Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: April 12, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

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DEPARTMENT OF JUSTICE

Notice of Extension of Public Comment Period for Consent Decree Under The Clean Air Act

On February 8, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Northern District of Alabama in the lawsuit entitled *United States et al.* v. *Drummond Company, Inc. d/b/a ABC Coke (Drummond),* Civil Action No. 2:19–cv–00240–AKK. The United States is joined in this matter by its co-plaintiff the Jefferson County Board of Health (JCBH). At the request of members of the public, DOJ is extending the public comment period for an additional 30 days.

This case relates to alleged releases of benzene from Drummond's coke by-product recovery plant in Tarrant, Alabama (Facility). The case involves claims for civil penalties and injunctive relief under the Clean Air Act, 42 U.S.C. 7401 *et seq.,* and its implementing regulations known as National Emission Standards for Hazardous Air Pollutants (NESHAPs), including 40 CFR part 61, subpart L (Benzene Emissions from Coke By-product Recovery Plants), subpart V (Equipment Leaks and Fugitive Emissions), and subpart FF (Benzene Waste Operations), as well as related claims under laws promulgated by the Jefferson County Board of Health. The settlement resolves the alleged claims by requiring Drummond to, among other things: (1) Pay a civil penalty of $775,000 for the past alleged violations to be split equally between the United States and JCBH; (2) undertake fixes to the Facility to address the alleged violations; (3) implement a leak detection and repair program to ensure compliance and reduce potential future fugitive benzene emissions; and (4) implement a supplemental environmental project of two years of semi-annual use of an infrared camera as part of leak detection efforts at a cost of $16,000.

Notice of the lodging of the decree was originally published in the **Federal Register** on February 14, 2019. *See* 84 FR 4104 (February 14, 2019). The publication of the original notice opened a thirty (30) day period for public comment on the Decree. The public comment period was extended until April 17, 2019. 84 FR 9,560 (March 15, 2019). The publication of the present notice extends the period for public comment on the Decree to May 17, 2019.

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States et al.* v. *Drummond Company, Inc. d/b/a ABC Coke,* D.J. Ref. No. 90–5–2–1–10717. All comments must be submitted no later than May 17, 2019. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, D.C. 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $10.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Henry Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

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LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket Nos. 2012–6 CRB CD 2004–09 (Phase II) and 2012–7 CRB SD 1999–2009 (Phase II)]

Distribution of 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds; Distribution of 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Satellite Royalty Funds

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Final distribution determination.

SUMMARY: The Copyright Royalty Judges announce their final determination of the distribution percentages of cable and satellite royalties in the program suppliers funds and the devotional funds for numerous years.

DATES: *Applicable date:* April 17, 2019.

ADDRESSES: The final distribution order is also published in eCRB at *https://app.crb.gov/.*

Docket: For access to the docket to read background documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/* and search for docket number 2012–6 CRB CD 2004–09.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by phone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Final Determination of Royalty Distribution

I. Introduction

The Copyright Royalty Judges (Judges) initiated the captioned proceedings to determine proper distribution of royalties deposited with the Library of Congress for retransmission of broadcast signals by cable and satellite during the years 2004–2009 and 1999–2009, respectively.[1] *See* 78 FR 50113 (Aug. 16, 2013) (cable retransmissions); and 78 FR 50114 (Aug. 16, 2013) (satellite retransmissions). In the Program Suppliers category, controversies exist between MPAA-represented Program Suppliers (MPAA) and Worldwide Subsidy Group LLC d/b/a Independent Producers Group (IPG). In the Devotional category, controversies exist between the Settling Devotional Claimants (SDC)[2] and IPG. The Judges determine the funds shall be distributed as follows:

TABLE 1—DISTRIBUTION OF PROGRAM SUPPLIERS FUNDS

Year	Cable		Satellite	
	MPAA (percent)	IPG (percent)	MPAA	IPG (percent)
2000			99.54	0.46
2001			99.75	0.25
2002			99.74	0.26
2003			99.65	0.35
2004	99.60	0.40	99.87	0.13
2005	99.60	0.40	99.73	0.27
2006	99.34	0.66	99.65	0.35
2007	99.44	0.56	99.77	0.23
2008	99.28	0.72	99.78	0.22
2009	99.44	0.56	99.57	0.43

TABLE 2—DISTRIBUTION OF DEVOTIONAL FUNDS

Year	Cable		Satellite	
	SDC (percent)	IPG (percent)	SDC (percent)	IPG (percent)
1999			100.0	0.0
2000			100.0	0.0
2001			98.8	1.2
2002			98.5	1.5
2003			97.2	2.8
2004	89.1	10.9	98.8	1.2
2005	89.2	10.8	98.4	1.6
2006	87.5	12.5	91.2	8.8
2007	92.4	7.6	97.1	2.9
2008	90.2	9.8		
2009	90.0	10.0	97.9	2.1

After accounting for administrative fees, the Copyright Office Licensing Division shall distribute remaining funds, together with interest accrued on each fund balance, in such a way as to effect these distribution percentages as if they had been determined on the day following each royalty deposit and continuing until the date of each partial distribution.

The Judges make this determination for the following reasons.

II. Background

A. Posture of the Proceeding

The Judges initiated this Phase II proceeding[3] on August 16, 2013, and held a preliminary hearing to resolve disputes over the validity and categorization of claims on December 8–16, 2014. The Judges issued an order resolving claims disputes on March 13, 2015. *See Memorandum Opinion and Ruling on Validity and Categorization of Claims* (Mar. 13, 2015) (*Claims Ruling*).[4] The Judges held a hearing from April

[1] On December 22, 2015, the Judges concluded that there was no remaining controversy with respect to the 2008 satellite fund in the Devotional category and, therefore, ordered distribution of those uncontroverted funds. *See Order Granting Final Distribution of 2008 Satellite Royalties for the Devotional Category* (Jan. 13, 2016). The Judges had already determined and distributed 1999 satellite funds allocated to the Program Suppliers category when they commenced this proceeding. *See* 78 FR 50114, 50115 (Aug. 16, 2013).

[2] The SDC are comprised of Amazing Facts, Inc., American Religious Town Hall, Inc., Billy Graham Evangelistic Association, Catholic Communications Corporation, Christian Television Network, Inc., The Christian Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Cottonwood Christian Center, Crenshaw Christian Center, Crystal Cathedral Ministries, Inc., Evangelical Lutheran Church in America, Faith for Today, Inc., Family Worship Center Church, Inc. (d.b.a. Jimmy Swaggart Ministries), International Fellowship of Christians & Jews, Inc. (cable only), In Touch Ministries, Inc., It is Written, John Hagee Ministries, Inc. (a.k.a. Global Evangelism Television), Joyce Meyer Ministries, Inc. (f.k.a. Life in the Word, Inc.), Kerry Shook Ministries (a.k.a. Fellowship of the Woodlands), Lakewood Church (a.k.a. Joel Osteen Ministries), Liberty Broadcasting Network, Inc., Messianic Vision, Inc., New Psalmist Baptist Church, and Oral Roberts Evangelistic Association, Inc.

[3] The Judges determined the Phase I allocation of cable royalties among the claimant categories for 2004 and 2005 after an evidentiary hearing. *See Distribution of the 2004 and 2005 Cable Royalty Funds,* 75 FR 57063 (Sept. 17, 2010). Representatives of the claimant categories negotiated a confidential settlement of Phase I allocation of cable royalties for the remaining years in the proceeding and of satellite royalties for all years in the proceeding.

[4] IPG filed four separate motions seeking modifications to the *Claims Ruling.* The Judges granted relief in response to two of them. The Judges modified the *Claims Ruling* on April 9, 2015, to reinstate IPG's claims on behalf of a claimant it represents in the Devotional category for 2001–02 and 2004–09 and modified the *Claims Ruling* again on October 27, 2016, to credit IPG with one claimant the Judges had previously dismissed for the 2008 satellite royalty year. *See Order on IPG Motions for Modification,* at 5 (Apr. 9, 2015) (*April 9 Order*); *Order Granting IPG Fourth Motion for Modification of March 13, 2015 Order,* at 1–2 (Oct. 27, 2016). The Judges considered and denied the other two IPG motions to modify the *Claims Ruling. See April 9 Order,* at 2–5; *Order Denying IPG Third Motion for Modification of March 13, 2015 Order* (June 1, 2016). In its proposed findings, IPG claimed that MPAA's expert, Dr. Gray, ''automatically awarded'' programs to MPAA in computing royalty shares when there were competing claims between MPAA and IPG. IPG PFF ¶ 24. IPG's criticism is misplaced. Dr. Gray testified that he incorporated the *Claims Ruling* (as subsequently modified) into his analysis. 4/10/18 Tr. 414–16 (Gray). IPG's complaint is with the *Claims Ruling,* not with Dr. Gray's methodology.

