

Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.

<hr/>	)	
<i>In re</i>	)	
	)	
DISTRIBUTION OF CABLE	)	NO. 16-CRB-0009-CD (2014-17)
ROYALTY FUNDS	)	
<hr/>	)	

**OPPOSITION OF THE JOINT SPORTS CLAIMANTS  
TO PUBLIC TELEVISION’S MOTION TO COMPEL**

Public Television’s (“PTV”) Motion is sweeping in its speculative complaints, yet silent on the precedents and principles of survey methodology that squarely reject them. All of its requests for additional discovery related to the cable operator surveys submitted by Bortz Media & Sports Group, Inc. (“Bortz”) in this proceeding should be denied.

In seeking the personally identifiable information (“PII”) of Bortz survey respondents, PTV fails to mention that the Judges’ predecessors have twice held that this information is appropriately redacted to maintain confidentiality, rejecting the argument that such information is needed to test respondents’ qualifications. PTV also ignores that the leading organization of survey research professionals—which their own survey expert describes as the most respected in the field—as well as the Federal Judicial Center, condemn requests for respondent PII in litigation as a threat to ongoing survey research. And PTV ignores that, in light of these principles, federal courts have upheld redactions of respondent PII in surveys used in litigation. PTV’s argument that the PII is “the most fundamental information that would be necessary to establish the survey’s validity,” Motion at 1, rings particularly hollow given that PTV itself has previously supported the Bortz Survey (with certain adjustments) as “methodologically sound” without claiming a need for access to the respondent PII.

PTV makes no attempt to, and cannot, distinguish this proceeding from precedent. It offers theories as to why respondent PII would be relevant that do not withstand scrutiny in light of the extensive information that PTV already has, or has chosen not to pursue. And it ignores that the protective order would not prevent disclosure of respondents' PII to industry participants. This violation of confidentiality would harm respondents and threatens to undermine Bortz's current, ongoing efforts to survey cable system operators ("CSOs"). PTV should not be permitted to misuse the discovery process to try to undermine future surveys just because it does not expect to like the results, especially given that PTV already has sufficient information to assess the Bortz Survey. Moreover, given that the parties and Bortz have relied on the above-mentioned precedent, it would be particularly inequitable to change the rules (as PTV seeks to do) in this proceeding for the surveys performed in reliance on that precedent.

The remainder of PTV's Motion seeks categories of documents that it either incorrectly speculates the Joint Sports Claimants ("JSC") are withholding, or incorrectly assumes JSC should be required to search for or create. PTV's requests far exceed the scope of permissible discovery. Under the Judges' precedents and the limited discovery principles governing this proceeding, PTV cannot compel JSC to search the records of prior proceedings for material that might conceivably be responsive. Nor can it compel JSC to create or produce documents that it does not possess. All of PTV's requests should therefore be denied.

## **BACKGROUND**

### **I. The Bortz Survey is a Tested Methodology that the Judges and PTV Have Repeatedly Recognized as Probative Evidence of Relative Marketplace Value**

The Bortz Survey is a survey of CSOs designed to assess the relative marketplace value that CSOs place upon the different categories of distant signal programming represented by each of the Allocation Phase Parties. *See* Cable Operator Valuation of Distant Signal Non-Network

Programming: 2014-17 (July 1, 2022) (“Bortz Report”). The Bortz Survey employs a “constant sum” methodology, which asks respondents—CSO executives—to “allocate a fixed sum among multiple competing categories.” Bortz Report at 19. In order to obtain information for this and future proceedings, Bortz surveys are conducted annually. *See* Declaration of James Trautman at ¶ 3 (“Trautman Decl.”).

The Bortz Survey has been tested in, and has evolved over the course of, numerous proceedings. *See* Bortz Report Appendix A. Despite a range of criticisms lodged by other parties, the Judges and their predecessors have placed significant—and in multiple cases, determinative—weight upon the results of Bortz surveys, and the D.C. Circuit has repeatedly affirmed reliance on the Bortz Survey. In the 2004-05 cable royalty distribution proceeding, the Judges found the “Bortz study to be the most persuasive piece of evidence provided on relative value,” concluding that “[t]he Bortz intervals certainly mark the most strongly anchored range of relative programming values produced by the evidence in this proceeding.” *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063 at 57066, 57068 (Sept. 17, 2010).<sup>1</sup> PTV itself urged the Judges to rely upon the 2004-05 Bortz surveys (with an adjustment for PTV’s share) as the basis for allocating royalties in that proceeding. *See* Declaration of Michael Kientzle Decl. ¶ 9, Ex. 7 at 9 (“Kientzle Decl.”) (Corrected Proposed Findings of Fact of the Settling Parties,

---

<sup>1</sup> *See also* *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3609 (adopting CARP determination that the Bortz Survey was “more reliable than any other methodology presented” for evaluating relative marketplace value of JSC, Program Suppliers, and Commercial Television) *aff’d Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 401-02 (D.C. Cir. 2005) (affirming the CARP and Copyright Office’s decisions to rely upon the Bortz surveys rather than viewing data because the Bortz surveys “adequately measure[] the key criterion of relative market value.”); *Distribution of Cable Royalty Funds*, 84 Fed. Reg. 3552, 3610 (Feb. 12, 2019) (finding that the Bortz Surveys, together with additional allocation methodologies, defined the “ranges of reasonable allocations for each program category in each year”).

Docket No. 20073 CRB CD 2004-2005 (Mar. 24, 2010)) (asserting that “The 2004-05 Bortz Surveys Are Methodologically Sound.”).

## **II. Respondent Confidentiality is Essential to Continuing to Conduct Bortz Surveys Effectively**

Maintaining the confidentiality of the Bortz survey respondents’ PII is essential to securing respondent participation and candid, unbiased answers. *See* Declaration of Nancy A. Mathiowetz, Ph.D. at ¶¶ 5-10 (“Mathiowetz Decl.”); Trautman Decl. at ¶¶ 4-5; Declaration of Melinda Witmer at ¶¶ 3-4 (“Witmer Decl.”); Declaration of Allan Singer at ¶¶ 4-5 (“Singer Declaration”). As discussed below, it is also consistent with the Judges’ precedent, survey research standards, and the weight of case law addressing the use of survey evidence in litigation. Accordingly, Bortz assures survey respondents that their answers to the survey questionnaire will remain confidential. *See* Bortz Report A-16–A-17. And Bortz redacted respondents’ PII from completed survey questionnaires prior to disclosure in this proceeding. *See* Trautman Decl. ¶ 8.

PTV questions, without basis, whether respondents were actually informed that their responses to the Bortz Survey would be kept confidential. Motion at 13. As James Trautman, who oversaw the 2014-17 Bortz surveys explains, confidentiality was in fact promised. Trautman Decl. at ¶¶ 9-10. Similarly misplaced is PTV’s speculation that Bortz may permit JSC, but not other parties, to review unredacted Bortz survey questionnaires. Motion at 13. Bortz applies the redactions to the questionnaires itself. *See id.* ¶ 8. And Bortz’s policy is not to share unredacted respondent PII with any parties, including JSC. *See id.*

## **III. Precedent Authorizes the Redaction of Respondents’ PII**

On two separate occasions, the Judges’ predecessors have denied requests to compel JSC to produce the PII of Bortz Survey respondents. In the 1990-92 cable royalty distribution proceeding, Program Suppliers sought unredacted copies of the Bortz Survey questionnaires,



arguing—as PTV does now—that “the identity of survey respondents is necessary to determine their position and qualifications” and that “no confidentiality was ever promised to the systems or the respondents.” Kientzle Decl. ¶ 3, Ex. 1 (Order, Docket No. 94-3 CARP CD 90-92 at 46-48 (Oct. 30, 1995) (“1990-92 Order”)). The Copyright Arbitration Royalty Panel (“CARP”) denied Program Suppliers’ “request for unredacted copies of the Bortz questionnaires . . . on the grounds of confidentiality.” *Id.* at 49. PTV cites another portion of this very Order to support its Motion but makes no mention of the on-point holding rejecting PTV’s position here. Likewise, in the 1990 cable royalty distribution proceeding, the Copyright Royalty Tribunal (“CRT”) denied Program Suppliers’ “request for unredacted copies of the 1989-1992 Bortz Studies” notwithstanding Program Suppliers’ willingness “to enter a confidentiality agreement regarding the use of unredacted 1989-1992 Bortz Studies.” Kientzle Decl. at ¶ 4, Ex. 2 (Order, Docket No. 92-1-90CD, at 5 (Sept. 7, 1993) (“1990 Order”)).

In the 2010-13 cable proceeding, Program Suppliers sought to compel the production of unredacted Bortz Survey questionnaires and Bortz Survey data entry spreadsheets. Kientzle Decl. at ¶ 5, Ex. 3. In so moving, Program Suppliers recognized and did not dispute the precedential value of the 1990-92 Order discussed above, and therefore clarified that they did not seek disclosure of the names and contact information for individual Bortz respondents. *Id.* at 10-13 (distinguishing the 1990-92 Order). The Judges granted Program Suppliers’ Motion, and expressly permitted the redaction of Bortz respondent PII. *See Order Granting Program Suppliers’ Mot. to Compel Unredacted Documents and Data from JSC, Consol. Dkt. No. 14-CRB-0010-CD/SD (2010-13) (Jan. 17, 2018) (“2010-13 Order”) (“JSC may redact only Personally Identifiable Information, i.e., in this instance, the name, contact information, and title information for individual Bortz survey respondents”).*

#### **IV. JSC Has Produced All Documents Underlying the 2014-17 Bortz Surveys, With the Sole Exception of Respondents' PII**

Other than the redaction of individual respondents' names and contact information, JSC has disclosed to all parties to this proceeding all documents and data underlying the 2014-17 Bortz Surveys. *See* Motion at Ex. 6, p. 1 (Sept. 2, 2022 Letter from D. Cantor to R. Dove) ("Sept. 2 Letter"). This includes: every completed questionnaire; the sources from which first points of contact at CSOs were identified; survey results compiled in excel format with unique identifiers for each respondent; and documentation of the application of the Bortz methodology for sampling, weighting, and projection. Trautman Decl. ¶ 11. Pursuant to 37 C.F.R. § 351.10(e), JSC has also produced all documents underlying any alternatives to the Bortz Report considered by Mr. Trautman. Sept. 2 Letter at 1. At PTV's request, JSC further produced any alternatives to the Bortz Report considered or reviewed by anyone assisting Mr. Trautman, even if not by Mr. Trautman. *See* Sept. 2 Letter.

### **ARGUMENT**

#### **I. The Judges Should Continue to Protect the Confidentiality of the Bortz Surveys**

The Judges' precedent expressly authorizes Bortz to redact respondents' PII in order to maintain confidentiality. *See* 1990-92 Order at 49; 1990 Order at 5. These decisions control here. The Copyright Act requires the Judges to "act in accordance with . . . prior determinations and interpretations" of the CRT and CARP. *See* Distribution of 1998 and 1999 Cable Royalty Funds, 80 Fed. Reg. 13423, 13428 (Mar. 13, (2015) (citing 17 U.S.C. § 803(a)(1)); *see also Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 140 (D.C. Cir. 2015) (referring to the Judges' "statutory obligation to adhere to precedent established by prior determinations . . .").

While the Judges may depart from precedent where it is "distinguished," H.R. Rep. No. 108-408 at 27 (2004), PTV's Motion does not even attempt to do so. In fact, although PTV cites

the 1990-92 Order for an unrelated proposition, it neglects to mention that *in the very same order* the CARP denied Program Suppliers’ request for Bortz survey respondent PII. *See* Mot. at 14. And PTV does not address the 1990 Order whatsoever.

On the basis of precedent alone, PTV’s Motion should therefore be denied. But even if the Judges were to reconsider this issue anew, the same result is warranted. Disclosing respondent PII poses a substantial threat of harm to individual respondents and ongoing survey research, while offering minimal, if any, incremental information relevant to this proceeding. Moreover, Bortz and the parties have reasonably relied on the precedent for purposes of this proceeding.

**a. Maintaining the Confidentiality of Respondent PII Is Necessary to Protect Respondents and Ongoing Survey Research**

PTV’s demand for the identities of Bortz survey respondents violates core principles of survey ethics and methodology intended to ensure effective survey research. *See* Mathiowetz Decl. at ¶¶ 4-9. The American Association for Public Opinion Research (“AAPOR”) is described by PTV’s own survey expert as the “most respected association of public-opinion and survey-research professionals.” Written Rebuttal Testimony of Dr. Kevin J. Boyle, at ¶ 15 (“Boyle WRT”).<sup>2</sup> AAPOR treats “the protection of identifying information about survey respondents” as an “ethical obligation” that “is not relieved when survey results are proffered in a legal proceeding.” Kientzle Decl. at ¶ 7, Ex. 5 (“AAPOR Statement”). AAPOR thus “strongly condemns the practice of seeking such information in a litigation context.” *Id.*

Other standard-setting organizations agree. The Federal Judicial Center’s Reference Manual on Scientific Evidence recommends that “[a]ll identifying information, such as the respondent’s name, address, and telephone number, should be removed” from copies of completed

---

<sup>2</sup> PTV’s other survey expert likewise cites to AAPOR materials in his testimony. *See* Written Rebuttal Testimony of Dr. Itamar Simonson, at ¶ 44 n.33, ¶ 47 n.37. And PTV’s regression expert is also a member of AAPOR. Rebuttal Testimony of John H. Johnson, IV, at 77.

survey questionnaires produced in litigation “to ensure respondent confidentiality.” Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed. 2011) § VII.C, [https://www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1](https://www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1;); *see also* Insights Association Code of Standards §1.6, <https://www.insightsassociation.org/Resources/Codes-of-Standards>.

AAPOR explains why seeking respondents’ PII—as PTV does here—is a threat to the effective performance of survey research. AAPOR Statement at 1-2. Without the promise of confidentiality, individuals are less likely to participate in a study, and those willing to participate may not form a representative sample or be willing to provide accurate and unbiased responses. *Id.* As AAPOR stated in opposing another motion to compel disclosure of survey respondents’ PII: “The simple fact is that survey and public opinion research must guarantee strict confidentiality in order to preserve the nature of [the] research sample and correspondingly the value of the quantitative and qualitative data.” Kientzle Decl. ¶ 8, Ex. 6, at 6 (“AAPOR Amicus Brief”).

Although PTV has disregarded these core survey principles, courts have not. Federal courts have repeatedly held that PII of study participants can be withheld in litigation, both to protect the integrity of future studies and the privacy interests of the participants. *See, e.g., Exeltis USA Inc. v. First Databank, Inc.*, No. 17-CV-04810-HSG, 2020 WL 7025089, at \*7 (N.D. Cal. Nov. 30, 2020) (rejecting challenge to anonymized survey, reasoning that “regardless of whether [the expert] conducted a quantitative or qualitative survey, if courts routinely allowed disclosure of the identities of a survey’s participants, it is unlikely that people would agree to participate in surveys” (cleaned up)); *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, No. 1:06-CV-1678-JEC, 2009 WL 10756688, at \*1 (N.D. Ga. Dec. 23, 2009) (holding expert was not required to disclose

names of survey participants because “[p]rohibiting public disclosure ensures the free flow of information and encourages unbiased and reliable survey data” and “defendants can challenge [the expert’s] opinion by other, less intrusive means”); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-PJC, 2009 WL 10271835, at \*4-\*6 (N.D. Okla. Mar. 11, 2009) (holding “[a]lthough the identity of the survey participants [was] relevant” that did not “outweigh the harm of undermining the public interest in insuring the ability of surveys to elicit accurate information from respondents.”); *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547-48 (11th Cir. 1985) (affirming protective order denying litigant access to names and addresses of CDC study participants where “disclosure of the names and addresses of these research participants could seriously damage . . . voluntary reporting”); *Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58, 60-61 (N.D. Ga. 1982) (granting protective order to redact personal identifying information of CDC study participants because there was “an insufficient showing of necessity to warrant the invasion of the personal privacy of the participants”).

Maintaining the confidentiality of respondent PII is particularly critical because Bortz surveys of CSOs are ongoing to this day. If the assurance of confidentiality is retroactively denied to respondents in this proceeding, that could threaten Bortz’s ability to effectively conduct these surveys in the future. Trautman Decl. at ¶ 6; Witmer Decl. at ¶¶ 3-4; Singer Decl. at ¶¶ 4-5; Mathiowetz Decl. ¶ 10. As AAPOR has stated: “The simple fact is that survey and public opinion research must guarantee strict confidentiality in order to preserve . . . the value of the quantitative and qualitative data.” AAPOR Amicus Brief at 6. PTV should not be permitted to misuse the discovery process in this proceeding in a manner that could also hinder JSC, or any other party, from developing survey evidence for future proceedings.

PTV is incorrect that the existence of the Protective Order eliminates any potential harm that violating the confidentiality of the Bortz surveys would cause. *See* Motion at 12-13.<sup>3</sup> As explained above, complete confidentiality is required in order to facilitate participation. Allowing a more limited universe of individuals to see the PII would not achieve the goals for which confidentiality is imposed. This is particularly true because the Protective Order in this case permits restricted materials to be shared with individuals who participate in the cable industry, with respect to whom the Bortz survey respondents would reasonably expect confidentiality. This includes “principles or counsel of any party or claimant in this proceeding . . . and employees of same” as well as numerous “independent experts.” *See* Protective Order, Dkt. No. 16-CRB-0009 CD (2014-17), at 3 (Feb. 17, 2022). Thus, business executives for each of the parties as well as their experts, many of who also participate in various aspects of the cable industry, would have access to the sensitive commercial information, something that survey respondents (based on past precedent) were promised would not occur.

The two cases to which PTV cites involving disclosure of respondents’ PII also have no bearing here. In one, the respondents were class members in the case who were told that their responses would be used in connection with the lawsuit. *See In re: Autozone, Inc.*, No. 10MD02159CRBJSC, 2016 WL 4136520, at \*2 (N.D. Cal. May 16, 2016). Here, respondents are third parties with no connection to the proceeding and were promised their PII would not be disclosed. In the other case, as PTV notes, the court affirmed a magistrate’s order compelling disclosure “because ‘confidential is not the equivalent of privileged’ in the discovery process.”

---

<sup>3</sup> PTV is mistaken that the Protective Order prohibits the redactions Bortz applied in this proceeding. Motion at 12-13. The Protective Order in this proceeding is identical in all material respects to the Protective Order in the 2010-13 cable distribution proceeding, in which Bortz made the same redactions. As discussed above, the Judges’ predecessors have permitted the redaction of respondent PII notwithstanding the movant’s willingness to abide by a protective order.

PTV Mot. at 13 (quoting *U.S. Surgical Corp. v. Orris, Inc.*, 983 F. Supp. 963, 970 (D. Kan. 1997)). But that analysis is incomplete. The question “does not depend upon a legal privilege” but rather whether the “interests in keeping [the] study participants’ names confidential outweigh the discovery interests.” *Farnsworth v. Procter & Gamble Co.*, 758 at 1547. The *Orris* decision is no basis for overriding the strong interests in maintaining confidentiality of the Bortz surveys.

**b. PTV Does Not Need Respondent’s PII to Assess the Validity of the Bortz Surveys**

Federal courts reject the argument PTV makes here that respondents’ PII is “key to assessing the validity” of the Bortz survey methodology. Motion at 12. As long as the underlying survey results and methodology are disclosed—as they have been here—nothing prevents PTV from, for example, “attack[ing] the . . . survey by challenging the sample size, survey questions and design, sampling techniques and other scientific challenges to the adequacy of the survey and its . . . methodology,” *Tyson Foods*, 2009 WL 10271835, at \*6, or “cross examin[ing the expert] on these issues,” *N. Am. Med. Corp.*, 2009 WL 10756688, at \*1. AAPOR agrees: “[N]o litigant has a genuine need to discover the identities of research respondents . . . . If a litigant wishes to challenge survey evidence it can . . . , for example, depose [or, in this case, examine] some or all of the researchers who conducted the research, or retain its own expert regarding the proper conduct of such research, or conduct its own research to check the accuracy of the survey’s findings.” AAPOR Amicus Brief at 12; *see also* Mathiowetz Decl. at ¶ 11.

PTV has not identified any unique circumstances in this proceeding that would justify the extreme, and harmful, step of disclosing respondent PII. PTV first argues that the names of respondents “bears on” whether those respondents were ““most responsible”” for programming decisions. Motion at 10-11. This is the same argument that Program Suppliers made, and that the Judges’ predecessors rejected, in a prior proceeding. *See* 1990-92 Order at 47-48 (summarizing

Program Suppliers argument that “the identity of survey respondents is necessary to determine their position and qualifications”). It is, if anything, an even weaker argument in this proceeding given the extensive information that JSC has produced. Indeed, PTV’s own Motion explains why it does not need the respondent PII. Specifically, PTV identifies several factors that its witness Ms. Costantini<sup>4</sup> contends are indicia that the respondents are not the correct people to answer the survey. These include the respondents’ title, their department, and the fact that they worked at a regional level. Motion at 5. While JSC disagrees with Ms. Costantini’s assertions, PTV can introduce testimony from Ms. Costantini, and cross-examine JSC witnesses, on these and other facts regarding the identification of respondents without access to respondent PII.

As PTV recognizes, Bortz did not redact the “Position” field in its survey response data, and therefore in almost all cases PTV knows the position that the individual survey respondent held at the CSO during the relevant period. *See* Motion at 11. Indeed, there were only eight survey responses across all four survey years, representing just 1% of all respondents, for which a respondent’s position is not recorded. Written Rebuttal Testimony of Lynne Costantini WRT at Table 1. By providing “Position” data for the remaining approximately 99% of respondents, JSC has already enabled PTV to prepare analyses of any alleged defects in the qualifications of Bortz respondents.<sup>5</sup>

---

<sup>4</sup> While Ms. Costantini did work for Time Warner at one time, she departed in 2008, 6 years period the beginning of the period at issue in this proceeding.

<sup>5</sup> PTV’s argument concerning whether Ms. Witmer participated in the Bortz Surveys is mistaken. Motion at 11. As Mr. Trautman explained in his direct testimony, given the regional nature of distant retransmission, Bortz began its query at the regional level, and many Bortz respondents held regional management positions. It is therefore unsurprising that no Bortz survey respondent had Ms. Witmer’s title. In any case, if PTV wishes to present arguments about “who Bortz interviewed instead of Ms. Witmer,” *id.*, Bortz’s disclosure already provides the required position information for Time Warner Cable respondents.



PTV alternatively suggests that “[r]espondent identification would enable confirmation” of whether the same respondent at the same system responded each year. Motion at 12. But PTV’s own survey expert acknowledges that there is way to seek this information without disclosing PII. *See Boyle WRT ¶ 100* (explaining that one can “enter a code that identifies when the same subject is interviewed year over year while maintaining the subject’s anonymity”). Tellingly, PTV never asked whether JSC would be willing to have Bortz create anonymized codes that would contain precisely the information they supposedly need. By its own conduct, PTV has made evident that this information is nowhere near “the most fundamental information that would be necessary to establish the survey’s validity,” as it now claims. Motion at 1.

## **II. JSC Has Produced All Documents Responsive to the Other PTV Requests at Issue**

The remainder of PTV’s Motion seeks to compel production of documents that are beyond the scope of discovery in this proceeding. JSC is not required to create documents in response to PTV’s discovery requests; nor is JSC required to search files from past proceedings in an attempt to locate material that could conceivably be responsive to a request. PTV’s Motion should be denied with respect to all of these requests.

### **a. JSC Has Produced All Documentation Concerning Identification and Selection of Bortz Survey Respondents**

PTV seeks additional information concerning the manner in which Bortz survey respondents were “identified and selected.” Motion at 15. However, JSC has already advised PTV that it has produced all responsive documents in its possession. JSC cannot be compelled to produce documents that do not exist. *Kientzle Decl. at ¶ 6, Ex. 4 (Order Granting in Part and Denying in Part Settling Devotional Claimants’ Motion to Compel Production of Underlying Documents, Docket No. 2008-2 CRB CD 2000-03 (Phase II) (Aug. 1, 2012))* (“Parties are not required to create documents to satisfy document requests”).

Specifically, PTV seeks to compel production of documents responsive to the following requests:

**PTV Follow Up Request 21:** Please provide all nonprivileged underlying documents related to the identity of each survey respondent and how that respondent was selected.

**PTV Follow Up Request 22:** Please provide all nonprivileged, unredacted documents related to the identify of each survey respondent and how that respondent was selected.

Motion at 15 & Ex. 3. JSC has already provided all documents in its possession responsive to these requests, except that, as explained above, its disclosures have redacted personally identifiable information for the Bortz Survey respondents. *See* Sept. 2 Letter at 2 (“no documents responsive to Request 21 have been withheld.”).<sup>6</sup> As JSC has explained to PTV, the Bortz Report itself describes the respondent selection process. Bortz Report § III.A.1 & Appendix A. And JSC has provided PTV with copies of the *Television & Cable Factbook*, which is the industry data that Bortz uses to identify the first point of contact at each surveyed CSO. Because JSC has already produced all responsive documents, the Judges should deny PTV’s Motion with respect to these requests.

**b. JSC Has Produced All Documents Relating to Pretesting, Alternative Methodologies, Tests, and Analyses**

PTV’s Motion seeks to compel the production of a wide range of documents concerning “pretesting, alternative methodologies, testing, and analyses relating to the Bortz surveys and their development.” Motion at 7-10; 15-16. PTV does not identify any specific documents that it has reason to believe were considered in connection with the 2014-17 Bortz surveys that JSC is withholding. Rather, it argues that JSC should be required to search all of the records related to past Bortz surveys (which date back to the 1980s) to determine whether Bortz created materials in

---

<sup>6</sup> In the parties’ discovery correspondence, PTV has not raised any concern with respect to JSC’s response to PTV Follow-Up Request 22 other than JSC objection that the request “seeks personally identifiable information . . . for individual respondents.” Motion at Ex. 5 p. 2.

connection with a past survey that could in some way be responsive to PTV's requests. *See* Motion at 16 ("JSC should be compelled to conduct a diligent search for the requested materials *without limiting its search to documents related only to 2014-17...*") (emphasis original).

PTV's request for documents considered only in connection with prior proceedings exceeds the scope of discovery that is permissible in royalty distribution proceedings before the Judges. *See* 1990-92 Order at 53 (denying discovery with respect to documentation concerning the 1989 Bortz Survey because "that survey was part of a prior proceeding and discovery is not permissible for testimony from a prior proceeding."). As PTV has explained to the Judges in this proceeding: "[T]he history shows that Congress, the Judges, and the parties agreed that the balance in these proceedings must be struck in favor of less discovery and more cost-effective and efficient determinations—to a far greater extent than in rate-setting and civil litigation proceedings." PTV Consolidated Opp. to SDC Motion to Compel at 16 (Sept. 30, 2022). PTV's demand for an exhaustive review of records going back to the 1980s—even though no expert in the current proceeding considered those materials in preparing his or her testimony—is incompatible with the same limited discovery principles it recently embraced.

PTV's interest in materials prepared in connection with prior proceedings that might reveal how Bortz "pretested" the survey, or "considered additional or alternative questions, question wordings, or orderings of questions," does not justify radically expanding the scope of discovery in cable royalty distribution proceedings. *See* Motion at 7-9; 15-16. In each prior proceeding, the parties, including PTV, had a complete opportunity to challenge the Bortz Survey methodology, and did in fact do so, including by calling industry participants as witnesses to testify about "respondent comprehension" of the questions posed. *Id.* at 8; *see, e.g.*, 2010-13 Written Rebuttal Testimony of Sue Ann Hamilton (arguing that Bortz Survey respondents did not understand the

Allocation Phase categories). PTV also had an opportunity to serve discovery in those proceedings, and PTV should have equal access to records of discovery materials produced in those proceedings. Tellingly, when PTV challenged the Bortz methodology in the most recent previous proceeding, PTV did not argue that Mr. Trautman should be required to go back in time and search for documents from completed proceedings.

**c. JSC Has Produced All Documents Relating to Interviewer Materials**

Finally, PTV's Motion seeks "documents related to selection, training, and feedback of Bortz interviewers." Motion at 9; 16. No such documents exist beyond those that JSC has already produced. Sept. 2 Letter at 2, 3; Motion Ex. 4, p. 9. As PTV recognizes, Ms. Sandra Grossman conducted "nearly all" of the 2014-17 Bortz surveys, and Ms. Grossman has been retained by Bortz to conduct the Bortz Survey since 2001. Bortz Report at A-15. Likewise, the interviewers supporting Ms. Grossman had experience conducting prior Bortz Surveys. Trautman Decl. ¶ 9. Ms. Grossman trained these interviewers, including by conducting mock interviews. Bortz Report at A-15. That training did not generate or rely upon any written materials other than copies of the Bortz Survey questionnaires themselves, which JSC has already provided. Trautman Decl. ¶ 9. The Judges should not compel JSC to produce documents that it does not possess.

**CONCLUSION**

For the foregoing reasons, the Judges should deny PTV's Motion.

Respectfully submitted,

JOINT SPORTS CLAIMANTS

By: /s/ Michael Kientzle

Daniel Cantor (D.C. Bar No. 451115)  
Michael Kientzle (D.C. Bar No. 1008361)  
Rosemary Szanyi (D.C. Bar No. 997859)  
Ryan White (D.C. Bar No. 1655918)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Ave., NW  
Washington, D.C. 20001-3743  
202.942.5000 (voice)  
[Daniel.Cantor@arnoldporter.com](mailto:Daniel.Cantor@arnoldporter.com)  
[Michael.Kientzle@arnoldporter.com](mailto:Michael.Kientzle@arnoldporter.com)  
[Rosemary.Szanyi@arnoldporter.com](mailto:Rosemary.Szanyi@arnoldporter.com)  
[Ryan.White@arnoldporter.com](mailto:Ryan.White@arnoldporter.com)

Christine Camara (N.Y. Bar. No. 5781885)  
ARNOLD & PORTER KAYE SCHOLER LLP  
250 West 55<sup>th</sup> Street  
New York, NY 10019-9710  
212.836.8000 (voice)  
[Christine.Camara@arnoldporter.com](mailto:Christine.Camara@arnoldporter.com)

Douglas F. Curtis (Ill. Bar No. 6329143)  
ARNOLD & PORTER KAYE SCHOLER LLP  
70 West Madison Street  
Chicago, IL 60602-4231  
312.583.2300 (voice)  
[Douglas.Curtis@arnoldporter.com](mailto:Douglas.Curtis@arnoldporter.com)

*Counsel for the Office of the  
Commissioner of Baseball*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of November, 2022, I caused a copy of the foregoing to be served on all parties registered to receive notice by eCRB by filing through the eCRB filing system.

/s/ *Michael Kientzle*  
Michael Kientzle

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF CABLE ROYALTY  
FUNDS**

**DOCKET NO. 16-CRB-0009 CD  
(2014-17)**

---

**DECLARATION OF JAMES M. TRAUTMAN**

1. I am Managing Director of Bortz Media & Sports Group, Inc. (“Bortz Media”). I have supervised market research assignments involving the cable and satellite television industries for over thirty years, and I have had primary responsibility for management of all of the cable operator studies conducted by Bortz Media for the Joint Sports Claimants (“JSC”), including the Cable Operator Valuation of Distant Signal Non-Network Programming: 2014-17 (“Bortz Report”). My background and experience are set forth in greater detail in my written direct testimony in this proceeding.

2. I have reviewed Public Television’s Motion to Compel Joint Sports Claimants to Produce Documents Underlying the Development and Execution of Their Survey Methodology, Docket No. 16-CRB-0009 CD (2014-17) and submit this declaration to address several points raised therein.

3. Bortz has conducted annual cable operator surveys on behalf of JSC for decades. These surveys ask cable system executives to allocate a hypothetical budget among different categories of distant signal non-network programming that correspond to the Allocation Phase categories at issue in this proceeding.

4. Ensuring the confidentiality of the identities of the cable system executives who respond to the survey is essential to Bortz’s ability to conduct the surveys. Redacting respondents’ personally identifiable information—specifically, their names and telephone numbers—is

necessary to preserve that confidentiality. Unless respondent confidentiality is respected, some potential respondents may be deterred from participating in the Bortz Survey, and others may provide biased responses.

5. The likelihood of deterring participation and biasing responses is even greater in the case of business executives, such as those surveyed in the Bortz Report, because of the potential competitive value of information disclosing the executive's perspectives and opinions. If a cable system executive became concerned that her identity would be linked to her survey responses, she would be unlikely to participate in future Bortz surveys.

6. Moreover, assuring respondent confidentiality is a core principle of survey research. Bortz's ability to conduct other surveys both within and outside of the cable television industry depends on the trust that survey participants place in us to protect the confidentiality of research, and our ability to conduct those surveys could be jeopardized if it became known that we did not protect the confidentiality of our survey respondents.

7. Redacting the personally identifiable information of the Bortz respondents from completed questionnaires and data entry spreadsheets (collectively, "Bortz Survey Data") is also consistent with decades of practice in cable royalty distribution proceedings. This information has been redacted in every proceeding in which Bortz has presented a version of the Bortz Surveys.

8. Bortz itself applies any and all redactions to the Bortz Survey Data. Bortz has a policy of not sharing unredacted Bortz Survey Data relating to this proceeding with any person or entity outside of Bortz, including counsel for the JSC.

9. I understand that PTV disputes whether Bortz respondents were in fact told that their identities would be kept confidential. They were. I worked with Ms. Grossman to prepare her and her team to conduct the 2014-17 Bortz Surveys. *See* Bortz Report at A-15. The preparation



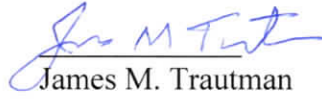
process consisted primarily of conducting mock interviews using the Bortz survey questionnaires, and did not generate or rely upon any other written materials. During that training, all Bortz interviewers were specifically instructed to assure Bortz survey respondents that their identities would be kept confidential. Ms. Grossman and each member of her team—all of whom have prior experience conducting Bortz surveys—were also aware of this practice from prior iterations of the Bortz surveys.

10. I also monitored many of the interviews with Bortz survey respondents in each of the years 2014-17. In those interviews, I heard interviewers assure respondents that their identities would be kept confidential.

11. With the exception of redacting survey respondents' PII, Bortz has disclosed all documents and data underlying the 2014-17 Bortz Surveys. Specifically, Bortz's disclosure includes a copy of every completed questionnaire, as well as copies of the *Television & Cable Factbook* from which Bortz identifies first points of contact at CSOs. And Bortz has disclosed survey results compiled in Excel format, with unique identifiers for each respondent, together with documentation of the application of the Bortz methodology for sampling, weighting and projection.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2022, at Denver, Colorado.

  
James M. Trautman

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF CABLE ROYALTY  
FUNDS**

**DOCKET NO. 16-CRB-0009 CD  
(2014-17)**

---

**DECLARATION OF NANCY A. MATHIOWETZ, PH.D.**

1. I am Professor Emerita, Department of Sociology at the University of Wisconsin-Milwaukee (UWM) and Principal Consultant, Cirque Analytics. Prior to joining the faculty at UWM in 2003, I was Associate Professor, Joint Program in Survey Methodology, University of Maryland and University of Michigan. I received a B.S. from the University of Wisconsin and a M.S. (Biostatistics) and Ph.D. (Sociology) from the University of Michigan. I served as co-Editor, *Public Opinion Quarterly* from 2008-2012 and as President, American Association for Public Opinion Research (AAPOR) from 2007-2008. In 2015 I was awarded the AAPOR Award for Exceptional Distinguished Achievement. Between 1998 and 2004, I was an associate editor of the *Journal of Official Statistics* and I have served as a reviewer for numerous other journals and publications. I am an elected Fellow of the American Statistical Association. I have testified as an expert on survey research methodology in federal and state court cases.

2. I have reviewed Public Television’s Motion to Compel Joint Sports Claimants to Produce Documents Underlying the Development and Execution of Their Survey Methodology, Docket No. 16-CRB-0009 CD (2014-17) and submit this declaration to address Public Television’s request for personally-identifiable information (“PII”) for the Bortz Survey respondents.

