COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DISTRIBUTION OF CABLE ROYALTY FUNDS	**CONSOLIDATED PROCEEDING NO. 14-CRB-0010-CD (2010-13)**

ORDER DENYING PROGRAM SUPPLIERS' MOTION FOR REHEARING AND CORRECTING 2012-13 ALLOCATIONS FOR CERTAIN PARTIES

I. Background and Posture of the Proceeding

The Copyright Royalty Judges (Judges) issued the Initial Determination allocating royalties to each programming category participating in the hearing in the captioned proceeding. *See Initial Determination* (October 18, 2018) (*Determination*). By statute, participants may seek rehearing on any issues resolved in a determination of the Judges. Under the Copyright Act (Act), the Judges may, "in exceptional cases," order a rehearing "on such matters as the … Judges determine to be appropriate." 17 U.S.C. § 803(c)(2)(A). The standard the Judges apply is well established. To obtain rehearing, the moving party must show that an aspect of the Judges' determination is erroneous, *viz*. that the challenged aspect of the determination is "without evidentiary support in the record or contrary to legal requirements." *See* 37 C.F.R. §§ 353.1, 353.2.

The Judges have previously ruled that this statutory language requires them to consider motions for rehearing pursuant to a strict standard. *See Order Denying Motions for Rehearing*, Docket No. 2011-1 CRB PSS/Satellite II (Jan. 30, 2013) (*SDARS II Order*). In considering granting rehearing, the Judges consider whether there exists (1) an intervening change in controlling law; (2) available new evidence; or (3) a need to correct a clear error or prevent manifest injustice. *See SDARS II Order* at 1.

When applying these considerations, the Judges must subject the rehearing arguments to a strict standard, in order "to dissuade repetitive arguments on issues that have already been fully considered …." *Order Denying Motions for Reh'g*, Docket No. 2005-1 CRB DTRA, at 1-2 (Apr. 16, 2007). Under this strict standard, a rehearing motion does not provide a litigant with a "second bite at the apple," allowing it "to re-litigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)). A party also may not use a motion for rehearing merely to effect a change of tactics, to present a new theory, or to introduce new evidence after the trial has concluded. *Order Denying Motions for Reh'g* at 2.

Program Suppliers, the program category represented by the Motion Picture Association of America (MPAA), filed a timely motion for rehearing on November 2, 2018 (Motion). In the

Motion, Program Suppliers asserted seven conclusions that constituted legal error because they were allegedly reached "without evidentiary support in the record or contrary to legal requirements." *See* Motion at 1, citing 37 C.F.R. § 353.2. The Judges issued an order allowing responses to the Motion. Canadian Claimants Group (CCG), Commercial Television Claimants (CTV), Joint Sports Claimants (JSC), Public Television Claimants (PTV) and Settling Devotional Claimants (SDC) filed responses. All responding parties opposed the Motion, except PTV, which supported the fourth ground for rehearing asserted by Program Suppliers; that is, that the Judges had treated similarly situated claimants differently and therefore acted arbitrarily. *See* Motion at 7; PTV Response at 8-9. All respondents, except PTV, challenged the Motion as not meeting the strict standard for rehearing.[1] *See, e.g.*, CCG Response at 1-2; CTV Response at 1-2; SDC Response at 1-3.

The Judges address the assertions of error *seriatim* in the order in which Program Suppliers presented them.[2]

A. Alleged Error in Applying Professor Crawford's Regression Results as a Starting Point for Royalty Allocations

1. The Judges did not Act Contrary to Prior Determinations or Interpretations

Program Suppliers assert that the Judges committed "clear legal error" by engaging in a "departure from precedent," when they utilized Professor Crawford's regression analysis[3] as the "starting point" for allocating royalties. *Motion* at 4. More particularly, they claim that "precedent" dictates that the Judges must limit their use of any Waldfogel-type regression analysis to "corroborating" evidence of survey results, rather than "as the primary allocation methodology." *Id.*

At the outset, the Judges agree with CTV, *see CTV Response* at 2, that Program Suppliers made this precise argument in their post-hearing submission. *See PS PCOL* ¶ 39. As noted *supra*, a disappointed party cannot use the rehearing process as an opportunity for a "second bite at the apple."