13–17, 2015, in which they received evidence and expert testimony concerning the proper distribution of royalties in the categories at issue in this proceeding. In accordance with 37 CFR 351.12, at the conclusion of the hearing and after closing arguments of counsel, the Chief Judge announced the end of presentation of evidence and closed the record, apart from allowing an exception for parties to file corrected and redacted exhibits in accordance with the Judges' rulings during the hearing and after the hearing based on filed and pending evidentiary motions. *See* 4/17/15 Tr. at 285.

After considering the entire record in the proceeding, the Judges found that no party had ''presented a methodology and data that, together, are sufficient to support a final distribution in the contested categories.'' *Order Reopening Record and Scheduling Further Proceedings,* at 1 (May 4, 2016) (*Order Reopening Record*). The Judges set aside the participants' evidence, reopened the record, and directed the parties to present additional evidence and expert opinion.[5] *Id.* at 2. The Judges permitted the participants to reintroduce any previously-introduced evidence and to designate prior testimony in accordance with 37 CFR 351.4(b)(2). *Id.* at 8.

The participants filed Written Direct Statements (WDSs) in the reopened proceeding on August 22, 2016. Shortly thereafter, the SDC filed a notice consenting to distribution of satellite royalties in the Devotional category in accordance with IPG's proposed royalty shares. *See Notice of Consent to 1999–2009 Satellite Shares Proposed By Independent Producers Group and Motion for Entry of Distribution Order* (Aug. 26, 2016) (Notice and Motion). IPG responded by opposing the *Notice and Motion* and filing an Amended WDS (AWDS) in which its economic expert, Dr. Charles Cowan, revised his written report and changed his proposed royalty shares. In response to motions by the SDC and MPAA, the Judges struck IPG's AWDS for failing to comply with the Judges' procedural rules. *See Order Granting MPAA and SDC Motions to Strike IPG Amended Written Direct Statement and Denying SDC Motion for Entry of Distribution Order* (Oct. 7, 2016) (*Oct. 7 Order*).[6] Specifically, the Judges determined that IPG could not file its AWDS as of right, had failed to file a motion requesting leave to file an AWDS, and failed to explain how its AWDS differed from its WDS. *See id.* at 3–4. IPG subsequently sought leave to file an AWDS, renewing the arguments it had made in opposition to the SDC's and MPAA's motions to strike. The SDC and MPAA opposed IPG's motion. The Judges accepted IPG's AWDS and granted the SDC and MPAA an additional opportunity to conduct discovery related to the AWDS. *See Order on IPG Motion for Leave to File Amended Written Direct Statement* (Jan. 10, 2017) (*Jan. 10 Order*).[7]

The SDC and MPAA filed Written Rebuttal Statements (WRSs) on December 15, 2017, in accordance with the Judges' procedural schedule. IPG elected not to file a WRS, filing a ''notice'' instead. IPG had initiated a collateral attack on the Judges' interlocutory *Claims Ruling* in U.S. District Court on December 8, 2017, and was seeking a temporary restraining order to stay this proceeding.[8] In addition, IPG had filed a motion on December 11, 2017, with the Judges seeking a stay of their proceeding. Neither of those motions had been resolved as of the due date for WRSs.[9] IPG thus did not submit or seek admission of any rebuttal testimony in the reopened proceeding.

Shortly before the scheduled rehearing in the reopened proceeding, MPAA and the SDC filed a joint Motion *in Limine* and Motion for Summary Disposition seeking to exclude all exhibits proposed by IPG and to conclude the proceeding summarily. *See Order Granting in Part Joint Motion in Limine and Denying Joint Motion for Summary Judgment,* at 1 (Apr. 6, 2018) (*Order on Motion in Limine*). The moving parties sought to exclude the written direct testimony[10] of Dr. Cowan, IPG's expert (and sole) witness, because he would not be available to testify in person, and would not, therefore, be subject to cross-examination by opposing counsel.[11] The moving parties sought to exclude the remaining IPG exhibits, which consisted entirely of designated prior testimony of witnesses in past distribution proceedings, because IPG failed to comply with the Judges' procedural rule governing submission of designated prior testimony.[12] *Id.* at 2. The Judges excluded Dr. Cowan's written testimony and all of IPG's proffered exhibits, except to the extent that IPG might use the testimony and exhibits in cross-examining MPAA's and the SDC's witnesses. *Id.* at 2–3, 5; 4/9/18 Tr. 146–47 (Barnett, C.J.).

The Judges construed the moving parties' request for summary disposition as a request to conduct a paper proceeding in accordance with 17 U.S.C. 803(b)(5)(B). The Judges denied the request, concluding that, in light of the failure of proofs by all parties that necessitated the reopened proceeding, it would be appropriate for the Judges to take live testimony, and allow IPG to cross-examine witnesses, in order to determine whether the moving parties' respective second attempts at constructing distribution methodologies were adequate. *Order on Motion in Limine,* at 4.

The Judges held a hearing in the reopened proceeding on April 9–10, 2018, and heard closing arguments on May 24, 2018. The record now before the Judges consists of the oral testimony of the witnesses presented by MPAA and the SDC at that hearing, together with all exhibits admitted at the hearing (including any properly designated testimony from the earlier hearing or prior proceedings). IPG did not present any witnesses, and, pursuant to the

[5] After the parties filed corrected and redacted exhibits, MPAA and the SDC filed a motion asking the Judges to disregard two of IPG's hearing exhibits because IPG allegedly failed to redact them properly. *See* Settling Devotional Claimants' and MPAA-Represented Program Suppliers' Objections to Consideration of Exhibits Submitted by IPG that were not Properly Redacted (Sept. 15, 2015). In light of the Judges' decision to set aside all of the participants' evidence, the Judges DENY this motion as moot.

[6] In the filings concerning IPG's AWDS, Dr. Cowan explained, ''after preparation of the August 22nd report, IPG's counsel immediately inquired about the produced results, and during the course of the next week [Dr. Cowan] discovered errors in the earlier processing of the data.'' IPG's counsel stated that he ''did not review or consider'' his expert's report prior to submitting it to the Judges purportedly to avoid allegations that IPG had ''straightjacketed'' its witness. IPG Opposition to MPAA Motion to Strike IPG's Amended Direct Statement, at 3 n.4. (Sept. 12, 2016); *See Oct. 7 Order,* at 4 & n.5.

[7] Based on the totality of IPG's conduct in relation to Dr. Cowan's report, and the apparent prejudice to the SDC and MPAA, the Judges permitted the SDC and MPAA to file ''individual motions or a joint motion with authoritative legal analysis addressing the Judges' authority, if any, to impose financial or other sanctions in this circumstance in which a party has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification.'' *Jan. 10 Order,* at 7. MPAA and the SDC filed separate sanctions motions. The Judges subsequently denied these motions. Order Denying MPAA and SDC Motions for Sanctions (March 12, 2019).

[8] *Worldwide Subsidy Group* v. *Hayden,* 17–cv–02643 (D. D.C. filed Dec. 8, 2017).

[9] The Judges denied IPG's motion for a stay of proceedings on January 4, 2018. *See Order Denying Independent Producers Group's Emergency Motion for Stay of Proceedings* (Jan. 4, 2018). IPG voluntarily dismissed its complaint in the collateral action in federal district court on January 11, 2017.

[10] IPG did not file a timely Written Rebuttal Statement, and thus did not seek admission of any rebuttal testimony.

[11] The moving parties alleged (and IPG did not dispute) that IPG informed them of Dr. Cowan's unavailability on April 2, 2018, seven days before the scheduled hearing. IPG did not apprise the Judges of the reason for Dr. Cowan's failure to appear, ascribing it to ''his own reasons.'' *Order on Motion in Limine,* at 1.

[12] 37 CFR 351.4(b)(2).

Order on Motion in Limine, the Judges admitted no IPG exhibits.

The Judges issued an Initial Determination on January 22, 2019. No participant filed a timely petition for rehearing. Consequently, this Final Determination is identical in substance to the Initial Determination.

B. Legal Standard for Distribution

The Copyright Act does not contain a statutory standard for apportioning cable and satellite royalty funds among claimants. The Judges and their predecessors, however, have long held that royalties should be awarded in accordance with the relative marketplace value of the programming. *See Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds: Final Distribution Order,* 78 FR 64984, 64986 (Oct. 30, 2013) (*2000–03 Cable Determination*).[13] Pursuant to 17 U.S.C. 803(a)(1), the Judges act ''in accordance with'' these prior decisions. The Judges look to ''hypothetical, simulated, or analogous markets'' to assess relative marketplace value, since there is no actual, unregulated marketplace for retransmission of broadcast signals by cable and satellite. *2000–03 Cable Determination,* 78 FR at 64986.