3. Respondents to the cable operator surveys conducted by Bortz Media & Sports Group “were assured that their responses would be kept confidential (i.e. results would be reported only in an aggregated form)” (Bortz Report; p. A-17). And I understand that Bortz redacted the

PII of Bortz survey respondents—specifically, their names and telephone numbers—from materials produced to the parties in this proceeding.

4. Bortz’s promise of confidentiality to the Bortz survey respondents, and its redaction of respondent PII, is consistent with established principles and codes of ethics of survey research.

5. The protection of respondent confidentiality is a core principle in the field of survey research because it is essential to both securing respondent participation and ensuring unbiased responses. Many potential respondents will decline to participate in a survey at all if they are concerned that their responses will be linked to their identity. Further, even if a respondent agrees to participate, absent a guarantee of confidentiality, the respondent may not be entirely candid in its responses.

6. These concerns apply to all surveys but can be particularly acute in the case of surveys of business executives, which must consider the potential impacts on their relationships with competitors, customers, suppliers, etc.

7. As explained in the Reference Guide on Survey Research (Diamond, 2011; p. 417) published by Federal Judicial Center and National Academy of Sciences, “[b]ecause failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents’ identities.”

8. Thus, the American Association for Public Opinion Research’s (AAPOR) Code of Professional Ethics (Section I.B.2) provides, among other things, that researchers “will not disclose any information that could be used, alone or in combination with other reasonably available information, to identify participants with their data, without participant permission.” It further provides that researchers “understand that the use of our research results in a legal

proceeding does not relieve us of our ethical obligation to protect participant privacy and keep confidential all personally identifiable data, except where participants have permitted disclosure.” AAPOR Code of Professional Ethics, Section I.B.5.

9. Similarly, the Insights Association (the entity created by the merger of the Council of American Survey Research Organizations and the Marketing Research Association) requires researchers to “[e]nsure that data obtained for purposes of research are not used to reveal the identity of the research subject without their consent.” Insights Association Code of Standards (Section 1.6).

10. Failing to honor confidentiality would have a material impact on the ability of the Bortz Survey to obtain participation among potential respondents.

11. The PII of the Bortz survey respondents is not analytically necessary to assessing the reliability or accuracy of the Bortz survey.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2022, at Oconomowoc, Wisconsin.

  
Nancy A. Mathiowetz, Ph.D.

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF CABLE ROYALTY  
FUNDS**

**DOCKET NO. 16-CRB-0009 CD  
(2014-17)**

---

**DECLARATION OF MELINDA WITMER**

1. I have over twenty-five years of experience working in the cable industry. From 2001 until June 2016, I was employed by Time Warner Cable (“TWC”). My first position at TWC was Vice President, Chief Counsel, Programming. I served in that role from 2001 until 2005, when I was promoted to Senior Vice President, Programming. I was promoted again in 2007, to Executive Vice President, Chief Video Officer, and stayed in that role until I left the company in June 2016, following Charter’s merger with TWC in May 2016. My background and experience are set forth in greater detail in my November 2, 2022 written rebuttal testimony in this proceeding.

2. I understand that Public Television is seeking personally-identifiable information (“PII”) for every respondent that participated in the Bortz Survey.

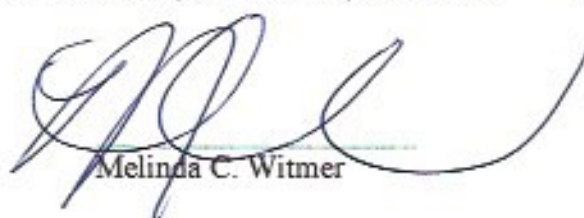
3. In my experience in the cable industry, information concerning the relative value, cost and importance of different categories of television content is highly-sensitive competitive information in the cable industry. Based on my experience at TWC, I would not have, and I do not expect that other TWC employees would have, provided this information to a surveyor in the absence of an assurance that my responses would remain anonymous.

4. If I learned that my confidential responses to such a survey were revealed in the course of litigation, and associated with my name and phone number, I would perceive that to be a serious violation of trust that created a risk of competitive harm, and I expect other TWC

employees would as well. I would not be willing to engage with the proprietor of the survey again in the future, and I expect other TWC employees would respond similarly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2022, at Scarsdale, New York.



Melinda C. Witmer

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF CABLE ROYALTY  
FUNDS**

**DOCKET NO. 16-CRB-0009 CD  
(2014-17)**

---

**DECLARATION OF ALLAN SINGER**

1. I have over twenty-five years of experience in the cable television industry as an executive involved with both the acquisition and the licensing of television programming. Over the course of my career, I have held several senior programming roles with major cable system operators. These roles include SVP, Content Acquisition at Comcast (2007-2009) and SVP, Programming at Charter Communications (2011-2016). My background and experience are set forth more fully in my July 1, 2022 written direct testimony in this proceeding.

2. I understand that Public Television is seeking personally-identifiable information (“PII”) for every respondent that participated in the Bortz Survey.

3. The 2014-17 Bortz Survey asks these respondents to assign relative values to the categories of distant signal content at issue in this proceeding by allocating a percentage of a finite dollar amount to each category of distant signal content that the system carried. Their responses provide important information concerning the value of distant signal programming during this period. The results of the Bortz Survey are consistent with my experience as a cable programming executive. *See* Written Direct Testimony of Allan Singer, at ¶¶ 48-53 (July 1, 2022).

4. Based on my years of experience as a programming executive at Comcast and Charter, I expect that Bortz would not have been able to secure the participation of cable system executives without promising that the executives’ responses would remain anonymous. The

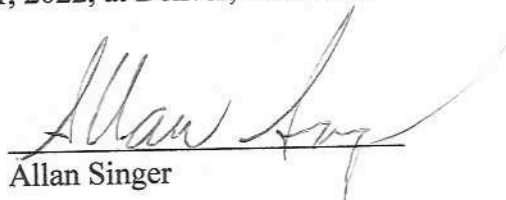


information that the Bortz Survey seeks is competitively sensitive, and I do not expect that cable system executives would be willing to disclose it in the absence of this guarantee.

5. Furthermore, if Bortz were required to reveal PII and thus not honor the promise of anonymity that it made in conducting the 2014-17 Bortz Survey, I expect that doing so would significantly damage its reputation among the 2014-17 Bortz Survey respondents, who would be unlikely to agree to provide responses to the Bortz Survey in future years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2022, at Denver, Colorado.

  
Allan Singer

**COPYRIGHT ROYALTY JUDGES**  
**The Library of Congress**

*In re*

**DISTRIBUTION OF CABLE ROYALTY  
FUNDS**

**DOCKET NO. 16-CRB-0009 CD  
(2014-17)**

---

**DECLARATION OF MICHAEL E. KIENTZLE**

1. I am over 18 years of age and an attorney duly licensed to practice law in the District of Columbia. I am a counsel in the law firm Arnold & Porter Kaye Scholer LLP. I submit this declaration in support of the Opposition of Joint Sports Claimants to Public Television's Motion to Compel.

2. I have personal knowledge of the following facts and if called as a witness and duly sworn I could and would testify competently thereto.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the Copyright Arbitration Royalty Panel Order dated October 30, 1995 in Docket No. 94-3 CARP CD 90-92.

4. Attached hereto as **Exhibit 2** is a true and correct copy of the Copyright Royalty Tribunal Order dated September 7, 1993 in Docket No. 92-1-90CD.

5. Attached hereto as **Exhibit 3** is a true and correct copy of Program Suppliers' Motion to Compel Production of Unredacted Documents and Data from the Joint Sports Claimants, Docket No. 14-CRB-0010-CD (2010-13) (Apr. 27, 2017), excluding exhibits thereto.

6. Attached hereto as **Exhibit 4** is a true and correct copy of the Copyright Royalty Judges' Order on Motions to Compel Discovery Filed by IPG, Docket No. 2008-2 CRB CD 2000-03 (Phase II) (Aug. 1, 2012).

7. Attached hereto as **Exhibit 5** is a true and correct copy of the American Association for Public Opinion Research's Statement on Protecting Respondent Confidentiality in Litigation Surveys.

8. Attached hereto as **Exhibit 6** is a true and correct copy of the Brief of Council of American Survey Research Organizations, Inc. and American Association of Public Opinion Research as Amici Curiae in Support of Plaintiff's Motion for Protective Order in *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-PJC (Feb. 24, 2009).

9. Attached hereto as **Exhibit 7** is a true and correct excerpt from the Corrected Proposed Findings of Fact and Conclusions of Law of the Settling Parties, Docket No. 2007-3 CRB CD 2004-2005 (Mar. 24, 2010).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2022, at Washington, D.C.

/s/ Michael Kientzle  
Michael E. Kientzle

## **EXHIBIT 1**

In the Matter of }  
 }  
1990-92 Cable Copyright }  
Royalty Distribution Proceeding }

Docket No. 94-3 CARP-CD 90-92



## ORDER

On September 22, 1995, motions were filed for the production of evidence underlying certain portions of the Phase I direct cases by the Program Suppliers, the Joint Sports Claimants (JSC), the National Association of Broadcasters (NAB) and the Public Broadcasting Service (PBS). Opposition to these motions were filed on October 3, 1995. Replies to the opposition to these motions were filed on October 12, 1995.

Because of the volume of motions, the explanation of each ruling has been kept brief.

However, there are a number of overriding principles the Office followed in making these rulings we would like to discuss to afford the parties guidance, and, it is hoped, to reduce the number of pre-controversy rulings requested in the future. <sup>1</sup>

P.O. Box 70977  
Southwest  
Station  
Washington  
D.C. 20024

## DISCUSSION

1. *Limited scope of discovery.* Discovery in CARP proceedings is intended to produce only the documents that underlie the witness' factual assertions. <sup>2</sup> It is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the

---

<sup>1</sup> The Office is making these rulings pursuant to Section 801(c) of the Copyright Act: "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."

<sup>2</sup> 37 CFR 251.45(c)(1) "...parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony."

witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties.

For example, articles mentioned in a resume are not discoverable to test whether a witness is being consistent. They are only offered to support the witness' knowledge and experience. Whereas, articles cited within the body of the testimony are discoverable to see whether they, in fact, support the methods being used.

2. *Bottom-line figures must be verified.* Parties who offer bottom-line figures in a CARP proceeding must be prepared to share all the underlying data that contributed to those bottom-line figures, notwithstanding the problems of confidentiality. Each of the data inputs in a survey or study could contain errors or be the source of undercounting for one or more of the Phase I parties, and therefore, they are all important to the process of verification.

Therefore, in a number of rulings, the Office has directed the parties to negotiate in good faith protective orders so that the underlying data can be revealed and confidentiality can be protected.

3. *Underlying data must be furnished in as organized and usable a form as possible.* CARP proceedings operate under tight deadlines. For the proceeding to run smoothly and quickly, all parties must be prepared to furnish to their opposing sides the underlying documents in as organized and usable a form as possible, namely, in computer tapes or discs even when the hard copy has been furnished.

#### **RULINGS:**

The following rulings apply to the discovery motions filed September 22, 1995. Parties required to furnish underlying documents shall do so no later than November 9, 1995, except

where the parties are directed to negotiate the terms of a protective order, in which case the underlying documents shall be furnished no later than November 17, 1995. If they are not produced, all motions to strike shall be ruled on by the CARP.

**I. JOINT SPORTS CLAIMANTS *make the following request for document production from* PROGRAM SUPPLIERS.**

1. Joint Sports Claimants ask for the underlying documents supporting Mr. Valenti's testimony on pages 8-9 and the chart that accompanies it concerning the cost of producing first-run network series programs for 1986-87 and 1991-92, and the license fees paid by the networks.

Program Suppliers respond that Mr. Valenti's testimony on the cost of producing first-run network series programs is based, in part, on proprietary business information, and, in part, on his own knowledge and experience. Program Suppliers further respond that it has furnished Joint Sports Claimants the documents supporting Mr. Valenti's testimony on the license fees paid by the networks.

Joint Sports Claimants replies that its request for documents underlying the testimony of Mr. Valenti is the subject of one of its questions submitted to Program Suppliers to which Program Suppliers has not yet responded. Joint Sports Claimants wrote, "We are unable to determine from the documents you produced how Mr. Valenti calculated the figures presented on pages 8-9 of his testimony. Please confirm whether Mr. Valenti relied solely on the documents you have produced. If he relied on other documents, please produce them. If not, please explain how Mr. Valenti calculated the figures presented on pages 8-9."

**RULING:** (a) Program Suppliers are directed to furnish the documents underlying the costs of producing first-run network series programs for 1986-87 to Joint Sports Claimants. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

(b) If Program Suppliers have furnished the underlying documents supporting the 1991-1992 costs of producing first-run network series programs, and the license fees paid by the networks to producers, the motion is denied as moot. If not, Program Suppliers are directed to furnish the requested documents to Joint Sports Claimants. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

2. Joint Sports Claimants ask for all the documents underlying the testimony of Paul Lindstrom and Allen Cooper on the Nielsen viewing study and ask that it be given in the form of computer tapes.

Program Suppliers respond that the information is proprietary and offers \$10,000 as part of a pool so that Joint Sports Claimants, NAB, and PBS may order Nielsen to perform other data runs to cross-check Program Suppliers' study.

Joint Sports Claimants reply that they have offered to enter into a protective order to maintain the confidentiality of Nielsen data. They do not agree that paying Nielsen to perform



additional analyses is as good as having the information furnished to them so they can perform their own analysis, because they do not believe they should be put to the expense and because they do not believe that the study can be verified by the company who performed the study, but only by opposing parties.

**RULING:** Program Suppliers are directed to furnish to Joint Sports Claimants all the data underlying the Nielsen viewing study in the form of computer tapes or discs, to the extent that it exists in such form, in as organized and usable a form as possible. To the extent that Nielsen asserts that any of the information is proprietary, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect the confidentiality of Nielsen's data.

3. Specifically, with regard to the Nielsen study, Joint Sports Claimants ask for the computer tapes that contain the name, time of broadcast, and classification of each program included in the study; the name and time of broadcast for all programs on WGN and WWOR deleted from the study because of the FCC's syndicated exclusivity rules; and the counties MPAA considered local for each sample station. Joint Sports Claimants state that MPAA has furnished several thousand pages of computer printouts, but that to work from these documents is too burdensome and that they are not entirely responsive to Joint Sports Claimants' request.

First, Program Suppliers respond that they have already made available a 4700 page printout of the programs and the Phase I categories in which they were placed for each of the 180 sample stations for each year, but to supply additionally the scheduling information for each program on each station would be extremely costly and time-consuming.

Second, as to Joint Sports Claimants' request for the number of distant cable households that viewed each program, Program Suppliers state that Nielsen does not gather data in this form. According to Paul Lindstrom of Nielsen Home Video Index, "the station schedules are program typed, then the station and time periods corresponding to each program type are aggregated and the viewing data is run for these time periods in total. At no time did we run the station data individually."

Third, Program Suppliers had not seen or had in its possession a computer tape containing source material from TV Data.

Fourth, Program Suppliers state they have provided in paper format to Joint Sports Claimants a complete list of the distant/local analysis perform by Ms. Kessler, and that a computer tape of this information would be extremely burdensome to Ms. Kessler to generate because this information is scattered in hundreds of separate worksheet files.

Fifth, Program Suppliers state that they have provided in paper format to Joint Sports Claimants the programs on WGN and WWOR that were excluded from the Nielsen study because of syndicated exclusivity blackout demands, and Nielsen cannot readily produce a computer tape of this information because no separate data base of excluded programs exists.

Joint Sports Claimants reply (a) that the 4700 page printout came from a computer file and Joint Sports Claimants requests the computer file to avoid the arduous tasks of imputing the data into its own computer.

(b) Joint Sports Claimants reply that they are prepared to receive the database in whatever format it was compiled by Nielsen, provided that format is adequately explained to Joint Sports Claimants computer specialists, and provided that the database does contain the information

necessary to replicate and verify the study results. Joint Sports Claimants state they need to know the time periods for each program because a given time period which ordinarily shows a movie might have broadcasted a baseball game on that date. Joint Sports Claimants also state that they need to know the location of the Nielsen households only to verify that they were distant to the broadcast station, but it does not need to know the actual address.

(c) Joint Sports Claimants reply that although Program Suppliers may not have seen or had in their possession a computer tape containing source material from TV Data, it must necessarily have been used by Nielsen so that it could be merged with the other data in the Program Suppliers' study data base.

(d) Joint Sports Claimants reply that the 1000 page printout containing counties considered local for each sample station must have come from a computer tape, and Joint Sports Claimants request this tape.

(e) Joint Sports Claimants reply that the 1000 page printout containing the list of the programs on WGN and WWOR excluded because of syndicated exclusivity demands must have come from a computer tape, and Joint Sports Claimants request this tape.

**RULING:** Program Suppliers are directed to furnish to Joint Sports Claimants in computer tapes or discs the computer file from which the 4700 page printout of the programs and their classifications was printed.

Program Suppliers are directed to furnish to Joint Sports Claimants the computer tape or disc containing source material from TV Data.

Program Suppliers are directed to furnish to Joint Sports Claimants the computer tape or disc from which the 1000 page printout containing counties considered local for each sample station was printed.

Program Suppliers are directed to furnish to Joint Sports Claimants the computer tape or disc from which the 1000 page printout containing the list of programs on WGN and WWOR excluded because of syndicated exclusivity blackout demands was printed.

4. Joint Sports Claimants ask for the documents underlying the research conducted by Multimedia Entertainment, Inc. on the value to viewers of talk shows described on pages 9-10 of Richard Thrall's testimony.

Program Suppliers respond that this is proprietary information. Program Suppliers further respond that Mr. Thrall relied on the reported results of a Roper study for his statement on news/talk being second to movies as cable viewers' favorite genre, but object to disclosing any of Multimedia's internal summaries of the Roper study on the grounds that they are proprietary.

In reply, Joint Sports Claimants renew their request.

**RULING:** Program Suppliers are directed to furnish the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

5. Joint Sports Claimants ask for the documents underlying the analysis of *Donahue's* share of advertising dollars on pages 22-25 of Mr. Thrall's testimony and Exhibit H.

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

**RULING:** Program Suppliers are directed to furnish the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

6. Joint Sports Claimants ask for the documents underlying the Household Viewing Hour Analysis described on page 19, footnote 28 of Stanley Besen's testimony as the basis upon which Mr. Besen performed his analysis of added/dropped signals.

Specifically, Joint Sports Claimants asks for (a) all documents that explain how the viewing hours were calculated for each of the years 1988-92; (b) the confidence limits for the viewing hours of each program category on each distant signal that was added or dropped during these years; and (c) all other information required by the rules of the Copyright Office.

Program Suppliers respond that (a) Joint Sports Claimants are in full possession of the methodology because it was the subject of testimony and cross examination in numerous Tribunal proceedings; and (b) there is no requirement to report the confidence limits for each program category on each distant signal, because Mr. Besen did not rely directly on this

information, and that the results actually reported by Mr. Besen do have confidence limits in accordance with the rules.

Joint Sports Claimants reply that if Program Suppliers are stating that the household viewing methodology for the years 1988-1992 is the same as that testified to in the 1989 distribution proceeding, Joint Sports Claimants will accept that answer, but any differences in methodology should be disclosed. Joint Sports Claimants further reply, with the support of an affidavit from Robert Crandall of the Brookings Institution, that because Mr. Besen's regression analysis relies on viewing estimates on a station-by-station basis for each category of programming, any error in the viewing estimates may bias the results of Mr. Besen's study, and therefore, the confidence limits are needed to verify the reliability of Mr. Besen's study.

**RULING:** Program Suppliers are directed to furnish Joint Sports Claimants the differences, if any, in the 1988-1992 household viewing hours study cited by Mr. Besen and the 1989 household viewing hours study submitted in the 1989 cable distribution proceeding. Program Suppliers are directed to furnish the confidence limits for the viewing hours of each program category on each distant signal that was added or dropped during the years of Mr. Besen's study. The "weighting" by viewing is not an indirect element of Mr. Besen's study, but directly affects his results.

7. Joint Sports Claimants ask for the documents underlying Howard Green's testimony on pages 3-4 on the costs of network program production.

Program Suppliers respond that they have produced publicly available information, but anything more is proprietary information.

In reply, Joint Sports Claimants renew their request.

**RULING:** Program Suppliers are directed to furnish the requested documents to Joint Sports Claimants. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

8. Joint Sports Claimants ask for the documents underlying Robert Sieber's testimony on pages 16-17 on the average license fees per half hour for sports, motion pictures and television series.

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

**RULING:** Program Suppliers are directed to furnish Joint Sports Claimants the requested documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

9. Joint Sports Claimants ask for the documents underlying Robert Sieber's testimony on pages 18-19 on the percentage of advertising revenues generated by sports, motion pictures and television series.

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

**RULING:** Program Suppliers are directed to furnish Joint Sports Claimants the requested documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

#### **SUPPLEMENTAL REQUEST**

10. In addition to the motions to compel discovery, Joint Sports Claimants filed a motion to compel the Program Suppliers to respond to Joint Sports Claimants' September 15 and September 19 discovery requests.

Joint Sports Claimants assert that Program Suppliers were slow in responding to certain discovery requests, and that, as a result, Program Suppliers agreed to allow Joint Sports Claimants to make supplementary discovery requests after the September 13 deadline for all discovery requests.

Joint Sports Claimants sent Program Suppliers a letter to confirm the agreement to extend the deadline, but Program Suppliers disavowed they had made an agreement and did not sign the letter.

Joint Sports Claimants thereafter made requests of Program Suppliers on September 15 and September 19, some of which were characterized as requests for clarification of what has been or can be produced, and others were additional requests for discovery. Program Suppliers did not respond to these letters.



Joint Sports Claimants have filed a motion to compel Program Suppliers to respond to the September 15 and 19 letters within seven days, to compel Program Suppliers to produce responsive documents within fourteen days, and to allow Joint Sports Claimants to file any necessary motion to compel within twenty-one days.

Program Suppliers respond that Joint Sports Claimants have mischaracterized the situation and that Program Suppliers did not agree to allow Joint Sports Claimants time to make additional requests. Therefore, Program Suppliers will not respond to Joint Sports Claimants' additional requests in its letters of September 15 and 19.

Joint Sports Claimants reply that Program Suppliers did respond to Joint Sports Claimants in a letter dated September 27, 1995, but Joint Sports Claimants considers that some of Program Suppliers' replies were not responsive to Joint Sports Claimants' questions, and that some questions are still unanswered.

**RULING:** Joint Sports Claimants' motion is granted in part and denied in part. Program Suppliers are directed to respond to questions posed by Joint Sports Claimants that are in the nature of clarification of what has been or can be produced by November 7, 1995. Program Suppliers are not required to respond to additional requests for discovery. Any stipulated extension of the discovery deadline would have had to have been in writing and signed.

II. NATIONAL ASSOCIATION OF BROADCASTERS (NAB) *makes the following requests for document production from PROGRAM SUPPLIERS.*

1. NAB asks for the documents underlying Mr. Valenti's testimony on pages 8-9 and the chart that accompanies it concerning the cost of producing first-run network series programs, and the license fees paid by the networks.

Program Suppliers respond that Mr. Valenti's testimony on the cost of producing first-run network series programs is based, in part, on proprietary business information, and, in part, on his own knowledge and experience. Program Suppliers further respond that they have furnished NAB the documents supporting Mr. Valenti's testimony on the license fees paid by the networks.

NAB replies that while Program Suppliers has furnished copies of trade press articles underlying Mr. Valenti's production costs for 1991-1992, they have not furnished anything supporting the production costs for 1986-87, and that the information is not likely to place anyone at a competitive disadvantage because it is 8-9 years old and the later figures for 1991-1992 have been published in the trade press.

**RULING:** Program Suppliers are directed to furnish NAB the documents underlying the publication costs of first-run network series program for 1986-87. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

2. NAB asks for the underlying documents supporting Mr. Valenti's testimony on pages 9-10 concerning the average cost of film production.

Program Suppliers respond that Mr. Valenti's testimony is based, in part, on proprietary information, and, in part, on his own knowledge and belief.

In reply, NAB continues to request the documents.

**RULING:** Program Suppliers are directed to furnish the documents underlying the average costs of film production. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

3. NAB asks for the documents that support Mr. Valenti's testimony that only two out of ten feature films break even after the theatrical run.

Program Suppliers respond that Mr. Valenti's testimony is based solely on his knowledge and experience, and not on any documentary evidence.

NAB replies that in light of Program Suppliers' representation, it is withdrawing its motion.

**RULING:** Motion is withdrawn.

4. NAB asks for the documents underlying or relating to Ms. Kessler's testimony concerning payments to claimants not properly within the Program Suppliers category.

Program Suppliers state that they have supplied the documents, but they have redacted the individual diary viewing and share information. Program Suppliers further state that they will not supply the redacted information because it is not necessary to understand Ms. Kessler's

testimony, that it involved Phase II data on a different study than that which is introduced in this case, and, therefore, outside of the scope of this Phase I hearing, and that it would violate the confidentiality of individual claimant shares.

NAB replies that Program Suppliers have put specific limited payments at issue by having Ms. Kessler testify to such payments in relation to program categorization, and that furnishing the information would not disclose confidential information about an individual claimant represented by Program Suppliers since the payments were for programs not covered by Program Suppliers' Phase I claim, and were returned by the claimants.

**RULING:** Motion is denied. Ms. Kessler is testifying about her work in categorizing programs and the difficulties she sometimes experiences, and is giving examples in her testimony of the programs that have given her difficulty. Attachment A to NAB's reply shows that Program Suppliers have furnished the document underlying Ms. Kessler's testimony of the examples she gave concerning her decision to recategorize certain programs. Additional information about how many household viewing hours those recategorized programs represented and what that translated to in terms of royalty payments is beyond the scope and purpose of Ms. Kessler's testimony.

5. NAB asks for "all documentation, computer tapes, and data" underlying the Nielsen viewing study. Program Suppliers respond that the information is proprietary and offers \$10,000 as part of a pool so that Joint Sports Claimants, NAB, and PBS may order Nielsen to perform other data runs to cross-check Program Suppliers' study.

NAB replies that it has offered to enter into a protective order to maintain the confidentiality of Nielsen data.

**RULING:** Program Suppliers are directed to furnish to NAB all the data underlying the Nielsen viewing study in the form of computer tapes or discs to the extent that it exists in such form in as organized and usable a form as possible. To the extent that Nielsen asserts that any of the information is proprietary, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect the confidentiality of Nielsen's data.

6. Specifically, with regard to the Nielsen study, NAB asks for (a) all documents showing the viewing study's results by program, station, and period; (b) documents related to the categorization of programs by Phase I category; (c) documents underlying the syndicated programs that were excluded from the Nielsen study because syndicated exclusivity protection was requested; and (d) documents relating to the number of cable systems within which the study's sample households were located. NAB states that what Program Suppliers furnished - two memoranda and a printout of the final program categorizations - was not sufficient.

Program Suppliers respond: (a) distant signal viewing data were not determined on an individual program basis for each of the 180 stations. Rather, Nielsen only determined viewing data for entire program categories. Individual program names were used only for categorizing programs. Gathering the data in the form requested by NAB would require Nielsen to perform completely new studies at a cost of over \$300,000 and would take several months to complete,

and would lack statistical relevancy because the sample size for the viewing of any one program in a distant market is not large enough.

(b) Program Suppliers state they have furnished NAB the information in paper format.

(c) Program Suppliers states that they have produced the requested documents.

(d) Program Suppliers state that in their supplemental production of discovery, the number of sample households which subscribe to cable was identified.

NAB replies (a) NAB must have the opportunity to examine and evaluate the validity of the Nielsen study, and that the viewing study is a special collection and tabulation of data performed just for Program Suppliers and the furnishing of the underlying data could not harm Nielsen's business interest.

NAB did not reply to (b).

NAB replies (c) that Program Suppliers have furnished only documents for two stations, WWOR and WGN, and NAB wants to receive the documents for any other stations that were subject to syndicated exclusivity blackout demands.

(d) NAB replies that what Program Suppliers have furnished is not responsive to the request.

**RULING:** Because Program Suppliers are directed in NAB Ruling 5 to furnish all underlying documents, NAB should be able to reconstruct the viewing study's results by program, station and period, even if, as Program Suppliers assert, the information was not compiled that way. To facilitate NAB's reconstruction of the Nielsen study, and in line with Joint Sports Claimants Ruling 2, Program Suppliers are directed to furnish NAB in computer tapes or discs, the computer file from which the 4700 page printout

of the programs and their classifications was printout, and the file from which the 1000 page printout containing counties considered local for each station was printed.

Program Suppliers are also directed to furnish NAB the computer tape or disc from which the 1000 page printout containing the list of programs excluded on WGN and WWOR because of syndicated exclusivity blackout demands was printed. If any stations other than WGN and WWOR were subject to blackout demands and this resulted in those programs being excluded from the Nielsen study, Program Suppliers shall furnish this information also.

NAB's motion relating to the identity and number of cable systems within which the study's sample households are located is denied. The requested documents do not underlie the Nielsen study, but are more in the nature of an interrogatory.

7. NAB asks for the documents underlying Exhibit A of the testimony of Richard Thrall concerning the number of potential distant viewers of the *Donahue* show.

Program Suppliers state that they have provided this information.

NAB replies that it is withdrawing its motion.

**RULING:** The motion is withdrawn.

8. NAB asks for the documents underlying the Household Viewing Hour Analysis described on page 19, footnote 28 of Stanley Besen's testimony as the basis upon which Mr. Besen performed his analysis of added/dropped signals. Specifically, NAB asks for (a) data showing the household viewing hours by program, station, and period.

Program Suppliers respond to NAB stating that Mr. Besen did not base his conclusions on distant viewing, but on the time that program categories occupied; viewing was used only indirectly as a weighting factor in one variation of the model.

NAB replies that it needs the station-by-station, program-by-program information to verify the categorization of programs, citing numerous errors which were uncovered in past proceedings.

**RULING:** Program Suppliers are directed to furnish NAB the underlying data of the household viewing hours study showing the viewing hours by station, program, and period so program categorization can be verified in as organized and usable a form as possible.

9. NAB asks for copies of two academic articles written by Mr. Besen: "Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation" and "Deregulation of Cable Television."

Program Suppliers state that it has furnished NAB all articles in their or Mr. Besen's possession; but these two articles are in neither's possession. However, Program Suppliers assert that they are readily available publicly.

NAB replies that Program Suppliers have not supplied these articles and in addition has not supplied six out of the seven articles and publications cited by Mr. Besen in the body of his testimony, originally requested in its August 28, 1995 letter to Program Suppliers.

**RULING:** NAB's motion is denied in part and granted in part. Concerning the two articles cited in Mr. Besen's resume, they are not offered in Mr. Besen's testimony as



the underlying support for any of his assertions. Concerning the six out of seven articles and publications cited by Mr. Besen in the body of his testimony, Program Suppliers are directed to furnish these publications to NAB. They are put forward by Mr. Besen to show support for his methodology.

10. NAB asks for the documents underlying Howard Green's testimony on pages 3-4 on the costs of network program production.

Program Suppliers respond that they have produced publicly available information, but anything more is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers are directed to furnish the requested documents to NAB.

To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

11. NAB asks for the documents underlying Howard Green's testimony on page 5 on the growth of Twentieth Television's barter revenues since 1992.

Program Suppliers respond that they have produced publicly available information, but anything more is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers are directed to furnish NAB with the requested documents. To the extent that Program Suppliers assert that the documents constitute

proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

12. NAB asks for the documents underlying Mr. Green's testimony on page 7 on the average production costs for reality/magazine programs, "Entertainment Tonight," and talk shows.

Program Suppliers respond that they have produced publicly available information, but anything more is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers are directed to furnish NAB with the requested documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

13. NAB asks for the documents underlying Robert Sieber's testimony on pages 11-12, to identify the multiple systems operator Mr. Sieber refers to, and the contract linking fees to ratings.

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers shall furnish NAB the requested documents with those portions of the documents redacted that are necessary to maintain the confidentiality of the identity of the multiple systems operator. For any other concern of confidentiality, NAB and Program Suppliers shall negotiate in good faith the terms of a protective order.

14. NAB asks for the documents underlying Mr. Sieber's testimony on page 12 to identify the contract which had a provision requiring the deletion of the lowest rated cable network if must-carry provision mandated the carriage of more broadcast signals.

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers are directed to furnish NAB the requested documents with those portions of the documents redacted that are necessary to maintain the confidentiality of the identity of the multiple systems operator. For any other concern of confidentiality, NAB and Program Suppliers shall negotiate in good faith the terms of a protective order.

It is noted that §251.48(b) requires that, when offering excerpts from a document, all other parties are entitled to inspect the full document, "Anyone presenting documents as evidence must present copies to all other participants at the hearing or their attorneys, and afford them an opportunity to examine the documents in their entirety and offer into evidence any other portion that may be considered material and relevant."

15. NAB asks for the documents underlying John Claster's testimony on pages 6-8 on the production costs of animated television series, including Claster TV's costs.

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

**RULING:** Program Suppliers are directed to furnish NAB with the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

16. NAB asks for the documents underlying Mr. Claster's testimony on page 10 on the reduction in Claster TV's audience and barter revenues because of the reinstatement of the FCC's syndicated exclusivity blackout rules.

Program Suppliers respond that Mr. Claster is relying on his own personal experience and knowledge.

In reply, NAB withdraws its request.

**RULING:** The motion is withdrawn.

**III. PUBLIC BROADCASTING SERVICE (PBS) *makes the following requests for production of documents from PROGRAM SUPPLIERS.***

1. PBS asks for the underlying documents supporting Jack Valenti's testimony on pages 8-9 and the chart that accompanies it concerning the cost of producing first-run network series programs, and license fees paid by the networks.

Program Suppliers respond that Mr. Valenti's testimony on the cost of producing first-run network series programs is based, in part, on proprietary business information, and, in part, on his own knowledge and experience. Program Suppliers further respond that it has furnished PBS the documents supporting Mr. Valenti's testimony on the license fees paid by the networks.

In reply, PBS offers to enter into a protective order to protect the confidentiality of Mr. Valenti's testimony.

**RULING:** Program Suppliers are directed to furnish PBS the requested documents to the extent that it hasn't done so already. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and PBS shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

2. PBS asks for the underlying documents supporting Mr. Valenti's testimony on pages 9-10 concerning the average cost of film production.

Program Suppliers respond that Mr. Valenti's testimony is based, in part, on proprietary information, and, in part, on his own knowledge and belief.

In reply, PBS offers to enter into a protective order.

**RULING:** Program Suppliers are directed to furnish PBS the documents underlying the average costs of film production. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and the movants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

3. PBS asks for all the raw data underlying the Nielsen viewing study.

Program Suppliers respond that the information is proprietary and offer \$10,000 as part of a pool so that Joint Sports Claimants, NAB, and PBS may order Nielsen to perform other data runs to cross-check Program Suppliers' study.

PBS replies that it has offered to enter into a protective order to maintain the confidentiality of Nielsen data.

**RULING:** Program Suppliers are directed to furnish to PBS all the data underlying the Nielsen viewing study in the form of computer tapes or discs, to the extent that it exists in such form, in as organized and usable a form as possible. To the extent that Nielsen asserts that any of the information is proprietary, Program Suppliers and NAB shall negotiate in good faith the terms of a protective order to protect the confidentiality of Nielsen's data.

4. Specifically, with regard to the Nielsen study, PBS asks for documents concerning (a) the counties where people-meter households were located, and the total number of people-meter households in each such county, and (b) data showing the amount of viewing minutes assigned in the Nielsen study to each program and to each station included in the study.

Program Suppliers respond that (a) the location of people-meter households is confidential. Program Suppliers further respond that (b) distant signal viewing data were not determined on an individual program basis for each of the 180 stations. Rather, Nielsen only determined viewing data for entire program categories. Individual program names were used for categorizing programs only.