The Judges also note, as pointed out in the *SDC Response*, Program Suppliers made an evidentiary argument in their Proposed Conclusions of Law that is *opposite* to their present contention, stating that "the Judges may change how they credit [a particular piece of evidence] when applying the [relative market value] criterion to the record before them, and noting further that "an approach or methodology for determining relative value adopted in a prior proceeding *is not considered binding legal precedent*." *Program Suppliers PCOL* ¶¶ 16-17 (emphasis added).

---

[1] PTV did not oppose the Judges' rehearing the issue of an upward adjustment for allocations to SDC and CCG.

[2] In reviewing the responsive materials, the Judges discovered a transcription error in the royalty allocations for 2012 and 2013. Specifically, the Judges identified their inadvertent use of a base number from 2011 in calculating the allocation percentages for 2012 and 2013. As a result, in this order the Judges amend the allocations for 2012-13 *sua sponte.* Following the discussion of Program Suppliers' alleged errors, *infra*, the Judges describe the adjustments necessary to correct this transcription error in the allocations for 2012 and 2013.

[3] Specifically, Program Suppliers refer to Professor Crawford's "duplicate minutes" analysis, although their rehearing criticisms would relate to both his "duplicate" and non-duplicate" minutes regression analyses (and, indeed, any Waldfogel-type regression analysis). For ease of reference, the Judges refer herein to Professor Crawford's regression analyses without distinguishing between his two approaches.

See SDC Response at 4.[4] As also noted *supra*, Program Suppliers cannot utilize the rehearing process to switch tactics and assert a construction of the applicable evidentiary principles simply to suit their needs in light of the Judges' determination.

Further, the Judges disagree with Program Suppliers' new argument. That argument misapprehends the Judges' duty to apply the evidentiary facts in the present record, in the context of the principles asserted in prior decisions. The Copyright Act is clear in this regard, providing that the Judges "act on the basis of a written record," as well as on the basis of relevant "prior determinations and interpretations." 17 U.S.C. § 803(a)(1).[5]

Moreover, Program Suppliers do not dispute that in a prior determination the Judges ruled that regressions such as performed by Professor Crawford – so-called Waldfogel-type regressions – are admissible and probative. Final Order, Distribution of 2004 and 2005 Cable Royalty Funds, 75 Fed Reg. 57063, 57068 (*2004-05 Determination*) (Sept. 17, 2010).[6] More particularly, the Judges ruled there that "[c]onceptually, the Waldfogel regression … may provide *a richer look* than the Bortz survey into factors that impact the purchasing decisions of cable operators." *Id.* (emphasis added).

Nonetheless, Program Suppliers argue that the Judges are somehow constrained in this proceeding to accord *the same evidentiary weight* to any Waldfogel-type regression as the Judges accorded to such a regression in a prior proceeding. As noted, Program Suppliers maintain that the Judges may only use Waldfogel-type regressions as evidence confirming other valuation methodologies, and cannot accord primary evidentiary weight to such regression analyses, even if (as is the case here) the Judges have found such a regression analysis to be the most probative methodology.

That argument confuses the interplay between the hearing record and prior decisions. Once the Judges have found competing methodologies for allocating royalties to be admissible, it is a fundamental responsibility of the Judges to weigh the relative probative values of those methodologies. The Judges are not locked into the factual weighing process undertaken by prior Judges or other predecessor decision-makers; otherwise the factual record in prior decisions would freeze the analysis in subsequent cases. Moreover, Program Suppliers' rehearing argument would be contrary to binding federal case law. *See Nat'l Ass'n of Broadcasters* v.

---

[4] Program Suppliers made this point yet again (citing additional authorities) in response to a legal argument asserted by the JSC. *See Program Suppliers' Response to Proposed Findings of Fact and Conclusions of Law* ¶ 2 (responding to JSC PCL ¶17 by claiming that JSC was "misstat[ing] the role of precedent in royalty distribution proceedings," [because] "[p]rior royalty awards from past proceedings and related evidence are not legal precedent [and] [m]oreover, *the Judges are not obligated to give the same weight given in prior proceedings to any particular piece of evidence presented here*.") (emphasis added).