Under applicable precedent, the Judges are not required to identify a methodology that would allow them to distribute cable and satellite royalties with ''mathematical precision.'' *Id.* (citing *National Ass'n of Broadcasters* v. *Librarian of Congress,* 146 F.3d 907, 929 (D.C. Cir. 1998)). The Judges' distribution determinations must instead lie within a ''zone of reasonableness.'' *See National Ass'n of Broadcasters,* 146 F.3d at 929; *see also Asociacion de Compositores y Editores de Musica Latino Americana* v. *Copyright Royalty Tribunal,* 854 F.2d 10, 12 (2d Cir. 1988) (recognizing ''zone of reasonableness'' standard in Phase II royalty distribution proceedings); *Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal,* 720 F.2d 1295, 1304 (D.C. Cir. 1983).

III. Use of Evidence of Viewership To Determine Relative Marketplace Value

IPG vigorously attacked the use of viewership evidence for determining relative market value of programming. Since both MPAA and the SDC utilize methodologies based on viewership evidence, the Judges consider these arguments together, before considering the methodologies individually.

Expert witnesses for MPAA and the SDC testified that relative viewership is an appropriate metric for determining relative marketplace value in this proceeding. *See* Written Direct Testimony of Erkan Erdem, Trial Ex. 7000, at 8–9, 12 (Erdem WDT); Written Direct Testimony of Jeffrey S. Gray, Trial Ex. 8002, ¶¶ 17–18 (Gray WDT); and Written Direct Testimony of John S. Sanders, Trial Ex. 7001, at 21 (Sanders WDT). MPAA and the SDC both argue that the Judges have previously relied on viewership evidence to apportion royalties among copyright owners in Phase II distribution proceedings. *See* SDC PFF ¶ 24 (citing *2000–03 Cable Determination* and *Distribution of 1998 and 1999 Cable Royalty Funds,* 80 FR 13423 (Mar. 13, 2015) (*1998–99 Phase II Cable Determination*)); MPAA PCOL ¶ 15 (citing *2000–03 Cable Determination*).

IPG, on the other hand, argues that the Judges are barred by precedent from determining relative marketplace value based on viewership evidence. *See, e.g.,* IPG PFF ¶ 132. IPG bases its argument on the rejection of viewing evidence by a Copyright Arbitration Royalty Panel (CARP) in the 1998–99 Phase I cable royalty distribution proceeding, and the Librarian of Congress' statement in his opinion adopting the panel decision that ''[t]he Nielsen study was not useful because it measured the wrong thing.'' Final Order, Docket No. 2001–8 CARP CD 98–99, 69 FR 3606, 3613 (Jan. 26, 2004) (*1998–99 Librarian Order*). IPG has made the same argument in past Phase II proceedings. *See, e.g.,* IPG PFF, Docket No. 2008–1 CRB CD 98–99 (Phase II), at 32 (Sept. 23, 2014); and IPG PFF in connection with Program Suppliers Category, Docket No. 2008–2 CRB CD 2000–2003 (Phase II), at 32 (June 14, 2013). The Judges have rejected IPG's argument on each occasion, *see, e.g., Distribution of 1998 and 1999 Cable Royalty Funds,* 80 FR 13423, 13433 (Mar. 13, 2015) (*1998–99 Phase II Cable Determination*); *2000–03 Cable Determination,* 78 FR at 64995, and do so again in this proceeding.

The Copyright Act requires the Judges to act ''on the basis of prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels . . ., and the Copyright Royalty Judges . . . .'' 17 U.S.C. 803(a)(1). As the Judges have recently had occasion to confirm, the *1998–99 Librarian Order* and the CARP report that it adopted are in the nature of '' 'precedent' that the Judges must consider . . . .'' *Initial Determination of Royalty Allocation,* Docket No. 14–CRB–0010–CD (2010–13), at 96 (Oct. 18, 2018) (*2010–13 Cable Allocation Determination*) (footnote omitted).[14] However, the Judges conclude, consistent with *1998–99 Phase II Cable Determination* and the *2000–03 Cable Determination,* that those prior decisions in no way preclude the Judges from accepting a distribution methodology founded on Nielsen viewing data.

The Judges have ruled in more recent proceedings that measurements of viewership *are* relevant to determining relative market value. *See 2010–13 Cable Allocation Determination* at 97; *1998–99 Phase II Cable Determination,* 80 FR at 13433; and *2000–03 Cable Determination,* 78 FR at 64995. ''[V]iewership can be a reasonable and directly measurable metric for calculating relative market value in cable distribution proceedings. Indeed . . . viewership is the initial and predominant heuristic that a hypothetical CSO would consider in determining whether to acquire a bundle of programs for distant retransmission . . ..'' *2000–03 Cable Determination,* 78 FR at 64995. Put another way, a CSO's demand for programming derives from consumers' desire to view the programming.

> Consumers subscribe to cable in order to watch the programming carried on the various channels provided by the cable operator. Cable operators acquire broadcast and cable channels that carry programming their subscribers want to view. Broadcasters acquire programs that will attract viewers. Viewing is the engine that drives the entire industry. It is an example of the economic concept of derived demand. The demand for programming at each step in the chain is derived from demand further along the chain, all the way to the television viewer.
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> *2010–13 Cable Allocation Determination,* at 97 (footnote omitted); *see also* Erdem WDT at 8–9; 4/9/18 Tr. 90–91, 94 (Erdem).

The cases that IPG cites stand for the proposition that the Judges decline to apportion royalties *among program categories* solely based on viewership studies. As the Judges clarified recently, they do so, *not* because those studies ''measure[] the wrong thing,'' but because, standing alone, they are

[13] IPG appealed certain portions of the *2000–03 Cable Determination.* The U.S. Circuit Court for the D.C. Circuit remanded for further consideration the Judges' determination relating to distribution of devotional programming royalties. The remand did not have any impact on the determination relating to distribution of Program Suppliers' royalties.

[14] The Judges also noted that ''[t]he decision whether or not to accept a methodology for determining relative market value is factually-dependent, so it is a misnomer to describe a previous decision declining to rely on viewership as 'precedent'—*i.e.,* controlling under the principle of *stare decisis.* Nevertheless, it is a 'prior determination' 'on the basis of' which Congress has directed the Judges to act (along with the written record and other items enumerated in the statute).'' *Id.* at 96 n.165.

''inadequate'' measures of relative value when comparing heterogeneous program categories. *2010–13 Cable Allocation Determination,* at 118. In the 2010–13 proceeding, the parties presented evidence that ''cable operators will pay substantially more for certain types of programming than for other programming with equal or higher viewership.'' *Id.* Evidence of viewership alone fails adequately to ''explain the premium that certain types of programming can demand in the marketplace.'' *Id.* Consequently, the Judges have looked to other evidence, such as CSO surveys and fee-based regression analyses, to inform their allocation of funds among categories.

As the D.C. Circuit has acknowledged, however, ''different considerations apply in Phase I and Phase II proceedings.'' *Indep. Producers Grp.* v. *Librarian of Congress,* 792 F.3d 132, 142 (D.C. Cir. 2015) (*IPG* v. *Librarian*); *see also Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds,* 66 FR 66433, 66453 (Dec. 6, 2001) (allocation methodology used in Phase I proceeding ''does not translate well to a Phase II proceeding dealing with one program category'') (*93–97 Librarian Order*). In a Phase II (or distribution phase) proceeding, the Judges must apportion royalties among relatively homogenous programs within a program category. The ''premium'' that some categories of programming can demand, irrespective of their levels of viewership, does not enter into the picture when all of the programs are in the same category. Thus, in distribution phase proceedings, the Judges have determined and continue to determine relative marketplace value based on evidence of viewership.

That is not to say that viewership evidence alone is an optimal means of determining relative market value. The Judges have acknowledged that viewership evidence may be ''subject to marginal adjustments needed to maximize subscribership.'' *2000–03 Cable Determination,* 78 FR at 64995. Nevertheless, the Judges have found viewership evidence to be an acceptable alternative in the absence of evidence ''by which to establish the relative marketplace values of . . . programs in the optimal theoretical manner.'' *1998–99 Phase II Cable Determination,* 80 FR at 13432. The Judges may, however, make appropriate adjustments to proposed allocations based on viewership evidence, provided those adjustments are supported by other record evidence.

In short, the authorities on which IPG relies—the *1998–99 Librarian Order* and the CARP report that it adopted—are not on point. The Judges will follow the precedents from Phase II distribution cases and consider viewership evidence in apportioning royalties among programs within programming categories.

IV. Distribution of Royalties in the Program Suppliers Category

A. MPAA's Methodology

MPAA's proposed apportionment of royalties in the Program Suppliers category is in proportion to the respective number of hours that cable and satellite subscribers viewed MPAA-represented and IPG-represented programs on a distant basis. *See* Gray WDT at 4. Generally, MPAA added the hours of distant viewing of MPAA-represented programs and divided by the total number of distant viewing hours for both MPAA- and IPG-represented programs to determine the MPAA share. *See id.* ¶ 49.