PBS replies that the information on people-meter households is needed to ascertain whether there has been an undercount of PBS distant signal viewing and that a protective order could work to maintain the confidentiality of the location of the households.

PBS further replies that it should be given the underlying raw data from which PBS will determine the viewing minutes assigned to each program and to each station, or that Program Suppliers should furnish it in the format PBS requested.

**RULING:** Program Suppliers are directed to furnish to PBS documents relating to the counties where people-meter households were located during 1990-92 and the number of people-meter households in each county as the underlying document of the Nielsen raw data. To the extent that this information is proprietary, Program Suppliers and PBS shall negotiate in good faith the terms of a protective order to protect the confidentiality of Nielsen's data. With regard to the viewing minutes assigned to each program, the ruling directing Program Suppliers to furnish all raw data to PBS should enable PBS to reconstruct this part of the study.

5. PBS asks for the documents underlying the research conducted by Multimedia Entertainment, Inc. on the value to viewers of talk shows described on pages 9-10 of Richard Thrall's testimony.

Program Suppliers respond that this is proprietary information. Program Suppliers further respond that Mr. Thrall relied on the reported results of a Roper study for his statement on news/talk being second to movies as cable viewers' favorite genre, but object to disclosing

any of Multimedia's internal summaries of the Roper study on the grounds that they are proprietary.

In reply, PBS renews its request.

**RULING:** Program Suppliers are directed to furnish PBS the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and PBS shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

6. PBS ask for the documents underlying the analysis of *Donahue*'s share of advertising dollars on pages 22-25 of Mr. Thrall's testimony and Exhibit H.

Program Suppliers respond that this is proprietary information.

In reply, PBS renews its request.

**RULING:** Program Suppliers are directed to furnish PBS the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and PBS shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

7. PBS ask for the documents underlying Howard Green's testimony on pages 3-4 on the costs of network program production.



Program Suppliers respond that they have produced publicly available information, but anything more is proprietary information.

In reply, PBS renews its request.

**RULING:** Program Suppliers are directed to furnish the requested documents to PBS.

To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and PBS shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

**IV. PROGRAM SUPPLIERS *make the following requests for document production from PBS, Devotional Claimants, NAB and Joint Sports Claimants.***

**A. Public Broadcasting System (PBS)**

1. Program Suppliers request copies of audience data and viewer trends and all analyses and interpretations of such data and trends by John W. Fuller.

PBS responds that the request for all PBS audience data and viewer trends for 1990-1992 and all interpretations of those data and trends by Mr. Fuller is not a request for documents that underlie Mr. Fuller's testimony and, moreover, would be terribly burdensome to produce.

Program Suppliers reply that they need all documentation surrounding all of Mr. Fuller's analyses and interpretations of audience data and viewer trends conducted for PBS in order to test his contentions about the efficacy of different approaches to measuring the value of programming. Program Suppliers also argue that PBS's claims of extreme burden in producing such documents are not valid because the Federal Rules of Civil Procedure make clear that burdensome production is not per se grounds for denial of a discovery request.

**RULING:** Program Suppliers' request is denied because the requested documents do not underlie Mr. Fuller's direct case testimony.

2. Program Suppliers request a complete list of all programming made available by PBS to its member stations from 1990-1992, the license fees paid by the member stations, and the amount of underwriting for such programming as referenced in the testimony of Peter Downey.

PBS responds that the documents sought regarding the programming and license fees paid by PBS member stations do not underlie Mr. Downey's testimony. Mr. Downey only makes a general observation that member stations pay a license fee based on the "number of stations choosing to carry the program, and the financial support provided by each station in the past." Moreover, producing information regarding all PBS programming and all licensing fees would be unduly burdensome.

Program Suppliers reply that Mr. Downey did rely or should have relied on data as to how distant signal importation was affecting local stations' ability to make license fee payments. Such data clearly underlie his testimony as to the harm caused to PBS stations by distant signal importation.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie his testimony within the meaning of §251.45(c)(1).

3. Program Suppliers request the yearly contributions to those stations identified by Mr. Downey as examples of fund-raising successes in their local communities.

PBS responds that Mr. Downey's statements regarding the fund-raising activities of certain PBS stations are based on his memory and general knowledge and not on specific documents. Mr. Downey does not cite to any documents identifying the yearly contributions to these stations nor do any such documents serve as the basis for his testimony on this subject.

Program Suppliers reply that Mr. Downey has testified to specific stations' fund-raising success and Program Suppliers seek the figures to confirm this success.

**RULING:** Program Suppliers' request is denied because there are no documents underlying Mr. Downey's testimony and he relied on his general knowledge and memory.

B. Devotional Claimants

1. Program Suppliers request documentation to support the claim of Pat Robertson that he is testifying on behalf of the producers of syndicated programs with a religious theme.

Devotional Claimants respond that Mr. Robertson is testifying on behalf of Devotional Claimants and no list of all devotional programs or producers exists. Devotional Claimants should not be required to create such a list for document production.

Program Suppliers reply that if no documentation exists as to what devotional programming Mr. Robertson is testifying on behalf of, his testimony should be limited solely to comments regarding the programming identified in his written direct case.

**RULING:** Program Suppliers' request is denied because the documents sought do not exist and would require Devotional Claimants to create a document. Program Suppliers' reply request to limit Mr. Robertson's testimony to only those programs identified in his direct case is also denied.

2. Program Suppliers request documentation identifying the dates and times devotional programs appeared on the Family Channel.

Devotional Claimants respond that the request is unduly burdensome and Mr. Robertson has already identified the religious programs that appeared on the Family Channel during 1990-1992. The list of such programs used by Mr. Robertson was prepared by the Family Channel's general counsel and has been destroyed.

Program Suppliers reply that if Mr. Robertson no longer has the requested information, and Devotional Claimants are unwilling to obtain it from the Family Channel, then his testimony on the issue should be stricken.

**RULING:** The Copyright Office rules that the times and dates of religious programming carried on the Family Channel as identified in Mr. Robertson's testimony are producible under §251.45(c)(1). Devotional Claimants relate that such documentation was obtained from the general counsel for the Family Channel, but has since been destroyed. If Devotional Claimants are unable to identify the requested times and dates, the issue of whether to strike Mr. Robertson's testimony regarding the identified programming is designated to the CARP for resolution.

3. Program Suppliers request documentation identifying all programming, other than religious programming, regularly appearing on the Family Channel.

Devotional Claimants respond that the request is unduly burdensome and Mr. Robertson has already identified the religious programs that appeared on the Family Channel during 1990-

1992. The list of such programs used by Mr. Robertson was prepared by the Family Channel's general counsel and has been destroyed.

Program Suppliers reply that if Mr. Robertson no longer has the requested information, and Devotional Claimants are unwilling to obtain it from the Family Channel, then his testimony on the issue should be stricken.

**RULING:** Program Suppliers' request is denied because the times and dates of nonreligious programming appearing on the Family Channel are not underlying documents to Mr. Robertson's testimony under §251.45(c)(1).

4. Program Suppliers request identification of all articles authored or co-authored by David Clark, an indication of the proceedings in which Mr. Clark has appeared as an expert witness, and copies of testimony or reports filed by Mr. Clark in proceedings not involving the Copyright Royalty Tribunal.

Devotional Claimants respond that the requests do not seek underlying documents related to written exhibits and testimony and should be denied under §251.45(c). If Program Suppliers' motion to compel is granted, Devotional Claimants request that production be limited to documents that were created within two or three years of the present proceeding.

Program Suppliers object to a two or three year time limitation on production of documents because it would preclude receipt of information on point to the issues in this case. If the request to identify articles written by Mr. Clark and proceedings in which he has appeared is granted, Program Suppliers reserve the right to make supplemental requests on such discovery.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie Mr. Clark's testimony within the meaning of §251.45(c)(1).

5. Program Suppliers request all source material used by Mr. Clark, including any documents prepared by him, in conducting his seminars in audience research.

Devotional Claimants respond that the requests do not seek underlying documents related to written exhibits and testimony and should be denied under §251.45(c). If Program Suppliers' motion to compel is granted, Devotional Claimants request that production be limited to documents that were created within two or three years of the present proceeding.

Program Suppliers reply that the request does not address Mr. Clark's qualifications and credentials as a witness, but rather the tools he uses in his audience research. Program Suppliers argue that they are entitled to know if he follows the same approach in all of his work.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie Mr. Clark's testimony within the meaning of §251.45(c)(1).

6. Program Suppliers request analyses, workpapers and other underlying data relied upon by Mr. Clark for his conclusion that the Bortz survey is superior to any other measure of value.

Devotional Claimants state that they have already responded to Program Suppliers' request by identifying that Mr. Clark based his statement on the Bortz study for 1990-1992, submitted by Joint Sports Claimants as part of their written direct case, and on viewing studies submitted by Program Suppliers in proceedings for the years up to the 1989 proceeding.

Program Suppliers reply that it is difficult to believe that Mr. Clark did not prepare any analyses or workpapers in reviewing the Program Suppliers and Bortz studies in drafting his testimony, and he should be required to produce them.

**RULING:** Program Suppliers request is denied because the underlying documentation has already been supplied by Devotional Claimants.

7. Program Suppliers request the identification of Devotional Claimants testimony and exhibits presented in prior proceedings as identified by Mr. Clark in his testimony for his assessment that "various other corroborating evidence" suggests that devotional programming is more valuable to cable programmers than what is reflected in viewership surveys.

Devotional Claimants respond that Mr. Clark specifically enumerates the testimony which provides corroborating evidence as to the value of devotional programming in his direct testimony. The corroborating evidence is prior testimony of the Devotional Claimants in distribution proceedings and is available at the Copyright Office.

Program Suppliers reply that since Devotional Claimants have introduced prior testimony and exhibits in their written direct case, they must produce them and cannot force Program Suppliers to look instead to public records.

**RULING:** Program Suppliers' request is denied because Devotional Claimants have properly designated prior testimony in accordance with §251.43(c). Properly designated testimony from prior distribution proceedings must only be produced where it is not otherwise available in the records of the Copyright Office.

8. Program Suppliers request affidavits filed with the Copyright Office identifying stations entitled to "specialty station" status and all documents demonstrating how Thomas Larson determined which affidavits belonged in the category of religious programming.

Devotional Claimants respond that they have already provided computer runs that identify which stations Mr. Larson included in his calculation as being religious programming specialty stations. Requesting that all specialty stations be grouped as either religious or foreign language specialty stations is more of an interrogatory than a document request and is beyond the scope of permitted discovery. In any event, the requested information is available from the Licensing Division of the Copyright Office.

Program Suppliers reply that they not only seek the specialty station affidavits but also documents showing how Mr. Larson classified the affidavits between religious and foreign language stations.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied with respect to copies of the specialty station affidavits because they are available in the records of the Copyright Office. The request is granted, however, with respect to any documents created or used by Mr. Larson to categorize the stations filing such affidavits as carrying religious programming. Productions of such documentation is proper because Copyright Office regulations regarding the filing of specialty station affidavits do not require the station to identify the reasons for its claim of specialty station status (i.e. religious, foreign or automated programming), and categorization of certain stations as carrying religious programming underlies Mr. Larson's testimony within the meaning of §251.45(c)(1).



9. Program Suppliers request the identification of the cable systems operated by Milestone Media Management, Inc. and/or Milestone Communications, Inc.

Devotional Claimants respond that Program Suppliers phrased their initial request as an interrogatory and later rephrased the request for a list of cable systems as a follow-up request for underlying documents. Program Suppliers therefore missed the August 28 deadline for filing requests for underlying documents and are precluded from making a request or motion to compel production after that date. If Program Suppliers' Motion to Compel is granted, Devotional Claimants ask that they be directed only to produce the relevant page from a 32-page monograph entitled "Milestone," rather than the entire monograph.

Program Suppliers argue that their original requests for the documents were not in the form of interrogatories, but rather were requests for documents, and therefore the requests were timely.

**RULING:** Program Suppliers' request for documentation identifying the cable systems operated by Milestone Media Management, Inc. and/or Milestone Communications, Inc. is granted. The Copyright Office grants Devotional Claimants' request to produce the relevant page of the Milestone monograph identifying the systems, in lieu of producing the entire monograph, provided that such document is responsive to Program Suppliers' request.

C. National Association of Broadcasters (NAB)

1. Program Suppliers request the name and position of each respondent representing each of the 286 cable systems contacted as part of the cable operator survey presented in Exhibit 2 of Richard Ducey's testimony.

NAB responds that the survey of 286 cable systems was conducted more than 10 years ago and was presented as exhibit 9 in NAB testimony in the 1983 distribution. Counsel for Program Suppliers cross-examined the study's author fully in the 1983 proceeding. Furthermore, the identities of the respondents are a private matter and cannot be disclosed without the respondents' permission, which was not obtained. Finally, NAB cannot locate the requested information to satisfy Program Suppliers' request.

Program Suppliers reply that they did not seek discovery of the designated testimony during the prior proceeding on this particular issue, and must be given the opportunity to investigate whether the individual respondents were in a position to speak authoritatively, and how the cable operator's response would have changed in the intervening 15 years. Program Suppliers also argue that neither the individual respondents nor the cable systems were promised confidentiality, and that NAB's claims of undue burden are unsubstantiated.

**RULING:** Program Suppliers' request is denied because NAB has properly designated prior testimony in accordance with §251.43(c) and discovery on such prior testimony is not permissible.

2. Program Suppliers request two books, Media Gratifications Research: Current Perspectives and Perspectives on Media Effects, cited in footnotes to Mr. Ducey's testimony.

NAB replies that it has informed Program Suppliers of several libraries where the books may be borrowed; however, NAB is willing to provide a copy of each book for inspection in the offices of its counsel, or to arrange for Program Suppliers to purchase copies of the books.

Program Suppliers find NAB's suggestions of production of the requested materials to be reasonable and will contact NAB's counsel on the matter.

**RULING:** Program Suppliers' request is moot.

3. Program Suppliers request all letters received by station WGN from distant signal subscribers beyond those included in Exhibit 5 of Mr. Ducey's testimony.

NAB replies that letters to WGN other than the ones cited by Mr. Ducey do not underlie his testimony and NAB does not have copies of those letters. Even if NAB did have copies, they would be unduly burdensome to produce due to their number.

Program Suppliers argue that it would be unfair to allow Mr. Ducey selectively to choose letters to support his position while refusing to produce letters that would refute it. They also argue that while NAB may not have the requested letters in their position, they certainly have access to them.

**RULING:** Program Suppliers' request for all letters received by WGN from distant signal subscribers is denied because they do not underlie Mr. Ducey's testimony within the meaning of §251.45(c)(1).

4. Program Suppliers request documents supporting Mr. Ducey's testimony concerning the number of children in cable households.

NAB responds that Mr. Ducey's statement that cable households have more children than non-cable household was based on his general knowledge rather than specific documentation. NAB acknowledges that it could create such documentation but believes that it should not be required to generate additional materials in support of the testimony.

Program Suppliers argue that Mr. Ducey's statement is not the type that is based on general knowledge, but rather must be based on some verifiable facts. NAB has previously stated that it is possible to produce documentary support for Mr. Ducey's statement.

**RULING:** Program Suppliers' request is denied because Mr. Ducey relied on his general knowledge for his statement and did not rely on any documents.

5. Program Suppliers request documents supporting Exhibit 34 of Mr. Ducey's testimony, which is a chart depicting Metropolitan Statistical Area population shifts.

NAB states that it has provided the source of its documentation supporting Exhibit 34, Census data from 1988, which was already listed on the Exhibit.

Program Suppliers state in reply that they seek the actual census data, as opposed to mere identification of the census as the source of the data used.

**RULING:** Program Suppliers' request is granted because the requested census data is producible under §251.45(c)(1). NAB is directed to produce the census data identified in Exhibit 34 to Mr. Ducey's testimony that was used to create the Exhibit.

6. Program Suppliers request a dated Cable Data Corporation printout of a summary of Form 3 cable systems.

NAB responds that Program Suppliers had not previously asked for the date of the Cable Data Corporation printout. NAB advises that the date of the printout is August 15, 1995.

Program Suppliers respond that NAB has provided the information responsive to the request.

**RULING:** Program Suppliers' request is moot because NAB has provided the requested information.

7. Program Suppliers request a book, entitled Video Economics, authored by Steven Wildman.

NAB replies that it will make available at the offices of its counsel a copy of Mr. Wildman's book for inspection or will arrange for Program Suppliers to purchase copies.

Program Suppliers reply that they find NAB's proposals for production reasonable and will contact NAB's counsel.

**RULING:** Program Suppliers' request is moot.

8. Program Suppliers request all elaborations on Steiner's model and documentation prepared by Mr. Wildman analyzing such elaborations.

NAB responds that the applicable elaborations on Steiner's model appear in chapters 3 and 4 of Mr. Wildman's book, Video Economics, which Program Suppliers can inspect at counsel's office or can purchase. With respect to elaborations other than those of Mr. Wildman, they do not underlie his testimony and should not be produced.

Program Suppliers argue that NAB's citation to two chapters of Mr. Wildman's book regarding elaborations on Steiner's model is insufficient. Program Suppliers are entitled to review the universe of elaborations on Steiner's model and Mr. Wildman, as an author of a book on Steiner's model, must have access to all scholarly elaborations on the model.

**RULING:** Program Suppliers' request is denied because it does not seek documents underlying Mr. Ducey's testimony regarding the Steiner model within the meaning of §251.45(c)(1).

9. Program Suppliers request the date of Cable Data Corporation documentation underlying Laurence DeFranco's testimony. All underlying data, workpapers, analyses, computations and tabulations for Mr. DeFranco's testimony on the location of television stations, location of cable systems, ADI analyses, newspaper analyses, and distance analysis.

NAB states that it has already provided the dates for the Cable Data Corporation documentation and does so again. NAB has produced a disk containing the ADI data, and has provided identifying information for Mr. DeFranco's distance analysis which can be inspected at NAB's counsel's offices.

Program Suppliers reply that NAB has produced the material responsive to the request.

**RULING:** Program Suppliers request is moot because NAB provided the requested information.

D. Joint Sports Claimants

1. Program Suppliers request three articles written by Peter H. Lemieux that appear in his resume:

(a) The Audience Rates Television: Summary Report (with E.J. Roberts, et al.), Television Audience Assessment, Inc. 1983.

(b) The Audience Rates Television: Methodology Report (with R. Wulfsburg, et al.), Television Audience Assessment, Inc. 1983.

(c) Audience Attitudes and Alternative Program Ratings (with E.J. Roberts), Television Audience Assessment, Inc. 1981.

These articles are related to Mr. Lemieux's testimony -- that carriage of superstations is linked to the sports programming on those stations -- because they go to his qualifications to testify on the subject and because Program Suppliers seek these articles in an effort to gain insight as to how Mr. Lemieux has approached this issue in other contexts and to determine whether they support his approach here.

Joint Sports Claimants respond that Mr. Lemieux listed these articles in his resume but neither mentioned nor relied on them in his report.

Program Suppliers reply that the titles of Mr. Lemieux's articles appear as if they are relevant to his testimony, could be used to assess his methodological approach in other contexts, and are needed to effectively cross-examine him.

**RULING:** Program Suppliers' request is denied because the articles do not underlie Mr. Lemieux's direct testimony within the meaning of §251.45(c)(1).

2. Program Suppliers state that Mr. Lemieux lists in his testimony the program schedules of WGN and WWOR from Sunday, November 11, 1994 and Wednesday, November 14, 1990 as representative of weekend and weekday programming found on these stations.

Program Suppliers request identification of all program schedules and their dates considered by Mr. Lemieux in his selection of the two November dates for WGN and WWOR, as well as the documents used by Mr. Lemieux to gain his knowledge of WGN's and WWOR's programming practices. Program Suppliers also seek materials showing how he converted the information from the list of blacked-out programs on WGN and WWOR to his tables.

Joint Sports Claimants respond that Mr. Lemieux relied on numerous Boston Globe television schedules, but does not recall the precise dates of these schedules, in selecting the two representative program dates and schedules. With respect to Mr. Lemieux's knowledge of WGN and WWOR's programming practices, he relied on his personal knowledge and experience rather than on specific documents. With respect to the conversion of blacked-out programs to his tables, Program Suppliers never requested such information and are precluded from doing so now. In any event, Joint Sports Claimants state that pages 20-21 of Mr. Lemieux's testimony explain how he generated the tables.

Program Suppliers argue that Joint Sports Claimants should have taken steps to preserve the dates and television schedules consulted by Mr. Lemieux and should not be permitted to submit testimony which was based on information that the witness has conveniently since lost, forgotten or destroyed. Program Suppliers move that his testimony that the selected schedules of WGN and WWOR are representative of other days be stricken.

**RULING:** Program Suppliers' request is denied because (a) Mr. Lemieux represents that he does not recall the dates of the Boston Globe television schedules he consulted and because Joint Sports Claimants lack the requested schedules; (b) he relied on his personal knowledge and experience with regard to WGN and WWOR's programming practices;



and (c) Program Suppliers never requested from Joint Sports Claimants information regarding how Mr. Lemieux converted blacked-out programs to his tables during the precontroversy discovery period, and is precluded from making such a request now.

3. Program Suppliers request all research studies done by Paul Bortz for entities comprising Joint Sports Claimants to support the statement in his resume that he has been responsible for survey research studies regarding consumer demand for sports programming and that he has analyzed the economics of delivering sports programming by cable TV. Program Suppliers argue that these studies may call into question the claims made in Mr. Bortz's direct testimony regarding the value of cable operator surveys and other methodologies in measuring distant signal programming value.

Joint Sports Claimants respond that Mr. Bortz did not consult the requested studies in preparing his testimony, but simply mentioned them in the qualifications section of his testimony.

Program Suppliers argue that the requested studies relate directly to Mr. Bortz's testimony on the value of distant signal programming and could raise doubts about the confidence Joint Sports Claimants members have in the Bortz survey methodology as it relates to this proceeding.

**RULING:** Program Suppliers' request is denied because the requested studies by Mr. Bortz are not a part of this proceeding and do not underlie his testimony within the meaning of §251.45(c)(1).

4. Program Suppliers request the identity of all cable systems selected in the various Bortz surveys plus the identity of the systems that were discarded from the final sample. Program Suppliers argue that Joint Sports Claimants' claims to survey respondent confidentiality are unsupportable because the respondents had no reason to expect their identity would be kept confidential. Program Suppliers argue that the identity of the survey respondents is necessary to determine whether the position and qualifications of respondents are accurately summarized. They further submit that:

"[T]he identity of the cable systems offers the only means to test the accuracy of the royalty information used to place cable systems into a stratum for selection purposes, as well as to examine the distant signal listings provided to respondents. Likewise, it is necessary to know the identity of the discarded systems to determine how their exclusion affected non-sampling error and the purported representativeness of the final sample". Motion at 6.

Joint Sports Claimants respond that Program Suppliers seek to discern the identity of cable systems and individual respondents to the cable operator surveys, and also request a variety of other information so as to learn the identity of the survey respondents. Joint Sports Claimants argue that these requests should be denied for the following reasons.

First, Joint Sports Claimants submit that they have already fully disclosed all relevant information regarding the surveys, including complete copies of the questionnaires redacted only to preserve the confidentiality of the respondents. Joint Sports Claimants also notes that they have turned over similar material for the pre-1989 surveys referenced in Mr. Trautman's testimony, and object to providing further information on these studies because they are not underlying documents to Mr. Trautman's testimony. Second, Joint Sports Claimants note that

they have been submitting the cable operator surveys since the 1978 distribution proceeding, and the Copyright Royalty Tribunal has always allowed them to produce redacted copies of the surveys and questionnaires. They submit that preserving the confidentiality of the surveys is critical to their preparation of future surveys, and that the Tribunal rejected Program Suppliers' claim in the 1990 proceeding that there was no need to protect confidentiality. Third, Joint Sports Claimants argue that Program Suppliers have been unwilling to discuss proposals to provide the requested information without disclosing the identity of the respondents. Joint Sports Claimants further note that it made arrangements in the 1990 proceeding for Program Suppliers to submit their request directly to Bortz for the 1989-1992 surveys, but that Program Suppliers have failed to explain why they did not obtain the information directly from Bortz that is now requested. Fourth, Joint Sports Claimants argue that Program Suppliers' asserted needs for the identity of the respondents and sample cable systems are not sufficient because (a) Joint Sports Claimants are willing to disclose the job titles of the respondents so that Program Suppliers can verify the grouping of titles, (b) Joint Sports Claimants have provided the Copyright Office information used to determine the royalty information and distant signal listings used in the survey, so that Program Suppliers do not need to know the identity of the sample systems to verify the accuracy of the information, (c) Program Suppliers have failed to show how analyzing the responses from year to year sheds light on the reliability of the surveys, and (d) Program Suppliers have failed to show why the identities of systems excluded from the surveys must be disclosed to check for non-sampling error.

Program Suppliers argue that the refusal to reveal the identity of the cable systems in the Bortz survey prevents them from testing the accuracy of the distant signal listings, and the

identity of the survey respondents is necessary to determine their position and qualifications. Because the Tribunal expressed concerns about the qualifications of the respondents, Joint Sports Claimants have strong incentive to group them into favorable job titles. Program Suppliers cannot verify the accuracy of the titles without knowing the identity of the individuals. Program Suppliers also need to know the identity of the discarded systems from the Bortz study in order to determine whether their exclusion affected non-sampling error and the representativeness of the final sample. Also, Program Suppliers need to know the identity of the cable systems and respondents to examine how they responded from year to year because wide shifts in yearly responses would underscore the reliability of the surveys.

Program Suppliers argue that Joint Sports Claimants have failed to show the need of confidentiality of the cable systems and respondents and offer no evidence to prove their claim that disclosure of the systems might affect their willingness to respond to future surveys. Finally, Program Suppliers note that no confidentiality was ever promised to the systems or the respondents.

**RULING:** Joint Sports Claimants are directed to reveal documents used in drawing the sample cable systems used in the Bortz studies but are not required to produce documents which would reveal the identity of those systems. Program Suppliers' request for documents relating to cable systems not used in the Bortz studies is denied because it does not seek underlying documents within the meaning of §251.45(c)(1).

5. Program Suppliers request documentation relied upon by Mr. Bortz for his statement that the USA Network and Lifetime began to acquire pre-broadcast syndication rights to major movie packages in October 1989.

Joint Sports Claimants respond that to the extent that the requested information does not appear in the material produced, Mr. Bortz relied on his knowledge and experience.

Program Suppliers reply that Joint Sports Claimants had earlier promised to produce documents related to Mr. Bortz's statements regarding USA Network and Lifetime, but now state that Mr. Bortz relied on his general knowledge. Program Suppliers argue that the request is disingenuous and that they have not received any of the documents earlier promised.

**RULING:** Program Suppliers' request is denied because Mr. Bortz relied on his knowledge and expertise.

6. Program Suppliers request unredacted copies of the questionnaires from each year of the Cable Operator Surveys as referenced in Mr. Bortz's testimony. Production of these unredacted surveys is critical for the same reasons stated in #4.

Joint Sports Claimants object for the reasons stated in #4.

In reply, Program Suppliers renew their request.

**RULING:** Program Suppliers' request for unredacted copies of the Bortz questionnaires is denied on the grounds of confidentiality.

7. Program Suppliers request copies of all articles from Forbes, Broadcasting, CableVision, and Electronic Media magazines in which Mr. Bortz was featured as claimed in his resume.

Joint Sports Claimants respond that the requested articles are simply listed in Mr. Bortz's resume and were not relied upon by him in preparing his testimony.

Program Suppliers argue they are entitled to the articles referred to by Mr. Bortz in his qualifications statement in order to assess the credibility and veracity of his testimony.

**RULING:** Program Suppliers' request is denied because the articles do not underlie Mr. Bortz's testimony within the meaning of §251.45(c)(1).

8. Program Suppliers request unredacted copies of the questionnaires and computer disks, printouts, tabulations and all analyses for all surveys referenced in James Trautman's testimony, for the same reasons identified in #4.

Joint Sports Claimants object for the reasons stated in #4.

In reply, Program Suppliers renew their request.

**RULING:** Program Suppliers' request for unredacted questionnaires, computer disks, printouts, tabulations and analyses are denied on the grounds of confidentiality.

9. Program Suppliers request the date on which each interview for each of the surveys in Exhibit 3 was completed.

Joint Sports Claimants respond that they were not made aware that any surveys were missing dates and are willing to provide them if Program Suppliers will identify which surveys are missing dates.

Program Suppliers state in reply that they reserve the right to renew their motion to compel if Joint Sports Claimants do not produce the dates for all Bortz questionnaires as they have promised.

**RULING:** Joint Sports Claimants are directed to provide Program Suppliers with any missing dates for the Bortz survey questionnaires.

10. Program Suppliers request documentation relied upon in the selection of the sample for each survey listed in Exhibit 3, for the same reasons identified in #4.

Joint Sports Claimants object for the reasons stated in #4.

In reply, Program Suppliers renew their request.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied with respect to documentation for the surveys from 1978 through 1983 and 1989 because they were the subject of a prior proceeding and discovery is not permissible on testimony from prior proceedings. The request is granted for documentation surrounding the 1986 survey, because it has not been introduced in a prior proceeding, and for the 1990 through 1993 surveys. To the extent that the documentation sought will reveal the identity of the cable systems and respondents participating in these surveys, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documentation requiring confidentiality.

11. Program Suppliers request the identity of each cable system selected for the sample but not included in the survey in Exhibit 3, and each system surveyed whose answers were not included in the final results, for the same reasons identified in #4.

Joint Sports Claimants respond that they have already agreed to produce redacted copies of the responses from cable systems excluded from the Bortz survey. Program Suppliers have not, however, explained why they need to know the identity of the systems.

Program Suppliers reply that Joint Sports Claimants have failed to show why the requested information is confidential and Program Suppliers need the identity of the systems that were excluded from the Bortz survey to determine whether their exclusion biased the results.

**RULING:** Program Suppliers' request for unredacted copies of survey responses that were not included in the studies, and the request for the identity of cable systems selected as part of the sample but not surveyed, are denied on the grounds of confidentiality.

12. Program Suppliers request, for the 1989-1993 Bortz surveys, the full population lists used to select sample cable systems for inclusion, sample frames or population lists showing the stratification used to select the sample systems, and the full set of sample selections, whether or not a survey was completed. Program Suppliers seek these documents for the same reasons stated in #4.

Joint Sports Claimants object for the reasons stated in #4.

In reply, Program Suppliers renew their request.

**RULING:** Program Suppliers request is denied in part and granted in part. The request is denied with respect to documentation surrounding the 1989 survey because that survey



was the subject of a prior proceeding and discovery is not permissible for testimony from a prior proceeding. The request is granted with respect to the 1990 through 1993 surveys, and program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect the confidentiality of the cable systems and respondents to the surveys.

13. Program Suppliers request, for the 1989-1993 Bortz studies, the random table numbers and the random numbers to sampling frame linkages showing how sample selection was accomplished for each study.

Joint Sports Claimants respond that they have identified the random number table which is in a publicly available book which Program Suppliers can obtain as easily as Joint Sports Claimants can. Program Suppliers' reasons for seeking the frame linkages -- to evaluate the validity of the methodology used -- are too vague and insubstantial and the real reason for requesting the frame linkages is to identify the sample cable systems.

Program Suppliers reply that Joint Sports Claimants have identified the random table numbers for the Bortz surveys, but have failed to produce them. Joint Sports Claimants' description of the request for frame linkages as "far too vague and insubstantial" is inadequate and they are needed to determine the process of sample selection.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied with respect to documentation surrounding the 1989 survey because that survey is the subject of a prior proceeding and discovery is not permissible for testimony from prior proceedings. The request is granted with respect to the 1990 through 1993 surveys,

and Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect the confidentiality of the cable systems and respondents to the surveys.

14. Program Suppliers request all materials used by Messrs. Bortz and Trautman showing quality control and checks used in interviewing, including call backs for validation, and all materials showing questionnaire editing and quality control for each of the 1989-1993 Bortz studies.

Joint Sports Claimants object to these requests as vague and ambiguous and does not know what Program Suppliers mean by "quality control." If Program Suppliers will clarify their requests, Joint Sports Claimants will respond.

Program Suppliers reply that Joint Sports Claimants' claim that the Joint Sports Claimants do not understand what is meant by quality control is implausible. Program Suppliers seek all documentation which reveals all efforts made to ensure that the surveying was conducted properly, accurately, impartially, and in accordance with prescribed procedures and that such checks are reflected in the survey results.

**RULING:** Program Suppliers request is denied in part and granted in part. The request is denied with respect to any quality control documentation for the 1989 survey because it was the subject of a prior proceeding and discovery is not permissible for testimony from a prior proceeding. The request is granted with respect to quality control documentation for the 1990 through 1993 surveys, and Joint Sports Claimants are directed to produce any and all documents which reveal efforts made to validate the

results obtained during the Bortz surveying, including call backs, and any and all documents which demonstrate that the surveying was conducted in accordance with its established procedures.

15. Program Suppliers request all documentation used in computing data weights, in hard copy and on a computer data base, for each of the 1989-1993 Bortz studies.

Joint Sports Claimants responds that data weights reflect the royalty payments made by sample systems and revealing data weights would allow Program Suppliers to identify many individual sample systems. Program Suppliers have made no showing as to why they need this information.

Program Suppliers reply that data weight computations and data weight results would likely apply to groups of cable systems, not to individual cable systems, thereby precluding any possibility of identifying cable systems individually, and such information is needed to assess survey methodology and results.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied with respect to documentation regarding the 1989 survey because it was the subject of a prior proceeding and discovery is not permissible on testimony from a prior proceeding. The request is granted for documentation for the 1990 through 1993 surveys, and Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect the confidentiality of the cable systems and respondents to the surveys.

16. Program Suppliers request all computations of sampling errors of estimates for the 1989-1993 Bortz studies.

Joint Sports Claimants state that they have already provided the formulas used to calculate sampling error. Joint Sports Claimants do not understand Program Suppliers' request for information about certain unspecified "assumptions that Bortz made about what numbers to use in calculating sampling errors." If Program Suppliers will clarify their request, Joint Sports Claimants will respond.

Program Suppliers reply that Joint Sports Claimants have only produced the formula for calculating sampling errors and has not produced the actual computations themselves. Program Suppliers argue that without the actual computations, which vary between survey questions, they would have no idea what numbers were used in the computations of sampling error for each question.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied for computations of sampling error estimates for the 1989 survey because it was part of a prior proceeding and discovery is not permissible for testimony from prior proceedings. The request is granted for computations of sampling error estimates for the 1990 through 1993 surveys, and Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect the confidentiality of the cable systems and respondents to those surveys.

17. Program Suppliers request identification information that would enable Program Suppliers to determine whether the same systems were included in the sample selections and

whether the same respondents responded to the questionnaires for any or all of the 1989-1993 Bortz studies. Program Suppliers state they are willing to engage in discussions leading to production of the requested materials without comprising the confidentiality of the respondents and cable systems, but retain the right to compel production in the event an agreement is not reached.

[Joint Sports Claimants do not interpose any objection]

Program Suppliers reply that they are willing to negotiate an agreement for production as offered by Joint Sports Claimants but reserve the right to compel production in the event an agreement is not reached.

**RULING:** Program Suppliers and Joint Sports Claimants are directed to reach an agreement for the production of the materials identified in Program Suppliers' request.

18. Program Suppliers request all national publications concerning trends in cable programming, television and film in which Larry Gerbrandt has been quoted, as identified in his resume.

Joint Sports Claimants respond that Mr. Gerbrandt simply mentioned these articles in the qualifications section of his testimony and did not rely on them in preparing his report.

Program Suppliers argue in reply that they are entitled to know if Mr. Gerbrandt's comments in the requested articles are consistent with his testimony.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie Mr. Gerbrandt's testimony within the meaning of §251.45(c)(1).

19. Program Suppliers request the annual special report Economics of Basic Cable Networks published by Paul Kagan Associates, Inc., for the years 1989-1993, as identified in that firm's resume to its testimony. Program Suppliers assert that these special reports relate directly to the data and results presented in Joint Sports Claimants' Exhibit 4.