[5] Contrary to Program Suppliers' repeated invocation of the word "precedent," *see* Motion at 1, 3, 4 and 5, the statute does not state that these relevant prior decisions constitute "precedent."

[6] In the 2004-05 proceeding, the Judges accepted and relied upon the regression approach of the economic expert witness, Dr. Joel Waldfogel, whose name is now used eponymously to describe this general regression approach in these section 111 proceedings. However, the Judges there noted that in a prior proceeding, another economist, Dr. Gregory Rosston, had produced a similar regression analysis that was relied upon by the CARP. *Id.* ("Dr. Waldfogel's specification was similar in its choice of independent variables to a regression model utilized by Dr. Gregory Rosston to corroborate the Bortz survey results in the 1998–99 CARP proceeding. *See Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress, in Docket No. 2001–8 CARP CD 98–99 (1998–99 CARP Report)* at 46 (October 21, 2003).").

Librarian of Congress, 146 F.3d 907, 923 n.13 (D.C. Cir 1998) (holding that the trier-of-fact (the CARP in that case) is in the best position to weigh evidence and gauge credibility).

Additionally, the Judges can apply the evidentiary record and assign weight to the probative evidence without explicitly identifying any "changed circumstances" as a precondition for the weighing of previously-accepted competing factual approaches to determining relative value. Indeed, the Judges' capacity to distinguish their determination from a prior decision is not limited to cases where "changed circumstances" are present, but also, *disjunctively, i.e.*, "*regardless of whether there are changed circumstances*" where there is present "evidence on the record … that requires prior conclusions to be modified …." *Librarian's Order, Distribution of 1998-1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3613-14 (Jan. 26, 2004) (*Librarian's Order).*

Moreover, here, the Judges are *not modifying a prior conclusion*, but simply *adopting the prior conclusion* that Waldfogel-type regressions are admissible and probative, and then weighing the probative value of such regression analyses against the other valuation methodologies *in the present record*. Of course, even if, *arguendo*, the Judges' reliance on Professor Crawford's regression analyses could somehow be construed as "modifying a prior conclusion," the *Determination* describes in significant detail why the Judges found Professor Crawford's Waldfogel-type regression to be highly probative. *See CCG Response* at 3 (noting that the Judges expressly explained, over "nearly 50 pages," the bases for their conclusion "that the regression analysis was stronger evidence than the constant sum surveys" and thus would satisfy the "changed circumstance" standard); *SDC Response* at 4-5 ("[T]he Judges addressed each of the parties' challenges to the Crawford regression at great length, rejecting some and giving weight to others[and] [w]hile the Judges [did not] reject [Professor] Crawford's model … [they] credit[ed] other methodologies and testimonies, establish[ing] that they relied on the large evidentiary record and engaged in reasoned decision-making ….").

Further, prior decisions went through an evolution in identifying the facts and analytical approaches relevant to the section 111 valuation exercise, moving from reliance on a multi-factor test, to a viewership-based analysis and then to survey-based analyses, before incorporating regression-based analyses. *See* Final Order, Distribution of 2000-2003 Cable Royalty Funds, 75 Fed. Reg. 26798, 26801-02 (May 12, 2010), (*2000-03 Determination)* (discussing change in standards for distribution throughout the course of section 111 royalty allocation proceedings). Seen through this historical lens, the present findings represent not a departure from prior rulings, but rather *a continuation of the evolutionary process of prior rulings*, adopting and elevating an admissible, fact-based valuation methodology – Professor Crawford's Waldfogel-type regression analyses. In that important sense, the Judges have *adhered* to the dynamic theme of prior decisions – following the relevant evidence wherever it leads.[7]

[7] So considered, the Judges in the present case have applied prior decisions in a well-accepted and conventional manner. *See generally* K. Llewellyn, *The Bramble Bush* at 74 (1930) (characterizing "past opinions" as a "springboard" for deciding new cases); E. Levi, *An Introduction to Legal Reasoning* 2 (1949) (An "indispensable dynamic quality of law" is that "the scope of a rule of law … depends upon a determination of what facts will be considered similar to those present when the rule was first announced [and] [t]he determination of similarity or difference is the function of each judge."). This dynamism is particularly appropriate when, as here, the jurists are applying prior *evidentiary rulings* in new contexts. *See* B. Cardozo, *The Nature of the Judicial Process* at 156 (1921) (Compared to "the field of substantive law[,] [t]he law of evidence and generally the whole subject of procedure supply fields where change may properly be made with a freedom even greater.").