MPAA's expert, Dr. Gray, derived levels of distant viewing from three types of Nielsen data: Local ratings viewing data [15] collected from meters recording from 2000 to 2009; distant viewing data from viewer diaries recorded from 2000 to 2003; and distant viewing household metered data from 2008 to 2009. *See id.* ¶¶ 29–31. Because of cost considerations in obtaining the Nielsen and Gracenote data for all stations distantly retransmitted by CSOs and satellite carriers in every royalty year, for most of the royalty years, Dr. Gray selected a sample of stations retransmitted by CSOs and satellite carriers based on a stratified random sampling methodology.[16] *See id.* ¶ 26. Dr. Gray used data from Gracenote, Inc.[17] and program logs from the Canadian Radio-television and Telecommunications Commission (CRTC) to identify compensable MPAA and IPG programming carried on the sample stations. *See id.* ¶¶ 32, 35.

MPAA did not supply Dr. Gray with Nielsen custom analyses[18] of distant viewing for all of the years covered in this proceeding. *See* Gray WDT ¶ 28 (''both due to cost and time, among other constraints, custom analyses of certain types of Nielsen data were not available for all royalty years''). Because he did not have distant household viewing data for every year, Dr. Gray devised a methodology to predict levels of distant viewing using the data that MPAA made available to him. He ''establish[ed] a mathematical relationship between local ratings and distant viewing levels for the years the data are available'' and ''extrapolate[d] that mathematical relationship using a regression analysis to estimate distant viewing for all compensable programs each year . . ..'' Gray WDT ¶ 36; *see also id.* ¶ 47 (regression calculates ''mathematical relationship between distant viewing and (1) local ratings for the program, (2) the total number of distant subscribers of that station, (3) the time of day the program aired by quarter hour, (4) the type of program aired, (5) the station affiliation the program aired on, and (6) the aggregate total fees paid by CSOs or satellite carriers in [sic] year the program aired''). Dr. Gray then replaced the actual viewing data with the values for distant viewership his regression model predicted, to compute viewership (and thus royalty) shares. *See id.* ¶ 49.

B. IPG's Criticisms of MPAA's Methodology

1. Dr. Gray Relied on an Inadequate Amount of Data

IPG argued that the Judges should reject MPAA's methodology because Dr. Gray relied on an ''unreasonably small amount of data'' [19] in computing royalty

[15] Local ratings are the percentage of television-viewing households in a particular station's designated market area (DMA) that tune to that station.

[16] Stratified random sampling is a statistical technique that permits oversampling of elements with a given characteristic while still allowing for valid statistical inferences about the universe of elements as a whole. Items that are selected with a lower probability of selection are given a higher weight to adjust for the differing probability of selection. *See* discussion in *Initial Determination of Royalty Allocation,* Docket No. 14–CRB–0010–CD (2010–13), at 89 (Oct. 18, 2018) *(2010–13 Initial Allocation Determination*). In this proceeding, Dr. Gray sampled stations with many distant subscribers (which he identified using Statement of Account (SOA) data from Cable Data Corporation (CDC)) ''with certainty'' whereas stations with ''few'' distant subscribers were selected ''with lower probability.'' *See* Gray WDT ¶ 26 & n.27; 4/10/18 Tr. 384–85 (Gray).

[17] Gracenote is the successor to Tribune Media, Inc. an entity in the business of producing a database of television programming information. In their testimony, the experts in this proceeding occasionally used ''Gracenote'' and ''Tribune'' interchangeably.

[18] A ''custom analysis,'' as the name suggests, is an analysis that Nielsen conducts at a specific client's request, of data that Nielsen has already collected. This is in contrast to ''custom research,'' where Nielsen collects data at a specific client's request. *See* Designated Testimony of Paul Lindstrom, Docket No. 2008–02 CRB CD 2000–2003 (Phase II), Trial Ex. 8014, at 282–83 (Lindstrom 2000–03 Oral Testimony). Nielsen refers to reports that it prepares for multiple clients as ''syndicated products.'' 4/10/18 Tr. 312 (Lindstrom).

[19] Elsewhere in its proposed findings IPG claimed that Dr. Gray's conclusions were ''[b]ased on approximately 6% of the *distant* retransmitted broadcasts from 2000–2003, and 6% of *distant* retransmitted broadcasts from 2008–2009 . . ..'' *Id.* ¶ 25. IPG purported to reach this conclusion by counting only broadcasts with positive viewing measurements in the Nielsen data. *Id.* IPG offered no evidence or expert analysis to support this 6% number (which was apparently computed by IPG's

shares. IPG PCL ¶ 134; s*ee id.* ¶¶ 19–22. Specifically, IPG argued that Dr. Gray failed to supplement his original methodology with enough additional data to overcome the Judges' earlier objection [20] that his proposed royalty shares were supported by insufficient data. *See* IPG PFF ¶¶ 20–22. IPG stated that ''[i]n response to the Order Reopening Record, the only change to Gray's analysis was the addition of Nielsen 2008–2009 National People Meter distant viewing data. No data was added for calendar years 2004–2007.'' *Id.* ¶ 20 (citations omitted). IPG asserted, ''MPAA could have performed a National People Meter distant viewing analysis for each of the years 2000–2009, but contended that it was 'difficult' but not 'impossible' given the three-month timeframe afforded by the Judges . . ..'' *Id.* ¶ 21 (citations omitted).

MPAA responded that IPG mischaracterized the record. MPAA noted that in addition to incorporating an additional two years' metered distant viewing data (for both cable and satellite) into his analysis, Dr. Gray ''also modified his regression specification to address the Judges' concerns set forth in their May 4, 2016 Order.'' MPAA Reply PFF ¶ 6 (citing 4/10/18 Tr. 393–94 (Gray)). By adding the additional two years of data to his cable analysis, Dr. Gray increased the number of distant viewing observations used in his regression analysis from 1.68 million to 3.86 million (the increase for satellite was ''a similar order of magnitude''). *See* 4/10/18 Tr. 395–96 (Gray). As to the availability of additional distant viewing data for 2004–2007, Dr. Gray testified that it was ''nearly impossible to attain.'' *Id.* at 396 (Gray).

In the *Order Reopening Record,* the Judges stated that they could not rely upon MPAA's viewership-based methodology without either ''contemporaneous data (whether local ratings and distant viewership data, as Dr. Gray utilized, or other data and analysis that might underlie a modified methodology); or (2) competent evidence that persuades the Judges that such data are not needed to produce reliable results . . ..'' *Order Reopening Record* at 4.

Dr. Gray modified his methodology in response to the *Order Reopening Record.* Most notably, he added two years of contemporaneous distant viewing data, increasing the number of distant viewing observations by approximately 130%. Dr. Gray testified that the addition of the contemporaneous distant viewing data resulted in little change to his regression-based viewing estimates:

> I would view the estimates as reasonably similar. For example, in 2004 . . . the estimate [of MPAA's share of distant viewing] increases from 99.59 [percent] to 99.60 [percent] when also using the contemporaneous distant viewing data.
>
> And then for satellite, in 2004, actually there is no impact. The satellite estimate remains at 99.87 with or without the additional contemporaneous data.

4/10/18 Tr. 399 (Gray). Dr. Gray testified further that these results ''comported with'' his expectation that the additional data would not change his estimates significantly: ''[E]ven based upon the 2000–2003 analysis, that . . . estimated a relationship between distant viewing and a host of factors, local ratings being one of them . . . that mathematical relationship I did not expect to change much over time, particularly to the advantage or disadvantage to one party.'' *Id.* at 399–400. Dr. Gray also testified that, in his opinion, based on the foregoing analysis, the absence of distant viewing data for 2004–2007 did not render his analysis unreliable. *Id.* at 397.

The Judges find that Dr. Gray's analysis, and the reasonable proximity of his current results to his previous results (*i.e.,* those without the benefit of the 2008–09 distant viewing data), constitute competent evidence that persuades the Judges that further contemporaneous distant viewing data are not needed to produce reliable estimates of distant viewing shares. The Judges reject IPG's contention that Dr. Gray relied on an inadequate amount of data.[21]

2. Dr. Gray Supplanted Viewing Data With Regression Results

IPG criticized Dr. Gray's analysis for relying on a ''sliver of data,'' then ''supplant[ing]'' those data with regression-based predictions of distant viewing. *See* IPG PFF ¶¶ 25–37.

As discussed in the preceding section, the Judges reject IPG's contention that Dr. Gray relied on an inadequate amount of data. As to Dr. Gray's use of regression-based predictions of distant viewing, IPG has presented no evidence or expert analysis that even suggests that this approach is improper or unreliable. Moreover, the Judges have relied on a similar approach that Dr. Gray presented on MPAA's behalf in an earlier Phase II distribution proceeding. *See 2000–03 Cable Determination,* 78 FR at 64994–98, 65002–03. IPG has provided the Judges with no basis for rejecting that approach in the instant proceeding.

