls and the News Media. Westview Press, 1995.

Protess, D., Cook, F., Doppelt, J., Ettema, J., Leff, D.,Miller, P., The Journalism of Outrage, Guilford, 1991.

Hirsch, P., Miller, P., and Kline, F.G., eds., Strategies for Communication Research, Sage, 1977.

Chapters in Edited Volumes

Miller, P., "The Industry of Public Opinion," in Glasser, T., and Salmon, C., Public Opinion and the Communication of Consent, Guilford, 1995.

Miller, P., "Made to Order and Standardized Audiences: Forms of Reality in Audience Measurement." in Whitney, D.C., and Ettema, J., (eds.) Audiencemaking: Media Audiences as Industrial Process, Sage, 1994.

Miller, P., and Merkle, D., "Campaign Polls and America's Sense of Democratic Consensus," in Miller, A. and Gronbeck, B., Presidential Campaigning and America's Self Images, Westview, 1994.

Miller, P., "The 1992 Horserace in the Polls." in Crotty, W., (ed.), America's Choice: The 1992 Elections. Dushkin. 1993.

Miller, P., Merkle, D., and Wang, P., "Journalism with Footnotes: Reporting the 'Technical Details' of Polls," in Lavrakas, P., and Holley, J., Polling and Presidential Election Coverage. Sage, 1991.

Lavrakas, P., Holley, J., and Miller, P., "Public Reactions to Polling News during the 1988 Presidential Election Campaign," in Lavrakas, P., and Holley, J., Polling and Presidential Election Coverage. Sage, 1991.

Miller, P., and Cannell, C., "Experimental Interviewing Techniques." in Thornberry, Owen T., "An Experimental Comparison of Telephone and Personal Interviews." Vital and Health Statistics. Series 2, No. 106. 1987.

Groves, R., Miller, P., and Cannell, C., "Differences between Telephone and Personal Interviews Data." in Thornberry, Owen T., "An Experimental Comparison of Telephone and Personal Interviews." Vital and Health Statistics. Series 2, No. 106. 1987.

Cannell, C., Groves, R., Miller, P., and Thornberry, O., "Study Design." in Thornberry, Owen T., "An Experimental Comparison of Telephone and Personal Interviews." Vital and Health Statistics. Series 2, No. 106. 1987.

Cannell, C., Miller, P., and Oksenberg, L., "Research on Interviewing Techniques," in Leinhardt, S., ed., Sociological Methodology, 1981. Jossey-Bass, 1981.

Miller, P., "Issues in Education on Mass Communication in the 1980s" in Friedrich, G., Ed., Education in the '80s: Speech Communication. National Education Association, 1981.

Miller, P. and Cannell, C., "Communication of Measurement Objectives in the Survey Interview," in Hirsch, P., Miller, P., and Kline, F.G., Strategies for Communication Research, Sage, 1977.

Miller, P., "Themes of Measurement in Communication Research'" in Hirsch, P., Miller, P., and Kline, F.G., Strategies for Communication Research, Sage, 1977.

Kline, F.G., Miller, P., and Morrison, A., "Adolescents and Family Planning Information: An Exploration of Audience Needs and Media Effects," in Blumler, J., and Katz, E., The Uses of Mass Communications, Sage, 1974.

Morrison, Andrew J., F. Gerald Kline, and Peter V. Miller, "Aspects of Adolescent Information Acquisition about Drugs and Alcohol," in Ostman, R.E. and H. Mowlana (eds), Communication Research and Drug Education. Sage Publications, 1974.

Journal Articles

Miller, P., "They Said It Couldn't Be Done: The National Health and Social Life Survey." Public Opinion Quarterly, Fall, 1995.

Miller, P., "Which Side Are You On? The 1990 Nicaraguan Poll Debacle." Public Opinion Quarterly. 55:281-302. 1991.

Ettema, J.S., D. Protess, D. Leff, P.V. Miller, J. Doppelt and F. Cook, "Agenda Setting as Politics: A Case Study of the Press-Public-Policy Connection," Communication. 12:75-98. 1991.

Protess, D., Cook, F., Curtin, T., Gordon, M., Leff, D., McCombs, M., Miller, P., "The Impact of Investigative Reporting on Public Opinion and Policymaking: Targetting Toxic Waste." Public Opinion Quarterly. 51:166-185. 1987.

Miller, P., and Groves, R., "Matching Survey Responses to Official Records: An Exploration of Validity in Victimization Reporting." Public Opinion Quarterly. 49:366-380. 1985. [Reprinted in Singer, E., and Presser, S., Survey Research Methods: A Reader. University of Chicago Press, 1989.]

