

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

In re

**DISTRIBUTION OF
CABLE ROYALTY FUNDS**

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

**ORDER 39 DENYING PROGRAM SUPPLIERS' MOTION TO STRIKE PORTIONS OF
THE WRITTEN AND ORAL TESTIMONY OF ROBERT A. PAPPER**

I. Background

The pending motion comes before the Copyright Royalty Judges (Judges) with a history that, for the sake of clarity, is herein summarized. Before the hearing, the Program Suppliers filed their “Motion *in Limine* to Exclude Portions of the Testimony of Professor Robert A. Papper.” (“MIL”) (eCRB no. 27485). The motion was based on the fact that Prof. Papper’s written testimonies on behalf of the Commercial Television Claimants (“CTV”) are based in part on his analysis of results of the Radio Television Digital News Association annual surveys for the years 2014 through 2017 (“RTDNA Surveys”), which he conducted as he had for many previous years. Questions were raised concerning the applicability and requirements of 37 C.F.R. § 351.10(e), which relates to survey evidence, specifically studies or analyses that are offered into evidence. In denying the MIL, the Judges determined, *inter alia*, that Prof. Papper’s written direct and rebuttal testimonies, including the portions subject to the MIL, express detailed opinions based in large part on certain RTDNA Surveys, and that Prof. Papper could be examined on his opinions, but that did not necessarily mean that the surveys would be offered or received into evidence. Order 29 at 8.

During the hearing, the Program Suppliers made similar objections to portions of the Papper testimonies. *See* 4/11/23 Tr. 4254-4355, 4366; 4/12/23 Tr. 4445-4452. Indeed, CTV called Prof. Robert Papper as a witness, and he was qualified as an expert in broadcast and digital journalism. 4/11/23 Tr. 4370 (Papper). He testified as to trends in the local television news industry, and particularly his opinion as to the impact of those trends on the relative value of CTV programming during the period 2014-2017. His opinions relied in large part on the results of the RTDNA Surveys, especially articles and studies (mainly authored or co-authored by Prof. Papper) that concern the results of the RTDNA Surveys for the period 2014-2017. RTDNA Survey information, and the articles and studies on which Prof. Papper relied, are appended to his written direct testimony. *See, e.g.*, 4/11/23 Tr. 4361-4463 (Papper); Ex. 7201 (Papper WDT); Ex. 7206 (Papper WRT).

On April 28, 2023, subsequent to the hearing, the Program Suppliers filed a “Motion to Strike Portions of the Written and Oral Testimony of Robert A. Papper” (eCRB no. 28213).

On May 8, 2023, an opposition to the motion to strike was filed by CTV (eCRB no. 28226).

On May 15, 2023, the Program Suppliers filed a reply in support of their motion to strike (eCRB no. 28238).

II. Ruling

As discussed in Order 29, denying the MIL, the RTDNA Surveys were not conducted for the purpose of litigation; and it was not expected that they would be offered independently during the hearing as evidence. Indeed, the RTDNA Surveys were not offered or received as survey evidence during the hearing. Rather, the RTDNA Surveys, and articles based upon them, were among the factors relied on by Prof. Papper in forming and presenting his expert opinions.

As will be seen in the Judges' allocation determination, the weight to be accorded data from the RTDNA Surveys is determined within the context of evaluating Prof. Papper's expert opinions.

Accordingly, the Program Suppliers' motion to strike is DENIED.

SO ORDERED.

Hon. David P. Shaw
Chief Copyright Royalty Judge

DATED: September 5, 2023