In the course of IPG's discussion of Dr. Gray's ''supplanting'' of distant viewing observations with regression-based predictions, IPG also pointed out that Dr. Gray used imputed values for local ratings whenever the Nielsen data did not include ratings measurements. *See* IPG PFF ¶¶ 26–28. IPG noted that, during the period covered by this proceeding, Nielsen produced meter-based local ratings only in the ''56 largest U.S. markets.'' *Id.* ¶ 27. IPG stated, ''Gray only had local ratings data from 56 markets, and conspicuously failed to clarify what number of the 122 sampled cable retransmitted stations were covered by such markets.'' However, IPG presented no analysis that would explain whether—much less how and why—these observations are problematic or diminish the reliability of Dr. Gray's methodology. The Judges, therefore, give no weight to IPG's observations concerning Dr. Gray's imputation of local ratings in certain markets.

3. The MPAA Methodology Fails To Measure Relative Market Value

IPG argued that Dr. Gray, in his live testimony, admitted that the MPAA methodology failed to measure relative market value. IPG PFF at 18. According to IPG, ''[Dr.] Gray actually constructed his methodology on the incorrect assumption that the willing seller is the copyright owner and the willing buyer is the broadcast station, *i.e., not a CSO/SSO.*'' *Id.* ¶ 39. IPG noted that the Judges have previously found that, in determining the relative market value of programming, the seller in the hypothetical market is the copyright owner and the buyer is the Cable System Operator (CSO) or Satellite System Operator (SSO). *Id.* ¶ 42 (citing *Distribution of 1998 and 1999 Cable Royalty Funds,* 69 FR 3606, 3613 (Jan. 26, 2004) (*1998–1999 Phase I Determination*)).

In his live testimony, Dr. Gray sought to elaborate on the nature of the hypothetical market for retransmission of television programming absent the

counsel), and Dr. Gray testified that it was incorrect. *See* 4/10/18 Tr. 427–29. Nor did IPG offer any evidence or expert analysis to support its implicit equating of zero-measured-viewing observations with missing data.

[20] *See Order Reopening Record* at 2–4.

[21] In the *Order Reopening Record,* the Judges also noted a dispute between Dr. Gray and IPG's expert in the original evidentiary hearing concerning Dr. Gray's regression specification and his use of a ''base year.'' *Order Reopening Record* at 4 n.5. The Judges stated their intention of addressing the substance of that dispute ''if this issue remains outstanding in the parties' submissions in the reopened proceedings . . ..'' *Id.* Dr. Gray testified that he modified his regression specification in a manner that, in his opinion, resolved the dispute. 4/10/18 Tr. 394 (Gray). In the absence of any contrary rebuttal evidence, the Judges find no basis to pursue the issue further.

compulsory licenses in sections 111 and 119.[22] Dr. Gray described a hypothetical market in which broadcast stations would, in essence, act as middlemen between copyright owners on one hand and cable and satellite operators on the other. In Dr. Gray's opinion as an economist, broadcast stations in an unregulated market would ''pay for the right to transmit [programming] in its local market and then pay a surcharge for the right to retransmit to a cable system or satellite system.'' 4/10/18 Tr. 456 (Gray). The broadcast station will then ''seek to recoup its surcharge in its transactions with the cable system and the satellite system.'' *Id.* at 457.

IPG contended that, because of Dr. Gray's views concerning the role of broadcasters in the hypothetical market, he concluded, ''[V]iewership ratings are significant because they are what a *broadcaster* considers significant.'' IPG PFF ¶ 41. That is not what Dr. Gray actually said in his testimony. Dr. Gray testified that in an unregulated market cable and satellite systems would be ''negotiating to retransmit the bundled signal, and they will do that in proportion to how much it is going to be valued by the subscriber, as evidenced by distant viewing.'' 4/10/Tr. 457 (Gray). In essence, Dr. Gray was repeating the argument that underlies the use of viewership evidence to determine relative market value, which the Judges discussed, *supra,*[23] The Judges are not persuaded by IPG's further attempt to discredit viewership evidence.

4. Dr. Gray Injected Impermissible Factors Into his Analysis

IPG argued that ''Dr. Gray disregard[ed] the premise of the 'Program Suppliers' program categorization, and his own stated premise, by injecting impermissible factors into his analysis that have a 'significant' effect on the regression analysis and his predicted distant viewership.'' IPG PFF at 21. Noting that Dr. Gray described the Program Suppliers category as ''relatively homogenous,'' IPG contended that Dr. Gray's use of explanatory variables for, *e.g.,* Tribune Media program type and station affiliation were inconsistent with that description and, thus, improper. *Id.* ¶¶ 48–53. IPG did not present any evidence or expert analysis to support that contention, and the Judges therefore reject it.

5. Dr. Gray Relied on Nielsen Data That Contain an Excessive Amount of ''Zero Viewing'' Without Adequate Explanation

IPG argued that the levels of ''zero viewing'' [24] in the Nielsen data that Dr. Gray relied on render his analysis unreliable. *See* IPG PFF ¶¶ 54–67; *see also id.* ¶¶ 29–31. IPG relies on the *93–97 Librarian Order* to argue that the Judges are precluded from relying on Nielsen's viewing measurements.

IPG stated that MPAA's expert witness, Dr. Gray, ''acknowledged that for Nielsen distant diary data, only sixteen weeks of sweeps data was utilized, with approximately 80% average zero viewing.'' IPG PFF ¶ 60. IPG then argued that ''[m]athematically . . . this constitutes 94% zero viewing (16 weeks × .8 plus 36 weeks × 0.0 [*sic*] [25] /52 = 94% zero viewing).'' *Id.* IPG compares this purported zero viewing percentage unfavorably with levels of zero viewing that the Librarian found unacceptable in the *93–97 Librarian Order. See id.* ¶ 56.

IPG's assertions regarding the levels of zero viewing in the data underlying the respective methodologies are without evidentiary basis. IPG's reliance on Dr. Gray's testimony is entirely misplaced: Dr. Gray did not ''acknowledge'' IPG's estimate of 80% average zero viewing for the sweeps periods. More importantly, Dr. Gray testified that it is improper to impute zero values to periods not covered by the Nielsen data, as IPG's counsel attempted to do. *See* 4/10/19 Tr. 428–31 (Gray).

IPG failed to demonstrate the existence of a high incidence of zero viewing. The Judges, therefore, need not reach the question whether MPAA has ''demonstrate[d] ''the causes for the large amounts of zero viewing and explain[ed] in detail the effect of the zero viewing on the reliability of the results'' of its methodology. *93–97 Librarian Order,* 66 FR at 66450.[26]

6. MPAA's Methodology Uses a Time-of-Day Indicium That the Judges Previously Rejected

IPG argued that Dr. Gray included the time of day, broken down into six dayparts, as part of his methodology for determining relative market value. *Id.* ¶ 70. IPG contends that the use of dayparts was one reason the Judges rejected IPG's proposed methodology in the *Order Reopening Record,* and should reject MPAA's methodology for the same reason. *See id.*

Dr. Gray used local ratings as an input in his regression analysis. In cases in which local ratings were unavailable because programs were broadcast outside Nielsen metered markets, he used imputed values. *See supra,* section IV.B.2; Gray WDT ¶ 48 n.41. The imputed values were ''the average local ratings of retransmitted programs of the same type broadcasting during the same time of day.'' *Id.* Dr. Gray defined six time- of-day categories, and computed average ratings for the various Tribune program types (*e.g.,* ''Game Show,'' ''Movie,'' or ''Network Series''). *Id.* ''For example, a Network Series program broadcasting at 9 p.m. with no local ratings information is given the average local rating of all Network Series programs broadcasting between 8 p.m. and 11 p.m.'' *Id.* Dr. Gray used the imputed ratings values, together with Nielsen metered ratings and other data points in his regression analysis to predict the distant viewing values that he aggregated and used in computing relative market value.

By contrast, in the methodology the Judges rejected in the *Order Reopening Record,* IPG used the time of day that a program was broadcast as one of a number of ''indicia of economic value,'' along with program length, fees paid, and number of subscribers. *See* Written Direct Testimony of Dr. Laura Robinson, ¶ 10 (Robinson WDT). Dr. Robinson's use of time of day was different from Dr. Gray's use of time of day. The Judge's ruling in the *Order Reopening Record* is not directly on point, and IPG has presented no evidence or expert analysis that would lead the Judges to conclude that the Judges should apply their earlier criticism to cover the present circumstances.

7. Dr. Gray Impermissibly Mixed Nielsen Metered Data and Diary Data in his Methodology

IPG asserted that, by using both Nielsen meter data and diary data in his methodology, Dr. Gray violated ''a clear edict . . . that doing so invalidated the

[22] Dr. Gray discussed this conception of the hypothetical market in greater detail in a recent allocation phase cable distribution proceeding. *See Final Determination of Royalty Allocation,* Docket No. 14–CRB–0010 CD (2010–13), at 80–81 (Dec. 18, 2018). The Judges did not rely upon Dr. Gray's testimony in the 2010–13 allocation proceeding in this proceeding.