Miller, P., "Alternative Questioning Procedures for Attitude Measurement in Telephone Surveys." Public Opinion Quarterly. 48:766-778. 1984.

Miller, P., and Cannell, C., "A Study of Experimental Techniques for Telephone Interviewing." Public Opinion Quarterly. 46:250-269. 1982. [Reprinted in Singer, E., and Presser, S., Survey Research Methods: A Reader. University of Chicago Press, 1989.]

Selected Papers and Presentations

Invited Papers

Miller, P., "Confessions of a Spielritter." Annual Van Zelst Lecture, Northwestern University. Evanston, 1995.

Miller, P., "Utilities Reconsidered: A Comment on Neuman's Parallel Content Analysis Proposal." Paper presented to audience conference, Audie, 1992.

Miller, P., "The Business of Public Opinion." Paper presented to the annual meeting, International Communication Association, Chicago, 1991.

Miller, P., "Audience Construction by Commercial Measurement Firms." Paper presented to the annual meeting, International Communication Association, Chicago, 1991.

Miller, P., and Merkle, D. "More Informed Primary Election Poll Coverage." Paper prepared for the Informed Electorate Conference, Annenberg Washington Program, May 1990.

Miller, P., "Some Key Research Quality Issues for the '90s." Paper presented to the Research Quality Workshop, Advertising Research Foundation, 1989.

Miller, P., "Approaches to Validity in Telephone Surveys." Biennial Bellcore Measurement and Operations Research Symposium, 1988.

Miller, P., "Survey Fieldwork Quality: It's Your Business." Paper presented to the Research Quality Workshop, Advertising Research Foundation, 1988.

Miller, P., "Ratings Policy and Public Policy." Paper presented to the Annual Telecommunications Policy Research Conference, Airlie, Va., 1988.

Miller, P., and Windon, B., "Genesis of the 'Bear' Commercial." Paper presented to the annual meeting, American Association for Public Opinion Research, Toronto, 1988.

Miller, P., "I am Single Source." Gannett Center Journal, 2:1, Summer, 1988.

Miller, P., "People Meters: An Historical Perspective." Panel presentation at the Gannett Center for Media Studies, 1987.

Cook, T., Curtin, T., Ettema, J., Miller, P., and Van Camp, K., "Television in the Life of the Schools." Paper presented to a conference on Assessing Television's Impacts on Education. U.S. Office of Educational Research and Improvement. 1986.

Miller, P., "Interviewer Behavior as Response Context." Conference on Context Effects in Surveys. NORC. 1986.

Miller, P., "Watching the Village Watchman." Paper presented to the Media Research Club of Chicago, 1985.

Miller, P., "A Comparison of Telephone and Personal Interviews in the Health Interview Survey." Paper presented to the Fourth Biennial Conference on Health Survey Research Methods, 1981.

Miller, P., "Applying Health Interview Techniques to Mass Media Research." Paper presented to the Third Biennial Conference on Health Survey Research Methods, 1979..

Miller, P., "On Television and Information." Paper presented to the Annual Research Conference on Telecommunications Policy, Airlie, Virginia, April, 1976.

Miller, P., F. Gerald Kline, and Andrew J. Morrison, "Adolescents Learning about Military Occupations in the Mass Media." Paper presented to the Research Seminar on Social Psychology of Military Service, University of Chicago, 1975.

Competitive Papers

Miller, P. and Roloff, M. "An Experiment on Journalistic Treatment of Survey Methods," Paper presented to the Annual Meeting, American Association for Public Opinion Research, Ft. Lauderdale. 1995.

Rucinski, D., Miller, P., and Hotinski, D., "What the Sex Survey Said: A Case Study." Paper presented to Annual Meeting, American Association Public Opinion Research, Ft. Lauderdale. 1995.

Miller, P., "Press Coverage of the 1992 Polls: An American--British Comparison." Paper presented to the Annual Meeting, American Association for Public Opinion Research. St. Charles, IL. 1993.

Miller, P., "People Meters: Some Thoughts on the Evolution of New Measurement Technology." Paper presented to the annual meeting of the International Communication Association, New Orleans, 1988.

Miller, P., "Measuring Mass Media Use in Studies of Media Effects." Paper presented to the annual meeting of the International Communication Association, Montreal, 1987.

Miller, P. and Paul Wang, "Social Class, Childrearing Patterns and Control of Television." Paper presented to the annual meeting of the International Communication Association, 1985.

Miller, P., Robert Groves and Velma Handlin. "A Record Check Experiment in the Study of Victimization Reporting." Paper presented to the annual meeting of the American Statistical Association, Cincinnati, 1982.