Accordingly, the Judges do no find any error, let alone clear error, in the *Determination* in this regard.[8]

2. Program Suppliers' "Fee Generation" Argument was asserted at the Hearing and cannot be reasserted on this Motion, and, the Judges' Reliance on Professor Crawford's Regression Analysis does not Conflict with Prior Decisions Regarding the "Fee Generation" Approach

Program Suppliers also argue that the Judges committed legal error because Professor Crawford's regression analysis was the substantive equivalent of a "fee generation" approach[9] that Program Suppliers assert the Judges and their predecessors had rejected in prior proceedings. *Motion* at 5. As to this issue as well, Program Suppliers contend that the Judges failed to: (1) provide a reasoned explanation for their departure from those prior rulings; and (2) identify any changed circumstances that would support the use of such a valuation approach. For the following reasons, the Judges find Program Suppliers' position to be without merit.

As an initial matter, the Judges agree with CTV, *viz.* that Program Suppliers argued at the hearing that Waldfogel-type regressions, such as Professor Crawford's regression analyses, were the equivalent of "fee generation" approaches that had been criticized in previous proceedings. *See* CTV Response at 3. The Judges rejected that argument. *See Determination* at 18-19. Thus, as noted *supra*, Program Suppliers cannot use the rehearing process simply to re-argue this issue.

Moreover, Professor Crawford's regression analysis is not the same as "fee generation" approaches that have been the subject of prior criticism. His approach (like other Waldfogel-type regressions) identifies a positive statistical relationship between (a) royalties paid by CSOs; and (b) program categories on distant local stations that had been retransmitted to subscribers by CSOs. Clearly, any "fee generation" approach that did not make use of this regression approach is distinguishable.

Despite this significant difference, Program Suppliers claim that Professor Crawford's analysis bears an important similarity to previously questioned fee generation approaches, because both approaches rely on "tonnage [*i.e.*, the "volume" of minutes of programming] and royalty fees paid under the Section 111 statutory scheme …." Motion at 5. This argument is unpersuasive for at least two reasons. First, as discussed above, the Judges have previously acknowledged the value of Waldfogel-type regressions, without lumping them into the category of "fee generation" methodologies that had been the subject of some criticism in prior cases.

[8] In their *Responses*, other parties have further noted that the *Determination* found that Professor Crawford's particular version of Waldfogel-type regression analyses represent an improvement on other Waldfogel-type regressions, because, *inter alia*, Professor Crawford (*i*) utilized the entire universe of all programs on all distant signals, rather than a sampling; (*ii*) produced narrower confidence levels than contained in Professor Waldfogel's regressions; (*iii)* calculated more statistically significant estimates; and (*iv)* applied data from subscriber groups, compared with the less precise data from the broader category of cable systems. *See* SDC Response at 4; PTV Response at 2; 5-6. Although these *absolute* improvements certainly rendered Professor Crawford's regression analyses *sufficient* to carry substantial weight and served to strengthen the Judges' reliance on Professor Crawford's analysis, these improvements would not be *necessary* for the Judges to accord greater *relative* weight to a Waldfogel-type regression approach if, based on the record as a whole, they found such a methodology to be more probative than any other approach admitted into evidence.

[9] Broadly, the "fee generation" approach has been defined as "a valuation method that attempts to measure the amount of royalties generated by a particular claimant group." *1998-99 CARP Report* at 60 (Oct. 21, 2003).