Joint Sports Claimants responds that Mr. Gerbrandt mentioned the Kagan special reports in the qualifications section of his testimony and did not rely on them in his report.

Program Suppliers state in reply that the Kagan special reports are not only referenced in the Kagan report submitted by Mr. Gerbrandt, but data from these publications was used in putting the reports together. Program Suppliers argue that while Joint Sports Claimants claim that Mr. Gerbrandt did not rely on the data in these reports for his testimony, Joint Sports Claimants cite no specific statement from Mr. Gerbrandt's testimony to support this contention.

**RULING:** Program Suppliers' request is denied because the Kagan special reports do not underlie Joint Sports Claimants' testimony within the meaning of §251.45(c)(1).

20. Program Suppliers request all documentation prepared by Richard Luker to measure the value of television viewing and copies of all ESPN Chilton Sports Polls taken since 1989, and the underlying data used in preparing those polls, as identified in Mr. Luker's qualifications statement.

Joint Sports Claimants respond that Mr. Luker does not report or rely on the results of a single Chilton poll in his testimony, but simply mentions the poll in describing his qualifications.

Program Suppliers reply that they require the Chilton Sports Poll to compare its methodology and analysis to Mr. Luker's methodology and analysis in the present proceeding.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie Mr. Luker's testimony within the meaning of §251.45(c)(1).

21. Program Suppliers request all documentation on which Mr. Luker relied in making the statement on page 4 of his testimony that "children or others who have little or no involvement in the decision of a household to subscribe to cable."

Joint Sports Claimants respond that Mr. Luker relied on his personal knowledge and not on any particular documents.

Program Suppliers reply that Joint Sports Claimants should have acknowledged earlier that Mr. Luker's statement regarding children's involvement in the selection of cable was based on his personal knowledge, rather than indicate that the documentation supporting it was proprietary.

**RULING:** Program Suppliers' request is denied because Mr. Luker's statement is based only on his personal knowledge and experience.

22. Program Suppliers request copies of 14 different technical reports authored by Mr. Luker and identified in his resume.

Joint Sports Claimants respond that Mr. Luker did not reference the requested technical reports in his testimony but simply listed them on his resume to show his background.

Program Suppliers reply that the requested reports of Mr. Luker appear to be related to the subject matter of this case and are required for comparison against his testimony in the current proceeding to evaluate its merit.

**RULING:** Program Suppliers' request is denied because the reports do not underlie Mr. Luker's testimony within the meaning of §251.45(c)(1).

23. Program Suppliers request the recommendations promulgated by the Food and Drug Administration in 1991 as identified in the qualification statement of Donna Mayo.

Joint Sports Claimants respond that the study conducted by Ms. Mayo for the Food and Drug Administration is simply described in the qualifications section of her testimony.

Program Suppliers reply that they require the recommendations of the Food and Drug Administration to which Ms. Mayo contributed in order to evaluate her expertise and credibility.

**RULING:** Program Suppliers' request is denied because the documents sought do not underlie Ms. Mayo's testimony within the meaning of §251.45(c)(1).

24. Program Suppliers request documentation regarding Ms. Mayo's analyses of the 100 "No Good" Nielsen diaries and the 100 diaries that did not report any distant signal viewing as described in Ms. Mayo's testimony.

Joint Sports Claimants respond that Ms. Mayo did not prepare any written analyses or notes of the Nielsen diaries she examined as described in Program Suppliers' request.

Program Suppliers reply that it is difficult to believe that Ms. Mayo did not make any notes in reviewing the Nielsen diaries and she should be required to produce them.



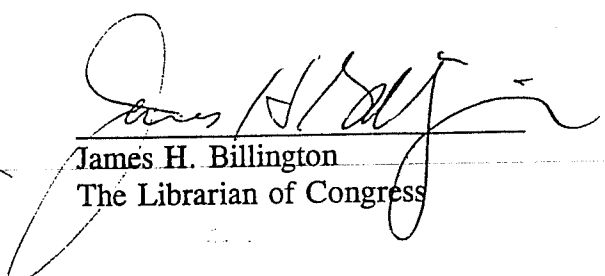
**RULING:** Program Suppliers' request is denied because Ms. Mayo did not prepare any written analyses of her review of Nielsen diaries.

25. Program Suppliers seek compliance with all discovery requests made for Samuel Book, Leonard Reid, Robert Crandall, William Rubens, Robert Wussler, Roger Werner, and Bryan Burns. These witnesses have testified in previous distribution proceedings but will not be appearing in the instant case. Program Suppliers argue that while Joint Sports Claimants properly designated portions of their prior testimony and incorporated it by reference, such testimony is subject to discovery under §251.45(c)(1).

Joint Sports Claimants argue that they have properly designated the prior testimony of Samuel Book, Leonard Reid, Robert Crandall, William Rubens, Robert Wussler, Roger Werner and Bryan Burns in accordance with §251.43(c) of the rules, and that Program Suppliers have already had the opportunity to cross-examine those witnesses. They note that "nothing in the Copyright Office rules authorize discovery of witnesses whose testimony is incorporated by reference." Opposition at 16.

Program Suppliers reply that because Joint Sports Claimants' designated testimony is submitted as part of its direct case, Program Suppliers are entitled to discovery on the designated testimony.

**RULING:** Program Suppliers' request is denied. Joint Sports Claimants have properly designated testimony from prior distribution proceedings in accordance with §251.43(c) and discovery on such prior testimony is not permissible.

  
JK  
James H. Billington  
The Librarian of Congress

Dated: October 30, 1995

## **EXHIBIT 2**



1825 Connecticut Avenue, N.W.  
Suite 918  
Washington, DC 20009  
(202) 606-4400  
FAX (202) 606-4407

In the Matter of )  
 )  
1990 Cable Royalty ) CRT Docket No. 92-1-90CD  
Distribution Proceeding )

### ORDER

By *Order*, dated August 23, 1993, the Copyright Royalty Tribunal established procedural dates for filing discovery motions and objections in Phase I of the above-captioned proceeding. On August 26, 1993, in response to the *Order*, the Tribunal received several discovery motions. On August 31, 1993, the Tribunal received responses to the motions. Shortly thereafter, on September 2, 3, and 7, additional motions and a clarification were filed. The Tribunal has reviewed the foregoing filings, and makes the following rulings:

#### PROGRAM SUPPLIERS

1. Program Suppliers request the Tribunal to compel the National Association of Broadcasters (NAB) to produce the following documents:

- a. A list of the news programs, and the identity of the stations broadcasting each program referred to by Richard V. Ducey in his testimony;
- b. a list of the programs aired by NAB in order to determine whether the shows listed by Mr. Ducey in his testimony are, in fact, a representative sample of the total programs aired by NAB;
- c. a representative sample of the studies relied upon by Mr. Ducey in testifying, that "[b]roadcasters are well aware of the viewer intensity with respect to their news programming, as this is documented in countless studies;" and
- d. a copy of the survey submitted by Robert LaRose (NAB Exhibit No. 35), with the dates and station

identification unredacted, or in the alternative, the striking of the exhibit.

NAB responded to Program Suppliers' motion as follows:

- a. The requested list of news programs is unnecessary to verify the accuracy of the statements made by NAB, in its direct case, regarding the total number of different news programs broadcast in distant signals, and compilation of the list would entail considerable time and expense;
- b. compilation of the requested list of programs, which would total in the thousands, has not been paralleled by Program Suppliers, and is not part of NAB's direct case, would be unduly burdensome, and is unnecessary for the purpose stated by Program Suppliers, since they have reviewed the station claims filed with the Tribunal;
- c. the studies requested, of which Dr. Ducey is generally aware based on his experience and expertise, were prepared by individual station consultants for the stations themselves, and are not in NAB's possession; and
- d. Exhibit 35 is proffered to demonstrate the focus of the survey, which is different than the focus of the Program Suppliers/A.C. Nielsen Studies (Studies), rather than for the particular results.

**Ruling -**

- a. The Tribunal will deny the request for a list of news programs as unduly burdensome, and because Mr. Ducey's testimony can be tested on cross-examination;
- b. the Tribunal will deny the request for a list of programs as unduly burdensome, and because Mr. Ducey's testimony can be tested on cross-examination;
- c. the Tribunal will deny the request for a representative sample of studies because Mr. Ducey's testimony can be tested on cross-examination; and
- d. the request for an unredacted copy of NAB Exhibit No. 35 will be denied, since the exhibit is being introduced for the limited purposes set forth by NAB.

2. Program Suppliers move to strike certain witness testimony and an exhibit of Christian Broadcasting Network, Inc.; Old Time Gospel Hour; Christian Television Corporation, Inc.; Heritage Ministries, Inc.; and Oral Roberts Evangelistic Association (Devotional Claimants). Specifically, Program Suppliers move to strike, from the Testimony of Michael A. Salinger, all opinions, observations and conclusions regarding the Study. Program Suppliers' motion is based on Dr. Salinger's testimony that he has not read the Study. Program Suppliers also move to strike, from the testimony of David W. Clark, any reference to post-1990 Joint Sports Claimants/Bortz & Company, Inc. Studies (Bortz Studies).

Program Suppliers also argue that Devotional Claimants' Exhibit No. 7, entitled "Cable Operator Allocation of Value by Distant Signal Program Type, 1990," lacks proper foundation, and so should be stricken from the record.

Devotional Claimants oppose Program Suppliers' three motions to strike portions of Devotional Claimants' direct case. They oppose the motion to strike portions of Dr. Salinger's testimony, on the ground that it is irrelevant that he has not read the Study because "he will not be testifying about the Nielsen study itself, other than to assume its reliance on viewership ratings as a measure of value, and to draw conclusions, as appropriate, on the merit of studies that rely on ratings or viewership." Devotional Claimants also oppose the motion based on Dr. Clark's testimony. Specifically, they maintain that Dr. Clark's references to 1991 and 1992 Bortz Studies are relevant and material because they demonstrate the reliability of the 1990 Bortz Study result for Devotional Claimants. Finally, Devotional Claimants oppose the motion to strike their Exhibit 7, which consist of a chart. They maintain, "this chart is directly drawn from, and is a precise graphic illustration of, the numerical results contained in the 1990 Bortz survey." They reject "Program Suppliers' stated interest in the identity of the preparer of the exhibit...[as] hyper-technical, at best." They assert that Dr. Clark has referred to the exhibit, and is competent to testify about the chart.

#### Ruling -

- a. The Tribunal will deny the request to strike Mr. Salinger's testimony, which is being offered merely to establish the merit of studies that rely on measures of viewership, and which can be tested on cross-examination;
- b. the Tribunal will deny the request to strike Mr. Clark's testimony relating to post-1990 Bortz data on the grounds that such testimony is relevant and similar testimony was accepted in the 1989 proceeding; and
- c. the Tribunal will deny the request to strike Devotional Claimants' Exhibit No. 7 on the grounds that it has proper foundation because it is based on the Bortz Study, and Mr. Clark will be available for cross-examination on the exhibit.

3. Program Suppliers move to strike, from Public Broadcasting Service's (PBS) direct case, two studies offered by John W. Fuller. Program Suppliers object to the studies because they were prepared in 1993, rather than in 1990.

PBS opposes the motion on the ground that the studies although prepared in 1993 are proffered to demonstrate the value of PBS programming during 1990, and so are directly relevant to this proceeding. PBS notes that John Fuller, the sponsor of the studies, will be available for cross-examination, thereby affording

Program Suppliers the opportunity to contest his conclusions that the 1993 studies are probative of marketplace values in 1990.

Ruling -

The Tribunal will deny the motion to strike Mr. Fuller's two studies based on the grounds that they are relevant and can be tested on cross-examination.

4. Program Suppliers request that the Tribunal compel Joint Sports Claimants (JSC) to produce the following documents:

- a. unredacted copies of the questionnaires for the 1989-1992 Bortz Studies;
- b. all documents underlying the changes made to the system operator program questionnaire as used in the 1992 Bortz Study;
- c. copies of the studies and analyses supporting JSC's "claim that pursuant to 'numerous market research studies and many other analyses' the individuals surveyed pursuant to the [Bortz] study are most responsible for decisions regarding programming," or an amendment to JSC's Exhibit 1, indicating that any claims regarding the Bortz Study respondent's programming responsibilities are based solely on the general experience of Bortz & Company rather than on objective data;
- d. a list of all cable system selected as part of the sample for the 1989-1992 Bortz Studies that did not respond to the survey; and
- e. documents referred to in the resumes contained at the end of JSC's Exhibit 1, or the striking of the resumes from the exhibit.

JSC oppose Program Suppliers' discovery motions as follows:

- a. Program Suppliers' request for copies of Bortz questionnaires is inequitable and prejudicial in light of the fact that Program Suppliers has denied JSC access to the very same type of underlying data. Moreover, requests for unredacted copies of the survey cannot be honored without breaching the confidentiality of the survey respondents, which would impede Bortz's ability to conduct future surveys. Finally, JSC deny that the identity of the respondents would provide Program Suppliers with any useful information, since the respondents' positions, which Program Suppliers cite as the reason for requesting the information, are not redacted. JSC state that they will comply with a Tribunal request to provide Program Suppliers "with redacted copies of the 1990-92 surveys," and to direct Bortz & Company, Inc. (Bortz) to provide any data from the surveys (other than respondent identities);

b. JSC maintain that the explanation regarding changes to the Bortz Study can be found on pages 5-8 of that study, and Program Suppliers' request for all documents "related to" those changes is "overly broad, unduly burdensome and unintelligible;"

c. JSC oppose Program Suppliers' request for respondent qualification studies on the ground that Bortz has not conducted any specific respondent qualification studies. JSC maintain that the Bortz testimony regarding the Bortz Study respondent qualifications is based on Bortz's expert opinion;

d. JSC oppose Program Suppliers' request for non-respondent cable system on the basis of confidentiality, instead, JSC offer to identify all sample systems which were not contacted and thus were not respondents;

e. JSC argue that the requests for research conducted by Messrs. Bortz and Trautman and Dr. Wirth as "overly broad and burdensome," and the research is not being relied upon by JSC.

Program Suppliers filed a letter clarifying the following three points:

a. Program Suppliers are willing to enter a confidentiality agreement regarding the use of unredacted 1989-1992 Bortz Studies. Program Suppliers contradict JSC's claim that the respondents' positions were not redacted in the 1989 questionnaires;

b. Program Suppliers allege that JSC "grossly mischaracterize" their request for the research conducted by Messrs. Bortz and Trautman and Dr. Wirth. Program Suppliers state that they only asked for a fraction of the materials listed in the foregoing individuals' resumes. They maintain that they only requested relevant materials; and

c. Program Suppliers, finally, reiterate that they "remain ready, willing and able to engage Nielsen to undertake a limited 1991 viewing." They allege that JSC have not given them a list of the programs to be included in the limited study, which they need to undertake the study, and have not agreed that the types and rates of error in the Nielsen methodology found in a 1991 limited study would be presumed to apply to the 1990 study.

#### Ruling -

a. The Tribunal will deny the request for unredacted copies of 1989-1992 Bortz Studies, however, redacted copies with the respondent's position unredacted must be produced;

b. the Tribunal will deny the request for all documents



underlying the changes to the Bortz questionnaire on the ground that the changes are explained in the Bortz Study; c. the Tribunal will grant the request for an amendment to JSC Exhibit 1, indicating that any claims regarding the Bortz Study respondent's programming responsibilities are based solely on the general experience of Bortz & Company;

d. the Tribunal will deny the request for a list of all sample cable systems that did not respond to the survey, on confidentiality grounds; and

e. the Tribunal will deny the request for documents listed in Mr. Bortz's resume since he will be available for cross-examination, the requests for documents listed in the resumes of Messrs. Trautman, Bardwell, and Wirth are moot because the Tribunal will grant the motion to strike these resumes since the individuals will not be available for cross-examination.

5. Program Suppliers move to strike the resumes of James M. Trautman, George E. Bardwell, and Michael O. Wirth from the Bortz Study. Program Suppliers base their motion on the ground that the foregoing individuals will not be appearing as witnesses and therefore, the resumes will not be subject to cross-examination.

JSC oppose the motion to strike the foregoing resumes on the basis that the resumes are relevant evidence because they establish the qualifications of professionals on whose expertise Mr. Bortz has relied in designing the cable operator surveys, and he will be available for cross-examination regarding the basis for his reliance.

#### Ruling -

The Tribunal will strike the resumes of Messrs. Trautman, Bardwell, and Wirth from the record because the individuals are not available for cross-examination.

6. Program Suppliers move to exclude the Bortz Study from JSC's direct case. Program Suppliers' argument is two-fold: The Bortz Study provides cable operator responses for the years 1989 to 1992, while the current proceeding involves only royalty distribution for the year 1990. The Bortz Study reveals that Bortz & Company had no involvement with the survey conducted in 1990, and therefore, Paul I. Bortz, president of Bortz & Company, cannot serve as the sponsoring witness for the 1990 survey, which is the only relevant study to this proceeding.

JSC argue that Program Suppliers are estopped from moving to exclude the 1990 Bortz Study because the Tribunal denied an identical motion to exclude the 1990 Bortz Study during the 1989 Cable Royalty Distribution Proceeding. Moreover, JSC assert that Program Suppliers' characterization Mr. Bortz's role in the 1990

Bortz Study is discredited, because contrary to Program Suppliers' allegations, Mr. Bortz was involved with the survey conducted in 1990 in every aspect except the actual collection of data. In this regard, JSC concludes, Mr. Bortz is no different from Program Suppliers own witnesses.

**Ruling -**

The Tribunal will deny the request to exclude the Bortz Study on the grounds that the Tribunal has already denied an identical request in the 1989 Cable Royalty Proceeding, and the Tribunal agrees with JSC that Mr. Bortz's nonparticipation in the actual collection of the 1990 data does not disqualify him as a sponsoring witness.

7. Program Suppliers move to strike the 1991 and 1992 data from the Bortz Study. Program Suppliers maintain that the relevant time period for this proceeding is the year 1990, and therefore, data for time periods other than the year 1990 are "simply irrelevant."

JSC reject Program Suppliers' depiction of the 1991 and 1992 data as irrelevant. JSC state that data from years other than the year in controversy are essential to establish that the survey results are consistent over the years and therefore, are reliable. This point, JSC notes, is recognized by Program Suppliers' own witnesses.

**Ruling -**

The Tribunal will deny the request to strike the 1991 and 1992 Bortz data on the grounds that such data is relevant and similar data has been accepted by the Tribunal in the past.

**NAB**

1. NAB moves to compel Program Suppliers to produce the following underlying documents or, in the alternative, to strike portions of their direct case and preclude introduction of evidence:

- a. A blank form of the representation agreements referred to by Allen R. Cooper in his testimony, or in the alternative, NAB moves to strike Mr. Cooper's testimony on pages 12 and 13, relating to representation of claimants;
- b. the database, in computer readable form, utilized by Stanley M. Besen in his cable system analysis, or in the

alternative, NAB motions to strike the study presented by Dr. Besen and all testimony related thereto;  
c. The underlying data of the A.C. Nielsen meter-based study, presented by Paul Lindstrom, or in the alternative, NAB moves to strike the Nielsen meter-based study; and  
d. NAB requests that the Tribunal strike Jack Valenti's testimony, on pages 4 and 5, concerning the average costs of production. NAB bases their motion on Program Suppliers' refusal to comply with NAB's request for documents underlying the discussion of production costs.

Program Suppliers respond to NAB's motion as follows:

a. Program Suppliers will provide the representation agreements is NAB reciprocate;  
b. Program Suppliers will provide Dr. Besen's database, even if NAB refuses to reciprocate with regard to Program Suppliers discovery requests;  
c. Program Suppliers deny that they have refused to provide the underlying data for the meter-based study. Rather, NAB has requested viewing data on a program by program basis, which does not exist for the meter-based study. Program Suppliers also deny that the requested information, if it did exist, could be used to challenge the validity of the results of the meter-based study; and  
d. Program Suppliers oppose the request to exclude portions of Mr. Valenti's testimony unless documents regarding the average cost of production of television series and movies are produced on the grounds that such documents are confidential and Mr. Valenti's extensive experience in the entertainment industry qualify him to testify.

**Ruling -**

a. The Tribunal will deny the request for a blank representation agreement on the ground that it is irrelevant;  
b. the request for Dr. Besen's database is moot since Program Suppliers have represented that they will provide it;  
c. the Tribunal will grant the request for underlying data, on a program and station basis, for the meter-based study, the Tribunal will permit Mr. Lindstrom to give oral testimony and be cross-examined prior to the data being provided. However, Mr. Lindstrom will have to be available for further cross-examination once the data is provided. The data should be provided expeditiously. If the data is not provided, then the failure to do so will go to the weight of the evidence; and  
d. the Tribunal will deny the request to strike Mr.

Valenti's testimony since it can be tested on cross-examination.

2. NAB, by letter of September 7, 1993, advises the Tribunal that discovery requests regarding Program Suppliers' witness, Dr. Besen were not complied with until this morning. Therefore, NAB requests that Mr. Besen's oral testimony, currently scheduled for Thursday, September 8, 1993 be rescheduled for later in September or, in the alternative, Dr. Besen be subject to being recalled at a later time.

Ruling -

The Tribunal will deny the request on the ground that NAB will have at least two days to prepare for Dr. Besen's cross-examination.

PBS

1. PBS moves to compel discovery of Program Suppliers' direct exhibit MEK-8, a computer print-out which provides the results of the Study. Program Suppliers filed this exhibit only with the Tribunal.

Program Suppliers responded that the requested document has been provided.

Ruling - The Motion to Compel is, therefore, moot.

2. In a second motion, PBS moves to compel discovery relating to the Program Suppliers' meter-based study. Specifically, PBS requests that the Tribunal compel Program Suppliers to produce background information about the meter households and information demonstrating, on a station by station and program by program basis, the viewing results for the meter-based study.

Ruling -

The Tribunal will grant PBS' motion for background information about the meter households and as stated earlier in response to NAB's request for underlying data regarding the meter-based study, the Tribunal will grant the request for program and station based underlying data.

3. PBS also moves to preclude Program Suppliers from presenting statistical evidence at the outset of the hearing. PBS notes its comments on Program Suppliers' "Motion for

Reconsideration of Order Establishing Procedural Schedule."<sup>1</sup> In PBS' comments, it requested that the Tribunal consider starting the hearing later in September or, in the alternative, requiring that Program Suppliers provide adequate time for discovery before presenting witnesses during the hearing. According to PBS, there is currently "a real threat of procedural unfairness," because Program Suppliers have not provided the parties with the discovery documents needed to cross-examine Program Suppliers' first four witnesses. Consequently, PBS renews its request that "Program Suppliers not be permitted to present witnesses on these statistical studies [the Study and meter-based study] until a reasonable time after discovery is provided."

**Ruling -**

As stated above, the Tribunal will permit Program Suppliers to introduce oral testimony regarding the Study and meter-based study with the understanding that although oral direct testimony and cross-examination will be permitted prior to Program Suppliers complying with discovery, the witness will be available for further cross-examination once the discovery material is provided.

4. PBS moved to Strike Program Suppliers' meter-based study and all testimony relating to it on the bases that Program Suppliers has failed to provide adequate documentation of the methodology and data underlying the meter-based study.

**Ruling -**

For the reasons stated above, the Tribunal will deny the motion to strike.

**JOINT SPORTS CLAIMANTS**

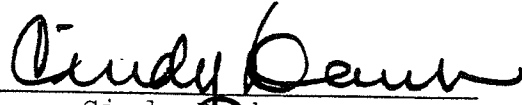
By pleading of August 26, 1993, Joint Sports Claimants (JSC) reserved their right to file discovery motions based on the fact that they were still in the process of attempting to obtain discovery documents from Program Suppliers. On September 3, 1993, JSC filed a motion requesting that the Tribunal strike the testimony of Paul Lindstrom. According to JSC, their motion is based upon Program Suppliers' "failure to provide... underlying documentation necessary to cross-examine Mr. Lindstrom."

---

<sup>1</sup> On August 20, 1993, Program Suppliers filed the reconsideration motion. By *Order*, of August 23, 1993, the Tribunal requested comments from all of the parties, including Program Suppliers, regarding an amended procedural schedule. Program Suppliers' motion will be handled in a separate order.

Ruling -

The Tribunal will deny the request to strike Mr. Lindstrom's testimony as discussed above.

A handwritten signature in cursive script, appearing to read "Cindy Daub", written over a horizontal line.

Cindy Daub  
Chairman

September 7, 1993

## **EXHIBIT 3**

<sup>1</sup> The Allocation Phase Parties are Program Suppliers, the Joint Sports Claimants (“JSC”) the Commercial Television Claimants (“CTV”), the Public Television Claimants (“PTV”), the Settling Devotional Claimants (“SDC”), and the Canadian Claimants Group (“CCG”).



Written Direct Statement (“WDS-A”).<sup>2</sup> JSC has refused to produce the unredacted documents and input data to Program Suppliers, notwithstanding Program Suppliers’ repeated communications to JSC regarding the critical importance of such documents to Program Suppliers’ ability to test and verify the multiple bottom-line numbers in the Bortz Report. Program Suppliers’ Motion is supported by the Declaration of expert statistician, Martin R. Frankel, Ph.D., and its supporting exhibits, all of which are attached hereto as Exhibit A. Program Suppliers have also attached, as Exhibits B-H, the correspondence between Program Suppliers and JSC related to this discovery dispute.<sup>3</sup> As Exhibits B-H demonstrate, Program Suppliers and JSC made numerous attempts to meet and confer over a three month period in an effort to resolve their discovery dispute related to JSC’s redaction of the Bortz input data (through conference calls, and through both correspondence and email). Unfortunately, these were unsuccessful, prompting Program Suppliers to file the Motion.

## **BACKGROUND**

Pursuant to the agreement of the Allocation Phase Parties, on January 10, 2017, JSC made an initial voluntary production of nonprivileged underlying documents related to its WDS-A to the parties. JSC acknowledged in the January 10 letter transmitting its initial discovery production that it produced “redacted copies of the certain documents pertaining to the 2010-13 Bortz surveys in order to maintain the confidentiality of survey respondents.” *See* Exhibit B at 1. However JSC failed to identify which documents in its production were redacted, and failed to provide a redaction log explaining the bases for its redactions. Program Suppliers, on their own,

---

<sup>2</sup> *See* Bortz Report at pp. 3 (Table I-1), 4 (Figure I-1), 41-42 (text and Table IV-1), 43 (Figure IV-1), 44 (Table IV-2), 45 (Table IV-3), 46 (Table IV-4), 47 (Table IV-5), and Appendix D, at pp. D-8-11.

<sup>3</sup> In an effort to reduce the volume of this pleading, Program Suppliers have not attached their January 26, 2017 Follow Up Discovery Requests as an exhibit, and instead attach JSC’s February 17, 2017 Responses to Program Suppliers’ Follow Up Discovery Requests, which repeat each of Program Suppliers’ January 26, 2017 Follow Up Discovery Requests, followed by JSC’s Responses. The particular Program Suppliers Follow Up Requests at issue in this Motion are PS Requests 4-5, 7-8, 19, 22-23, 32-33, 50, 52-54, and 63-64. *See* Exhibit D at 4-7, 10-13, 15-17, 22-25, and 27-28.

examined JSC's January 10 discovery production and discovered that (1) JSC had redacted portions of the 2010-13 Bortz survey questionnaire forms (bates stamped as JSC 00005097 -JSC 00008172) and the 2010-13 Bortz survey data entry spreadsheets (Microsoft Excel files labeled with bates stamps JSC 00008183 –JSC 00008186), and (2) those redactions went beyond the information necessary to protect the confidentiality of individual Bortz survey respondents. Accordingly, on January 26, 2017, Program Suppliers served JSC with Follow Up Discovery Requests seeking to have JSC produce unredacted copies of these documents to Program Suppliers in discovery.

By way of example, Program Suppliers' January 26, 2017 Follow Up Discovery Requests Nos. 4-5 and 7-8 to JSC detailed Program Suppliers' concerns as follows:

4. From examining the documents that JSC produced in discovery related to Appendix B of the Trautman Testimony, entitled *Cable Operator Valuation of Distant Signal Non-Network Programming 2010-13* (hereafter referred to as the "Bortz Survey"), it appears that JSC produced redacted copies of the 2010-2013 Bortz Survey questionnaires (*see* JSC00005097 – JSC0008172). Program Suppliers do not object to JSC redacting the names of the particular individuals who were Bortz Survey respondents for the 2010-2013 Bortz Survey questionnaires to maintain the confidentiality of their individual responses. However, it is clear that JSC did not limit its redactions on the questionnaires to just the names of individual Bortz Survey respondents. Instead, it appears that JSC also redacted additional information from the questionnaires, such as the identity of the particular cable system being surveyed ("System Name"), the location of the cable system being surveyed ("City/State"), the subscribers Bortz attributed to that cable system ("Subscribers"), the "Remit Number" Bortz assigned to the cable system, the royalties Bortz attributed to the cable system ("Royalties"), and the particular strata assigned to the cable system within the Bortz sample ("Strata"). None of these redactions are proper, as they impede Program Suppliers' ability to verify the bottom line results of the Bortz Survey, including but not limited to replicating sample selection (including the degree to which the cable systems selected are representative of the universe of Form 3 cable systems), response rates, and standard errors for the Bortz Survey. Produce unredacted copies of the 2010-2013 Bortz Survey questionnaires.
5. From examining the documents that JSC produced in discovery, it appears that JSC produced documents labelled on the JSC production index as JSC00008183 – JSC00008186 (Survey Data Entry), JSC00008187 –JSC00008191 (Survey Results), and JSC00008192 –JSC00008199 (Universe Data, Sampling and Stratification Statistics). These files do not include the necessary input data, output data, intermediate data sets, program files, macros, and code for Program Suppliers to

verify the bottom-line results of the Bortz Survey, including but not limited to replicating Bortz's sample selection processes, estimation processes, response rate calculations, and standard error calculations. Please produce all data files, program files, macros, and code Bortz utilized in its calculations.

\*\*\*

7. Please produce all computer programs that were utilized in the computation of the estimates, confidence intervals, and standard errors reported in the Bortz Survey for 2010-2013.
8. Please produce the copyright royalty revenue, subscriber information, stratum number, cable system name, and Cable Data Corporation system identification number associated with each set of respondent data allocations reported in the Bortz Survey Data entry files and Bortz Survey result percentage allocations JSC produced for each of the 2010-2013 Bortz Surveys (*i.e.*, JSC00008183 – JSC00008186 (Survey Data Entry), JSC00008187 –JSC00008191 (Survey Results)).

*See* Exhibit D at 4-7 and 10-13 (Program Suppliers' Follow Up Discovery Requests Nos. 4-5 and 7-8). Program Suppliers also requested that JSC produce a redaction log identifying the redacted materials with specificity, and setting forth the bases for their redactions. *See* Exhibit D at 4 (Program Suppliers' Follow Up Discovery Request No. 3).

Program Suppliers engaged JSC in a meet and confer conference call to discuss their Follow Up Requests on February 7, 2017. During this conference call, Program Suppliers explained to JSC that JSC's redactions exceeded what was reasonably necessary for JSC to protect the confidentiality of individual Bortz survey respondents and, in fact, impeded any meaningful statistical review or analysis of the Bortz survey results. Program Suppliers also clarified that they did not object to JSC redacting the name and contact information for individual Bortz survey respondents from its discovery production, but did object to JSC's redaction of input data that is required to verify and test the weighted Bortz survey results and confidence intervals. In addition, Program Suppliers reminded JSC that given that a Protective Order had already issued in this proceeding, JSC could rest assured that, redacted or not, all of

the confidential or proprietary information underlying the Bortz Report, which had been designated as “Restricted” would be subject to the Protective Order protections.<sup>4</sup>

JSC responded to Program Suppliers by letter on February 16, 2017, reiterating its refusal to produce unredacted documents underlying the Bortz Report to Program Suppliers. Instead, JSC offered to produce the unredacted documents underlying the Bortz Report to Cable Data Corporation (“CDC”), subject to a discovery agreement similar to one utilized by JSC in the 2004-2005 Cable Phase I Proceeding. Besides preventing Program Suppliers and the other Allocation Phase Parties from requesting or obtaining any unredacted Bortz survey input data, that agreement would require all analyses of unredacted input data underlying the Bortz Report to be performed exclusively by CDC. *See Exhibit C.*

JSC followed its February 16 correspondence with Responses to Program Suppliers’ Follow Up Discovery Requests on February 17, 2017. *See Exhibit D.* JSC responded to many of Program Suppliers’ Follow Up Requests with responses similar to the following:

**RESPONSE:** JSC objects that this request seeks confidential survey responses and other data which might directly or indirectly identify a survey respondent. JSC further responds that it has produced all information necessary to replicate the Bortz Survey’s sample selection processes, response rate calculations, and unweighted survey results. *See Universe Data, Sampling and Stratification Statistics (JSC00008192-99); “2010 Sample (Status)” (JSC00008247); “2011 Sample (Status)” (JSC00008248); “2012 Sample (Status)” (JSC00008247); “2013 Sample (Categorized)” produced herewith (JSC00008265); redacted 2010-2013 Survey Data Entry files (JSC00008183-86); 2010-2013 Survey Results (JSC00008187-91); redacted 2010-2013 Bortz Survey questionnaires (JSC00005097-8172).* JSC produces herewith the Visual Basic computer code (JSC00022530-36) containing the formulas Bortz Media applied in conjunction with unredacted Survey Data Entry files to produce weighted survey results and confidence intervals for 2010-2013. Consistent with the practice in

---

<sup>4</sup> *See Protective Order at 1-2 (March 31, 2016) (defining “confidential information” subject to the Protective Order as including “proprietary or private business information, in any form or format, the disclosure of which would damage the Producing Party, grant unfair advantage to the Receiving Party, or inhibit the ability of the Producing Party to obtain like information in the future.”).*

prior proceedings, JSC also will provide the unredacted Survey Data Entry files and unredacted 2010-2013 Bortz Survey questionnaires to an agreed-upon neutral third party upon Program Suppliers' execution of an agreement embodying the same material terms as the July 13, 2009 agreement executed by Program Suppliers in the 2004-05 Phase I proceedings (copy attached).

*See* Exhibit D at 4-7, 10-13, 15-17, 22-25, and 27-28 (JSC Responses to Program Suppliers' Follow Up Requests 4-5, 7-8, 19, 22-23, 32-33, 50, 52-54, and 63-64). JSC also produced a redaction log on February 17, 2017, which set forth the following basis for each of JSC's redactions to the underlying documents related to the Bortz Report: "Consistent with prior practice, JSC has redacted information that might directly or indirectly identify a survey respondent." *See* Exhibit E at 8-10. Clearly, JSC's own "prior practice" is not a proper legal basis for JSC's redactions.

At Program Suppliers' request, Dr. Frankel reviewed JSC's discovery production and correspondence to assess the potential impact of JSC's offer to utilize CDC as an intermediary to receive and analyze the unredacted Bortz input data, and to determine whether JSC's redacted production, would provide him with the information necessary to test the validity of Bortz survey and to verify the bottom-line figures contained in the Bortz Report. Dr. Frankel concluded that JSC's redactions of the Bortz input data "impede the replication and any meaningful statistical analysis of the weighted Bortz Survey results and confidence intervals set forth in the Bortz Report." *See* Exhibit A at ¶ 5. Specifically, he determined that JSC had not produced all of the input data necessary for him to replicate the weighted Bortz survey results and related confidence intervals, or to perform the statistical tests necessary to verify the accuracy of those figures, or the Bortz survey. *See* Exhibit A at ¶¶ 3-8.