Groves, Robert, Peter V. Miller and Charles F. Cannell. "A Methodological Study of Telephone and Face-to-Face Interviewing." Paper presented to the annual meeting of the American Association of Public Opinion Research, May, 1981.

Miller, Peter V. "Beyond Stereotypes: Adolescents Learning Sex Roles from Parents and the Mass Media." Paper presented to World Congress of Sociology, Uppsala, Sweden, 1978.

Panel Discussions

"Comment on Single Source Measurement Systems." Media Research Club of Chicago. September, 1991.

"Single Source: Everything You Ever Wanted in a Survey, and Less?" Roundtable discussion at the annual meeting, American Association for Public Opinion Research, 1991.

"A Comparison of Magazine Readership Measurement Techniques." Panel discussion at the annual meeting, American Association for Public Opinion Research, Toronto, 1988.

"Setting Survey Standards: A Necessary but Elusive Goal." Panel discussion at the annual meeting of the American Association for Public Opinion Research, 1986.

"Survey Standards in Theory and Practice." National Opinion Research Center, University of Chicago, March, 1986.

"The Folklore of Audience Measurement." Panel discussion at the annual meeting of the American Association for Public Opinion Research, 1985.

"Making Sense of TV Ratings." Roundtable presentation at the annual meeting of the American Association for Public Opinion Research, 1985.

Doctoral Committees

Scott Deatherage, PhD., 1994.
Daniel Merkle, PhD., 1993. (Chair)
Gregory Makoul, PhD., 1992.
Beth Barnes, PhD., 1990.
Lynn Thomson, PhD., 1990. (Chair)
Martin Stoller, PhD., 1989.
Paul Wang, PhD., 1987. (Chair)
Hyo Song Lee, PhD., 1987.
Linda Willer, PhD., 1985.

Survey Research Consultation

Joint Sports Claimants, 1995-96.
Commonwealth Edison Company, 1990-1993.
A.C. Nielsen Company, 1985-1988; 1990-91.
American Bar Foundation, 1987-88.
Ciba Geigy, 1987-88.
National Cancer Institute, 1982.
National Coffee Association, 1982-83.
Michigan Bell Telephone Company, 1981-82.
American Dairy Council, 1981.
American Red Cross, 1981.
U.S. Department of Agriculture, 1980.
Minnesota Community Prevention Program for Cardiovascular Diseases, 1980.
Department of Communication, Canada, 1975.

believe there is not a great gulf to be bridged," said Association of Independent Television Stations President Jim Hedlund. "There has been a concerted effort to reach a resolution," commented Thomas Goodgame, president of Westinghouse Broadcasting's TV station group, who testified on behalf of NAB. He noted, however, that NAB's problems with cable extend beyond must carry.

Cable, he said, competes unfairly with broadcasters, and if Congress does not restore some form of rate regulation, cable will continue to "siphon" valuable programing and major sports events away from free over-the-air television. He also pointed out that cable systems enjoy two revenue streams: subscriber fees and advertising. "Any advertising they get is just gravy," said Goodgame, chairman of NAB's TV board.

Broadcasters have complained for some time that cable makes money off broadcast signals they carry for free. Under NAB's "if carry/must pay" proposal, cable operators would have to carry a complement of local signals and pay for them. But the association put must pay on the back burner after Senate leaders told them there was no support.

Asked if he was advocating "must pay" instead of "must carry," Goodgame said he was not. He thinks must carry should be resolved; however, he wants lawmakers to be aware that there are other inequities between the two competitors.

But that is not how Mooney sees it. "What we are hearing the broadcasters say is they don't like having to pay more for programing," he said. They are trying to "brand cable as a kind of illegitimate competitor in the hope that the government will do something to give them a leg up in getting back that 20% of audience share they have lost entirely, and even more important, to help them keep from losing any more," said the NCTA president.

Broadcasters still have 76% of the viewing audience, Mooney argued. Moreover, he said, they still get 92 cents out of every dollar spent on television advertising, and total industry revenues are nearly $26 billion a year, while total cable revenues are about $16 billion.

Goodgame told the congressmen that NAB endorses H.R. 3826, a bill authored by Jim Cooper (D-Tenn.) that would reregulate rates, provide must carry and channel positioning protections and impose limits on horizontal and vertical concentration within the cable industry.

Still, the television executives made clear that NAB opposes competition from the telephone industry as a means of dealing with cable. "The telcos, whether RBOC's or independents, can only be permitted in as overbuilds. If the telcos are permitted to compete with cable, it should be as overbuilds and must be restricted to their historic role as common carriers. Nor can they be program originators or suppliers," Goodgame told the congressmen.

"I will tell you that the quantity, quality and diversity that people come to expect from free TV will suffer if balance is not restored to the marketplace," said Hedlund, whose testimony was in line with Goodgame's.