The distinction between prior fee generation approaches and Waldfogel-type regressions was specifically addressed in the *Determination*, as noted by CCG. *See* CCG Response at 3. While prior pronouncements as to factual issues are not dispositive in future cases, Program Suppliers have not identified any basis for the Judges to now subject Waldfogel-type regressions to the same criticisms previously levelled against fee generation approaches. Moreover, as noted above, the Judges addressed this issue in the *Determination* finding that *the "value-per-minute" metric*, when combined with a volume metric, is distinguishable from other approaches that utilized a volume metric and/or a royalty-based metric. *See Determination* at 19).[10]

Second, Program Suppliers' argument is also deficient because neither the Judges nor their predecessors have categorically rejected use of the broad category of fee generation approaches to ascertain relative value in section 111 allocation proceedings. As the Librarian concluded when accepting in full the CARP Report for the 1998-99 distribution years: "[W]hile it is true that fees generated do not measure the absolute value of programming, it does not mean that they are not capable of measuring *the relative value* of programming between the claimant groups. *Librarian's Order*, 69 Fed. Reg. at 3618 (emphasis added). In that Order, the Librarian expressly noted that "there does exist precedent," in the 1990-1992 CARP Report, for using the "fee generation" approach to determine relative market value. *Id.* When the Judges succeeded to the CARP's jurisdiction, they likewise stated that "we are not persuaded that we are precluded from ever considering fee generation as a distribution methodology …." *2000–03 Determination*, 75 Fed. Reg. at 26805. In fact, in the present *Determination*, the Judges acknowledged the ongoing use of a fee generation approach in particular instances, notwithstanding that it had been "generally discounted" in some prior cases. *See Determination* at 48 n.45; 78 n.145.

Further, the Judges do not credit Program Suppliers' suggestion that the Judges' previous finding of a "wobbly" relationship between fee generation and hypothetical marketplace value precludes them from relying on a methodology that, *arguendo*, may bear a resemblance to a fee generation approach. Rather, the determination on which Program Suppliers rely states more fully that "[t]he wobbly relationship between the two *does not mean … that we are precluded from utilizing the evidence of fee generation in shaping our award*." *2004-05 Determination*, 75 Fed. Reg. at 57072 (emphasis added).[11]

Finally, Program Suppliers string-cite several additional prior decisions that they claim support their assertion of clear error in the Judges' reliance on Professor Crawford's regression analyses. However, those decisions are distinguishable. Not only do they not deal with Waldfogel-type regressions, they do not even purport to reject categorically any use of time or fee related valuation methodologies. *See CRT 1983 Cable Royalty Distribution Determination*, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986) (despite acknowledging criticisms of previous "fee generation formulas," the CRT reiterated that it had "consistently held that our distributions are based on all the relevant data presented before us, *including the amount that program types were carried and the degree to which cable systems were willing to pay for them*.") (emphasis added); *CRT 1979 Cable Royalty Distribution Determination*, 47 Fed. Reg. 9879, 9893 (March 8, 1982)

[10] *See also PTV Response* at 6 (noting that "tonnage and royalty fees" are *inputs* into a Waldfogel-type regression analysis, rather than the values themselves, just as neither price nor quantity, standing alone, constitutes a measure of value, but in combination serve to identify a market value).

[11] It is worthy of underscoring that the 2010 determination also relied on the regression analysis presented by Dr. Waldfogel, without rejecting, limiting or criticizing his analysis as a "fee generation" approach.

(giving "'limited weight' to [the] total number of program hours" for several claims); *CRT 1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980) ("We find that despite the clear deficiencies and questionable data in all the time-related methods, *each did offer some probative value to which we were able to accord some limited weight*.") (emphasis added). These CRT determinations only underscore that the fact-finder shall determine the appropriate evidentiary weight to give to all valuation approaches contained in the record.