Dr. Frankel also found that JSC's offer to utilize CDC as an intermediary was inappropriate, because CDC "lacks the statistical expertise necessary to evaluate the unredacted Bortz input data and perform the statistical analysis necessary to test the reliability of the

weighted Bortz survey results and confidence intervals.” *See* Exhibit A at ¶ 10. Dr. Frankel further concluded that it was neither appropriate nor reasonable for him, as an expert statistician, “to rely on statistical analyses performed by a non-expert third party such as CDC as the basis for any of my conclusions regarding the reliability of the Bortz survey, or the reasonableness of any of the computations underlying the weighted Bortz survey results or the confidence intervals contained in the Bortz Report.” *See* Exhibit A at ¶ 10. Indeed, Dr. Frankel found that JSC’s proposal to utilize CDC as an intermediary would impede his ability to perform a “complete and independent statistical review and analysis” of the Bortz survey results, because it would restrict the form and manner in which he could conduct his analysis. *See* Exhibit A at ¶ 12. As a compromise, Dr. Frankel instructed Program Suppliers to offer to JSC that the unredacted Bortz discovery data be produced directly to Dr. Frankel. *See* Exhibit A at ¶ 11.

Program Suppliers made Dr. Frankel’s compromise proposal to JSC via letter on March 1, 2017. *See* Exhibit F. Program Suppliers also pointed out that JSC’s redactions were improper, and that JSC had conceded through its earlier correspondence and meet and confer conference calls that JSC had failed to produce the underlying input data necessary for Program Suppliers to test the validity of the weighted Bortz survey results and the related confidence intervals. Program Suppliers also reminded JSC that production of such underlying documents and data is required under the Judges’ regulations and relevant precedent. *See id.*

By letter dated March 14, 2017, JSC rejected Dr. Frankel’s compromise proposal. In addition, JSC took the position that Program Suppliers’ analysis of the unredacted Bortz input data should be limited to the non-statistical analyses that JSC would direct CDC to perform for Program Suppliers. *See* Exhibit G at 2-3. Program Suppliers and JSC and held another meet and confer conference call regarding the issues addressed in JSC’s March 14 letter on March 24, 2017. During that conference call, Program Suppliers again sought a compromise whereby JSC

would disclose the unredacted input data necessary for Program Suppliers to verify the weighted Bortz survey results and confidence intervals and perform other statistical tests.<sup>5</sup> On March 28, 2017, JSC informed Program Suppliers over email that a compromise could not be reached, and that the parties were at an impasse. *See* Exhibit G.

Accordingly, Program Suppliers had no choice but to file the instant Motion seeking to compel the unredacted documents and input data underlying the Bortz Report that JSC should have produced to Program Suppliers more than three months earlier, on January 10, 2017, pursuant to the Allocation Phase Parties' discovery agreement.

### **ARGUMENT**

To be clear, Program Suppliers do not oppose parties' reasonable redactions of documents produced in discovery, especially when such redactions protect privileged information, or are otherwise supported by a proper legal basis. However, that is not the case here. JSC's redactions do not to remove privileged information and are not narrowly tailored to preserve the confidentiality of individual Bortz survey respondents. Instead, JSC's redactions remove input data that Mr. Trautman and Bortz utilized in preparing the Bortz Report, and which is necessary for Program Suppliers to verify and test the weighted Bortz survey results and the related confidence intervals. JSC's redactions are clearly improper, and should not be permitted by the Judges. The Judges should also reject JSC's proposal that would require Program Suppliers to utilize CDC as an intermediary to receive and analyze the unredacted Bortz survey input data.

---

<sup>5</sup> In a further attempt to reach a compromise, Program Suppliers suggested that JSC produce a version of the Microsoft Excel files bates stamped JSC 00008183 –JSC 00008186 with information regarding the royalties paid by the cable system, the subscribers attributed to the cable system, and the stratum assigned to the cable system linked with each Bortz survey respondent's percentage allocations for the Bortz constant sum question for each royalty year.

**I. JSC Must Produce All Nonprivileged Documents And Input Data Contributing To The Bottom-Line Figures In The Bortz Report, And Cannot Withhold Such Input Data In This Proceeding Based On A Claim Of “Confidentiality.”**

“[P]arties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony” submitted in royalty distribution proceedings. *See* 37 C.F.R. § 351.6. Where a party, such as JSC, submits written testimony or exhibits containing expert reports or analyses that present bottom-line numbers to the Judges as a basis for royalty allocation, that party must produce *all* of the underlying documents and data necessary to permit opposing parties to test the validity of those bottom-line numbers. *See Amended Joint Order On Discovery Motions*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 19 (July 30, 2014) (“The Judges and their predecessors have emphasized time and again that ‘parties are obligated to produce any information needed to verify any bottom-line numbers that they intend to use in the proceeding, and to provide that information in as orderly, usable and complete a fashion as possible.’” (citing *Order Granting IPG Motion to Compel Production of Electronic Documents*, Docket No. 2008-1 CRB CD 98-99 (Phase II) at 4 (January 31, 2014))); *see also Order Denying IPG Motion to Strike SDC Rebuttal Statement*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 3 (July 20, 2015) (“The Judges have previously explained that the measure of whether production is adequate is not whether the receiving party can achieve the same results; rather, it is whether the receiving party is able to *test* the validity, *vel non*, of the producing parties’ computations.”) (emphasis in original).

There is no question here that JSC is withholding nonprivileged underlying documents related to the bottom-line figures in the Bortz Report. By its own admission, JSC *has not produced* the unredacted underlying documents and input data that were actually utilized by Mr. Trautman and his staff at Bortz to generate the weighted Bortz survey results and the related



confidence intervals.<sup>6</sup> Moreover, Program Suppliers' expert statistician, Dr. Frankel, has reviewed JSC's production and confirmed that the input data necessary for him to test the validity of the weighted Bortz survey results and confidence intervals has not been produced by JSC. *See* Exhibit A at ¶¶ 3-8. Dr. Frankel's conclusion regarding JSC's faulty production is further confirmed by the Settling Devotional Claimants' ("SDC") expert witness Dr. Erkan Erdem, who also indicated that he was unable to perform certain statistical tests to evaluate the validity of the Bortz survey results because the relevant underlying data was not available to him.<sup>7</sup> Thus, it is clear that JSC has failed to produce all nonprivileged underlying documents related to the Bortz survey results to the Allocation Phase Parties in this proceeding, including Program Suppliers.

## **II. JSC's Objections Have No Legal Basis.**

JSC objects to production of the requested documents, arguing that it needs "to preserve the confidentiality promised to [Bortz] survey respondents." *See* Exhibit G at 1. This objection appears to be based on some selective quotations from an October 30, 1995 discovery order issued by the Copyright Office ("Office") in the 1990-92 Cable Phase I Proceeding, which denied Program Suppliers' request for unredacted Bortz "questionnaires, computer disks, printouts, tabulations and analyses" on the "grounds of confidentiality". *See* Exhibit G at 1-2 (quoting Order, Docket No. 94-3 CARP CD 90-92 at 50 (October 30, 1995) ("October 30, 1995 Order")). However, as Program Suppliers explain below, that Order does not permit JSC's redactions to its input data in this proceeding.

---

<sup>6</sup> *See, e.g.*, Exhibit C at 1-2; Exhibit D at 4-7, 10-13, 15-17, 22-25, and 27-28 (JSC Responses to Program Suppliers' Follow Up Requests 4-5, 7-8, 19, 22-23, 32-33, 50, 52-54, and 63-64); Exhibit E at 8-10 (JSC Redaction Log); Exhibit G at 1-2; and Exhibit H at 1 (recognizing that Program Suppliers do not currently have, and JSC has not produced to Program Suppliers, the unredacted documents actually utilized to generate, or necessary to test the validity of, the weighted Bortz survey results or confidence intervals).

<sup>7</sup> *See* SDC Amended Written Direct Statement, Erdem Written Direct Testimony, at 11, n.30 (March 9, 2016). ("Due to lack of data (i.e., IDs for systems with completed surveys), I am unable to perform the weighted equality of means statistical test with the Bortz survey results.").

*First*, the October 30, 1995 Order is clear that any objection to discovery production based on “confidentiality” cannot be applied to the input data and documents necessary to test the validity of bottom-line figures appearing in a party’s written exhibits or testimony. Indeed, the Office articulated the following “overriding principle” at the outset of that Order “to provide the parties guidance” for future royalty distribution proceedings:

Parties who offer bottom-line figures in a CARP proceeding must be prepared to share all the underlying data that contributed to those bottom-line figures, notwithstanding the problems of confidentiality. Each of the data inputs in a survey or study could contain errors or be the source of undercounting for one or more of the Phase I parties, and, therefore, they are all important to the process of verification.

Therefore, in a number of rulings, the Office has directed the parties to negotiate in good faith protective orders so that the underlying data can be revealed and confidentiality can be protected.

October 30, 1995 Order at 2.

With regard to the specific issue of Program Suppliers’ request for documents underlying Bortz’s sample selection, the Office held that production of “confidential” Bortz input data was required, subject to protective order:

Program Suppliers’ request is...granted[.] To the extent that the documentation sought will reveal the identity of the cable systems and respondents participating in these [Bortz] surveys, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documentation requiring confidentiality.

*See id.* at 51.

Here, unlike the discovery dispute addressed in the October 30, 1995 Order, the Judges already adopted a Protective Order that was jointly proposed by the parties, and specifically designed to protect confidential and proprietary information. *See* Protective Order at 1-2 (March 31, 2016). Accordingly, unlike the discovery dispute at issue in the October 30, 1995 Order,

protection already exists to addresses any confidentiality concerns JSC may have regarding the production of unredacted underlying documents and input data related to the Bortz Report.

*Second*, unlike the discovery dispute addressed in the October 30, 1995 Order (at 46-48), here, Program Suppliers do not seek the disclosure of information that could identify individual Bortz survey respondents, and have indicated repeatedly that they have no objection to redaction of the Bortz survey questionnaires and other survey data to remove the names and contact information for individuals responding to the Bortz survey. *See, e.g., supra* at 3-4, *see also* Exhibit D at 4-7 (Program Suppliers' Follow Up Requests 4-5 and 7-8) and Exhibit F at 2.<sup>8</sup>

*Third*, unlike in the 1990-92 Cable Phase I proceeding, here Program Suppliers have demonstrated, through the declaration of their expert witness, Dr. Frankel, that JSC's redactions extend well beyond redactions necessary to protect the confidentiality of individual Bortz survey respondents; they obscure cable system royalty, subscriber, and stratum input data that are necessary to replicate, verify, and test the bottom-line figures in the Bortz Report. *See* Exhibit A at ¶¶ 3-8. Specifically, JSC has redacted input data underlying the weighted Bortz survey results and confidence intervals, such as the "Royalties," "Strata," "System Name," "City/State," "Subscribers," and "Remit Number" appearing on the 2010-2013 Bortz Survey Questionnaires, and the "Royalties," "System Name," "City/State," "Subscribers," and "Remit Number" appearing on the 2010-2013 Survey Data Entry Spreadsheets. *See id.* (JSC Redaction Log entries for JSC 00005097 – JSC 00008172 and JSC 00008183 – JSC 00008186); *see also* Exhibit

---

<sup>8</sup> Indeed, Program Suppliers understand and appreciate JSC's desire to preserve the confidentiality of individual survey respondents and protect their private contact information, having submitted their own cable operator survey in this proceeding conducted by Horowitz Research, Inc. ("Horowitz Survey"). For this reason, Program Suppliers did not request (and do not seek) any information about individual Bortz survey respondents. Instead, Program Suppliers seek the input data necessary to verify and test, and to perform statistical analysis related to, the bottom-line figures in the Bortz Report—all of which is clearly subject to production in this proceeding.

A at 4-8 and Frankel Exhibits 1-2.<sup>9</sup> Clearly, Program Suppliers have a legitimate need for the unredacted information that is critical to their expert's statistical review of the Bortz survey results and the underlying data. Accordingly, JSC's objection to production of unredacted documents and input data related to the bottom-line figures in the Bortz Report unsustainable, and the Judges must enter an order compelling JSC to produce the unredacted documents and input data underlying the Bortz Report to Program Suppliers.

**III. JSC's Proposal To Produce Unredacted Documents Only To CDC, And Under Terms That Would Prevent Program Suppliers From Accessing Input Data On Their Own, Is Improper.**

JSC's proposal to have Program Suppliers' route requests for critical analysis of documents underlying the Bortz Report through CDC does not satisfy JSC's discovery obligations in this proceeding, and should not be permitted by the Judges. JSC's proposal fails here for several reasons.

*First*, Program Suppliers' discovery agreement with JSC in a prior proceeding that restricted their access to Bortz survey input data does not carry over to this proceeding. Indeed, the July 13, 2009 Bortz Discovery Agreement, by its terms is limited to the 2004-2005 Cable Phase I proceeding, and expressly does not limit any party's right to seek and obtain unredacted information related to the Bortz cable operator surveys for other royalty years. *See* Exhibit C and 6 (July 13, 2009 Bortz Discovery Agreement at ¶ 11). Indeed, Program Suppliers have not accepted, and cannot be compelled to accept, the terms of the July 13, 2009 Bortz Discovery Agreement in this proceeding.

*Second*, Program Suppliers (and the Judges) have a different set of facts before them in this proceeding than they had in past proceedings where Program Suppliers agreed, voluntarily,

---

<sup>9</sup> None of this nonprivileged Bortz survey input data is properly the subject of redaction in royalty distribution proceedings, especially when the Judges have already entered a Protective Order designed to protect confidential and proprietary information from disclosure.

to utilize CDC as an intermediary. As an initial matter, Program Suppliers now have had experience using CDC in the manner JSC proposes in the 2004-2005 Cable Phase I proceeding, and are in a better position to understand the limitations that such an arrangement imposes on Program Suppliers' ability to perform their own statistical tests on the unredacted Bortz input data.

Moreover, in this proceeding, now that Program Suppliers have had the benefit of conducting their own cable operator survey, the Horowitz Survey, they and their expert witnesses better understand the types of statistical tests and analyses that they need to perform to verify the accuracy of the Bortz Report. Consequently, they do not consider CDC an appropriate party to undertake such work. Indeed, Dr. Frankel has reviewed both the redacted Bortz discovery production and JSC's proposal related to CDC, and has concluded that JSC's proposal is inappropriate, because it would compromise his ability to conduct a full and independent statistical review of the Bortz Report and the bottom-line figures it presents. *See Exhibit A at ¶¶ 9-10.* Thus, Program Suppliers' experience and the findings of Dr. Frankel present a different record here than in past proceedings.

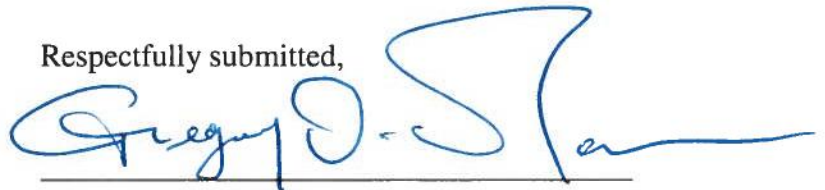
*Third*, it is plainly bad policy to allow a producing party to control the form and process an opposing party may choose to analyze the producing party's data. It is cavalier of JSC to suggest that Program Suppliers do not need to perform (and should not be permitted an opportunity to perform) their own statistical tests utilizing the actual unredacted input data underlying the Bortz Report. *See Exhibit G at 2-3.* As Dr. Frankel, concluded "turning the full [Bortz] data over to CDC restricts the form and manner in which I can perform my analysis, and ultimately compromises my expert examination and opinion." *See Exhibit A at ¶ 12.* JSC should not be permitted to decide or control the type of statistical tests that opposing parties can conduct on the Bortz input data, or to manage the form and manner under which any such

independent review and analysis can be performed. JSC's proposal to utilize CDC as an intermediary, and JSC's description of how it envisions CDC's intermediary role to work, *see* Exhibit G at 2-3, suggests that this is exactly the sort of arrangement JSC intends. Neither Program Suppliers nor the Judges should be so constrained under the guise of protecting "confidentiality," especially in a proceeding where a protective order has already been negotiated by the parties and entered by the Judges.

### CONCLUSION

For all of the foregoing reasons, the Judges should enter an order compelling JSC to produce unredacted copies of the Bortz survey questionnaires (*see, e.g.*, JSC 00005097 – JSC 00008172) and the Bortz survey data entry spreadsheets (*see, e.g.*, JSC 00008183 – JSC 00008186) to Program Suppliers, but permitting JSC to redact the name and contact information for individual Bortz survey respondents.

Respectfully submitted,



Gregory O. Olaniran  
D.C. Bar No. 455784  
Lucy Holmes Plovnick  
D.C. Bar No. 488752  
Alesha M. Dominique  
D.C. Bar No. 990311  
Mitchell Silberberg & Knupp LLP  
1818 N Street NW, 8th Floor  
Washington, DC 20036  
(202) 355-7917 (Telephone)  
(202) 355-7887 (Facsimile)  
goo@msk.com  
lhp@msk.com  
amd@msk.com

*Attorneys for  
Program Suppliers*

Dated: April 27, 2017

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of April, 2017, a copy of the foregoing pleading was sent by Federal Express overnight mail to the parties listed on the attached service list.

  
Lucy Holmes Plovnick  
Lucy Holmes Plovnick

## **SERVICE LIST**

### **JOINT SPORTS CLAIMANTS**

Robert Alan Garrett  
Sean Laane  
Michael Kientzle  
Bryan L. Adkins  
ARNOLD & PORTER LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001

### **SETTLING DEVOTIONAL CLAIMANTS**

Clifford M. Harrington  
Matthew J. MacLean  
Michael A. Warley  
Jessica T. Nyman  
PILLSBURY WINTHROP  
SHAW PITTMAN LLP  
1200 Seventeenth Street NW  
Washington, DC 20036

### **SETTING DEVOTIONAL CLAIMANTS/PROFESSIONAL BULL RIDERS**

Arnold P. Lutzker  
Benjamin Sternberg  
LUTZKER & LUTZKER LLP  
1233 20th Street, NW  
Suite 703  
Washington, DC 20036

### **PUBLIC TELEVISION CLAIMANTS**

Ronald G. Dove, Jr.  
Lindsey Tonsager  
Dustin Cho  
COVINGTON & BURLING LLP  
One City Center  
850 10th Street NW  
Washington, DC 20001

### **COMMERCIAL TELEVISION CLAIMANTS**

### **NATIONAL ASSOCIATION OF BROADCASTERS**

John I. Stewart, Jr.  
Ann Mace  
David Ervin  
CROWELL & MORING LLP  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2595



## **MUSIC CLAIMANTS**

### **AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS**

Samuel Mosenkis  
Jackson Wagener  
ASCAP  
One Lincoln Plaza  
New York, NY 10023

### **BROADCAST MUSIC, INC.**

Joseph J. DiMona  
BROADCAST MUSIC, INC.  
7 World Trade Center  
250 Greenwich Street  
New York, NY 10007-0030

Michael J. Remington  
Brian Coleman  
Jennifer T. Criss  
DRINKER BIDDLE & REATH LLP  
1500 K Street, NW – Suite 1100  
Washington, DC 20005

### **SESAC, INC.**

John C. Beiter  
LEAVENS, STRAND & GLOVER LLC  
1102 17th Avenue South  
Suite 306  
Nashville, TN 37212

## **CANADIAN CLAIMANTS**

L. Kendall Satterfield  
SATTERFIELD PLLC  
1629 K Street NW, Suite 300  
Washington, DC 20006

Victor Cosentino  
LARSON & GASTON LLP  
200 S. Los Robles Avenue, Suite 530  
Pasadena, CA 91101

## **MULTIGROUP CLAIMANTS SPANISH LANGUAGE PRODUCERS**

Brian D. Boydston  
PICK & BOYDSTON LLP  
10786 Le Conte Avenue  
Los Angeles, CA 90024

## **NATIONAL PUBLIC RADIO**

Jonathan D. Hart  
Gregory A. Lewis  
NATIONAL PUBLIC RADIO  
1111 North Capitol Street, NE  
Washington, DC 20002

## **MAJOR LEAGUE SOCCER**

Edward S. Hammerman  
HAMMERMAN PLLC  
5335 Wisconsin Ave., Suite 440  
Washington, DC 20015-2054

## **EXHIBIT 4**

**UNITED STATES COPYRIGHT ROYALTY JUDGES**

<b>In the Matter of</b>	}	
	}	
<b>Distribution of 2000, 2001, 2002</b>	}	<b>Docket No. 2008-2 CRB CD 2000-2003</b>
<b>and 2003 Cable Royalty Funds</b>	}	<b>(Phase II)</b>
	}	

---

**ORDER GRANTING IN PART AND DENYING IN PART  
SETTLING DEVOTIONAL CLAIMANTS' MOTION TO COMPEL  
PRODUCTION OF UNDERLYING DOCUMENTS**

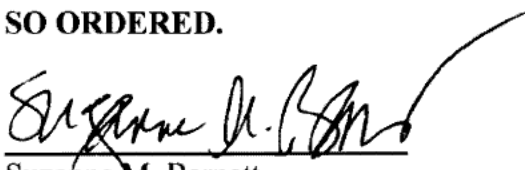
The Settling Devotional Claimants ("SDC") seek production of documents requested in their initial and follow-up requests to the Independent Producers Group ("IPG"). SDC claims that IPG has identified responsive documents to many of its requests but has not produced them, or that it has failed to identify responsive documents altogether. The requests are broken down into the following categories:

1. Documents identifying what devotional programming IPG is claiming for each year in this proceeding and how these programs were identified;
2. Documents underlying IPG's distribution methodology;
3. Documents underlying the authority of IPG to file claims and collect cable royalties on behalf of its clients;
4. Documents and answers specifying the designation of records by IPG from prior proceedings;
5. Documents underlying claims forfeited by IPG;
6. Documents underlying the qualifications of Raul Galaz;
7. Documents underlying the credibility of Raul Galaz;
8. Documents underlying the authority of individuals to act as agents or representatives of IPG; and
9. Prior versions of the testimony of Raul Galaz.

IPG responds<sup>1</sup> that it has not produced documents to SDC up to this point because there was not a protective order in place at the time the requests were made, and that IPG will not produce documents to more than five "Reviewing Parties," nor Messrs. Lutzker and Hammerman. These matters were addressed by the Judges' Order of July 10, 2012, and IPG **IS DIRECTED** to produce those documents which it has agreed to produce subject to being marked restricted, and in accordance with the terms of that Order.

IPG also has individual responses and objections to the categories of document requests identified above. With respect to Numbers 1, 2, 3, 5, IPG asserts that it has produced all responsive documents. These requests of SDC are, therefore, **DENIED**. Of course, should it become apparent during the course of the proceeding that responsive documents do exist, the associated testimony of IPG will be stricken. With respect to Number 4, IPG charges that the request is not a document request, but rather is an interrogatory asking for a listing of page numbers. SDC's request is outside the scope of discovery in distribution proceedings, and it is **DENIED**. With respect to Number 6 – documents underlying the qualifications of Raul Galaz – IPG asserts that no such documents exist. Parties are not required to create documents to satisfy document requests, and SDC's request is **DENIED**. IPG also objects to Number 7 – documents underlying the credibility of Raul Galaz – as being outside the scope of discovery, and SDC's request is **DENIED**. This ruling also applies to document requests for Tracee Productions and Adventist Media Center Productions, which are not a part of IPG's claims in this proceeding. Finally, with respect to Numbers 8 and 9 – documents underlying IPG's authority to act as agent/representative and prior versions of Raul Galaz's testimony – IPG objects that they are outside the scope of discovery and violate the attorney/client privilege, respectively. These requests are **DENIED**.

**SO ORDERED.**

  
Suzanne M. Barnett  
Chief Copyright Royalty Judge

DATED: August 1, 2012

---

<sup>1</sup> In addition to its opposition, IPG filed a motion for leave to submit a sur-reply. The Judges' rules do not permit the filing of sur-replies, and there is nothing contained in IPG's filing that is relevant to the resolution of discovery matters. The motion is denied.

## **EXHIBIT 5**

## AAPOR Statement on Protecting Respondent Confidentiality in Litigation Surveys

### Background

Survey research offers multiple, practical benefits in both litigation and non-litigation contexts, particularly where information must be gathered from a large number of individuals and analyzed. According to the *Federal Reference Manual on Scientific Evidence*, (3rd Ed., at 417): “[O]ne of the advantages of a survey is that it avoids a repetitious and unrepresentative parade of witnesses.” Accordingly, numerous courts have acknowledged the value and usefulness of surveys.

The American Association for Public Opinion Research (AAPOR) strongly opposes the release of personally-identifying information from surveys in litigation (and other) contexts.

In the context of litigation, a party to a case may try to obtain the names and contact information for respondents to an opposing party’s survey to discredit the survey through respondent depositions. Or one party to the case may sponsor a “survey” solely for the purpose of identifying class members who will subsequently be subpoenaed for deposition testimony. These practices not only violate the promise of confidentiality that is made to respondents when they agree to participate in a survey, but they may also have a chilling effect on respondent participation in research and undermine the public interest in the ability of surveys to elicit accurate information from respondents.

### AAPOR’s Position

The AAPOR Code of Professional Ethics and Practices explicitly calls for the protection of identifying information about survey respondents. This ethical obligation is not relieved when survey results are proffered in a legal proceeding. AAPOR urges all researchers to comply with its strict standards for protecting survey respondents’ privacy and confidentiality. It strongly condemns the practice of seeking such information in a litigation context. Courts have also acknowledged the importance of respondent confidentiality and generally agree that the industry’s ethical standards for confidentiality should be respected.

AAPOR believes confidentiality of survey respondents’ identities must be preserved to avoid harming the vital public interest in promoting survey research. AAPOR’s emphasis on respondent confidentiality is consistent with generally accepted standards and guidelines for survey research that ensure reliability and accuracy. These professional standards, adopted and implemented by AAPOR and other professional societies such as the Council of American Survey Research Organizations and the American Statistical Association, reflect the fact that confidentiality represents an important element of survey design.

Survey respondents are more likely to be “neutral witnesses” and to give accurate, unbiased information if they are assured confidentiality. Often, individuals will not participate in a study if they think the information will be used for any purpose other than research. Furthermore, even if some people agree to participate without the promise of confidentiality, the researcher cannot guarantee that those people form a

representative sample of the total population that is to be sampled. Thus, confidentiality not only helps to ensure unbiased responses, but also contributes to a representative sample.

When information about populations rather than individuals is relevant in litigation, a normal part of the foundation for admissibility is the requirement that the survey evidence be reliable. Since confidentiality of respondents' identities is essential to reliability, if there is no confidentiality, then there is no foundation for admissibility and the judicial process cannot benefit from the information provided by surveys. Because survey research plays an important role in both litigation and non-litigation contexts, the loss of the survey as a research tool deprives society of an important method of data collection. No other tool permits researchers to obtain similar data, and without that data, many issues affecting public and private interests cannot be comprehensively and intelligently analyzed.

AAPOR believes that excellence in survey practice requires that survey methods be fully disclosed—reported in sufficient detail to permit replication by another researcher – and that all data (subject to appropriate safeguards to maintain privacy and confidentiality) be fully documented and made available for independent examination. To promote that practice, AAPOR has established an exemplary and comprehensive list of discoverable information (encompassed in its Code of Professional Ethics and Practices and the Transparency Initiative) that nonetheless excludes the identity or identifying characteristics of respondents. AAPOR urges all researchers to comply with its disclosure standards.

According to the *Federal Reference Manual on Scientific Evidence* (at 418) “[T]he need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.” AAPOR agrees.

## We Can Help

AAPOR members who require assistance to protect respondent identities in a litigation setting should contact Rich Morin at [rmorin@pewresearch.org](mailto:rmorin@pewresearch.org) to explore whether an *amicus* brief filed by AAPOR is appropriate.

It is our obligation to do everything we can to protect the identities of our respondents and AAPOR supports the efforts of our members to meet this obligation.



## **EXHIBIT 6**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 24 2009

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STATE OF OKLAHOMA, *et al*

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

:  
:  
:  
:  
:  
:  
:  
:  
:

Case No. 4:05-CV-329-GKF-PJC

APPENDIX 1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT COURT OF OKLAHOMA**

---

STATE OF OKLAHOMA, *et al.*,

Plaintiffs,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

---

Case No. 4:05-CV-329-GKF-PJC

**BRIEF OF COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS,  
INC. AND AMERICAN ASSOCIATION OF PUBLIC OPINION RESEARCH AS  
AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE  
ORDER**

Duane L. Berlin, CT Bar No. 302216  
Lev & Berlin, P.C.  
200 Connecticut Avenue  
5<sup>th</sup> Floor  
Norwalk, CT 06854  
Telephone: (203) 838-8500  
Facsimile: (203) 854-1652

Attorney for Amici Curiae

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii.
I. INTRODUCTION .....	1
II. INTEREST OF THE AMICI CURIAE .....	1
A. Council of American Survey Research Organizations.....	1
B. American Association of Public Opinion Research....	2
C. Impact on Survey and Public Opinion Research.....	4
III. BACKGROUND OF MOTION FOR PROTECTIVE ORDER .....	4
IV. ARGUMENT .....	5
A. Public Interest Demands Confidential Treatment of Survey Research Sources .....	5
B. Courts Have Repeatedly Recognized the Importance and Legitimacy of Respondent Confidentiality .....	10
V. CONCLUSION .....	16
EXHIBITS	
A. CASRO: “Who we are. What we do.”	
B. CASRO Code of Standards for Survey Research	
C. AAPOR Code of Professional Ethics & Practices Best Practices for Survey and Public Opinion Research	

# TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Andrews v. Eli Lilly &amp; Co.</u> 97 F.R.D. 494 (N.D. Ill. 1983) .....	6, 10
<u>Apel v. Murphy</u> 70 F.R.D. 78 (D.R.I. 1976) .....	14
<u>Apicella v. McNeil Laboratories, Inc.</u> 66 F.R.D. 78 (E.D.N.Y. 1975) .....	7
<u>Applera Corporation v. MJ Research, Inc.</u> 389 F. Supp. 2d 344 (D. Conn. 2005) .....	9
<u>Army Times Pub. Co. v. Dept. of Air Force</u> 998 F.2d 1067 (D.C. Cir. 1993) .....	10
<u>Baker V. F. &amp; F. Investment</u> 470 F.2d 778 (2d Cir. 1972) <u>cert. denied</u> , 411 U.S. 966 (1973) .....	7
<u>Cimino v. Raymark Industries, Inc.</u> 751 F. Supp. 649 (E.D. Tex. 1990) .....	6, 9
<u>Comm-Tract Corp. v. Northern Telecom, Inc.</u> 143 F.R.D. 20 (D. Mass. 1992) .....	14
<u>Deitchman v. E.R. Squibb &amp; Sons, Inc.</u> 740 F.2d 556 (7th Cir. 1984) .....	11
<u>Dow Chemical Co. v. Allen</u> 672 F.2d 1262 (7th Cir. 1982) .....	6
<u>EEOC v. U. of Notre Dame de Lac</u> 715 F.2d 331 (7th Cir. 1983) .....	14
<u>Farnsworth v. Procter &amp; Gamble Co.</u> 758 F.2d 1545 (11th Cir. 1985) .....	10
<u>Harris v. Upjohn Co.</u> 115 F.R.D. 191 (S.D. Ill. 1987) .....	14
<u>In re Data General Corp. Antitrust Litigation</u> MDL 369 (N.D. Cal. 1981) .....	10
<u>In re Eli Lilly &amp; Co., Prozac Products Lit.</u> 142 F.R.D. 454 (S.D. Ind. 1992) .....	11
<u>Marrese v. American Academy of Orthopedic Surgeons</u> 726 F.2d 1150 (7 <sup>th</sup> Cir. 1984).....	11

	<u>Page</u>
<u>Mt. Sinai School of Medicine v. The American Tobacco Co.</u> 880 F.2d 1520 (2d Cir. 1989) .....	10
<u>Plough, Inc. v. National Academy of Sciences</u> 530 A2d 1152 (D.C. Ct. App. 1987) .....	14
<u>Richards of Rockford Inc. v. Pacific G.E. Co.</u> 71 F.R.D. 388 (N.D. Cal. 1976) .....	10, 13
<u>Solarex Corp. v. Arco Solar, Inc.</u> 121 F.R.D. 163 (E.D. N.Y. 1988) .....	11
<u>Star Editorial, Inc. v. USDC for the Central District of California</u> 7 F.3d 856 (9th Cir. 1993) .....	7
<u>Summit Technology, Inc. v. Healthcare Capital Group, Inc.</u> 141 F.R.D. 381 (D. Mass. 1992) .....	14
<u>Thornbury v. Delta Airlines, Inc.</u> No. C-76-0798 RFP (N.D. Cal. 1979) .....	10
<u>Times Journal Co. v. Department of Air Force</u> 793 F. Supp. 1 (D.D.C. 1991) .....	10
<u>United States v. ALCOA</u> 35 F. Supp. 820 (S.D. N.Y. 1940) .....	14
<u>United States v. Angiulo</u> 847 F.2d 956 (1st Cir. 1988) .....	14
<u>United States v. IBM Corp.</u> 83 F.R.D. 92 (S.D. N.Y. 1979) .....	10
<u>United States of America; State of California,</u> <u>ex rel. v. Montrose Chemical Corp. of Cal. et al.</u> Case No. CV 90-3122 AAH (C.D. Cal. 1995) .....	15
<u>Upjohn Company v. United States</u> 449 U.S. 383 (1981) .....	8
<u>Wright v. Patrolmen's Benevolent Assn.</u> 79 F.R.D. 161 (S.D. N.Y. 1976) .....	10
<u>Zippo Mfg. Co. v. Rogers Imports, Inc.</u> 216 F. Supp. 670 (S.D. N.Y. 1963) .....	14
<b>Federal Rules</b>	
Fed. R. Civ. P. 26.....	11, 13
Fed. R. Evid. 501 .....	11, 13

	<u>Page</u>
<b>Miscellaneous</b>	
H. Barksdale, <u>The Use of Survey Research Findings as Legal Evidence</u> (1957) .....	9, 13
Federal Judicial Center, <u>The Reference Manual on Scientific Evidence</u> , (2 <sup>nd</sup> , 2000) .....	2, 8
W. Finfrook & D. Spradlin, <u>How to Organize and Present Statistical Evidence</u> , 24 Prac. Law. 67 (1978) .....	9
M. Finkelstein, <u>Quantitative Methods in Law</u> (1978).....	9
M. Hansen, W. Hurwitz & W. Madow, <u>Sample Survey Methods and Theory</u> (1953) .....	13
Hendel & Bard, <u>Should There Be a Researcher's Privilege?</u> 59 Am. A. U. Professors Bull. 398 (1973) .....	8
I. McCarthy, <u>Trademarks and Unfair Competition</u> , (2d ed. 1984) .....	9
McCormick, <u>Evidence</u> (Cleary ed. 1972) .....	8
Note, <u>Protection from Discovery of Researcher's Confidential Information</u> , 9 Conn. L. Rev. 425 (1977) .....	14
Wigmore, <u>Evidence</u> (McNaughton rev. ed. 1961) .....	12

## I. INTRODUCTION

The Council of American Survey Research Organizations, Inc. (“CASRO”) and the American Association for Public Opinion Research (“AAPOR”) appear in this litigation as amici curiae for the limited purpose of supporting plaintiffs’ motion for a protective order protecting the identities of respondents and any respondent identifiable information from disclosure. For the reasons set forth below, CASRO and AAPOR urge that the Court issue a protective order protecting the identities of respondents and any respondent identifiable information from disclosure. Mandating the disclosure of respondent identifiable information would be devastating to all forms of survey research and contrary to public interest. The reliability of any survey evidence may be fully and fairly litigated by the parties without infringing upon the privacy of survey respondents and without threatening important social interests advanced by survey research.

## II. INTERESTS OF THE AMICI CURIAE.

### A. CASRO:

CASRO is a not-for-profit trade association representing over three hundred (300) United States survey research companies engaged in professional survey research regarding a wide variety of technical, scientific, economic, and other public and private issues. (See Exhibit A.) CASRO’s members are in aggregate responsible for the overwhelming majority of the survey research conducted each year in the United States. Two of CASRO’s principal purposes are (1) to promote the establishment, maintenance, and strict observance of professional and ethical standards in survey research and (2) to protect the privacy interests of those who volunteer to participate in survey research activities. These principles reflect the social utility of survey research and our need to protect this valuable resource.