Several subcommittee members would like the industries to reach a compromise. "It's in your best interest to resolve this now rather than have us resolve it," said Matthew Rinaldo of New Jersey, the subcommittee's ranking Republican. Both Rinaldo and Markey praised the must carry agreement reached by NCTA and the National Association of Public Television Stations. Markey said it will be included in any cable package. It was introduced as a bill (H.R. 4415) by House Commerce Committee Chairman John Dingell (D-Mich.), Markey and Rinaldo among others.

George Miles, executive vice president of noncommercial WNET(TV) New York, urged passage of H.R. 4415 as an "insurance policy guaranteeing that the system we have built so painstakingly will continue to be available on cable as well as over the air." However, Sharon Ingraham, chairperson of the National Federation of Local Cable Programers, was opposed to language in the must carry bill that would permit cable operators to put public TV station signals on access channels that are not being used.

And Lowell Paxson, president of the Home Shopping Network, asked the subcommittee to pass a must carry law that would mandate carriage of all local full-power television stations within 35 miles of a cable system's headend before carriage of stations located 36-50 miles from the headend.

Although most of the hearing focused on must carry, the issue of vertical and horizontal concentration within the industry also came under scrutiny, and opinions were mixed. Daniel Brenner, director of the communications law program, University of California, saw no need for legislative intervention. Brenner said vertical integration serves "all kinds of goals" and that the burden of proof should rest with those calling for limits.

Stanley M. Besen, senior economist with Rand Corp., also cautioned against regulating vertical integration. Instead, he said, Congress should remove regulatory barriers barring the entry of competing media outlets. But Robert Picard, editor of the *Journal of Media Economics*, California State University, held a completely different view. He said the "unfettered vertical and horizontal integration occurring in the cable television industry poses the greatest threat to the public interest that exists in any communications industry today." —KM

Upfront: The $4 billion question

Network guarantee question may delay start of upfront, due to get rolling after networks announce fall schedules in coming weeks

The $4 billion upfront market, expected to begin in the next few weeks, may be delayed due to a disagreement over the terms of negotiation. Specifically, as of last week media buyers and network sales executives were still debating whether audience ratings data is accurate enough to serve as a barometer of viewership.

There are other major questions looming before the upfront market as well. How much market share will ABC take from NBC? What effect, if any, will the new NCAA college basketball contract that cuts beer and wine advertising by 33% have on CBS? If that's not enough, there is also concern about how much automobile manufacturers will spend and what role a "sluggish economy" will play.

Meanwhile, the networks have reportedly been considering getting rid of, or at least cutting back on, offering guarantees for audience delivery. One network that may already be prepared to change the rules a little bit is ABC. Sources inside ABC told BROADCASTING that the network has come up with an audience delivery guarantee system that relies more on the homes using television numbers (HUT) than on actual shares per program. ABC plans to put it "out on the street this week." The change would, according to the network, attempt to "isolate what might be any dropoffs between program performance and problems with research methodology dropoffs."

Doing away with guarantees is not the advertising community's idea of a good solution. One media buyer described the talk of doing away with guarantees as "very superficial." Another media buyer put it this way: "The unfortunate thing is that if—as we all suspect—there is something wrong with the system of measurement, why do the buyers and sellers have to take the rap? Why do the advertisers have to take a beating?" As for not relying on Nielsen at all, the buyer asked whether agencies are now "supposed to imagine what the numbers are."

Although it gets the most publicity, Nielsen numbers will not be the only issue in negotiations. Commercial load and spot length will also be a significant factor in the upfront. NBC in particular logged more ads in prime time, according to an unreleased study. A media buyer told BROADCASTING that there is concern about ad loads and that "lately we have not been able to prevail on the networks [about] the idea of limiting expansion of commercial time. We're getting eaten away on every edge, including [the idea of] premiums for 15-second spots and audience erosion."

It still may be too early to tell whether this year's upfront will match last year's $4 billion marketplace. Robert Coen, senior vice president and director of forecasting at McCann-Erickson, told BROADCASTING that improvement in the advertising marketplace may be delayed by a sluggish economy. "There is a reluctance to commit to higher prices," Coen said.

Usually film distributors are the first to buy in the upfront. A Blair Television analysis of major domestic film distributors'

Time Warner [illegible] New York [illegible]

To the surprise of Time Warner and some city officials, New York City's Board of Estimate last week voted unanimously to preliminarily deny the cable group's franchise renewal request for its Manhattan Cable and Paragon Cable Manhattan systems, whose 20-year franchises expire in August. The vote followed the Bureau of Franchises' recommendation to deny the request, setting the stage for the renewal process to become mired in the muddle of federal cable law and New York City politics.