B. Alleged Error arising from Treatment of "Replication" Issues

Program Suppliers assert that neither Dr. Gray (testifying on behalf of Program Suppliers) nor Dr. Erdem (testifying on behalf of SDC) was able to independently replicate Professor Crawford's regression analysis. Motion at 5-6. Based on this assertion, Program Suppliers argue that the Judges committed "legal error," because an expert's "theory or technique" cannot be considered if it cannot be "replicated." *Id.* at 5.[12]

As an initial matter, the Judges note that Program Suppliers did not move either *in limine* before the hearing or at the hearing to strike Professor Crawford's testimony on this basis. As noted at the outset of this Order, the rehearing process is not a device for a participant to seek a "second bite at the apple" by asserting arguments that it could have made prior to the issuance of an Initial Determination.[13] Accordingly, Program Suppliers are foreclosed from making this argument on rehearing. Moreover, as explained below, the record would not support an

[12] The Judges note that Program Suppliers have raised the issue of "replication" without defining that term. This is problematic, because the word "replicate" does not have a precise or singular meaning when applied to econometric work in particular, to statistical work in the social sciences more broadly, or even within the scientific community *writ large*. *See, e.g.*, M. Duvendack, R. Palmer-Jones & W.R. Reed, *What is Meant by "Replication" and Why Does it Encounter Resistance in Economics?*, 107 Amer. Econ. Rev., Papers and Proceedings 46, 47 (2017) ("There are different conceptions of what a replication is …. These different conceptualizations are consistent with the National Academy of Sciences' (2016) conclusion that there is no consensus in the scientific literature on what is meant by … replicability …."); M. Clemens, *The Meaning of Failed Replications: A Review and Proposal*, 31 J. Econ. Surveys 326, 326, 330-31 (2015) ("[E]conomics and other social sciences have not arrived at a clear standard that a study must meet in order to qualify as a *replication* test of some other study …. There is no settled standard for when the term 'replication' may be used in the tradition of economics or social science in general …. The term nearly defies precise definition …. [T]here is no consensus standard for use of the term replication."); https://replicationnetwork.com/ ("There is no commonly accepted definition of a replication."). In a previous proceeding, the Judges considered the "replication" of a study to be the reciprocal of "falsification," with both representing the polar opposite outcomes based on the "testability" of the study. *See Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement*, *In re Distribution of 1998 and 1999 Cable Royalty Funds* at 10 Docket No. 2008-1 CRB CD 98-99 (Phase II) (May 2, 2014). However, Program Suppliers do not indicate that they are adopting this (or any) definition of "replication" in their request for rehearing. In any event, as explained in the text, Program Suppliers have not pointed to sufficient evidence demonstrating that Drs. Gray and/or Erdem were unable to test Professor Crawford's regression analysis, or that any testing they did undertake served to falsify Professor Crawford's findings.

[13] To underscore the point that any objections by Program Suppliers (or any party) to the testimony by Professor Crawford (or any expert) could have and should have been made during the hearing, the Judges note, for example, that SDC filed a motion to strike Professor Crawford's testimony *on different grounds*, alleging that CTV had "failed to comply with the Judges' regulations regarding the submission of studies and analyses in these proceedings" related to Professor Crawford's work. *SDC Motion to Strike Testimony of Gregory S. Crawford, Ph.D.* (March 1, 2018). After considering that Motion, subsequent Responses by CTV and PTV, and a Reply by SDC, the Judges denied the Motion. *Order Denying SDC Motion to Strike Testimony of Gregory S. Crawford* (April 16, 2018).

argument that Professor Crawford's regression analysis should be stricken based on the delinquent arguments now raised by Program Suppliers.

First, in support of its claim that Dr. Gray could not replicate Professor Crawford's analysis, Program Suppliers rely on isolated excerpts from Dr. Gray's testimony that are too cryptic to support Program Suppliers' argument. Program Suppliers' first reference is to a single, brief and contextually unmoored excerpt from Dr. Gray's oral hearing testimony. *See* 3/14/18 Tr. 3739 (Gray) (testifying, as an aside when discussing his minimum fee analysis, that he "was unable to replicate Professor Crawford."). Next, Program Suppliers refer to Dr. Gray's written testimony, in which he referred to his "attempted replication" of Professor Crawford's regression analysis (again in connection with his own minimum fee analysis), but without criticizing the latter's work or even noting whether his own attempt at replicating Professor Crawford's work was successful. *See* Gray WRT ¶ 24. As PTV correctly argues, these purported replication-related criticisms were made merely "in passing," and hardly serve to discredit Professor Crawford's regression analysis. *See* PTV Response at 7.