[23] *See supra,* section III (derived demand factors transmitted through broadcast stations as buyers-resellers of distant retransmission rights in hypothetical market).

[24] IPG defines ''zero viewing'' as ''the percentage occurrence of unmeasured viewing on a *broadcast-by-broadcast* basis.'' IPG PFF ¶ 108. Although IPG cites to the *93–97 Librarian Order* for that definition, the decision does not actually define ''zero viewing,'' or suggest that it is a term of art.

[25] IPG appears to intend a value of 1.0, denoting 100% zero viewing for the non-sweeps weeks. As written, IPG's formula would yield 25% zero viewing (rounded to the nearest whole number).

[26] Further, the Judges previously have found MPAA's explanation of the levels of zero viewing in the Nielsen data in another Phase II proceeding to be sufficient. IPG has not provided any evidence to call that finding into question. *See 2000–03 Cable Determination,* 78 FR at 64995 & n.47.

purported results of any analysis relying thereon.'' IPG PFF ¶ 76. To support its assertion, IPG quotes a statement from a 1992 CRT decision: ''Mr. Lindstrom stated that it was invalid to mix metered viewing with diary viewing. We accept Mr. Lindstrom's statement.'' [27] *1989 Cable Royalty Distribution Proceeding,* 57 FR 15286, 15300 (Apr. 27, 1992); *see also id.* at 15291 (referring to the same testimony by Mr. Lindstrom).

Mr. Lindstrom's testimony in the *1989 Cable Royalty Distribution Proceeding* is not part of the record of this proceeding. There is no evidence before the Judges that could give context and meaning to the CRT's laconic summary of Mr. Lindstrom's statement. The Judges note, however, that the CRT's earlier mention of this same testimony was less categorical, merely stating, ''mixing meter data with diary data *could* invalidly alter the percentage viewing shares . . ..'' *Id.* at 15291 (emphasis added).

Mr. Lindstrom did testify, however, in the instant proceeding. Mr. Lindstrom testified on direct examination about the decision to use meter data for 2008–09 to supplement Dr. Gray's earlier analysis. *See* 4/10/18 Tr. 300–03 (Lindstrom). Mr. Lindstrom raised the issue of mixing data collection methodologies in the course of this discussion, noting his concern regarding the mixing of diary and meter data to measure distant viewing *for the same time frame—i.e.,* 2008–09. *See id.* at 302. In neither his direct nor his cross-examination testimony did Mr. Lindstrom criticize Dr. Gray's use of diary and meter data in his regression. Accordingly, IPG's counsel had the opportunity to explore the ''mixed data'' issue when cross-examining Dr. Gray. *See* 37 CFR 351.10(b) (cross-examination permitted on ''matters raised on direct examination''). Nonetheless, IPG's counsel did not conduct cross-examination on this issue.

Further, the CRT did not—and the Judges do not—issue ''edicts,'' clear or otherwise. Even if it did, the CRT's brief statement in the *1989 Cable Royalty Distribution Proceeding* would not qualify as one. The statement is an evidentiary finding, based on testimony regarding a specific study. Neither the testimony, nor the study is in evidence. The testimony in *this* proceeding supports neither IPG's categorical statement concerning mixing of diary and meter data, nor IPG's application of that statement to Dr. Gray's study. The Judges reject IPG's criticism of Dr. Gray's use of distant viewing data in this proceeding.[28]

C. Conclusions Concerning the MPAA Methodology

The Judges find and conclude that MPAA's distribution methodology is adequate on its face. IPG has presented no evidence or expert analysis that could serve as a basis for rejecting MPAA's methodology or adjusting MPAA's proposed royalty shares to account for any alleged methodological shortcomings. The Judges award royalty shares in the Program Suppliers category as proposed by MPAA and detailed in Table 1.

V. Distribution of Royalties in the Devotional Category

A. The SDC's Methodology

Dr. Erkan Erdem, the SDC's economic expert, devised a methodology that estimates relative marketplace value by using Nielsen local ratings, scaled by numbers of distant subscribers, as a proxy for distant cable and satellite viewership. *See* Erdem WDT at 13. Broadly speaking, Dr. Erdem multiplied the ratings reported in Nielsen's Report on Devotional Programming (RODP) [29] by the numbers of distant subscribers to cable and satellite systems that carry the programs reported in the RODP to obtain what he described as a ''reasonable proxy'' for distant viewership. *See id.* at 13, 15. He then summed the resulting distant viewership estimates for each of IPG's and the SDC's programs, and allocated the royalty shares proportionally. *See id.* at 15. In this respect, the SDC's current methodology does not differ from the methodology the SDC presented prior to the *Order Reopening Record.*

Dr. Erdem sought to validate his reliance on *local* ratings in his methodology by conducting three regression analyses ''to establish that there is a positive, statistically significant correlation between local and distant ratings . . ..'' Erdem WDT at 18. His initial analysis (prior to the *Order Reopening Record*) relied only on February 1999 data to establish this correlation. *See id.* In his testimony in the reopened proceeding, Dr. Erdem used distant viewing data for all four sweeps periods in 1999 through 2003. He continued to find a positive and statistically significant correlation in all three regression analyses. *See id.* at 19. Dr. Erdem's analysis also showed that ''after controlling for local ratings, distant ratings appear to be consistent and stable over 1999–2003.'' *Id.* at 20.

During each of the years covered by this proceeding, Nielsen produced RODPs for each of four quarterly ''sweeps'' periods. When he initially computed royalty shares, Dr. Erdem only had RODPs for one month in each year from 1999 through 2003.[30] *See Order Reopening Record* at 5. The SDC obtained copies of page R–7 (the summary page) from an additional eight RODPs (May, July, and November 1999; May and July 2000; November 2001; July 2002; and May 2003) (the Supplemental Nielsen RODPs). Erdem WDT at 17. Dr. Erdem ''exclude[d] the Supplemental Nielsen RODPs from [his] baseline royalty share calculations,'' but used them in four analyses to demonstrate the validity and reliability of those baseline calculations. *Id.*

First, Dr. Erdem ''analyzed the consistency of ratings for claimed programs over all Nielsen sweep months over 2004–2009'' (*i.e.,* the years for which he had complete sets of RODPs) by calculating how often a claimed program that is rated in February is also rated in the remaining three sweeps months. *Id.* at 20. He found that ''if a program was rated in February, it was also rated in all three remaining sweep months for approximately 91 percent of the time implying that it is highly likely that a program is rated for the rest of the year if it is rated in February.'' *Id.* Dr. Erdem conducted the same analysis including 1999 (using the Supplemental Nielsen RODPs for the remaining sweep periods for that year) and he obtained ''almost identical'' results (91.84% including 1999 versus 90.70% excluding 1999). *Id.* at 20, 31 Ex. 4.

Second, Dr. Erdem ''calculated the change in the ratings between February and every other sweep month for each claimed program'' in 2004–2009. *Id.* at 21 (footnote omitted). He found that ratings for any given program were ''highly stable within a year,'' rarely

[27] Paul Lindstrom was a senior vice president in Nielsen's Strategic Media Research group prior to his retirement in 2017. *See* 4/10/18 Tr. 282 (Lindstrom). He worked for Nielsen for nearly 40 years and testified in numerous distribution proceedings before the Judges and their predecessors. *See id.*

[28] IPG also referred to a subsequent CARP decision in which the CARP found that there were ''unanswered technical questions regarding . . . mixing diary and meter data.'' IPG PFF ¶ 77. This statement is no more an ''edict'' concerning the permissible use of Nielsen data than the CRT's 1992 statement.

[29] The RODP is a syndicated report that Nielsen produces quarterly. It provides nationwide, annualized average ratings for regularly scheduled Devotional programs.

[30] This shortcoming only affected the SDC's proposed shares of satellite royalties, since the cable portion of this proceeding covers only 2004–09. Dr. Erdem used RODPs for each of the four sweeps periods in 2004–09 in computing cable and satellite royalty shares for those years. *See* Erdem WDT at 4, 7 n.8, 21.

differing by more than 0.1 percentage points. *Id.* When Dr. Erdem included 1999 in this analysis, he found ''the change was at most 0.1 percentage points for 96.4 percent of the time (calculated over 278 comparisons).'' *Id.*

Third, Dr. Erdem ''checked the impact of using only February ratings data on [his] royalty estimates even for years when [he had] access to four reports,'' reasoning that ''[i]f the impact is small, then this is further evidence that February is representative of the whole year.'' *Id.* He found that the largest changes in the SDC's computed royalty shares were 2.8 percentage points for cable and 0.3 percentage points for satellite. *Id.*

Finally, Dr. Erdem computed royalty shares for 1999–2003 using all of the Supplemental Nielsen RODPs. He found ''the impact of using a more comprehensive data has almost no impact (when rounded to 1 decimal point) on the royalty shares.''[31] *Id.*

B. IPG's Criticisms

1. Dr. Erdem had no ''Foundational Familiarity'' with Data Used to Bolster Methodology

IPG acknowledged that the SDC obtained additional data that Dr. Erdem used to bolster the analysis that he presented before the Judges reopened the record. *See* IPG PFF ¶ 83. IPG argued, however, that Dr. Erdem was not sufficiently familiar with one portion of the additional data: distant household viewing hours (HHVH) data for 2000–2003 that Nielsen prepared for MPAA and that the SDC received through discovery. *Id.* ¶ 85. IPG supported this conclusion only with the fact that Dr. Erdem received the data in discovery, instead of developing, designing or commissioning it himself. *Id.*

IPG's criticism is unsupported by expert analysis or record evidence. Therefore, the Judges reject it.