Richard Aurelio, president of Time Warner's New York City Cable Group, said he was surprised at the vote: "We thought our proposal was the most generous ever offered in the United States," he said. But even with talks taking place just prior to the vote, the cable group and the Bureau of Franchises failed to hammer out an agreement to resolve the issues that separated them. Bruce Regal, counsel for the city, and a cable television specialist for the New York City Law Department, also expected an agreement and a renewal vote. "Most people did," he said.

According to Norman Sinel, lead independent counsel for the city and senior partner, Arnold & Porter, a "substantial portion of technical aspects" remained unresolved going into the vote. These included the length of the franchises, the "nature and development of meaningful" public and municipal access channels and the "nature of the monopoly power of vertically integrated" Time Warner, said Sinel. Efforts were made to ensure that programing would be available to other third parties, such as satellite broadcasting, but according to Sinel, no agreement on this could be reached.

Adding to Time Warner's troubles was what the city perceived as a failure to live up to the terms of the systems' expiring franchise agreements, and a poor customer survey showing. Sinel said that if the contentious issues had been resolved to the "satisfaction of the director of franchises, the vote would have gone better, despite failures" of the systems during their 20-year tenure.

Aurelio said the renewal was denied as part of a "bargaining tactic to squeeze more out of the company." Yet the city "had not presented in the final discussions" the additional concessions it sought from Time Warner, he said, making it hard for the company to answer unspecified demands. Aurelio also said that Time Warner [illegible] proposal to the Board of Estimate, one for the [illegible] year term [illegible] year term.

The next legal step, under the 1984 Cable Act, is an administrative hearing allowing the franchisee to present its case under due process of law, but which is not outlined structurally or procedurally in the Cable Act. That makes it difficult for the city to know exactly how to put the administrative procedure together. First, though, Time Warner must request the administrative hearing, and the company has not yet decided if it will do so, said Aurelio.

Outside the realm of the administrative process, both the city and Time Warner seem willing to continue to negotiate the points they disagree on. So it is possible the issue could again come before the Board of Estimate for a vote, said Corporation Counsel Victor Kovner. But if the administrative hearing goes forward, the city is unsure who will end up voting on the franchise, said Regal. The matter will be further complicated if it remains unresolved by June 30, which is when New York's new city charter eliminates both the Bureau of Franchises and the Board of Estimate, and authority passes to a new set of governmental bodies.

The precedent the vote sets for other franchise renewals around the country remains to be seen. Kovner said a precedent will be set in the final outcome of the renewal process, not in the preliminary denial, "although standing alone" the vote indicates that a "city has a right to deny a franchise under certain circumstances." The city so far, said Sinel, has "conducted all its actions in consistence with the Cable Act." Aurelio said he believes that "under the Cable Act" the Time Warner franchises are "entitled to renewal." The entire renewal process shows as well "that the Cable Act is cumbersome to deal with," said Sinel.

A temporary restraining order sought by a New York publisher last week to prevent the vote was denied (BROADCASTING, May 14). The lawsuit, which charged that the mayor and city council president could not delegate their votes, will still proceed. If it succeeds, it is difficult to tell what effect, if any, the decision will have on the cable franchises if they are renewed. —CSG

advertising expenditures shows that total broadcast TV spending (spot, network and syndication) by major film companies rose 19% in 1989 to $418 million. Network ad spending, the report says, was up 14% to $207 million.

Last year's top network television advertiser by product classification was automotive, with $1,490,623,000. The automobile industry is also credited with driving last year's record upfront of $4 billion. McCann-Erickson's Coen said, "It is not reasonable to expect auto to be as strong as last year," adding that last year showed "an extreme need for auto to reserve time for new models." Shearson Lehman Hutton auto analyst Joe Phillippi told BROADCASTING that autos will probably be "flat to down" in the upfront, with a lot of advertising spending based on summer auto sales, which would also determine the amount of auto manufacturers' spending in the scatter market.

As for how the networks individually will do in the upfront, according to Mabon, Nugent & Co. analyst Ray Katz, ABC currently has the momentum. CBS, he said, may decide to hold back on its prime time inventory in the hope that its new shows will do well and sell better in the scatter market. NBC, the firm said, will use its Thursday night lineup to "leverage its new shows' sales potential." As for the battle between NBC and ABC, one network executive said that there is a "whole lot of pressure on NBC based on audience loss." In the February sweeps (won by NBC) NBC was off 8% in rating and 6% in share. "No one is predicting that NBC will be surpassed by households," the network observer said, "but [NBC] might possibly be surpassed in demos."