In furtherance of its purpose, CASRO has established a detailed Code of Standards for Survey Research (the “CASRO Code”) (set forth herein as Exhibit B), which establishes specific requirements and responsibilities for professional survey researchers to maintain the confidentiality of information that might reveal the identities of survey respondents. The



CASRO Code includes carefully drawn rules of ethical and professional conduct for survey research organizations. Among other things, the CASRO Code provides that the survey research organization has the responsibility to protect the identities of respondents and to insure that individuals and their responses cannot be related in published or publicly-available survey reports or other information. See Section A(3) of the CASRO Code. The CASRO Code strictly limits access to information identifying respondents, and imposes restrictions upon post-research retention of such identifying information. See Section A(3) of the CASRO Code. Further, the CASRO Code states that “the use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-Identifiable Information or lessen the importance of Respondent anonymity.” See Section A(3)(f) of the CASRO Code. The CASRO Code’s provisions regarding confidentiality are consistent with professional practice and standards within the survey research industry, as well as consistent with the legal trend recognizing the importance of this issue as evidenced by reasoned judicial precedent. In acknowledgment of this legal trend, *The Reference Manual on Scientific Evidence*, published by the Federal Judicial Center, directs that based on the ethical obligations of survey researchers, all identifying information, such as a respondent’s name, address and telephone number, should be redacted to ensure respondent confidentiality. Federal Judicial Center, *The Reference Manual on Scientific Evidence* (2<sup>nd</sup> 2000) (the “Reference Manual”).

B. AAPOR:

AAPOR is a leading professional organization of public opinion and survey research professionals in the United States, consisting of seven (7) chapters, with members from academia, media, government, the non-profit sector and private industry. AAPOR’s members embrace the principle that public opinion research is essential to a healthy democracy, providing information crucial to informed policymaking and giving voice to the nation’s beliefs, attitudes and desires. Two of AAPOR’s principal purposes are (1) to promote the establishment, maintenance, and strict observance of high ethical and professional standards in survey and public opinion research and (2) to protect the privacy interests of respondents.

In furtherance of its purpose, AAPOR has established a detailed Code of Professional Ethics and Practices (the “AAPOR Code”) and the Best Practices for Survey and Public Opinion Research (“AAPOR Best Practices”) (both set forth herein as Exhibit C), both of which establish specific responsibilities for professional survey and public opinion researchers to maintain the confidentiality of information that might identify survey respondents. The AAPOR Code includes carefully drawn rules of ethical and professional conduct for survey and public opinion research organizations. Among other things, the AAPOR Code provides that the survey and public opinion research organizations shall respect respondents’ concerns about their privacy, shall hold as privileged and confidential all information that might identify a respondent with his or her responses and shall not disclose or use the names of respondents for non-research purposes unless the respondents grant permission for such disclosure or use. See Section II(D) of the AAPOR Code. Further, similar to the CASRO Code, the AAPOR Code explicitly states that the ethical and professional obligation to maintain the confidentiality of respondent identifiable information is not extinguished or relieved by legal proceedings. See Section II(D)(6) of the AAPOR Code. The AAPOR Code’s provisions regarding confidentiality are consistent with professional practice and standards within the survey research industry, as well as consistent with the legal trend recognizing the importance of this issue as evidenced by reasoned judicial precedent.

Similarly, the AAPOR Best Practices establish important procedures and practices for the industry. The AAPOR Best Practices require research organizations to establish clear intentions and meticulous procedures to assure privacy of respondents and the confidentiality of the information provided by respondents. The AAPOR Best Practices state that “Exemplary survey research practice requires that one literally do ‘whatever is possible’ to protect the privacy of research participants and to keep collected information they provide confidential or anonymous.” Additionally, the AAPOR Best Practices require that all interviewers and other research staff be carefully trained and indoctrinated to uphold and maintain the confidentiality of respondents’ identities and information they provide and take/sign an explicit oath or pledge of confidentiality to do so before beginning work.

C. Impact on Survey and Public Opinion Research.

Adherence to these industry codes, guidelines and principles impose substantial costs and burdens upon survey and public opinion researchers. The willingness of survey and public opinion researchers to accept and assume such additional costs and burdens reflects the great importance that the survey and public opinion research industry places on respondent confidentiality and indirectly the great importance that the clients of survey and public opinion researchers and the general public, place on respondent confidentiality. Without such protection, members of the public who are asked to participate in survey projects may be reluctant to do so because of fear of harassment and possible invasions of privacy. Those who do agree to participate may respond less candidly or reliably in order to portray themselves in a more favorable light and may represent an inappropriate or unrepresentative population sample. Such a result would create a distortion; it would devalue the benefit of statistical data, rendering it unnecessarily deficient.

Confidentiality, therefore, is an essential prerequisite to reliable and accurate survey and public opinion research. Such research contributes significantly to the public interest by assisting the analyses of a wide variety of technical, scientific, economic, sociological, psychological, and political issues. In short, survey and public opinion research is the lifeblood in this information age.

As leading representatives of the United States survey and public opinion research industry, CASRO and AAPOR have direct and unique interests in articulating the strong need for preserving the confidentiality of survey data that would reveal the identity of individual respondents. This memorandum is submitted by CASRO and AAPOR to describe the relevant public needs for, and advantages of, such confidentiality.

### **III. BACKGROUND OF MOTION FOR PROTECTIVE ORDER**

CASRO and AAPOR understand that the proceedings in this litigation are subject to various confidentiality provisions. Indeed, CASRO's and AAPOR's interest in this case is limited to the issue of respondent confidentiality as it is herein challenged. CASRO and AAPOR understand that the defendant in this case seeks disclosure of the identities of the respondents in connection with surveys, focus groups and interviews conducted by Status Consulting, Consumer Logic, Inc., Westat, Inc., and Wilson Research Strategies, as well as

information which would connect the individual respondent with his or her specific responses. CASRO and AAPOR also understand that in this survey research, the respondents were assured that their responses would not be attributed to them personally and that their identities would remain confidential. In accordance with professional survey research standards, the State of Oklahoma, Status Consulting, Consumer Logic, Inc., Westat, Inc., and Wilson Research Strategies have declined to breach that assurance of confidentiality. CASRO and AAPOR further understand that the plaintiffs have provided substantial materials relating to the results, methods and manner of the survey research, excluding respondent-identifiable information.

Accordingly, it is CASRO's and AAPOR's belief that important public interests demand that the court issue a protective order protecting the identities of respondents and respondent identifiable information from disclosure. Some or all of the survey respondents undoubtedly agreed to participate in these surveys only because of the assurance of confidentiality and that their responses would not be connected with their identities. The interests involved in this matter therefore are not merely those of the litigants, nor even those of the survey and public opinion research industries. Those interests are relevant and important, but no less important are the interests of the survey respondents themselves and the public in general. As we explain below, courts have often held that in situations similar to the situation in this matter both the public interest and the legitimate private expectations of survey respondents require careful protection of respondent identifiable information.

#### **IV. ARGUMENT**

##### **A. Public Interest Demands Confidential Treatment of Survey Research Sources.**

The public plainly has an important interest in the conduct and reliability of survey and public opinion research. Such research is now widely used by universities (in the fields of medicine and social sciences, for example), corporations, research institutes, litigants, as well as governmental agencies, to assist in the analyses of technical, scientific, economic, and other questions. No other tool permits researchers to obtain comparable data. Without such data many issues affecting both public and private interests could not be addressed as intelligently or resolved as reliably. There is, as one court rightly summarized the situation, "undoubtedly a



compelling social interest in promoting research.” Andrews v. Eli Lilly & Co., 97 F.R.D. 494, 500 (N.D. Ill. 1983). See also, Dow v. Allen, 672 F.2d 1262 (7th Cir. 1982).

In Cimino v. Raymark Industries, Inc., 751 F. Supp. 649 (E.D. Tex. 1990), the court articulated the value of survey data as a unique and important research tool:

“... the science of statistics is now universally accepted, exerting the most profound influence on our daily lives. 'The objective of statistics is to make an inference about a population of interest based on information obtained from a sample ... of that population.' For example, statistical sampling plays a critical role in medical and pharmaceutical research. . . [a]s in medical research, private industries employ statistical techniques in the development and testing of new products . . . [it is used] for many diverse tasks, such as maintaining the dimension requirements for the plastic cards used in automatic bank teller machines or testing the specific gravity of laundry detergent. Statistical techniques are particularly valuable in the field of marketing . . . the insurance industry . . . education . . . in the administration and evaluation of various standardized tests . . . [and] in the political arena.” Id. at 660.

It is therefore clear that quantitative research, as well as qualitative research, is extremely valuable; it cannot however be effectively conducted without meaningful assurances of confidentiality to cooperative sources. Such assurances are essential for two purposes. First, many individuals will not participate in a study if they believe that the information given by and attributed to them may be used for purposes other than research. For many respondents, any rewards for participation in a survey, which typically are merely the satisfaction of having provided helpful information, would not outweigh the real or imagined risks and burdens of public disclosure. Furthermore, even if some individuals might still be induced to participate in a research project without assurances of strict confidentiality, the researcher could not be certain that those who do agree to participate fairly represent the larger population that is to be sampled. The simple fact is that survey and public opinion research must guarantee strict confidentiality in order to preserve the representative nature of his or her research sample and correspondingly the value of the quantitative and qualitative data. Given the enormous value of survey data, and the social importance inherent therein, protection of the statistical source, i.e., survey respondents, is of utmost importance, and only for an extremely compelling reason should a court jeopardize the usefulness of survey results by infringing on the confidential relationship which exists between the researcher and respondent.

In many respects the researcher's needs in terms of source protection is analogous to those of a news reporter. In both situations, the researcher and the reporter face the reality that without meaningful promises of confidentiality they would have many fewer sources of reliable information. Both the researcher and the reporter depend for their effectiveness upon the willingness of the public to volunteer help; neither can offer anything in return except anonymity and protection against harassment.<sup>1</sup> The news reporter is generally afforded a constitutionally-derived privilege to maintain the confidentiality of his sources unless the party seeking disclosure can show a compelling need, which is unlikely to exist in most civil actions. See Baker V. F. & F. Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D. N.Y. 1975); and Star Editorial, Inc. v. USDC for the Central District of California, 7 F.3d 856 (9th Cir. 1993).<sup>2</sup>

Another important reason to preserve strict confidentiality of the identities of research respondents is to protect the results of the research against inaccuracies or bias. In this respect, survey research is analogous to the communications between attorney and client, where the courts have long recognized the overriding importance of encouraging full, open and honest disclosure by promising and respecting the communications' confidentiality. See, e.g., Upjohn Company v. United States, 449 U.S. 383 (1981); McCormick, Evidence, Section 87, at 176 (Cleary Ed. 1972). In survey research, respondents who believe that their answers may be publicly attributed to them may hedge, qualify or even wholly alter their responses to avoid harassment or to present themselves or others in a more favorable light. Consciously or not, the candor of their responses may be inhibited by the likelihood of public disclosure.

---

<sup>1</sup>The same principles apply to informers who reveal criminal or other abuses, and the public interests supporting protection for such informers also support protection for the privacy of survey respondents.

<sup>2</sup>In these cases, there was strong evidence that the reporters' confidential sources could provide information important for the resolution of the underlying disputes. Nonetheless, the courts held that the public interest in confidentiality outweighed the litigants' individual interests in disclosure.

disclosure by promising and respecting the communications' confidentiality. See, e.g., Upjohn Company v. United States, 449 U.S. 383 (1981); McCormick, Evidence, Section 87, at 176 (Cleary Ed. 1972).

Another important reason to preserve strict confidentiality of the identities of research respondents is to protect the results of the research against inaccuracies or bias. In this respect, survey research is analogous to the communications between attorney and client, where the courts have long recognized the overriding importance of encouraging full, open and honest disclosure by promising and respecting the communications' confidentiality. See, e.g., Upjohn Company v. United States, 449 U.S. 383 (1981); McCormick, Evidence, Section 87, at 176 (Cleary Ed. 1972). In survey research, respondents who believe that their answers may be publicly attributed to them may hedge, qualify or even wholly alter their responses to avoid harassment or to present themselves or others in a more favorable light. Consciously or not, the candor of their responses may be inhibited by the likelihood of public disclosure.

To diminish this natural impulse, the researcher must credibly reassure the respondent that neither approval nor disapproval will attach to his responses. The respondent must be reliably assured that his response will be combined with those of many others in the form of statistical data, the overall significance of which will be scientifically evaluated on the basis of cumulative trends. The respondent must be, and must understand himself to be, the source of statistical data and not a witness. He must believe himself to be merely one datum, submerged among many others. To provide such an assurance, the researcher must effectively guarantee the respondent that his individual identity will remain strictly confidential.

The importance of confidentiality to ensure the free flow of information and to provide the foundation for unbiased survey data is widely recognized by professional researchers. See generally, Hendel & Bard, Should There Be a Researcher's Privilege?, 59 Am. A. U. Professors Bull. 398 (1973); See also The Reference Manual. Moreover, because the credibility of any researcher's promise of confidentiality is affected by the conduct of other researchers, any breach of confidentiality by any researcher, whether because of a court order or any other cause, adversely affects all survey research. Accordingly, CASRO and AAPOR have incorporated strict confidentiality provisions in their respective codes of standards, and the U.S. survey and public opinion research industry has embraced them wholeheartedly. The promises

of confidentiality that professional researchers make both to their respondents and to their fellow research professionals are only meaningful if courts recognize the public interest in validating those promises. In Applera Corporation v. MJ Research Inc., 389 F. Supp. 2d 344, 350 (D. Conn. 2005), the court acknowledged researchers' ethical prohibition on disclosure of the actual individual identities of the survey respondents as a legitimate need for confidentiality.

Our society has a strong public interest in protecting the confidential relationship between researcher and respondent. It has no interest in discouraging and inhibiting that relationship by unwarranted intrusions upon the respondent's privacy. As described above, survey research plays an increasingly important role in public and private planning.

The judicial process itself is a significant beneficiary of survey and public opinion research. In Cimino v. Raymark Industries, Inc., 751 F. Supp. 661 (E.D. Tex. 1990) it was reported that "... [a]cceptance of statistical evidence is now commonplace in the courts ... [it] occurs frequently in Title VII employment discrimination cases, most often demonstrating a pattern or practice of discrimination on the part of the employer ... it has been used in anti-trust cases to project pre and post merger market share and market concentration ... [and] in trademark infringement suits [it] is useful in determining consumer product identification and confusion regarding trademarks ... ." These and other valuable applications of survey research<sup>3</sup> can only be effectively fostered, as the public interest plainly requires, if the confidentiality necessary for their continued success is guaranteed. CASRO and AAPOR urge, therefore, that respondent confidentiality be afforded the protection it needs and that in the instant case the Court issue a protective order protecting the identities of respondents and respondent identifiable information from disclosure.

---

<sup>3</sup>See generally M. Finkelstein, Quantitative Methods in Law (1978), quantitative techniques of proof as applied in various legal claims; H. Barksdale, The Use of Survey Research Findings as Legal Evidence (1957) (same); W. Finfrook & D. Spradlin, How to Organize and Present Statistical Evidence, 24 Prac. Law. 67, 67-68 (1978), antitrust evidence increasingly economic and statistical; I. McCarthy, Trademarks and Unfair Competition, Section 32:46 ff. (2d ed. 1984), important and growing role of survey evidence.



B. Courts Have Repeatedly Recognized the Importance and Legitimacy of Respondent Confidentiality.

The important public interest in the confidentiality of research respondents' identities has been frequently recognized by the courts. For example, in a survey regarding economic issues and military personnel, the United States District Court for the District of Columbia found that “. . . the survey presents a unique opportunity for candid exchange. . . . [i]f survey respondents are not promised confidentiality they will . . . be less likely to express their opinions candidly, thus depriving . . . policy makers of valuable and necessary information. The absence of these candid opinions would likely result in the implementation of . . . policies which do not respond to the actual needs of Department personnel.” Times Journal Co. v. Department of Air Force, 793 F. Supp. 1 (D.D.C. 1991). See also Army Times Pub. Co. v. Dept. of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).

Further support is found in Richards of Rockford Inc. v. Pacific G. & E. Co., 71 F.R.D. 388 (N.D. Cal. 1976); where the court rejected a demand for confidential data precisely because effective assurances of confidentiality are imperative for the continuation of accurate and reliable research. Similarly, the court in Farnsworth v. Procter & Gamble Co., 758 F.2d 1545 (11th Cir. 1985), rejected an effort to compel the disclosure of respondent identities because such disclosures could have seriously damaged the voluntary reporting program involved there. In the same way, the court in Andrews v. Eli Lilly & Co., 97 F.R.D. 494, 500 (N.D. Ill. 1983), found that such disclosures might well “chill []” research projects that depend for their effectiveness on strict confidentiality. In Mt. Sinai v. American Tobacco, the Second Circuit Court upheld the redaction of the identities of medical subjects in health studies. Mt. Sinai School of Medicine, et al. v. The American Tobacco Company, et al., 880 F.2d 1520 (2d Cir. 1989). See also In re Data General Corp. Antitrust Litigation, MDL 369 (N.D. Cal. 1979); Thornbury v. Delta Airlines, Inc., No. C-76-0798 RFP (N.D. Cal. 1979); United States v. IBM Corp., 83 F.R.D. 92, 95n. (S.D. N.Y. 1979); Wright v. Patrolmen's Benevolent Assn., 79 F.R.D. 161, 163 (S.D. N.Y. 1976).

The courts in deciding cases similar to the instant case, wherein they must choose between protecting the identities of research sources and compelling their disclosure, necessarily engage in a balancing test between two competing interests. The court in Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163 (E.D. N.Y. 1988) (a case wherein the discovery of the identity of research sources was denied) articulates the balancing process: “Under Rule 26 of the Federal Rules of Civil Procedure, the court is required to compare the potential hardship to the party against whom discovery is sought if discovery is granted, with that to the party seeking discovery if it is denied.” The court goes on to recognize that the court must balance the need for the information against the injury that would result from disclosure, and “[i]n balancing conflicting interests, courts are admonished not only to consider the nature and magnitude of the competing hardships, but also to ‘give more weight to interests that have a distinctively social value than to purely private interests.’” Id. at 169. (Quoting from Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1159 (7<sup>th</sup> Cir. 1984) See also, Summit Technology, Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381 (D. Mass. 1992) wherein the court rightly recognized the importance of the public’s interest in the free flow of information and the role it plays in the court’s application of the balancing test in deciding discovery matters affecting non-party research sources.

All these cases illustrate the courts’ recognition that the confidentiality of respondent identities is consistent with the respondents’ own privacy expectations and, even more importantly, in the public interest. See also Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556 (7<sup>th</sup> Cir. 1984); In re Eli Lilly & Co., Prozac Products Lit., 142 F.R.D. 454 (S.D. Ind. 1992).

Relatedly, the inappropriateness of compelling the disclosure of respondent identities is further confirmed by the rules that have been developed to decide whether a privilege should be granted. Under Fed. R. Evid. 501, federal courts are required to decide such issues in nondiversity cases by applying the common law, as interpreted in light of “reason and experience.” A four (4) part test has been developed for this purpose. As articulated in Wigmore’s classic formulation, those standards are:

- (1) The communications must originate in a confidence that they will not be disclosed.

- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

See 8 Wigmore, Evidence Section 2285 at 527 (McNaughton rev. ed. 1961).

The relationship between researcher and survey respondent clearly satisfies all four branches of the test. The confidentiality of that relationship is an essential prerequisite to its success; it is plainly in the public interest to foster the relationship; the communications originated in a confidence that the respondents would not be identified; and any breach of confidentiality would result in public losses that would far outweigh any short-term benefit that might be thought to result from an invasion of the respondents' privacy. In these circumstances, a privilege is obviously appropriate, and a fortiori it would be contrary to the public interest to breach the relationship's confidentiality by complying with defendants' discovery request.

Moreover, no litigant has a genuine need to discover the identities of research respondents (or information which would match sources to their individual responses). If a litigant wishes to challenge survey evidence, it can readily attempt to do so without breaching the confidentiality promised to the survey respondents. It can, for example, depose some or all of the researchers who conducted the research, or retain its own expert regarding the proper conduct of such research, or conduct its own research to check the accuracy of the survey's findings. Such steps offer ample protection to a litigant's interests without any breach of respondent confidentiality.

Efforts to breach survey respondents' privacy are based upon a misconception of the function of such respondents. Survey respondents are not witnesses, but merely sources of statistical data. Survey and public opinion research does not depend on the unique or personal characteristics of each individual in the sample; its usefulness lies instead in the evidence it offers of statistical trends; a summary description of the degree to which certain characteristics are common to the population under study. It provides an entirely different kind of information from the usual testimony of witnesses. Disclosure of the individual identities of survey

respondents could not “improve” the statistical information offered by the survey; it would only supply access to the unique and, usually irrelevant, characteristics of individual respondents.

Moreover, survey research is conducted on the basis of standardized methodologies for selecting a representative sample from the population of possible subjects, designing the instruments to record the data, gathering data and analyzing the results. See, e.g., H. Barksdale, The Use of Survey Research Findings as Legal Evidence (1957); M. Hansen, W. Hurwitz & W. Madow, Sample Survey Methods and Theory (1953). Accordingly, the weakness of specific methodologies, and any cures for those weaknesses, are widely known to experts in the field. In this case, for example, defendants can cross-examine plaintiffs’ experts on the methodologies used in performing the surveys, focus groups and interviews, and can engage its own expert to testify regarding any shortcomings in their methods. Since there is, in CASRO’s and AAPOR’s view, no professional objection to the disclosure of all of the data and records regarding the survey and public opinion research, other than that which identifies the source(s) and matches identity with a response(s), the defendants’ expert could reanalyze the resulting data. Finally, no litigant is confined merely to criticism of his opponent’s research. The litigant can draw his own samples and replicate the research. Alternatively, the litigant can counter the opponent’s research by conducting his own study using another design or methodology.

The defendants have numerous methods available to them by which they might seek to challenge the underlying methods and findings. The availability of those alternative methods is analogous to Richards of Rockford, Inc. v. Pacific G. & E. Co., 71 F.R.D. 388 (N.D. Cal. 1976); where there was an attempt to discover respondent identifiers in interviews, obtained under a pledge of confidentiality, conducted by an academic researcher of PG&E’s employees regarding PG&E’s decision to purchase equipment manufactured by Richards. The court was unable to apply a privilege under federal common law because the case arose in diversity under state law, See Fed. R. Evid. 501, but nonetheless the court denied the motion to compel by applying principles derived from Fed. R. Civ. Proc. 26. Explaining its refusal to permit the discovery, the court stated that the case was a civil proceeding and that the relevant facts were “independently and readily adducible” so that the information sought [was] largely supplementary.” Id. at 390. The court emphasized that any contrary rule requiring the disclosure of respondent identities would “severely stifle research into questions of public



policy . . .” Id.; See also Apel v. Murphy, 70 F.R.D. 651, 653 (D.R.I. 1976), discovery related to an insubstantial assertion may be refused; Summit Technology, Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381 (D. Mass. 1992), while identity of research source was relevant for discovery purposes, the identity was more tangential than primary; Note, Protection from Discovery of Researcher's Confidential Information, 9 Conn. L. Rev. 425 (1977).

Furthermore, it has been held that survey evidence is admissible, notwithstanding the confidentiality of the respondents’ identities, whenever the survey was conducted by professionals according to professional standards and was disclosed in a fashion that permits the court and opposing party to evaluate the professionalism and reliability of the survey. See, e.g., Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 683-84 (S.D. N.Y. 1963); United States v. ALCOA, 35 F. Supp. 820, 823-28 (S.D. N.Y. 1940).

In these circumstances, public policy mandates against the intrusion on the confidential nature of the researcher/source relationship. That is, the public’s need, in this age of information, for professional, reliable research far outweighs the defendant’s need for survey respondent identifiers. See generally, EEOC v. U. of Notre Dame de Lac, 715 F.2d 331 (7th Cir. 1983); Harris v. Upjohn Co., 115 F.R.D. 191 (S.D. Ill. 1987); United States v. Angiulo, 847 F.2d 956 (1st Cir. 1988); Plough, Inc. v. National Academy of Sciences, 530 A.2d 1152 (D.C. Ct. App. 1987).

It would be remiss not to mention Comm-Tract Corp. v. Northern Telecom, Inc., 143 F.R.D. 20 (D. Mass. 1992). In Comm-Tract Corp, the court evaluated the need for survey respondent identifiers based on the manner the particular survey would be utilized as evidence. The court bases its evaluation on the notion that the survey report was hearsay. This ruling is not authority in this District. CASRO and AAPOR vigorously disagree with the notion that a survey report is hearsay. The survey report is the raw data in the aggregate, in conclusory form, based on expert analysis and management by the survey researcher. The survey researcher is a social scientist. The declarant of the evidence offered is the survey researcher, not the respondents in the survey. The survey and public opinion researcher(s) in the instant case are available for cross-examination and confrontation by the defendant.

In February 1995, CASRO appeared as amicus curiae on the limited issue of respondent confidentiality in United States of America; State of California, ex rel. v. Montrose Chemical Corporation of California, et al., Case No. CV 90-3122 AAH, U.S. Dist. Court, Central Dist. of California. In that case, before it was later dismissed for unrelated reasons, the Honorable Harry V. Peetris, Special Master, ruled on this identical issue. During the discovery hearing, Judge Peetris stated, in sum and substance, that although respondent identifiers should be turned over, it would be only for the limited purpose of re-surveying the respondents; not for deposition or trial or investigation. He stated, “. . . and in balancing the need for the information against the injury to the public, generally, I find that confidentiality must be retained” (from Transcript of Hearing, U.S.; Cal. v. Montrose et al., CV 90-3122 AAH, Feb. 28, 1995, p. 12, lines 23 and 24).

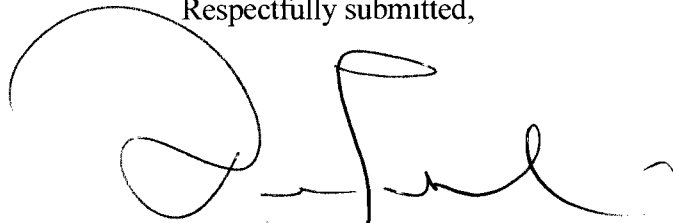
Finally, in contrast to these substantial public interests, litigants have only the most insubstantial basis for seeking to breach the respondent’s confidentiality. In this case, the plaintiffs have been provided with a substantial amount of materials and information, on the results, methods and manner of the survey and public opinion research, which are more than sufficient to advance any argument questioning the reliability of the research. Therefore, disclosing respondent identifiable information does not provide any advantage, whether material or not, to aid the defendants in this case. Disclosing respondent-identifiable information would seriously erode important public interests and depart unjustifiably from well-settled and soundly reasoned legal principles. Accordingly, we respectfully ask this Court to issue a protective order protecting the identities of respondents and respondent identifiable information from disclosure. At trial, the parties may dispute the weight and significance of the survey evidence without the use of respondent-identifiable information.

## V. CONCLUSION

Disclosure of the identities of survey research respondents and of respondent-identifiable information would invade a confidential relationship whose continuing privacy is of vital social importance and essential to the public interest. It is urged that this Court not jeopardize the usefulness, validity and reliability of survey results. Accordingly, we respectfully urge that this Court issue a protective order protecting the identities of respondents and respondent identifiable information from disclosure.

Dated: February 23, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Duane L. Berlin', with a large, stylized initial 'D'.

Duane L. Berlin, CT Bar No. 302216  
LEV & BERLIN, P.C.  
200 Connecticut Avenue  
5<sup>th</sup> Floor  
Norwalk, CT 06854  
(203) 838-8500

Attorney for Amici Curiae  
Council of American Survey  
Research Organizations, Inc.  
and American Association of  
Public Opinion Research

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of February, 2009, I served a true and correct copy of this Amicus Brief in Support of Plaintiff's Motion for a Protective Order on the Clerk of Court for filing and a copy of this Amicus Brief in Support of Plaintiff's Motion for a Protective Order on the following:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	
<b><u>Counsel for State of Oklahoma</u></b>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmLawok.com



Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<b><u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u></b>	
John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
FAEGRE & BENSON, LLP	
Dara D. Mann	dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	ktucker@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com

Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	
John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<b><u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., &amp; Cobb-Vantress, Inc.</u></b>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com

David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	m
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<b><u>Counsel for National Chicken Council; U.S. Poultry and Egg Association &amp; National Turkey Federation</u></b>	

John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<b><u>Counsel for Arkansas Farm Bureau Federation</u></b>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<b><u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u></b>	

# EXHIBIT A

We represent 350 research companies in the U.S., the Americas and abroad, all of which must abide by the CASRO Code of Standards, the research industry's enforceable ethical standard for businesses for 35 years.

**HOME | ABOUT US | FOR THE PUBLIC/MEDIA | GOV'T & PUBLIC AFFAIRS | EVENTS | CAREERS**

## **CASRO - Who We Are - What We Do**

Founded in 1975, the Council of American Survey Research Organizations (CASRO) represents over 300 companies and research operations in the United States and abroad.

CASRO is the "Voice and Values" of the survey research industry.

- We promote a rigorous code of conduct that enhances the image of survey research and protects the public's rights and privacy
- We advocate our industry's effective self-regulation when legislators propose bills that threaten legitimate survey research
- We champion legitimate research companies and marginalize disreputable research "pretenders" who threaten to tarnish the industry's reputation and alienate respondents

CASRO requires members to adhere to the CASRO Code of Standards and Ethics for Survey Research, a tough, internationally-cited set of standards, which has long been the benchmark for the industry.

CASRO provides its members with numerous benefits, including access to invaluable industry data, and superb staff training and networking opportunities at workshops and conferences throughout the country.

CASRO has achieved unique status among all North American associations by serving as an active representative on numerous global initiatives and as chief liaison with several leading international associations.

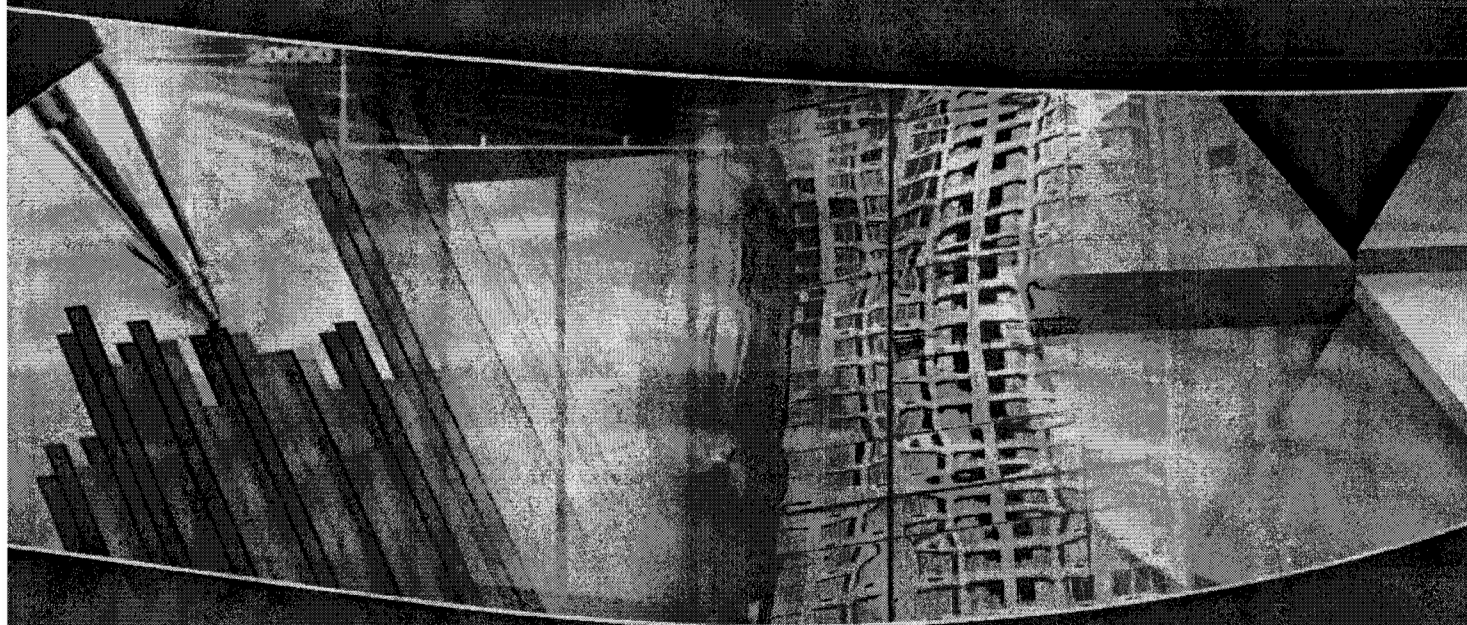
CASRO's "Research Career Development" initiative reaches out to colleges and universities with information and resources to attract the best and brightest students and to make the survey research profession a career of choice.

# **EXHIBIT B**



CASRO<sup>®</sup>

*CODE OF STANDARDS AND ETHICS  
FOR SURVEY RESEARCH*





---

Council of American Survey Research Organizations® (CASRO®)  
170 North Country Road, Suite 4  
Port Jefferson, New York 11777 USA  
(631) 928-6954 \* Fax: (631) 928-6041  
www.casro.org \* email: casro@casro.org

©1997 - 2009 CASRO - Council of American Survey Research Organizations. All Rights Reserved. First Adopted 1977. Revised as needed. This document is protected under the copyright laws of the United States and other countries and may not be reprinted or reproduced without permission from CASRO, provided that it may be referenced and quoted with attribution and credit given to CASRO.

The Voice and Values of Research

**CASRO**  
COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS®

CODE OF STANDARDS AND ETHICS FOR SURVEY RESEARCH

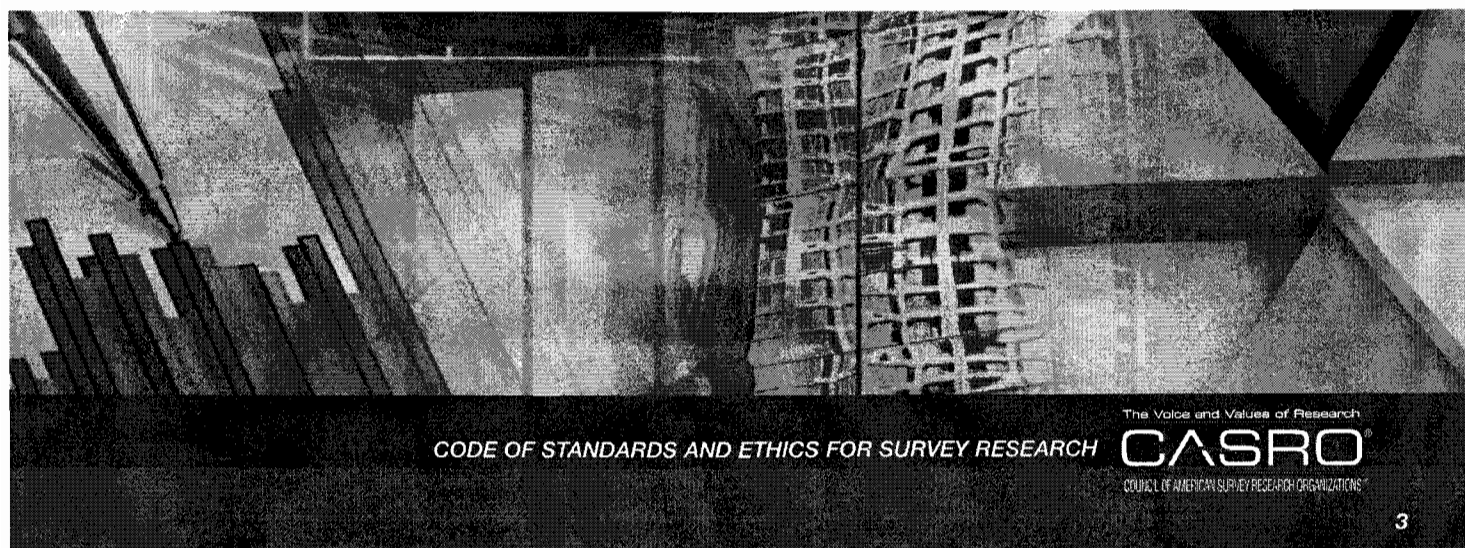
## TABLE OF CONTENTS

Introduction .....	4
I. Responsibilities to Respondents .....	5
A. Confidentiality .....	5
B. Privacy and the Avoidance of Harassment .....	7
Internet Research .....	8
Privacy Laws and Regulations .....	14
II. Responsibilities to Clients .....	16
III. Responsibilities in Reporting to Clients and the Public .....	17
IV. Responsibilities to Outside Contractors and Interviewers .....	19
Appendix: Personal Data Classification .....	20

### Addendums (for CASRO Members Only)

*Found on Members Only section of CASRO website:*

1. Standards regarding disclosure of respondent-identifiable data to clients  
(Suggested Client Agreement)
2. Suggested CASRO Client Certification of Email Sample List Compliance



## INTRODUCTION

This Code of Standards and Ethics for Survey Research sets forth the agreed upon rules of ethical conduct for Survey Research Organizations. Acceptance of this Code is mandatory for all CASRO® Members.