2. Dr. Erdem Relied on National Average Ratings Data instead of Station-by-Station Local Ratings

IPG noted that the SDC methodology measures distant viewership using national average ratings set forth on the R–7 summary page of RODPs. IPG asserted, ''there is no way to determine if a higher rating was derived from a station with *de minimus* [*sic*] distant subscribers or extraordinarily high distant subscribers.'' IPG PFF ¶¶ 89–90. IPG contended that the RODPs include local ratings on a station-by-station basis but that Dr. Erdem failed to use that information in the SDC methodology. *Id.* ¶ 90.

In this proceeding, the Judges must determine royalty shares on an annualized basis. The two methodologies presented by MPAA and the SDC demonstrate that there are different ways of measuring those shares. MPAA starts with disaggregated viewership measurements and aggregates them up to royalty shares. The SDC begins with data that Nielsen has already aggregated and averaged on an annualized basis. IPG, in spite of its criticism of the MPAA methodology, appears to criticize the SDC for not using the same general approach.

In the absence of any expert analysis supporting IPG's assertion, the Judges find no credible support in the record to indicate that Dr. Erdem's choice of a starting place is deficient. Dr. Erdem reasonably explained and justified his methodological choices as part of his expert testimony. Therefore, the Judges accept Dr. Erdem's testimony as authoritative. Criticism by IPG's counsel is not a substitute for expert rebuttal testimony. The Judges reject this criticism of the SDC's methodology because it is unsupported by expert analysis or record evidence.

3. The SDC Relied on Insufficient Data to Establish Correlation between Local Ratings and Distant Viewership

IPG argued that Dr. Erdem based his conclusion that there is a positive and statistically significant correlation between local ratings and distant viewership on a quantum of data that the Judges previously found to be insufficient in the *Order Reopening Record*. *See* IPG PFF ¶ 93. Specifically, IPG faulted Dr. Erdem for using only 1999–2003 distant HHVH data to establish the existence of a correlation between local ratings and distant viewing. *Id.* ¶¶ 83–84, 93.[32] IPG noted that the Judges rejected MPAA's original methodology in this proceeding because Dr. Gray relied on distant viewership data from 2000–2003 to establish a mathematical relationship between local ratings and distant viewing that he used to predict levels of distant viewing for the entire period covered by the proceeding. *See id.* ¶ 93; *Order Reopening Record* at 3.

The Judges did find the original methodologies and data that the parties presented in this proceeding to be substantively insufficient. The Judges required the parties to present additional data ''or competent persuasive evidence that such data are not needed to produce reliable results . . ..'' *Id.* at 5; *see id.* at 4. MPAA and the SDC have done both. Specifically, both MPAA and the SDC have now presented a quantum of persuasive evidence and analysis demonstrating a positive correlation between local ratings and distant viewing *that is consistent over time. See* Erdem WDT at 19–20; 4/9/18 Tr. 63–65 (Erdem); *cf.* Gray WDT ¶¶ 13–14 (additional two years of contemporary distant viewing data produced results ''consistent with'' earlier results without those data). That consistency provides the Judges with adequate assurance regarding the reliability of the viewing data in the record to support a consistent positive correlation between local ratings and distant viewing data over the years at issue in this proceeding, particularly when computing the royalty shares directly from local ratings data as in Dr. Erdem's methodology. The Judges, therefore, reject IPG's argument that Dr. Erdem used insufficient distant viewing data.

4. Dr. Erdem ''Misrepresented'' a Positive Correlation between Local Ratings and Distant Viewership

IPG stated, ''[f]or the first time, in his oral testimony [Dr.] Erdem revealed that his asserted local ratings/distant viewership correlation is not between *broadcasts* for which he has both local ratings data and distant viewership data, but *annual averages of broadcasts* for programs.'' IPG PFF ¶ 97.[33] IPG then argued that Dr. Erdem's analysis does not support a conclusion that there is a positive correlation between local ratings and distant viewing, because there is no way of knowing whether the local ratings and distant viewing measurements relate to the same broadcasts. *See id.* ¶¶ 98–99.

[31] This had no effect on the cable royalty shares because Dr. Erdem already had RODPs for all sweeps months in 2004–09. *See supra,* note 32.

[32] Dr. Erdem and Mr. Sanders testified that it was not possible for the SDC to obtain distant viewing data for 2004–2009. *See* Erdem WDT at 22; Sanders WDT at 14; 4/9/18 Tr. 62, 122 (Erdem); 4/9/18 Tr. 239 (Sanders) (''there was a limitation on that data and I just don't recall exactly what it was''). IPG argued that the SDC could have acquired metered distant viewing data as MPAA did. *See* IPG PFF ¶ 84; 4/9/18 Tr. 238–39 (IPG Counsel). Assuming for the sake of argument that the SDC *could* have acquired metered distant viewing data, IPG presents no evidence that the SDC *should* have acquired those data. The record does not even suggest that those data would have changed Dr. Erdem's conclusions materially to IPG's benefit.

[33] The Judges emphatically reject IPG's implication that Dr. Erdem ''misrepresented'' his results or tried to conceal the nature of the data on which he relied. Dr. Erdem was clear, both in his written and oral testimony, that he relied on the average nationwide ratings presented in Nielsen's RODPs. *See, e.g.,* Erdem WDT at 13 (''The average ratings provided in the Nielsen Reports on Devotional Programming . . . constitute the primary data source to allocate royalties.''); 4/9/18 Tr. 118–119 (Erdem).

The Judges regard this criticism as a particular instance of IPG's more general criticism of Dr. Erdem's use of annualized national average ratings in his methodology. The Judges reject this criticism for the same reasons already articulated in this Determination. *See infra,* section V.B.2.

5. Dr. Erdem failed to Account for Number of Broadcasts of Retransmitted Programs

IPG stated,

> [t]here is no evidence or testimony to demonstrate that [Dr.] Erdem accounted for the number of broadcasts of a program on a station when calculating ''the number of subscribers for channels'' on which the program is broadcast. That is, no evidence or testimony demonstrates that [Dr.] Erdem valued a program differently if it had been retransmitted on a station 100 times versus 1,000 times.

IPG PFF ¶ 102.

Dr. Erdem's methodology multiplies ratings by numbers of distant subscribers to derive a measurement of distant viewing. Volume of programming, whether measured by numbers of minutes or numbers of broadcasts, is not a part of Dr. Erdem's methodology, and Dr. Erdem testified that volume is not a reliable indicium of value. *See* Erdem WDT at 9. According to Dr. Erdem, ''a determination of relative market value should not be based on total hours or total number of programs'' because '''quality' of the content and the time slot when a show is broadcast . . . are significant drivers of 'demand''' and thus relative market value. *Id.*

The Judges accept Dr. Erdem's assessment and no witness testified otherwise. Specifically, no witness testified that the failure to include volume measurements renders a viewership-based methodology unreliable.

IPG's criticism on this issue is unsupported by any expert analysis or record evidence. The Judges, therefore, reject it.

6. The RODP does not Measure all Compensable Devotional Programming

IPG contended, and the SDC confirmed, that the Nielsen RODPs do not report ratings for all of the Devotional programs at issue in this proceeding. *See* IPG PFF ¶ 103; Erdem WDT at 7, 13; Sanders WDT at 20–21. Under Nielsen's reportability standards, the RODP only includes programs that, *inter alia,* are ''telecast in at least five NSI markets on reportable commercial TV stations and scheduled at the same time and day in at least two of the four [sweeps] weeks.'' [34] Erdem WDT at 6 (quoting Nielsen RODP for February 2004 at pp. A–B). IPG argued that, as a result, the SDC methodology omits ''significant IPG-represented programming,'' including programs carried on WGNA.[35] IPG PFF ¶ 103 (citing Erdem WDT at 16 n.25).

Dr. Erdem testified that it was appropriate to exclude non-regularly scheduled programs from an analysis of relative market value because ''from an Operator's perspective, with rare exception, programs that are not scheduled on a regular basis are less likely to drive subscriptions than regularly scheduled programs (such as the ones captured by the Nielsen reports).'' Erdem WDT at 9 n.14. John Sanders, the SDC's expert on media valuation, expressed a similar opinion:

> To attract a subscriber, I would argue there has to be some level of predictability to the program. So if you know that a program is going to be aired five days a week, that's something that someone could subscribe to with some level of certainty.
>
> If it is something that may or may not be aired several times a year, as a special, there is no way of foreseeing that.