Most fifth estaters interviewed by BROADCASTING thought that last year's $4 billion upfront market could be matched. Last year was an extremely high year, according to John Mandel, vice president, director, national broadcast, Grey Advertising, adding that if this year does not match it, "$3.9 billion is still a lot of money."

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Under fire from the networks, Nielsen announced May 17 that it had received a request from the Committee on National Television Audience Measurement (CONTAM) to "evaluate a national audience measurement system that would combine existing household tuning and peoplemeter viewing technologies with other methodologies." Nielsen said it has "agreed to respond to CONTAM." Nielsen Executive Vice President William Jacobi said that "the objective would be to determine if a combination of different methodologies can be used to supplement the Nielsen peoplemeters in determining television viewing and demographics." Test data on the project, Nielsen said, will not be ready before the end of 1990.

The Nielsen peoplemeters show the number of adults 18-49 viewing network prime time programing declining by 5.5% in March and 3.6% in April. For the February sweeps, network prime time viewing was off some 8% compared to a year ago. However, network researchers attributed the February dropoff to the lack of "blockbuster" specials.

The current drop has been a little bit harder to pinpoint. Advertisers, for the most part, have said that they are going with the Nielsen figures. "The agency position is that Nielsen is the most accurate recording of viewing," said one media buyer, adding that the networks' "own Committee on National Audience Measurement and the American Association of Advertising Agencies confirm that there was nothing mechanically wrong with Nielsen. We will continue to use Nielsen to estimate what we think program ratings will be."

One network sales executive told BROADCASTING there is something "flawed" with the current [ratings] system and that "no one believes [viewing] changes are as dramatic as indicated." As for the possibility of abandoning guarantees, the executive said "arrangements will have to be made to accommodate the unrealistic swings...people will be hard put to address hard numbers." —JF

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Fuzzy Picture: TV's NIELSEN Ratings, Long Unquestioned, Face Tough Challenges

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Networks and Hopeful Rivals Say Surveys Are Flawed; 'PEOPLE METER' Is Fingered

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Not an Easy Business to Enter

By Dennis Kneale
Staff Reporter of The Wall Street Journal

NEW YORK -- For 40 years, TV's NIELSEN ratings have been the only show in town.

The data on television viewing gathered by A.C. NIELSEN Co. have been the unquestioned currency of the business, dictating how billions of advertising dollars are spent and determining which shows survive and which ones falter. Customers didn't mind the monopoly: One set of numbers from a single supplier made things less complicated.

But now television has turned the tables: It is rating the NIELSENS -- and it's not pleased with the result.

The company is under fire, its numbers are suspect, and new rivals are lining up to exploit the tumult. A growing number of television executives claim that the NIELSEN system -- particularly the remote control "PEOPLE METER" device NIELSEN families use to log who watches what -- has fundamental flaws. New studies contend the ratings significantly understate viewing in a number of ways, especially by children and young adults and people in bars, hotels and on vacation.

NIELSEN'S trouble began a few months ago, when its numbers, based on 4,093 homes that are supposed to represent 92.1 million households, showed millions of people suddenly ceasing to watch TV. Network viewing had been slowly declining for several years, but overall television viewing had remained steady for decades. This sudden, severe falloff in total TV viewing was unprecedented.

The networks went ballistic, rueful over having to give

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sponsors $100 million in free commercials to cover the ratings decline of the first quarter alone. Something had to be wrong, they argued. They later imposed the first major change in how ratings are guaranteed to advertisers, using eight-year trends instead of just the current year's NIELSENS.

"As a researcher, I've got to have confidence in the numbers, and I don't," says Alan Wurtzel, senior vice president of research at Capital Cities/ABC Inc. "We continue to do business based on numbers that are suspect, and we can only do that for a short time."

NIELSEN officials defend their system as proven, accurate and rigorously tested. John Dimling, executive vice president at A.C. NIELSEN'S rating service, NIELSEN Media Research, notes that despite network complaints, the ad industry's major trade group has endorsed the system.

Nevertheless, would-be rivals see an opening. Britain-based Pergamon AGB PLC says it will re-enter the U.S. market soon; two years ago, it racked up losses of $67 million in an effort that NIELSEN soundly stomped. Arbitron Co., NIELSEN'S only major rival in local-market TV ratings, has set a fall start for a much-delayed system it wants to take nationwide by late next year.

But any dive into NIELSEN'S domain may well belly-flop. "It's anyone's prerogative to come into this market," says William G. Jacobi, executive vice president of NIELSEN Media Research. "But if they do, we are going to fight them tooth and nail. This is a business we love, and we're going to defend it with every resource we have."