The Code has been organized into sections describing the responsibilities of a Survey Research Organization to Respondents, Clients and Outside Contractors and in reporting study results.

This Code is not intended to be, nor should it be, an immutable document. Circumstances may arise that are not covered by this Code or that may call for modification of some aspect of this Code. The Standards Committee and the Board of Directors of CASRO® will evaluate these circumstances as they arise and, if appropriate, revise the Code. The Code, therefore, is a living document that seeks to be responsive to the changing world of Survey Research. To continue to be contemporary, CASRO® advocates ongoing, two-way communication with Members, Respondents, Clients, Outside Contractors, Consultants and Interviewers.

Please also refer to other CASRO® Publications, which may provide detail relevant to many sections of the CASRO® *Code of Standards and Ethics for Survey Research*.

The Voice and Values of Research

**CASRO**

COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS

CODE OF STANDARDS AND ETHICS FOR SURVEY RESEARCH



## I. RESPONSIBILITIES TO RESPONDENTS

### Preamble

Researchers have professional and legal responsibilities to their respondents that are embodied in the procedures of a research study. Underlying these specific responsibilities are four fundamental ethical principles:

Respondents should be:

- a. willing participants in survey research;
- b. appropriately informed about the survey's intentions and how their personal information and survey responses will be used and protected;
- c. sufficiently satisfied with their survey experience;
- d. willing to participate again in survey research.

### A. Confidentiality

1. Since individuals who are interviewed are the lifeblood of the Survey Research Industry, it is essential that Survey Research Organizations be responsible for protecting from disclosure to third parties—including Clients and members of the Public—the identity of individual Respondents as well as Respondent-identifiable information, unless the Respondent expressly requests or permits such disclosure.
2. This principle of confidentiality is qualified by the following exceptions:
  - a. A minimal amount of Respondent-identifiable information will be disclosed to the Client to permit the Client: (1) to validate interviews and/or (2) to determine an additional fact of analytical importance to the study (including the practice of appending Client-owned database information to the Survey Research Organization's data file as an analytic aid). Where additional inquiry is indicated, Respondents must be given a sound reason for the re-inquiry; a refusal by Respondent to continue must be respected.

Before disclosing Respondent-identifiable information to a Client for purposes of interview validation or re-inquiry, the Survey Research Organization must take whatever steps are needed to ensure that the Client will conduct the validation or recontact in a fully professional manner. This includes the avoidance of multiple validation contacts or other conduct that would harass or could embarrass Respondents. It also includes avoidance of any use of the information (e.g., lead generation) for other than legitimate and ethical Survey Research purposes or to respond to Customer/Respondent complaints. Assurance that the Client will respect such limitations and maintain Respondent confidentiality should be confirmed in writing before any confidential information is disclosed.

Where Respondent-identifiable data is disclosed to clients so that the Survey Research Organization may analyze survey data in combination with other respondent-level data such as internal customer data, respondent-level data from another survey, etc., it is understood that the information will be used for

model building, internal (Survey Research Organization) analysis, or the like and not for individual marketing efforts and that no action can be taken toward an individual respondent simply because of his or her participation in the survey. To assure Client compliance, the Survey Research Organization must obtain written confirmation from the Client before releasing any data. (A suggested CASRO® Client agreement clause is available.)

Further, with respect to such research uses as Database Segmentation and/or Modeling (see preceding paragraph), specific action(s) may not be taken toward an individual Respondent as a result of his/her survey information and participation beyond those actions taken toward the entire database population group the Respondent by chance has been selected to represent. In order for such specific action, the following two elements must be met:

The Respondent has first given his/her permission to do so, having been told the general purpose and limitations of such use; and

The research firm has obtained a written agreement from the Client assuring that no other use will be made of Respondent-identifiable information.

Predictive equations which integrate a segmentation scheme into a Client database may be applied so long as no action is taken toward an individual Respondent simply because of his or her participation in the survey. Respondents must be treated like all other individuals in the database according to the segment(s) to which they belong or have been assigned.

- b. The identity of individual Respondents and Respondent-identifiable information may be disclosed to other Survey Research Organizations whenever such organizations are conducting different phases of a multi-stage study (e.g., a trend study). The initial Research Company should confirm in writing that Respondent confidentiality will be maintained in accordance with the Code.
  - c. In the case of research in which representatives of the Client or others are present, such Client representatives and others should be asked not to disclose to anyone not present the identity of individual Participants or other Participant-identifying information except as needed to respond, with the Participant's prior specific approval, to any complaint by one or more of the Participants concerning a product or service supplied by the Client.
3. The principle of Respondent confidentiality includes the following specific applications or safeguards:
- a. Survey Research Organizations' staff or personnel should not use or discuss Respondent-identifiable data or information for other than legitimate internal research purposes.
  - b. The Survey Research Organization has the responsibility for insuring that Subcontractors (Interviewers, Interviewing Services and Validation, Coding, and Tabulation Organizations) and Consultants are aware of and agree to maintain and respect Respondent confidentiality whenever the identity of Respondents or Respondent-identifiable information is disclosed to such entities.

- c. Before permitting Clients or others to have access to completed questionnaires in circumstances other than those described above, Respondent names and other Respondent-identifying information (e.g., telephone numbers) should be deleted.
- d. Invisible identifiers on mail questionnaires that connect Respondent answers to particular Respondents should not be used. Visible identification numbers may be used but should be accompanied by an explanation that such identifiers are for control purposes only and that Respondent confidentiality will not be compromised.
- e. Any Survey Research Organization that receives from a Client or other entity information that it knows or reasonably believes to be confidential, Respondent-identifiable information should only use such information in accordance with the principles and procedures described in this Code.
- f. The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity. Consequently, Survey Research firms confronted with a subpoena or other legal process requesting the disclosure of Respondent-identifiable information should take all reasonable steps to oppose such requests, including informing the court or other decision-maker involved of the factors justifying confidentiality and Respondent anonymity and interposing all appropriate defenses to the request for disclosure.

#### B. Privacy and the Avoidance of Harassment

1. Survey Research Organizations have a responsibility to strike a proper balance between the needs for research in contemporary American life and the privacy of individuals who become the Respondents in the research. To achieve this balance:
  - a. Respondents will be protected from unnecessary and unwanted intrusions and/or any form of personal harassment.
  - b. The voluntary character of the Interviewer-Respondent contact should be stated explicitly where the Respondent might have reason to believe that cooperation is not voluntary.
2. This principle of privacy includes the following specific applications:
  - a. The Research Organization, Subcontractors and Interviewers shall make every reasonable effort to ensure that the Respondent understands the purpose of the Interviewer/Respondent contact.
    - (1) The Interviewer/Research Company representative must provide prompt and honest identification of his/her research firm affiliation.
    - (2) Respondent questions should be answered in a forthright and non-deceptive manner.



- b. Deceptive practices and misrepresentation, such as using research as a guise for sales or solicitation purposes, are expressly prohibited.
- c. Survey Research Organizations must respect the right of individuals to refuse to be interviewed or to terminate an interview in progress. Techniques that infringe on these rights should not be employed, but Survey Research Organizations may make reasonable efforts to obtain an interview including: (1) explaining the purpose of the research project; (2) providing a gift or monetary incentive adequate to elicit cooperation; and (3) re-contacting an individual at a different time if the individual is unwilling or unable to participate during the initial contact.
- d. Research Organizations are responsible for arranging interviewing times that are convenient for respondents.
- e. Lengthy interviews can be a burden. Research Organizations are responsible for weighing the research need against the length of the interview and Respondents must not be enticed into an interview by a misrepresentation of the length of the interview.
- f. Research Organizations are responsible for developing techniques to minimize the discomfort or apprehension of Respondents and Interviewers when dealing with sensitive subject matter.
- g. Electronic equipment (taping, recording, photographing) and one-way viewing rooms may be used only with the full knowledge of Respondents.

### 3. Internet Research

The unique characteristics of Internet research require specific notice that the principle of respondent privacy applies to this new technology and data collection methodology. The general principle of this section of the Code is that survey Research Organizations will not use unsolicited emails to recruit survey respondents or engage in surreptitious data collection methods. This section is organized into three parts: a. email solicitations, b. active agent technologies, and c. panel/sample source considerations.

#### a. Email Solicitation

- (1) Research Organizations are required to verify that individuals contacted for research by email have a reasonable expectation that they will receive email contact for research. Such agreement can be assumed when ALL of the following conditions exist:
  - (a) A substantive pre-existing relationship exists between the individuals contacted and the Research Organization, the Client supplying email addresses, or the Internet Sample Providers supplying the email addresses (the latter being so identified in the email invitation);
  - (b) Survey email invitees have a reasonable expectation, based on the pre-existing relationship where survey email invitees have specifically opted in for Internet research with the research company or Sample Provider, or in the case of Client-supplied lists that they may be contacted for research and invitees have not opted out of email communications;

- 
- (c) Survey email invitations clearly communicate the name of the sample provider, the relationship of the individual to that provider, and clearly offer the choice to be removed from future email contact.
  - (d) The email sample list excludes all individuals who have previously requested removal from future email contact in an appropriate and timely manner.
  - (e) Participants in the email sample were not recruited via unsolicited email invitations.
- (2) Research Organizations are prohibited from using any subterfuge in obtaining email addresses of potential respondents, such as collecting email addresses from public domains, using technologies or techniques to collect email addresses without individuals' awareness, and collecting email addresses under the guise of some other activity.
  - (3) Research Organizations are prohibited from using false or misleading return email addresses or any other false and misleading information when recruiting respondents. As stated later in this Code, Research Organizations must comply with all federal regulations that govern survey research activities. In addition, Research Organizations should use their best efforts to comply with other federal regulations that govern unsolicited email contacts, even though they do not apply to survey research.
  - (4) When receiving email lists from Clients or Sample Providers, Research Organizations are required to have the Client or Sample Provider verify that individuals listed have a reasonable expectation that they will receive email contact, as defined, in (1) above.
  - (5) The practice of "blind studies" (for sample sources where the sponsor of the study is not cited in the email solicitation) is permitted if disclosure is offered to the respondent during or after the interview. The respondent must also be offered the opportunity to "opt-out" for future research use of the sample source that was used for the email solicitation.
  - (6) Information about the CASRO Code of Standards and Ethics for Survey Research should be made available to respondents.

b. Active Agent Technology

- (1) Active agent technology is defined as any software or hardware device that captures the behavioral data about data subjects in a background mode, typically running concurrently with other activities. This category includes tracking software that allows Research Organizations to capture a wide array of information about data subjects as they browse the Internet. Such technology needs to be carefully managed by the research industry via the application of research best practices.

Active agent technology also includes direct to desktop software downloaded to a user's computer that is used solely for the purpose of alerting potential survey respondents, downloading survey content or asking survey questions. A direct to desktop tool does not track data subjects as they browse the Internet and all data collected is provided directly from user input.



Data collection typically requires an application to download onto the subjects' desktop, laptop or PDA (including personal wireless devices). Once downloaded, tracking software has the capability of capturing the data subject's actual experiences when using the Internet such as Web page hits, web pages visited, online transactions completed, online forms completed, advertising click-through rates or impressions, and online purchases.

Beyond the collection of information about a user's Internet experience, the software has the ability to capture information from the data subject's email and other documents stored on a computer device such as a hard disk. Some of this technology has been labeled "spyware," especially because the download or installation occurs without the data subject's full knowledge and specific consent. The use of spyware by a member of CASRO is strictly prohibited.

A cookie (defined as a small amount of data that is sent to a computer's browser from a web server and stored on the computer's hard drive) is not an active agent. The use of cookies is permitted if a description of the data collected and its use is fully disclosed in a Research Organizations' privacy policy.

- (2) Following is a list of unacceptable practices that Research Organizations should strictly forbid or prevent. A Research Organization is considered to be using spyware when it fails to adopt all of the practices in set forth in Section 3 below or engages in any in the following practices:
- (a) Downloading software without obtaining the data subject's informed consent.
  - (b) Downloading software without providing full notice and disclosure about the types of information that will be collected about the data subject, and how this information may be used. This notice needs to be conspicuous and clearly written.
  - (c) Collecting information that identifies the data subject without obtaining affirmed consent.
  - (d) Using keystroke loggers without obtaining the data subject's affirmed consent.
  - (e) Installing software that modifies the data subject's computer settings beyond that which is necessary to conduct research providing that the software doesn't make other installed software behave erratically or in unexpected ways.
  - (f) Installing software that turns off anti-spyware, anti-virus, or anti-spam software.
  - (g) Installing software that seizes control or hijacks the data subject's computer.
  - (h) Failing to make commercially reasonable efforts to ensure that the software does not cause any conflicts with major operating systems and does not cause other installed software to behave erratically or in unexpected ways.
  - (i) Installing software that is hidden within other software that may be downloaded.

- 
- (j) Installing software that is difficult to uninstall.
  - (k) Installing software that delivers advertising content, with the exception of software for the purpose of ad testing.
  - (l) Installing upgrades to software without notifying users.
  - (m) Changing the nature of the active agent program without notifying user.
  - (n) Failing to notify the user of privacy practice changes relating to upgrades to the software.
- (3) Following are practices Research Organizations that deploy active agent technologies should adopt. Research Organizations that adopt these practices and do not engage in any of the practices set forth in Section 2 above will not be considered users of spyware.
- (a) Transparency to the data subject is critical. Research companies must disclose information about active agents and other software in a timely and open manner with each data subject. This communication must provide details on how the Research Organization uses and shares the data subject's information.
    - i. Only after receiving an affirmed consent or permission from the data subject or parent's permission for children under the age of 18, should any research software be downloaded onto the individual's computer or PDA.
    - ii. Clearly communicate to the data subject the types of data if any, that is being collected and stored by an active agent technology.
    - iii. Disclosure is also needed to allow the data subject to easily uninstall research software without prejudice or harm to them or their computer systems.
    - iv. Personal information about the subject should not be used for secondary purposes or shared with third parties without the data subject's consent.
    - v. Research Organizations are obligated to ensure that participation is a conscious and voluntary activity. Accordingly, incentives must never be used to hide or obfuscate the acceptance of active agent technologies.
    - vi. Research Organizations that deploy active agent technologies should have a method to receive queries from end-users who have questions or concerns. A redress process is essential for companies if they want to gauge audience reaction to participation on the network.
    - vii. On a routine and ongoing basis, consistent with the stated policies of the Research Organization, data subjects who participate in the research network should receive clear periodic notification that they are actively recorded as participants, so as to insure that their participation is voluntary. This notice should provide a clearly defined method to uninstall the Research Organization's tracking software without causing harm to the data subject.

(b) Stewardship of the data subject is critical. Research companies must take steps to protect information collected from data subjects.

- i. Personal or sensitive data (as described in the Personal Data Classification Appendix) should not be collected. If collection is unavoidable, the data should be destroyed immediately. If destruction is not immediately possible, it: (a) should receive the highest level of data security and (b) should not be accessed or used for any purpose.
- ii. Research Organizations have an obligation to establish safeguards that minimize the risk of data security and privacy threats to the data subject.
- iii. It is important for Research Organizations to understand the impact of their technology on end-users, especially when their software downloads in a bundle with other comparable software products.
- iv. Stewardship also requires the Research Organization to make commercially reasonable efforts to ensure that these “free” products are also safe, secure and do not cause undue privacy or data security risks.
- v. Stewardship also requires a Research Organization that deploys active agent technologies to be proactive in managing its distribution of the software. Accordingly, companies must vigorously monitor their distribution channel and look for signs that suggest unusual events such as high churn rates.
- vi. If unethical practices are revealed, responsible research companies should strictly terminate all future dealings with this distribution partner.

c. Panel/Sample Source Considerations

The following applies to all Research Organizations that utilize the Internet and related technologies to conduct research.

(1) The Research Organization must:

- (a) Disclose to panel members that they are part of panel.
- (b) Obtain panelist’s permission to collect and store information about the panelist.
- (c) Collect and keep appropriate records of panel member recruitment, including the source through which the panel member was recruited.
- (d) Collect and maintain records of panel member activity.

(2) Upon Client request, the Research Organization must disclose:

- 
- (a) Panel composition information (including panel size, populations covered, and the definition of an active panelist).
  - (b) Panel recruitment practice information.
  - (c) Panel member activity.
  - (d) Panel incentive plans.
  - (e) Panel validation practices.
  - (f) Panel quality practices.
  - (g) Aggregate panel and study sample information (this information could include response rate information, panelist participation in other research by type and timeframe, see Responsibilities in Reporting to Clients and the Public).
  - (h) Study related information such as email invitation(s), screener wording, dates of email invitations and reminders, and dates of fieldwork.
- (3) Stewardship of the data collected from panelists is critical:
- (a) Panels must be managed in accordance with applicable data protection laws and regulations.
  - (b) Personal or sensitive data should be collected and treated as specified in the Personal Data Classification Appendix.
  - (c) Upon panelist request, the panelist must be informed about all personal data (relating to the panelist that is provided by the panelist, collected by an active agent, or otherwise obtained by an acceptable method specified in a Research Organization's privacy policy) maintained by the Research Organization. Any personal data that is indicated by panel member as not correct or obsolete must be corrected or deleted as soon as practicable.
- (4) Panel members must be given a straightforward method for being removed from the panel if they choose. A request for removal must be completed as soon as practicable and the panelist must not be selected for future research studies.
- (5) A privacy policy relating to use of data collected from or relating to the panel member must be in place and posted online. The privacy policy must be easy to find and use and must be regularly communicated to panelists. Any changes to the privacy policy must be communicated to panelists as soon as possible.
- (6) Research Organizations should take steps to limit the number of survey invitations sent to targeted respondents by email solicitations or other methods over the Internet so as to avoid harassment and response bias caused by the repeated recruitment and participation by a given pool (or panel) of data subjects.



- 
- (7) Research Organizations should carefully select sample sources that appropriately fit research objectives and Client requirements. All sample sources must satisfy the requirement that survey participants have either opted-in for research or have a reasonable expectation that they will be contacted for research.
  - (8) Research Organizations should manage panels to achieve the highest possible research quality. This includes managing panel churn and promptly removing inactive panelists.
  - (9) Research Organizations must maintain survey identities and email domains that are used exclusively for research activities.
  - (10) If a Research Organization uses a sample source (including a panel owned by the Research Organization or a subcontractor) that is used for both survey research and direct marketing activities, the Research Organization has an obligation to disclose the nature of the marketing campaigns conducted with that sample source to Clients so that they can assess the potential for bias.
  - (11) All data collected on behalf of a Client must be kept confidential and not shared or used on behalf of another Client (see also Responsibilities to Clients).

#### 4. Privacy Laws and Regulations

- a. Research Organizations must comply with existing state, federal, and international statutes and regulations governing privacy, data security, and the disclosure, receipt and use of personally-identifiable information (collectively "Privacy Laws"). Some of the Privacy Laws affecting Survey Research are limited to specific industries (e.g., financial and health care industries), respondent source (e.g., children), and/or international venues.
- b. In instances in which privacy laws apply to Survey Research operations for specific industries or respondent source, Research Organizations will:
  - (1) Always enter into a confidentiality or "chain of trust" agreement when receiving and using legally-protected, personally-identifiable information from a source other than the data subject, insuring that the Research Organization will protect the information and only use it for the purposes specified in the agreement;
  - (2) Always require subcontractors and other third parties to whom they disclose personally-identifiable information to enter into confidentiality or "chain of trust" agreements that require such party(ies) to provide the same level of security and limitations of use and disclosure as the Research Organization;
  - (3) Always store or maintain personally-identifiable information in a verifiably secure location;
  - (4) Always control and limit accessibility to personally-identifiable information;

- 
- (5) Always use reasonable efforts to destroy personally-identifiable information once the survey is complete and validation has been conducted, unless the personally-identifiable information relates to Respondents in panels, to ongoing studies, or for some other critical research reason, or the research Client is legally or contractually obligated to require its service providers to maintain such information for a certain period of time and contractually imposes this requirement on the Research Organization;
  - (6) Never knowingly receive, use or disclose personally-identifiable information in a way that will cause the Research Organization or another party to violate any Privacy Law or agreement.
- c. In order to conduct international research that requires either transmitting or receiving personally-identifiable information of Respondents, Research Organizations must comply in all material respects with international privacy laws and regulations, by, in the case of data transfers with a person or entity in the European Union, either (i) certifying their compliance with the privacy provisions described in the United States Safe Harbor Principles of the European Union Directive on Data Protection or (ii) satisfying an alternative method of complying in all material respects with the Directive. The EU Safe Harbor privacy principles are contained in the CASRO Model Privacy Policy and are as follows:
- (1) Notice: A description of what information is collected, how it is collected, its purpose, and its disclosure to third parties.
  - (2) Choice: A statement of and procedures for allowing individuals to choose not to participate in the research and/or to have their personal information used or disclosed to a third party.
  - (3) Onward Transfer: A statement that personal information will be transferred only to third parties who are also in compliance with the Safe Harbor Principles.
  - (4) Access: Procedures to provide individuals with access to their personal information in order to correct, amend, or delete that information where it is inaccurate.
  - (5) Security: A description of the reasonable precautions taken to protect personal information from loss, misuse and unauthorized access, disclosure, alteration, and destruction.
  - (6) Data Integrity: A statement that information will be used consistent with the purpose for which it was collected.
  - (7) Enforcement: A description of internal and external mechanisms for assuring compliance, and addressing and resolving disputes and complaints.
- d. Research Organizations will, to the extent required by law or as necessary to fully and completely comply with the principles set forth in the section of this Code entitled Responsibilities to Respondents, adopt effective and comprehensive legal and operational policies, such as those set forth in CASRO's Privacy Protection Program, which will be updated as necessary to conform with additions to and changes in Privacy Laws.

## II. RESPONSIBILITIES TO CLIENTS

- A. Relationships between a Survey Research Organization and Clients for whom the surveys are conducted should be of such a nature that they foster confidence and mutual respect. They must be characterized by honesty and confidentiality.
- B. The following specific approaches describe in more detail the responsibilities of Research Organizations in this relationship:
  - 1. A Survey Research Organization must assist its Clients in the design of effective and efficient studies that are to be carried out by the Research Company. If the Survey Research Organization questions whether a study design will provide the information necessary to serve the Client's purposes, it must make its reservations known.
  - 2. A Research Organization must conduct the study in the manner agreed upon. However, if it becomes apparent in the course of the study that changes in the plans should be made, the Research Organization must make its views known to the Client promptly.
  - 3. A Research Organization has an obligation to allow its Clients to verify that work performed meets all contracted specifications and to examine all operations of the Research Organization that are relevant to the proper execution of the project in the manner set forth. While Clients are encouraged to examine questionnaires or other records to maintain open access to the research process, the Survey Research Organization must continue to protect the confidentiality and privacy of survey Respondents.
  - 4. When more than one Client contributes to the cost of a project specially commissioned with the Research Organization, each Client concerned shall be informed that there are other Participants (but not necessarily their identity).
  - 5. Research Organizations will hold confidential all information that they obtain about a Client's general business operations, and about matters connected with research projects that they conduct for a Client.
  - 6. For research findings obtained by the agency that are the property of the Client, the Research Organization may make no public release or revelation of findings without expressed, prior approval from the Client.
- C. Bribery in any form and in any amount is unacceptable and is a violation of a Research Organization's fundamental, ethical obligations. A Research Organization and/or its principals, officers and employees should never give gifts to Clients in the form of cash. To the extent permitted by applicable laws and regulations, a Research Organization may provide nominal gifts to Clients and may entertain Clients, as long as the cost of such entertainment is modest in amount and incidental in nature.



### III. RESPONSIBILITIES IN REPORTING TO CLIENTS AND THE PUBLIC

- A. When reports are being prepared for Client confidential or public release purposes, it is the obligation of the Research Organization to insure that the findings they release are an accurate portrayal of the survey data, and careful checks on the accuracy of all figures are mandatory.
- B. A Research Organization's report to a Client or the Public should contain, or the Research Organization should be ready to supply to a Client or the Public on short notice, the following information about the survey:
1. The name of the organization for which the study was conducted and the name of the organization conducting it.
  2. The purpose of the study, including the specific objectives.
  3. The dates on or between which the data collection was done.
  4. A definition of the universe that the survey is intended to represent and a description of the population frame(s) that was actually sampled.
  5. A description of the sample design, including the method of selecting sample elements, method of interview, cluster size, number of callbacks, Respondent eligibility or screening criteria, and other pertinent information.
  6. A description of results of sample implementation including (a) a total number of sample elements contacted, (b) the number not reached, (c) the number of refusals, (d) the number of terminations, (e) the number of non-eligibles, (f) the number of completed interviews.
  7. The basis for any specific "completion rate" percentages should be fully documented and described.
  8. The questionnaire or exact wording of the questions used, including Interviewer directions and visual exhibits.
  9. A description of any weighting or estimating procedures used.
  10. A description of any special scoring, data adjustment or indexing procedures used. (Where the Research Organization uses proprietary techniques, these should be described in general and the Research Organization should be prepared to provide technical information on demand from qualified and technically competent persons who have agreed to honor the confidentiality of such information).
  11. Estimates of the sampling error and of data should be shown when appropriate, but when shown they should include reference to other possible sources of error so that a misleading impression of accuracy or precision is not conveyed.
  12. Statistical tables clearly labeled and identified as to questionnaire source, including the number of raw cases forming the base for each cross-tabulation.



- 
13. Copies of Interviewer instructions, validation results, code books, and other important working papers.
- C. As a **minimum**, any general public release of survey findings should include the following information:
1. The sponsorship of the study.
  2. A description of the purposes.
  3. The sample description and size.
  4. The dates of data collection.
  5. The names of the research company conducting the study.
  6. The exact wording of the questions.
  7. Any other information that a lay person would need to make a reasonable assessment of the reported findings.
- D. A Survey Research Organization will seek agreements from Clients so that citations of survey findings will be presented to the Research Organization for review and clearance as to accuracy and proper interpretation prior to public release. A Research Organization will advise Clients that if the survey findings publicly disclosed are incorrect, distorted, or incomplete, in the Research Organization's opinion, the Research Organization reserves the right to make its own release of any or all survey findings necessary to make clarification.

#### **IV. RESPONSIBILITIES TO OUTSIDE CONTRACTORS AND INTERVIEWERS**

- A. Research Organizations will not ask any Outside Contractor or Interviewer to engage in any activity which is not acceptable as defined in other sections of this *Code of Standards and Ethics for Survey Research* or related CASRO® publications.

## APPENDIX: PERSONAL DATA CLASSIFICATION

Classification Level Name	"Ordinary Personal Data" <sup>1</sup>	"Sensitive Personal Data" <sup>2</sup>	"Hyper-Sensitive Personal Data" <sup>3</sup>
<b>Criteria</b>	Data that is identifiable to an individual person but is not "Sensitive Personal Data."	Data that is (1) identifiable to an individual person and (2) has the potential to be used to harm or embarrass the person.	Individually identifiable data that typically has no legitimate survey research value or purpose and has a very high potential to harm or embarrass the data subject.
<b>Examples</b>	Name Telephone # (work & home) Address (work & home) E-mail address (work and home) Internal Company ID numbers Gender Marital status # of Children Date of Birth, Age Citizenship Education Income range Veteran status Immigration status Languages spoken Country of residence Non-medical benefits information Purchase history, buying patterns, shopping patterns, hobbies All other personal data not "Sensitive Personal Data" IP address	Criminal arrests or convictions Judgments in civil cases Administrative sanctions Race, ethnicity, national origin Political opinions Religious or philosophical beliefs Union & Trade-union membership Data concerning health or medical treatment Data concerning sexual orientation or activity Financial data (such as credit rating, excluding items listed as Hyper-Sensitive Personal Data) Salary & Compensation Disability status	Social Security Numbers National ID Numbers Driver's License # Financial Information (Credit card #s, Account #s) Passwords
<b>Administrative Access Restrictions</b> (e.g., access granted only to employees with a demonstrable need to know)	Access restricted to persons with a need to know for legitimate business purposes, and who have signed a confidentiality agreement.	Access restricted to persons with a need to know for legitimate business purposes, and who have signed a confidentiality agreement, and who have been specifically designated by management.	Do not collect if at all possible; implement processes to eliminate data that's not used or ask client to provide only essential data. If collected and not eliminated do not disclose to third parties and apply the same Administrative Access requirements as Sensitive Personal Data.
<b>Physical Labeling</b> (e.g., papers and diskette or tape label)	"Personal Data" label in a conspicuous location on each document.	"Sensitive Personal Data" label in a conspicuous location on each document.	Same as Sensitive Personal Data.
<b>Electronic Labeling</b> (e.g., digital file, e-mail, or web page)	"Personal Data" label in a conspicuous location on each digital file, e-mail, or web page, and on subject line of messages.	"Sensitive Personal Data" label in a conspicuous location on each digital file, e-mail, or Web page, and on subject line of messages.	Same as Sensitive Personal Data.



Classification Level Name	"Ordinary Personal Data" <sup>1</sup>	"Sensitive Personal Data" <sup>2</sup>	"Hyper-Sensitive Personal Data" <sup>3</sup>
<b>Physical Storage</b> (e.g., secure room, locked drawer)	Storage in a secure office or other location. Room need not be locked if access to the building or floor is restricted to persons who are authorized to see the data.	Storage in a locked drawer, file cabinet, or office required. If stored in an open-file storage area, access to the area must be restricted to persons who are authorized to see the data.	Same as Sensitive Personal Data.
<b>Electronic Storage</b> (e.g., password protection, encryption)	Stored in a directory or folder with restricted access, e.g., password protection.	Stored in a directory or folder with restricted access, e.g., password protection.	Same as Sensitive Personal Data.
<b>Physical Transmission</b> (e.g., sealed envelope, bonded courier)	Sealed envelope.	Sealed double envelopes with bonded courier, and data encrypted with minimum 128 bit key.	Same as Sensitive Personal Data.
<b>Electronic Transmission</b> (e.g., encrypted, authentication of recipient)	Information should be transmitted to a verified account (email address or login ID).	Information should be transmitted to a verified account (email address or login ID) and the data should be transmitted in encrypted form (minimum 128-bit key).	Same as Sensitive Personal Data.
<b>Physical Disposal</b> (e.g., shredding of paper or other media)	After applicable Electronic Disposal, secure onsite disposal (including shredding of paper).	After applicable Electronic Disposal, secure onsite disposal (including shredding of paper). Disposal audit trail required.	Same as Sensitive Personal Data.
<b>Electronic Disposal</b> (e.g., wiping of disk, degaussing)	Where feasible and possible, removal of directory entry for file, and overwriting of file space with other data. Alternatively, security certification where data becomes embedded in archives and cannot be selectively deleted.	Where feasible and possible, degaussing (wiping) of media or physical destruction of media. Alternatively, security certification where data becomes embedded in archives and cannot be selectively degaussed (wiped).	Same as Sensitive Personal Data.

<sup>1</sup> Standard demographic data included in surveys are only considered "Ordinary Personal Data" if it is identifiable to an individual person.

<sup>2</sup> Standard demographic data included in surveys are only considered "Sensitive Personal Data" if it is identifiable to an individual person. It may be necessary to create additional classification levels for data that is subject to specific statutory requirements, such as "personal health information" subject to HIPAA.

<sup>3</sup> It may be necessary to create additional classification levels for data that is subject to specific statutory requirements, such as "personal health information" subject to HIPAA.