4/9/18 Tr. 240 (Sanders). Dr. Erdem also noted that the omitted IPG programs that aired on WGNA had no effect on IPG's share of cable programming in this proceeding because the excluded WGNA programming that IPG claimed comprised only a few irregularly scheduled telecasts from 2000–2003. *See* Erdem WDT at 16 & n.25.[36]

The Judges accept the unrebutted testimony of the SDC's experts that the omitted programs were significantly less valuable than the programs that were included in the RODP. The Judges also accept Dr. Erdem's unrebutted testimony that exclusion of non-regularly scheduled programs was an appropriate methodological choice.[37] With respect to the exclusion of WGNA programming, the Judges accept Dr. Erdem's conclusion that the exclusion had no impact on IPG's shares of cable royalties. Moreover, with respect to satellite, the exclusion of WGNA programming from Dr. Erdem's methodology was intended to avoid giving an unfair advantage to the SDC and did not unfairly decrease IPG's satellite royalty shares for the years at issue given the irregularity of the broadcasts that IPG claims.

7. Dr. Erdem Relied on RODP Data with Excessive ''Zero Viewing''

As it did with MPAA's methodology, IPG attacked the SDC's methodology based on the supposed levels of ''zero viewing'' in the underlying Nielsen data. IPG argued that the *93–97 Librarian Order,* therefore, precludes the Judges from accepting the SDC's methodology. *See* IPG PFF ¶¶ 108–116.

None of the RODPs that Dr. Erdem used in the SDC methodology contained zero viewing measurements. Nielsen credits all programs that meet its reportability standards with either a numerical rating or the designation ''LT,'' meaning that the rating is too low to report (less than 0.1% of households). For programs receiving a ''LT'' rating, Dr. Erdem computed a numeric rating from the number of households viewing the program and the number of households sampled—essentially the same computation that Nielsen performs for higher-rated programs—and used that value in his analysis. *See* Erdem WDT, at 14–15 & n.22; 4/9/18 Tr. 113 (Erdem).

Nevertheless, IPG argued that the SDC's methodology suffers from a zero viewing problem. IPG contended that the SDC's methodology, by relying on sweeps data (which cover only 16 weeks a year at most), ''automatically'' has levels of zero viewing ranging from 69% to more than 84%. *See* IPG PFF ¶ 109. IPG reached this conclusion by imputing zero viewing values for the weeks of the year not covered by available sweeps data. IPG also endeavored to show that the Nielsen RODP data on which the SDC rely have high levels of zero viewing on a station-by-station basis. *See id.* ¶ 110.

IPG's effort to demonstrate a zero viewing problem with the Nielsen RODP data employed by the SDC is not supported by record evidence. IPG's zero viewing estimates appear for the first time in IPG's proposed findings, without citation to the record. *See* IPG

[34] NSI stands for ''Nielsen Station Index,'' and is Nielsen's local ratings product.

[35] WGNA, the national feed for WGN Chicago, is the most widely retransmitted television station in the U.S., reaching over 32 million distant cable subscribers and more than 9 million distant satellite subscribers during each year covered by this proceeding. *See* Gray WDT at 20, 36–49 (Appendices C–1 and C–2).

[36] By contrast, one SDC program was aired regularly on WGNA in 1999–2001. *See* Erdem WDT at 16 n.25. Dr. Erdem did not include any WGNA programming in his calculations of royalty shares. Since the SDC claimed the only regularly scheduled program on WGNA during this time period, this methodological decision had the effect of reducing *the SDC's* royalty share. *See id.*

[37] Mr. Sanders testified that it might be necessary to adjust royalty shares based on RODP data to reflect audiences attributable to programs that do not meet Nielsen's reporting criteria. Sanders WDT at 21. However, in the absence of any evidence of the value, if any, of the omitted programs, the Judges are unable to determine whether (and, if so, to what extent) they should adjust the SDC's proposed royalty shares.

PFF ¶ 109. IPG again improperly imputed zero values to periods not covered by the data to achieve this result.[38]

IPG failed to demonstrate the existence of any significant incidence of zero viewing. The Judges, therefore, need not evaluate whether the SDC have ''demonstrate[d] the causes for the large amounts of zero viewing and explain[ed] in detail the effect of the zero viewing on the reliability of the results'' of its methodology. *93–97 Librarian Order,* 66 FR at 66450.

8. Dr. Erdem Relied on Cable Data to Establish Viewership Correlation for Satellite Transmissions

IPG faulted Dr. Erdem for determining a correlation between local and distant ratings by using HHVH data that combined distant viewing by cable and satellite. According to IPG,

> [Dr.] Erdem testified that the MPAA distant HHVH figures that he utilized were ''an average'' of distant cable and satellite HHVH Figures. No evidence or testimony exists as to why [Dr.] Erdem would blend the distant *cable and satellite* HHVH figures when attempting to calculate and impute a distant *satellite* rating.

IPG PFF ¶ 107 (citations omitted).

Dr. Erdem computed royalty shares based on *local* ratings. He used HHVH data to demonstrate that his reliance on local ratings was reasonable, by showing that there is a positive and statistically significant correlation between local ratings and distant viewing. Dr. Erdem testified that that stage of the analysis ''is not specifically for cable or satellite.'' 4/9/18 Tr. 108 (Erdem). In light of Dr. Erdem's description of the particular, limited use of the HHVH data, and in the absence of any contrary evidence or expert analysis, the Judges find Dr. Erdem's use of the HHVH data to be reasonable.

C. Conclusions Concerning the SDC Methodology

The Judges find and conclude that the SDC's distribution methodology is facially adequate and an appropriate means in the current proceeding based on the record evidence for measuring relative market values of Devotional programming for the years at issue. IPG has presented no evidence or expert analysis that could serve as a basis for rejecting the SDC's methodology or adjusting the SDC's proposed royalty shares to account for any alleged shortcomings in that methodology. The Judges award royalty shares in the Devotional category as proposed by the SDC and detailed in Table 2.

[38] *See supra,* section IV.B.5.

VI. Conclusion

The Judges adopt the MPAA and SDC methodologies and proposed percentages for final distribution of satellite royalties deposited for the years 1999 through 2009 and cable royalties deposited for the years 2004–2009 and allocated to the Program Suppliers and Devotional categories, respectively. The Judges therefore ORDER distribution of funds in the Program Suppliers category as set forth in Table 1 and in the Devotional category as set forth in Table 2.

The Register of Copyrights may review the Judges' Determination for legal error in resolving a material issue of substantive copyright law. The Librarian shall cause the Judges' Determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period. When this Determination becomes final and non-appealable, either party may or the parties jointly may file a motion for distribution of the funds. The Judges will then order distribution in accordance with this Final Determination.

February 13, 2019.

So ordered.

Suzanne M. Barnett,

Chief United States Copyright Royalty Judge.

David R. Strickler

United States Copyright Royalty Judge.

Jesse M. Feder

United States Copyright Royalty Judge.

The Register of Copyrights closed her review of this Determination on March 29, 2019, with no finding of legal error.

Dated: April 1, 2019.

Jesse M. Feder,

Chief United States Copyright Royalty Judge.

Approved by:

Carla B. Hayden,

Librarian of Congress.

[FR Doc. 2019–07695 Filed 4–16–19; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

Notice: (19–020).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Laurette L. Brown, National Aeronautics and Space Administration, Mail Code IT–C2, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Laurette L. Brown, National Aeronautics and Space Administration, Mail Code IT–C2, Kennedy Space Center, FL 32899 or email *Laurette.L.Brown@NASA.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The NASA Business Opportunities Expo is an annual event sponsored by the NASA KSC Prime Contractor Board, U.S. Air Force 45th Space Wing and Canaveral Port Authority. Attendees include: Small businesses who want to meet and network with NASA and KSC Prime Contractors; large contractors seeking teaming opportunities with Small Businesses; and construction companies interested in learning more about NASA contract opportunities.

Exhibitors include businesses offering a variety of products and services, representatives from each NASA center, the Patrick Air Force Base 45th Space Wing, prime contractors and other government agencies.

Attendee Information collected is name, Company, address, email, telephone. Exhibitors are asked to provide the same information, plus company information that is published in the event program: Commercial and Government Entity (CAGE) Code, Primary North American Industry Classification System (NAICS) Code, Business Categories, Core company capabilities and Past or current work/contracts with NASA.

II. Methods of Collection

Electronic

III. Data

Title: NASA Business Opportunities Expo.

OMB Number: 2700–xxxx.

Type of Review: New.

Affected Public: Individuals.

Average Expected Annual Number of Activities: 1.

Average Number of Respondents per Activity: 2300.

Annual Responses: 2300: Attendee 2100, Exhibitor 200.