The sometimes sleepy giant is known for aggressive and shrewd tactics when challenged. Acquired by Dun & Bradstreet Corp. in 1984, NIELSEN has annual sales of more than $600 million. Yet only about $50 million comes from national television ratings. (About two-thirds of the company's total revenue is from tracking the sale of packaged goods at retail stores.) So it is questionable whether the market can support more than one major player.

After the networks screamed about the measured drop in viewing, NIELSEN reviewed its procedures and pronounced the system healthy. Maybe, the company said, the drop was due to normally sedentary sofa spuds heading outside to enjoy unusually warm winter weather. But anomalies kept cropping up.

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In some cases, curiously, the households watching television held steady with a year ago, yet in specific age groups the viewing fell sharply. In March, NIELSEN noted only a 2% drop in households watching all channels in prime time, but women aged 18 to 34 inexplicably had a deeper decline of 8%. In April, late-night viewing fell only 3% in homes, yet plunged 13% for men under age 35, the NIELSEN ratings showed.

How, the networks demanded, could overall viewing be about the same yet decline so sharply in specific groups?

The national numbers, moreover, contradicted NIELSEN'S own local-market ratings derived from 200,000 diaries in the nation's 200 television markets. In February, the local markets saw no real change in TV viewing from a year before -- but the national numbers logged a 5% drop.

In May, according to the local surveys, "NBC Nightly News" was in second place among the three network newscasts, with an audience of 9.2 million people. Yet in the national numbers, NBC was mired in third place, with 1.7 million fewer viewers.

Television executives and even some people in the ad industry have been quick to take note. "There's some suspicion the numbers are flawed," says Paul Isacsson, executive vice president at Young & Rubicam Inc. He worries that they make it look as if ad agencies are paying higher prices for fewer and fewer viewers.

If the numbers are flawed, the culprit may be the PEOPLE METER, the newfangled device that NIELSEN introduced -- reluctantly -- for national ratings in late 1987. Before then, NIELSEN had used diaries. Diaries were a lot cheaper, but they were prone to error, especially as the number of channels expanded with the rise of cable in the mid-1980s. Viewers forgot what they had watched and simply guessed.

NIELSEN had tested the PEOPLE METER since 1977 without ever using it. NIELSEN might have waited years more before switching, but for a rare outbreak of competition in 1985. British upstart AGB had entered the U.S brandishing the PEOPLE METER as a major selling point.

The PEOPLE METER works like a remote control. Each viewer presses some buttons when he or she starts or stops watching TV. When the set is on, a separate meter automatically records the channel the set is tuned to. But even if the set is turned on, what matters most is that someone has pressed buttons showing that there's really a viewer, or several

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viewers. Even the youngest tots are expected to use the gizmo when they tumble out of bed at dawn for Saturday cartoons.

For adults, too, this is an onerous burden of button-pushing, especially when a NIELSEN home is expected to do it diligently for up to two years. That may be why almost half of homes refuse when NIELSEN asks them to join its PEOPLE METER sample, and why only 47% stay on as members of the NIELSEN system.

The rate of cooperation may distort the random nature that the system needs to represent an entire nation's viewing. Viewers who agree to use the PEOPLE METER may be systematically different in their television habits from those who refuse. "It's an enormous potential source of bias," says Persi Diaconis, a statistician at the University of Illinois.

NIELSEN'S Mr. Jacobi, however, says getting 47% of homes to cooperate "is an admirable achievement."

NIELSEN still uses diaries alone in 175 of the 200 TV markets for local ratings, because PEOPLE METERS would be too costly to install everywhere. Critics say this might help explain the difference between the national ratings and figures derived from local reports.

For households that agree to use a PEOPLE METER in the national sample, "user fatigue" may understate viewing. NIELSEN data show the longer some viewers, particularly younger ones, have the time-consuming device, the less they use it.

Among men aged 18 to 34, for example, newcomers using the PEOPLE METER only three months appear to watch 17% more television than the NIELSEN sample overall, a new study by the firm Statistical Research Inc. finds. At the one-year point they watch about the same load as the overall sample, a sign that they may have grown lax in their button-pushing duties.

That argument is strengthened by a new phone survey the firm did of 26,000 homes, says William Rubens, a longtime NBC ratings executive who now consults to the networks. The survey indicated that 26% more men aged 18 to 34 and 33% more kids were watching TV than NIELSEN showed for the same period. "It's an inescapable conclusion," he says, that some parts of the NIELSEN system are a biased representation of the public's viewing.

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NIELSEN'S Mr. Dimling says that the phone survey, like any survey, may have its own problems and adds that the survey results closely followed NIELSEN figures for the broad category of viewers aged two and above.