For more information about



**CODE OF STANDARDS AND ETHICS FOR SURVEY RESEARCH**

please visit

**[www.casro.org](http://www.casro.org)**

or contact

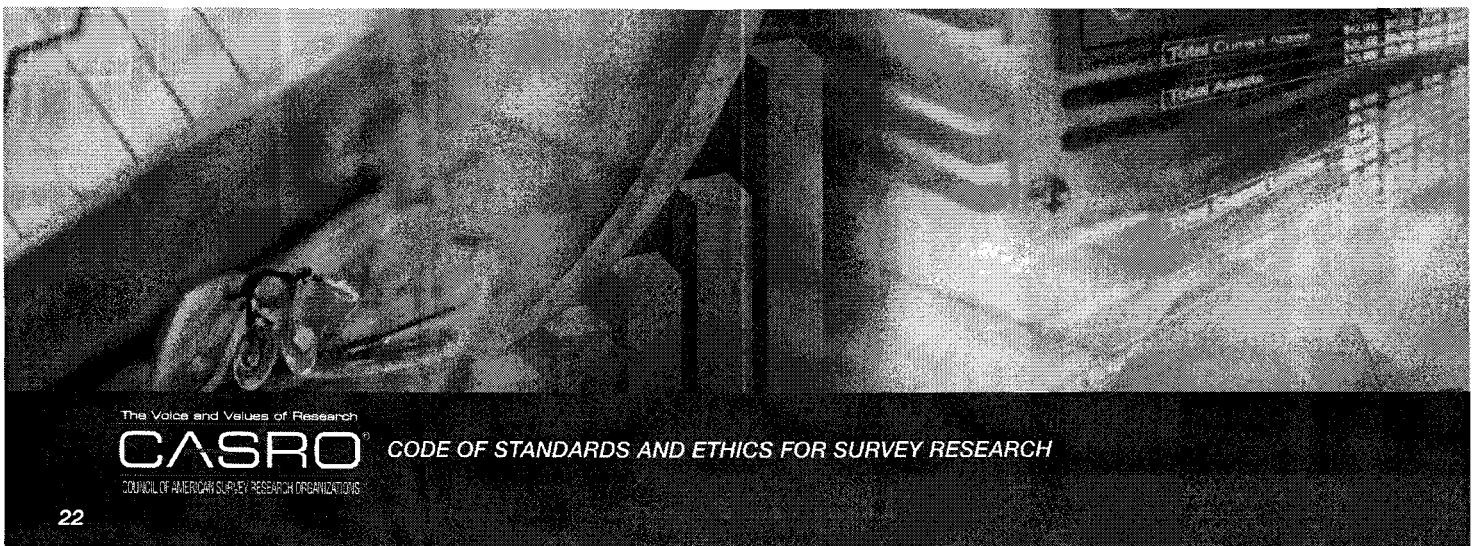
Council of American Survey Research Organizations® (CASRO®)

170 North Country Road, Suite 4

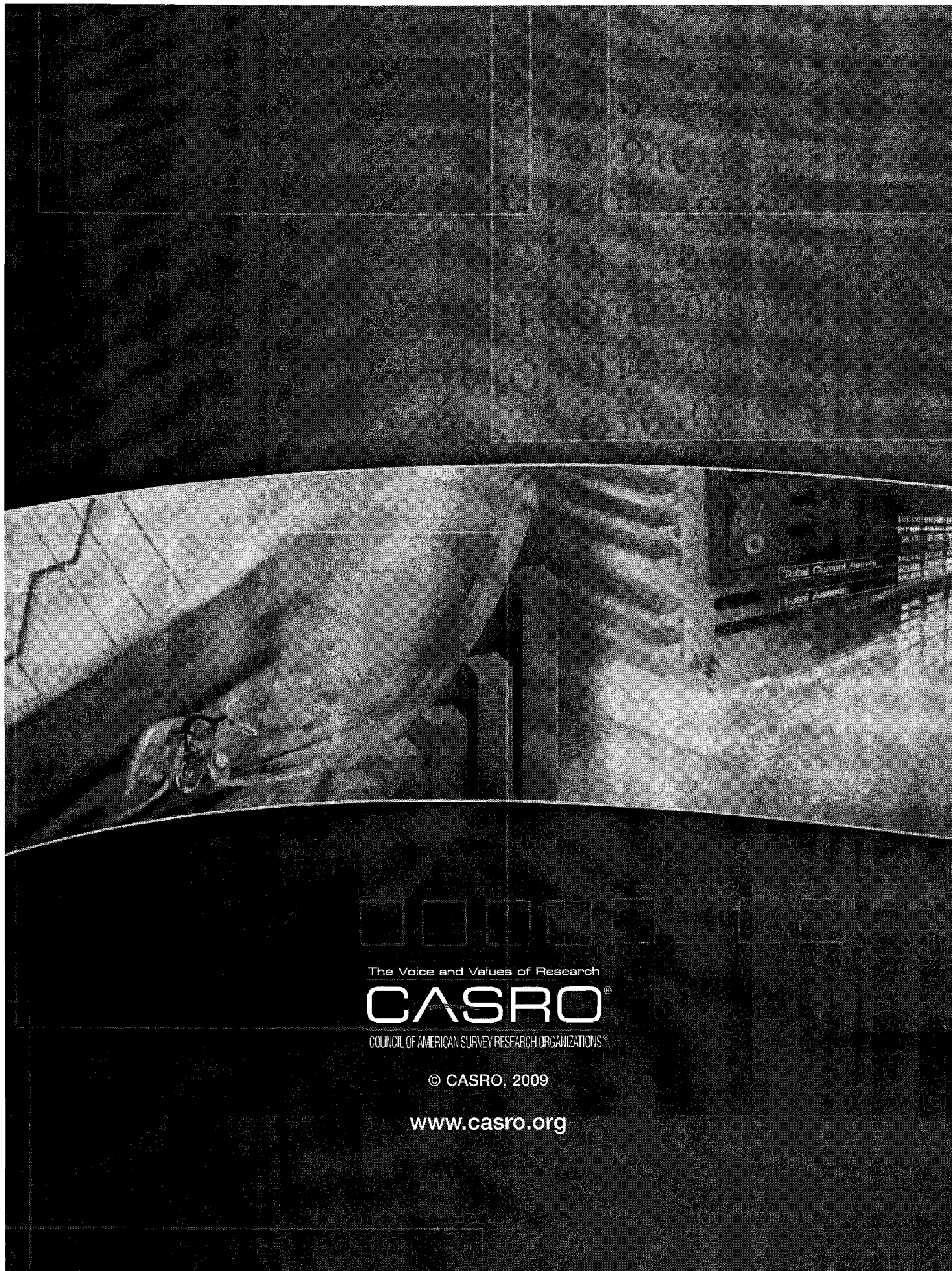
Port Jefferson, New York 11777 USA

(631) 928-6954 • Fax: (631) 928-6041

email: [casro@casro.org](mailto:casro@casro.org)







The Voice and Values of Research

**CASRO**<sup>®</sup>

COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS<sup>®</sup>

© CASRO, 2009

[www.casro.org](http://www.casro.org)

# EXHIBIT C





---

## AAPOR Code of Professional Ethics & Practices

Home > About AAPOR> Standards & Ethics > AAPOR Code of Professional Ethics & Practice

We, the members of the American Association for Public Opinion Research, subscribe to the principles expressed in the following code. Our goals are to support sound and ethical practice in the conduct of public opinion research and in the use of such research for policy- and decision-making in the public and private sectors, as well as to improve public understanding of public opinion and survey research methods and the proper use of public opinion and survey research results.

We pledge ourselves to maintain high standards of scientific competence and integrity in conducting, analyzing, and reporting our work; in our relations with survey respondents; with our clients; with those who eventually use the research for decision-making purposes; and with the general public. We further pledge ourselves to reject all tasks or assignments that would require activities inconsistent with the principles of this code.

### THE CODE

#### **I. Principles of Professional Practice in the Conduct of Our Work**

A. We shall exercise due care in developing research designs and survey instruments, and in collecting, processing, and analyzing data, taking all reasonable steps to assure the reliability and validity of results.

1. We shall recommend and employ only those tools and methods of analysis that, in our professional judgment, are well suited to the research problem at hand.
2. We shall not knowingly select research tools and methods of analysis that yield misleading conclusions.
3. We shall not knowingly make interpretations of research results that are inconsistent with the data available, nor shall we tacitly permit such interpretations.
4. We shall not knowingly imply that interpretations should be accorded greater confidence than the data actually warrant.

B. We shall describe our methods and findings accurately and in appropriate detail in all research reports, adhering to the standards for minimal disclosure specified in Section III.



C. If any of our work becomes the subject of a formal investigation of an alleged violation of this Code, undertaken with the approval of the AAPOR Executive Council, we shall provide additional information on the survey in such detail that a fellow survey practitioner would be able to conduct professional evaluation of the survey.

## **II. Principles of Professional Responsibility in Our Dealings With People**

### **A. The Public:**

1. When preparing a report for public release we shall ensure that the findings are a balanced and accurate portrayal of the survey results.
2. If we become aware of the appearance in public of serious inaccuracies or distortions regarding our research, we shall publicly disclose what is required to correct these inaccuracies or distortions including, as appropriate, a statement to the public media, legislative body, regulatory agency, or other appropriate group, to which the inaccuracies or distortions were presented.
3. We shall inform those for whom we conduct publicly released surveys that AAPOR standards require members to release minimal information about such surveys, and we shall make all reasonable efforts to encourage clients to subscribe to our standards for minimal disclosure in the releases.

### **B. Clients or Sponsors:**

1. When undertaking work for a private client, we shall hold confidential all proprietary information obtained about the client and about the conduct and findings of the research undertaken for the client, except when the dissemination of the information is expressly authorized by the client, or when disclosure becomes necessary under the terms of Section I-C or II-A of this Code.
2. We shall be mindful of the limitations of our techniques and capabilities and shall accept only those research assignments that we can reasonably expect to accomplish within these limitations.

### **C. The Profession:**

1. We recognize our responsibility to the science of survey research to disseminate as freely as possible the ideas and findings that emerge from our research.
2. We shall not cite our membership in the Association as evidence of professional competence, since the Association does not so certify any persons or organizations.

### **D. The Respondent:**

1. We shall avoid practices or methods that may harm, humiliate, or seriously mislead survey respondents.
2. We shall respect respondents' concerns about their privacy.
3. Aside from the decennial census and a few other surveys, participation in surveys is voluntary. We shall provide all persons selected for inclusion with a description of the survey sufficient to

permit them to make an informed and free decision about their participation.

4. We shall not misrepresent our research or conduct other activities (such as sales, fund raising, or political campaigning) under the guise of conducting research.

5. Unless the respondent waives confidentiality for specified uses, we shall hold as privileged and confidential all information that might identify a respondent with his or her responses. We also shall not disclose or use the names of respondents for non-research purposes unless the respondents grant us permission to do so.

6. We understand that the use of our survey results in a legal proceeding does not relieve us of our ethical obligation to keep confidential all respondent identifiable information or lessen the importance of respondent anonymity.

### **III. Standards for Minimal Disclosure**

Good professional practice imposes the obligation upon all public opinion researchers to include, in any report of research results, or to make available when that report is released, certain essential information about how the research was conducted. At a minimum, the following items should be disclosed.

1. Who sponsored the survey, and who conducted it.
2. The exact wording of questions asked, including the text of any preceding instruction or explanation to the interviewer or respondents that might reasonably be expected to affect the response.
3. A definition of the population under study, and a description of the sampling frame used to identify this population.
4. A description of the sample design, giving a clear indication of the method by which the respondents were selected by the researcher, or whether the respondents were entirely self-selected.
5. Sample sizes and, where appropriate, eligibility criteria, screening procedures, and response rates computed according to AAPOR Standard Definitions. At a minimum, a summary of disposition of sample cases should be provided so that response rates could be computed.
6. A discussion of the precision of the findings, including estimates of sampling error, and a description of any weighting or estimating procedures used.
7. Which results are based on parts of the sample, rather than on the total sample, and the size of such parts.
8. Method, location, and dates of data collection.

From time to time, AAPOR Council may issue guidelines and recommendations on best practices with regard to the release, design and conduct of surveys.

*As revised in 2009*

[Back to top](#)

###

## READ MORE

---

[Disclosure standards | Ethics](#)

---

American Association for Public Opinion Research  
P.O. Box 14263 | Lenexa, KS 66285-4263  
(913) 895-4601 | FAX: (913) 895-4652  
Email: [info@aapor.org](mailto:info@aapor.org)



---

## Best Practices for Survey and Public Opinion Research

Home > Resources For Researchers > Best Practices

"The quality of a survey is best judged not by its size, scope, or prominence, but by how much attention is given to [preventing, measuring, and] dealing with the many important problems that can arise."

--*"What is a Survey?"*, American Statistical Association, 1996

How to produce a quality survey:

1. Have specific goals.
2. Consider alternatives.
3. Select samples that well represent the population to be studied.
4. Use designs that balance costs with errors.
5. Take great care in matching question wording to the concepts being measured and the population studied.
6. Pretest questionnaires and procedures.
7. Train interviewers carefully on interviewing techniques and the subject matter of the survey.
8. Check quality at each stage.
9. Maximize cooperation or response rates within the limits of ethical treatment of human subjects.
10. Use appropriate statistical analytic and reporting techniques.
11. Develop and fulfill pledges of confidentiality given to respondents.
12. Disclose all methods of the survey to allow for evaluation and replication.

Have specific goals for the survey.

The objectives of a high quality survey or poll should be specific, clear-cut and unambiguous. Such surveys are carried out solely to develop statistical information about the subject, not to produce predetermined results, nor as a ruse for marketing, fund-raising, changing voters' minds, or similar activities. [Go to the Top of the Page](#)

Consider alternatives to using a survey to collect information.

In its initial conceptualization, the ideal survey takes seriously the important question of whether or not the information needed would best be acquired by conducting a survey or poll. A survey generally originates when an individual or institution is confronted with a need for information for

which existing data appear to be insufficient. At this point, it is important to consider if the required information can even be collected by a survey or whether a survey would actually be the best way to acquire the information needed. If a survey is indeed appropriate, then careful attention must be given as to who is to be sampled and what is to be learned about those sampled.

Select samples that well represent the population to be studied.

A replicable or *repeatable* plan is developed to randomly choose a sample capable of meeting the survey's goals. Sampling should be designed to guard against unplanned selectiveness. A survey's intent is not to describe the particular individuals who, by chance, are part of the sample, but rather to obtain a composite profile of the population. In a bona fide survey, the sample is not selected haphazardly or only from persons who volunteer to participate. It is scientifically chosen so that each person in the population will have a measurable chance of selection. This way, the results can be reliably projected from the sample to the larger population with known levels of certainty/precision.

Critical elements in an exemplary survey are: (a) to ensure that the right population is indeed being sampled (to address the questions of interest); and (b) to locate (or "cover") all members of the population being studied so they have a chance to be sampled. The quality of the list of such members (the "sampling frame") whether it is up-to-date and complete is probably the dominant feature for ensuring adequate coverage of the desired population to be surveyed. Where a particular sample frame is suspected to provide incomplete or inadequate coverage of the population of interest, multiple frames should be used.

Virtually all surveys taken seriously by social scientists, policy makers, and the informed media use some form of *random or probability sampling*, the methods of which are well grounded in statistical theory and the theory of probability. Reliable and efficient estimates of needed statistics can be made by surveying a carefully constructed sample of a population, provided that a large proportion of the sample members give the requested information. The latter requires that careful and explicit estimates of potential non response bias and sample representativeness be developed.

Use designs that balance costs with errors.

For example, allocating a survey budget to support a very large sample size, but with insufficient attention to follow-up of non respondents to produce a good response rate (cf. *item 9*, below) generally yields results that are less accurate than surveying a smaller sample with a higher response rate. Similarly, allocating most of one's funds to provide a large sample size but with little or no resources devoted to interviewer training would not be prudent. Although sampling errors can be readily estimated using probability sampling methods, they do not reflect the total error of a survey statistic or estimate, which is a function of many different features of a given survey. Survey professionals practicing at their best carefully seek to balance these various types of error in the design and conduct of a particular survey, in order to minimize the total error given the budget or resources available.

Take great care in matching question wording to the concepts being measured and the population studied.

Based on the goals of a survey, questions for respondents are designed and arranged in a logical format and order to create a survey questionnaire. The ideal survey or poll recognizes that planning

the questionnaire is one of the most critical stages in the survey development process, and gives careful attention to all phases of questionnaire development and design, including: definition of topics, concepts and content; question wording and order; and questionnaire length and format. One must first ensure that the questionnaire domains and elements established for the survey or poll fully and adequately cover the topics of interest. Ideally, multiple rather than single indicators or questions should be included for all key constructs.

Beyond their specific content, however, the manner in which questions are asked, as well as the specific response categories provided, can greatly affect the results of a survey. Concepts should be clearly defined and questions unambiguously phrased. Question wording should be carefully examined for special sensitivity or bias. Techniques should be developed to minimize the discomfort or apprehension of both respondents and interviewers when dealing with sensitive subject matter. Ways should be devised to keep respondent mistakes and biases (e.g., memory of past events) to a minimum, and to measure those that cannot be eliminated. To accomplish these objectives, well-established cognitive research methods (e.g., paraphrasing and "think aloud" interviews) and similar methods (e.g., behavioral coding of interviewer-respondent interactions) should be employed with persons similar to those to be surveyed to assess and improve all key questions along these various dimensions.

Pretest questionnaires and procedures to identify problems prior to the survey.

High quality surveys and polls always provide adequate budget and time for pretesting questionnaire(s) and field procedures. A pretest of the questionnaire and field procedures is the only way of finding out if everything "works" especially if a survey employs new techniques or a new set of questions. Because it is rarely possible to foresee all the potential misunderstandings or biasing effects of different questions or procedures, it is vital for a well-designed survey operation to include provision for a pretest. All questions should be pretested to ensure that questions are understood by respondents, can be properly administered by interviewers, and do not adversely affect survey cooperation. In circumstances where one is uncertain about the best design or any critical component of such a design, split sample experiments, which systematically compare the effects of two or more alternatives, should be included either prior to or as part of the pretesting process to select the most appropriate or effective design(s) or component(s).

Train interviewers carefully on interviewing techniques and the subject matter of the survey.

Insisting on high standards in the recruiting and training of interviewers is also crucial to conducting a quality survey or poll. For high quality data to be collected, interviewers in telephone or in person surveys must be carefully trained to do their work properly through face-to-face ("classroom") or telephone training, self-study, or some combination of these. Good interviewer techniques should be stressed, such as how to make initial contacts, how to deal with reluctant respondents, how to conduct interviews in a professional manner, and how to avoid influencing or biasing responses. Training should also involve practice interviews to familiarize the interviewers with the variety of situations they are likely to encounter. Time should be spent going over survey concepts, definitions, and procedures, including a question-by-question approach to be sure that interviewers can deal with any misunderstandings that may arise.

Construct quality checks for each stage of the survey.

Excellent surveys and polls are those that collect information carefully, and check and verify each



step of the research process. To assure that the proper execution of a survey corresponds to its design, every facet of a survey must be looked at during implementation. Checks must be made at every step to ensure that the sample is selected according to specifications; that the interviewers do their work properly; that the information from questionnaires is edited and coded accurately; that computer data entry is done correctly; and that the computer programs used for data analysis work properly.

Sloppy execution in the field, in particular, can seriously undermine results. Controlling the quality of fieldwork is done by observing/monitoring, verifying and/or redoing a small sample of the interviews. At least some questionnaire-by-questionnaire checking (including interviewer "edits"), and a review of frequencies to monitor questionnaire performance while in the field are also essential to detect omissions (e.g., skip errors) or other obvious mistakes in the data before it is too late to fix them.

Maximize cooperation or response rates within the limits of ethical treatment of human subjects.

Nonresponse occurs when members of the sample cannot or will not participate in a survey. Careful sample management and control to ensure that a large proportion of sample members provide the information requested is essential to good survey practice. A low cooperation or response rate does more damage in rendering a survey's results questionable than a small sample, because there may be no valid way scientifically of inferring the characteristics of the population represented by the nonrespondents. Proper sample management and control entails such things as adding sample in correctly formulated replicates, tracking the disposition of all cases, monitoring the sample while in the field for potential problems, and "metering" or rationing resources to ensure the collection of data from harder-to-reach respondents. Interviewers must also be carefully equipped through training with effective responses to deal with concerns that reluctant respondents might express. Specific procedures designed explicitly to stimulate survey cooperation or participation should also be considered, such as (where possible) sending advance letters to sample households or individuals to inform them of the pending survey, offering monetary (i.e., cash) or non-monetary (some other valued reward) incentives to encourage participation, and sending reminders or making follow-up calls to those who do not respond initially. Failure to follow up nonrespondents and refusals, in particular, can severely undermine an otherwise well-designed survey. To deal with this possibility: (a) visits or calls to sample households are scheduled with careful attention to such considerations as the best time of day to call or visit; (b) allowance is made for repeated attempts (e.g., callbacks at different times and days) to thoroughly work the selected sample in not-at-home and related situations; and (c) special efforts (i.e., reworking refusals with an experienced interviewer) are made to persuade persons who are inclined not to participate to respond. In mail surveys, it is usually necessary to send reminders and conduct several follow-up mailings, and at times to contact at least a subsample of the remaining nonrespondents by telephone or personal visit. Where possible, specific efforts to directly observe or measure the characteristics of nonrespondents should also be included in the overall survey design.

Use statistical analytic and reporting techniques appropriate to the data collected.

Excellence in the practice of survey and public opinion research requires that data analysis and interpretation be competent and clear, and that findings or results be presented fully, understandably, and fairly. The information collected should be critically examined in a search for meaning, processed, refined, and thoroughly analyzed. Routine reliability studies should be conducted for all key measurements.

Special codes should be provided for missing items, indicating why the data are not included. An ideally, the "filling in" or imputation of these missing data items (based on rigorous and well validated statistical methods) should be undertaken to reduce any biases arising from their absence. Statistical tables should be clearly labeled, including identification of questionnaire source, and the (unweighted) number of cases forming the base for each cross-tabulation. Sampling errors should be included for all statistics presented, rather than only the statistics themselves.

Findings and interpretations should be presented honestly and objectively, with full reporting of all relevant findings, including any that may seem contradictory or unfavorable. Sampling and nonsampling errors including coverage, measurement and reporting errors, response variance, interviewer and respondent bias, non response, imputation error and errors in processing the data should explicitly be taken into account in the analysis of survey data and interpretation of survey results, in a comprehensive effort to assess error from each perspective. Conclusions should be carefully distinguished from the factual findings, and great care should be taken to be sure that the conclusions and the findings presented are consistent.

Carefully develop and fulfill pledges of confidentiality given to respondents.

Establish clear intentions and meticulous procedures to assure the privacy of respondents and the confidentiality of the information they provide. Unless the respondent explicitly requests otherwise, or waives confidentiality for specified uses, one should hold as privileged and confidential the identity of individual respondents and all information that might identify a respondent with his or her responses.

*Exemplary* survey research practice requires that one literally do "whatever is possible" to protect the privacy of research participants and to keep collected information they provide confidential or anonymous. One must establish clear intentions to protect the confidentiality of information collected from respondents, strive to ensure that these intentions realistically reflect one's ability to do so, and clearly state pledges of confidentiality and their realistic limitations to respondents. This is, one must ensure that the means are adequate to protect confidentiality to the extent pledged or intended, that procedures for processing and use of data conform to the pledges made, and that appropriate care is taken in dealing with directly identifying information (i.e., using such steps as destroying this type of information or removing it from the file when it is no longer needed for inquiry).

Interviewers and other research staff must be carefully trained and indoctrinated to uphold and maintain the confidentiality of respondents' identities and the information they provide and take/sign an explicit oath or pledge of confidentiality to do so before beginning work. In the verification of information, one must protect the identity of respondents from outside disclosure.

One should also assure that appropriate techniques are applied to control for potential statistical disclosure of respondent data. Individual respondents should never be identified or identifiable in reporting survey findings: all survey results should be presented in completely anonymous summaries, such as statistical tables and charts, and statistical tabulations presented by broad enough categories so that individual respondents cannot be singled out.

Disclose all methods of the survey to permit evaluation and replication.

Excellence in survey practice requires that survey methods be fully disclosed and reported in



sufficient detail to permit replication by another researcher and that all data (subject to appropriate safeguards to maintain privacy and confidentiality) be fully documented and made available for independent examination. Good professional practice imposes an obligation upon all survey and public opinion researchers to include, in any report of research results, or to make available when that report is released, certain minimal essential information about how the research was conducted to ensure that consumers of survey results have an adequate basis for judging the reliability and validity of the results reported. Exemplary practice in survey research goes beyond such standard for "minimal disclosure," promulgated by AAPOR and several other professional associations (e.g., CASRO and NCPP) by (a) describing how the research was done in sufficient detail that a skilled researcher could repeat the study, and (b) making data available for independent examination and analysis by other responsible parties (with appropriate safeguards for privacy concerns).

A comprehensive list of the elements proposed for disclosure by one or more sources which in combination, exceed the "standards for minimum disclosure" proposed by any one of the professional organizations includes:

- who sponsored the survey, and who conducted it;
- the purpose of the study, including specific objectives;
- the questionnaire and/or the exact, full wording of all questions asked, including any visual exhibits and the text of any preceding instruction or explanation to the interviewer or respondents that might reasonably be expected to affect the response;
- a definition of the universe the population under study which the survey is intended to represent, and a description of the sampling frame used to identify this population (including its source and likely bias);
- a description of the sample design, including cluster size, number of callbacks, information on eligibility criteria and screening procedures, method of selecting sample elements, mode of data collection, and other pertinent information;
- a description of the sample selection procedure, giving a clear indication of the methods by which respondents were selected by the researcher, or whether the respondents were entirely self-selected, and other details of how the sample was drawn in sufficient detail to permit fairly exact replication;
- size of samples and sample disposition the results of sample implementation, including a full accounting of the final outcome of all sample cases: e.g., total number of sample elements contacted, those not assigned or reached, refusals, terminations, non-eligibles, and completed interviews or questionnaires;
- documentation and a full description, if applicable, of any response or completion rates cited (for quota designs, the number of refusals), and (whenever available) information on how non respondents differ from respondents;
- a description of any special scoring, editing, data adjustment or indexing procedures used;
- a discussion of the precision of findings, including, if appropriate, estimates of sampling error with references to other possible sources of error so that a misleading impression of accuracy or precision is not conveyed and a description of any weighting or estimating procedures used;
- a description of all percentages on which conclusions are based;
- a clear delineation of which results are based on parts of the sample, rather than on the total sample;
- method(s), location(s), and dates of interviews, fieldwork or data collection;
- interviewer characteristics;

- copies of interviewer instructions or manuals, validation results, codebooks, and other important working papers; and
- any other information that a layperson would need to make a reasonable assessment of the reported findings.

Sources

[Back to top](#)

###

[READ MORE](#)

---

[Disclosure standards | Sampling](#)

---

American Association for Public Opinion Research  
P.O. Box 14263 | Lenexa, KS 66285-4263  
(913) 895-4601 | FAX: (913) 895-4652  
Email: [info@aapor.org](mailto:info@aapor.org)

## **EXHIBIT 7**

**Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

_____	)	
<b>In the Matter of</b>	)	
	)	<b>Docket No. 2007-3 CRB CD 2004-2005</b>
<b>Distribution of the</b>	)	
<b>2004 and 2005</b>	)	
<b>Cable Royalty Funds</b>	)	
_____	)	

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW OF THE SETTLING PARTIES**

**March 24, 2010**

We detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards. Indeed, it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme. . . . Bortz adequately measured the key criterion of relative market value. Moreover, as the CARP put it, Bortz "subsumes *inter alia* all viewing data that a CSO might consider when assessing relative value of programming groups."

*Id.* at 402 (citation omitted).

## **II. The Record In This Proceeding Confirms That The 2004-05 Bortz Surveys Provide Reliable And Valid Estimates Of Relative Marketplace Values.**

The 1998-99 CARP stated that its decision to rely exclusively upon the Bortz results in setting certain awards was based upon the record before it and recognized that future records could produce different results. *See* 1998-99 CARP Report at 53 ("We certainly do not suggest that in future proceedings Bortz results should necessarily be mechanically adopted to set the awards for PS, JSC and NAB"). The record in this proceeding, however, affords no proper basis for departing from the CARP's conclusion (affirmed by the Register, Librarian and Court of Appeals) that the Bortz surveys provide the best available estimates of the relative market values of JSC, CTV and PS programming (and a floor for PTV programming). To the contrary, the record in this proceeding confirms that the 2004-05 Bortz surveys, like the 1998-99 Bortz surveys, provide reliable and valid estimates of those values. Moreover, aspects of the Bortz surveys presented in this proceeding have resolved the issues that prevented the 1998-99 CARP from relying on the Bortz survey results as a basis for the Canadians' award.

### **A. The 2004-05 Bortz Surveys Are Methodologically Sound.**

The 1998-99 CARP concluded the Bortz survey had "been improved and perfected over the years to the point where few doubt its robustness and accuracy." *Id.* at 52. Indeed, the 1998-99 CARP did not suggest that Bortz should make any changes in the methodology of the surveys -- including the program categories used in those surveys. *See also* 1998-99 CARP Report at 18-19 (noting that the 1990-92 CARP conceded that the survey was "well designed" and did not suggest any specific methodological changes) (citation omitted). Numerous experts in prior distribution proceedings have offered testimony demonstrating that the Bortz surveys are properly designed and executed. *See* SP PFOF ¶¶63-85.



In this proceeding, Mr. Trautman of Bortz Media testified that the 2004-05 Bortz surveys followed the same procedures, and met the same high standards, as the 1998-99 Bortz surveys upon which the 1998-99 CARP relied. Furthermore, Dr. Gregory Duncan of the University of California at Berkeley, a qualified expert in survey research, *see* Tr. 2502 (Duncan), determined that the conclusions of the 1998-99 CARP concerning, and those of various survey experts who have evaluated, the prior Bortz surveys apply equally to the 2004-05 Bortz surveys. Dr. Duncan explained that the 2004-05 surveys are “methodologically sound;” they are “based on sound principles and tested methods” and were “conducted in such a way that [their] results can be deemed reliable.” Duncan WDT (SP Ex. 1) at 11. Dr. Duncan’s testimony and other record evidence (including the testimony of Mr. Trautman of Bortz Media, who has substantial survey experience involving the cable industry) demonstrate that the 2004-05 Bortz surveys followed the same high professional standards as the 1998-99 surveys to which the 1998-99 CARP accorded determinative weight. *See* SP PFOF ¶¶86-125.

The Program Suppliers did not present any witness to rebut Dr. Duncan’s testimony supporting the Bortz survey methodology; nor did they present anyone qualified as a survey expert to testify concerning that methodology. While the Program Suppliers offered the same criticisms of the Bortz methodology that they have offered (and which were rejected) in prior proceedings (such as those relating to program categorization), they failed to provide empirical support for any of those criticisms (as instructed to do by the Register and Librarian in the 1998-99 proceeding). *See infra* pages 20-29 (discussing criticisms); SP PFOF ¶¶267-72.

The Canadians’ witnesses offered in this proceeding some of the same criticisms of the Bortz methodology that they offered in prior proceedings. As discussed below, these criticisms also are unsupported by any empirical evidence and are unfounded. While the 1998-99 CARP did not use the Bortz surveys to determine the Canadians’ award, the record in this proceeding provides a stronger basis than any prior record for accepting the Bortz methodology (rather than fee generation) to set the Canadians’ 2004-05 award. *See* SP PFOF ¶¶297-308, 325-36, 570-671. At the least, however, as the Canadians’ witnesses acknowledged, those criticisms do not affect the Bortz results for Program Suppliers, JSC and CTV. *See* SP PFOF ¶¶125, 305.

The Devotionals, who support the Bortz results, offered no criticism of the Bortz methodology.

**B. The 2004-05 Bortz Surveys Provide Reliable Estimates Of Relative Marketplace Values In The Relevant Hypothetical Marketplace.**

The 1998-99 CARP determined that, in a hypothetical marketplace absent compulsory licensing, negotiations for distant signal programming would most likely occur between individual cable operators (or perhaps MSOs or a collective that they might form), on the one hand, and individual broadcast stations that would act as intermediaries for copyright owners and that would license all the copyrighted programming broadcast by each station, on the other hand. As a result, cable system operators (or MSOs or a collective) would bargain for a fixed quantity, meaning that the supply curve for each type of programming would remain vertical, *i.e.*, the supply of programming would remain the same irrespective of the price. Thus, the “demand side” (the cable operators’ perspective) would determine relative values of each type of programming. Under these circumstances, the CARP concluded, the Bortz surveys of cable operator program demand provide the best evidence of relative market value. *See* 1998-99 CARP Report at 11-13.

The Program Suppliers argued that this “description of the hypothetical marketplace is fundamentally flawed, produces absurd results, and must be rejected.” The Register and Librarian, however, dismissed the Program Suppliers’ argument. *See* 1998-99 Librarian Order, 69 Fed. Reg. at 3614. As the Register and Librarian explained, “While Program Suppliers may disagree with the Panel’s consideration of the hypothetical marketplace and in particular its conclusion that it is the perspective of cable operators that best determines how much different categories of programming would be worth, the Panel’s actions are based on prior decisions.” *Id.* at 3614.

Again, nothing in the record of this proceeding warrants a departure from prior decisions. Rather, the record confirms, consistent with precedent, that in the relevant hypothetical marketplace broadcasters would likely act as intermediaries between copyright owners and cable operators; the supply of programming would be fixed; demand would determine the relative market values of each type of distant signal non-network programming; and thus the relative



**A. The 2004-05 Bortz Survey Results Can And Should Be Adjusted To Provide Royalty Shares For PTV And The Canadians.**

**1. The PTV Award.**

After examining all of the evidence in the record, the 1998-99 CARP decided to award PTV its 1990-92 royalty share rather than its Bortz share. The 1998-99 CARP explained its reason not to tie the PTV award to the Bortz results as follows:

The Panel's primary concern about the Bortz survey turns on [the survey's] treatment of PTV. We find that the Bortz survey results understate the relative value of PTV. The major bias to the detriment of PTV is the Bortz treatment of cable systems that carried only PTV as distant signals. If a cable system carried PTV only as a distant signal, it was removed from the Bortz sample. On the other hand, if the system carried only one or more commercial distant signals, and no PTV distant signals, it was included in the Bortz survey and PTV was automatically assigned a zero.

1998-99 CARP Report at 22-23. The same situation pertains to the Canadians since Bortz Media did not interview any cable systems that carried Canadian signals as their only distant signals.

As Mr. Trautman explained, the intent of the Bortz survey is to provide comparisons of multiple program categories; where a cable system carries only one such category (*i.e.*, only a PTV signal or only a Canadian signal), no such comparison may be made. He recognized, however, that it would be appropriate to adjust the results of the Bortz survey to deal with these PTV-only and Canadian-only systems. *See* Bortz Report (SP Ex. 2) at 8-9 & 40-41; Tr. 108 (Trautman). Indeed, he presented such adjustments in the 1998-99 CARP proceeding (as did other parties), but the CARP did not accept them. *See* 1998-99 CARP Report at 26-29. In this proceeding, PTV has sponsored the testimony of Ms. Linda McLaughlin who provided a new analysis to deal with the PTV- and Canadian-only systems. Her analysis attempts to meet concerns that were expressed with the proposed adjustments in the 1998-99 proceeding. *See* SP PFOF ¶¶309-324, 330.

The Settling Parties believe that the Judges should adopt Ms. McLaughlin's adjustment to the 2004-05 Bortz results -- as well as the further adjustment proposed by Canadian witness Gary Ford to deal with his concern that, as a result of a "clerical error," one large system carrying only



a distant Canadian signal was not included in the Bortz survey. No party has provided any substantive basis for contesting that these adjustments should not be adopted. See SP PFOF ¶¶318-324. With these adjustments (and the one additional adjustment discussed below), the PTV and Canadian 2004-05 royalty shares (like the shares for JSC, CTV and Program Suppliers) should be tied directly to the 2004-05 Bortz results.

## **2. The Canadians' Award.**

The 1998-99 CARP determined that it would not rely upon the 1998-99 Bortz surveys to set the Canadians' 1998-99 award. Instead, "despite our expressed concerns respecting fee generation," it tied the Canadians' award to the "fee generation" of distant Canadian signals, as adjusted by (1) the results of Dr. Ringold's constant sum surveys of cable operators and (2) the awards to other parties. See 1998-99 CARP Report at 72-75. The 1998-99 CARP declined to use the Bortz results for the Canadians saying only that the survey was not "designed" to include the Canadians and did not provide "statistically significant results" for the Canadians. See 1998-99 CARP Report at 31 n.13. The Panel acknowledged, however, that "fee generation does not reach the level of robustness and reliability of the Bortz study." *Id.* at 64.

In the 2000-03 proceeding, the Judges concluded that the Canadians' fee generation approach had been "sufficiently vetted" in the 1990-92 and 1998-99 proceedings, and should be accorded deference as one method – rather than the sole method or best method – for determining the Canadians' share. 2000-03 Distribution Order at 25-26. The Judges went on to state, however, that:

It very well may be that there are other methods or other evidence that best represent *the* relative marketplace value of Canadian Claimants' programming as well as the programming of other groups. . . The Judges, therefore, do not opine as to what may be the best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings.

*Id.* at 18.

The record of this proceeding provides the strongest support ever for using the Bortz survey results (rather than fee generation) to set the Canadians' award. Historically, only an

# Proof of Delivery

I hereby certify that on Monday, November 28, 2022, I provided a true and correct copy of the Opposition of the Joint Sports Claimants to Public Television's Motion to Compel to the following:

Public Television Claimants, represented by Ronald G. Dove Jr., served via E-Service at [rdove@cov.com](mailto:rdove@cov.com)

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via E-Service at [jennifer.criss@dbr.com](mailto:jennifer.criss@dbr.com)

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via E-Service at [ted@copyrightroyalties.com](mailto:ted@copyrightroyalties.com)

SESAC Performing Rights, LLC, represented by Timothy L Warnock, served via E-Service at [twarnock@loeb.com](mailto:twarnock@loeb.com)

Multigroup Claimants, represented by Brian D Boydston, served via E-Service at [brianb@ix.netcom.com](mailto:brianb@ix.netcom.com)

ASCAP, represented by Sam Mosenkis, served via E-Service at [smosenkis@ascap.com](mailto:smosenkis@ascap.com)

Devotional Claimants, represented by Matthew J MacLean, served via E-Service at [matthew.maclean@pillsburylaw.com](mailto:matthew.maclean@pillsburylaw.com)

National Public Radio, represented by Amanda Huetinck, served via E-Service at [ahuetinck@npr.org](mailto:ahuetinck@npr.org)

Commercial Television Claimants / National Association of Broadcasters, represented by David J Ervin, served via E-Service at [dervin@crowell.com](mailto:dervin@crowell.com)

Program Suppliers, represented by Lucy H Plovnick, served via E-Service at [lh@msk.com](mailto:lh@msk.com)

Global Music Rights, LLC, represented by Scott A Zebrak, served via E-Service at [scott@oandzlaw.com](mailto:scott@oandzlaw.com)

Canadian Claimants, represented by Lawrence K Satterfield, served via E-Service at

lksatterfield@satterfield-pllc.com

Signed: /s/ Michael E Kientzle