The phone survey also showed 52% more visitors watching television in other people's homes than NIELSEN reported. And NIELSEN appears to understate other "out-of-home" viewing. Because its PEOPLE METERS are based only in homes, TV-watching in bars, hotels and other public places isn't counted. Nor does NIELSEN count viewing once a family turns off the set and heads for a vacation. About 20% of the U.S. public is on vacation during any given week of the summer months, and studies find 80% of people on vacation watch TV.

In addition to griping about NIELSEN'S numbers, some customers are growing weary of dealing with a monopoly and are looking for alternatives, such as AGB's failed effort two years ago. "The real killer was aborting the competitive process before it bore fruit," says CBS Inc. senior vice president David Poltrack, who supported AGB's effort.

AGB failed in its first attempt partly because it didn't anticipate the huge investment required and the complexity of tracking thousands of hours of programs. But counter-moves by NIELSEN hurt too. In October 1985, just as AGB was unveiling the results of its first test, NIELSEN announced its own PEOPLE METER plans -- though NIELSEN didn't switch to the contraption for two years. The company dealt another blow by hiring away AGB's U.S. president, Joseph Philport, months before the AGB service was to go nationwide.

Last month, AGB announced plans to re-enter the U.S.market, saying it had been "invited" by the three networks. The fight could be nasty -- and petty. NIELSEN'S Mr. Jacobi accused AGB of "false pretenses" because, he notes, no formal invitation had been issued to the company.

"The attack is really quite ridiculous," says Robert Maxwell, the Britain-based tabloid publisher and chairman of Maxwell Communication Corp., who bought AGB 18 months ago. He calls Mr. Jacobi a "monopolist" and adds: "We are in discussions with the networks and continue to be."

Mr. Maxwell says AGB can set up in the U.S. on an investment of up to $40 million and an annual budget of $30 million. But others say $100 million is a more likely start-up figure. And so far, only the three networks are interested in AGB.

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"If AGB is considered the handmaiden of the networks, even if they're doing things right, the effort will be tainted," says consultant Norman Hecht, a former AGB executive.

It also raises revenue questions. The Big Three now pay NIELSEN only $15 million combined, less than one-third of the $50 million a year in revenue NIELSEN gets for its national television ratings service. The rest comes from ad agencies, advertisers and cable channels, which so far aren't expressing much interest in AGB.

Nor are NIELSEN'S customers clamoring, as yet, for a new service called ScanAmerica, from Arbitron. The service would track both TV viewing and product purchases by the same sample of families.

Arbitron plans to be in 1,000 homes in five major cities by year-end and have a national sample of 2,000 homes by late 1991. That will take an investment of $125 million, and Arbitron will lose money on the service well into the mid-1990s, says Kenneth Wollenberg, executive vice president.

Bristol-Myers Squibb has signed up, eager to match TV viewing to product purchases. The NIELSEN people "just aren't moving fast enough for our purposes," says Marianna Reges, a media manager for Bristol-Myers's in-house advertising.

Still, many television executives doubt that two ratings services can survive. "It would be like having two monetary systems," says John Hunt, a vice president at ad agency Ogilvy & Mather. If two suppliers turned in different numbers, it would raise conflicts as to which set was right. Yet if the numbers were the same, he says, why pay for two services?

Marshall Cohen, executive vice president at Viacom Inc.'s MTV Networks subsidiary, says the networks would abandon a new rival as soon as NIELSEN'S numbers got better. They blamed a loss of audience two years ago on NIELSEN'S switch to the PEOPLE METER; a year later they cited the long strike by script writers; now it's the PEOPLE METER again. "Next year," says Mr. Cohen, "they'll blame it on the bossa nova."

But the networks say their complaints are legitimate and that their desire for a new and better service is real. CBS's Mr. Poltrack says when he first got into the television business, he couldn't believe billions of dollars were based on so fragile a system as NIELSEN'S. "I still can't believe it," he says. "The whole thing is crazy."

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NIELSEN Numbers: What to Believe?

A.C. NIELSEN'S national ratings conflict with its own local ratings compiled in 200 television markets. Percent change in ratings vs. a year ago, by group, for total day 7AM-1AM.

	LOCAL	NATIONAL
Households	- 1%	- 5%
Women 18 to 34	No change	-10
Women 35 to 49	- 4	-10
Men 18 to 34	No change	- 6
Men 35 to 49	- 5	- 3

Source: A.C. NIELSEN

---- INDEX REFERENCES ----

COMPANY (TICKER): AGB RESEARCH PLC; DUN & BRADSTREET CORP.; MAXWELL COMMUNICATIONS CORP. PLC; CAPITAL CITIES/ABC INC.; CBS INC.; GENERAL ELECTRIC CO. (U.AGB DNB U.MXC CCB CBS GE)

INDUSTRY: MEDIA; ADVERTISING (MED ADV)

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