Moreover, Dr. Gray also testified that he *was* able to "reproduce" Professor Crawford's original estimates (set forth in Professor Crawford's initial Written Direct Testimony) "based upon the data [Professor Crawford] shared," and Dr. Gray further acknowledged that Professor Crawford's original estimates "are close to his final estimates." 3/14/18 Tr. 3739 (Gray).[14]

The Judges find that this quoted testimony from Dr. Gray undercuts Program Suppliers' rehearing argument. Dr. Gray not only was able to reproduce allocation share estimates that were close to Professor Crawford's final share estimates, Dr. Gray had sufficient confidence in his accurate replication of Professor Crawford's initial allocations to include them – *without criticism* and down to the second decimal point – in his own comparative analysis. *See* Gray WRT ¶ 24, Table 3 and Appx. A, Table A-1.

Finally, as CCG correctly notes, it is not clear that Dr. Gray actually attempted to reproduce Professor Crawford's work, because Dr. Gray changed an important element of Professor Crawford's regression analysis, utilizing CSO level information rather than the disaggregated "subscriber group" level of information that allowed for an analysis of "subscriber group variation." CCG Response at 4-5, citing *Determination* at 34, n.69.

Program Suppliers further contend that SDC's expert witness, Dr. Erdem, also was unable to "replicate" Professor Crawford's regression analyses. In support of this assertion, Program Suppliers cite three excerpts from Dr. Erdem's Written Rebuttal Testimony. Motion at 6 n.6 (citing Erdem WRT at 2, 14-15 n.13).

The first cited comment does not support Program Suppliers' argument. Rather, Dr. Erdem notes there that he found Professor Crawford's regressions to be "highly sensitive to data

[14] Apparently, Dr. Gray either did not possess or did not review the additional underlying data on which Professor Crawford relied to marginally change his "final estimates" to reflect minor adjustments to his allocations necessary to reflect corrections of "program categorization errors" by another CTV expert, Dr. Christopher Bennett. *Compare* Crawford WDT ¶ 142 & Fig.17 *with* Crawford *C*WDT ¶ 142 & Fig.17; *see also* CTV CWDT pp. 1-3 (explaining "program categorization errors" and adjusting all allocation shares accordingly, marginally *increasing* Program Supplier's share estimate from 23.44% to 23.95%). The relatively minor adjustments made by Professor Crawford in his corrected testimony to adjust for program classification errors do not diminish the probative value of his regression analysis.

processing steps," and "not robust … highly sensitive to changes in included variables." Erdem WRT at 2. A regression's alleged "sensitivity" or lack of "robustness" does not generally demonstrate that the regression cannot be replicated. In fact, sensitivity and robustness issues are demonstrated not by attempting to replicate the regression, but rather by *modifying* aspects of the regression. *See Determination* at 22, n. 48; *see also* J. Miller, *The Chicago Guide to Writing about Multivariate Analysis* at 165 (2d. ed. 2013) ("Sensitivity analyses show how results or conclusions vary when different definitions, standards, or statistical specifications are used.").

The second excerpt from Dr. Erdem's testimony cited by Program Suppliers is equally unavailing. Dr. Erdem characterized as the "first step" in his analysis an attempt to replicate the "figures" contained in the regressions set forth in in the Crawford CWDT. When performing this "first step," Dr. Erdem testified that he had found a "glitch in the way in which [Professor Crawford's] algorithm sorted the data," *Id.* at 14. This glitch caused Dr. Erdem to be unable, in his words, to "replicate" – in his "first step" – the calculations made by Professor Crawford. However, Dr. Erdem, by his own admission, declined to expend the time necessary to test all the sorting possibilities to determine whether he could falsify or replicate Professor Crawford's regression analysis, or, perhaps, determine that he (Dr. Erdem) had made a methodological error. As PTV properly argues, given Dr. Erdem's "admission" that he "did not have time for sufficient testing," his testimony cannot support Program Suppliers' assertion regarding the alleged non-replicability of Professor Crawford's regression analysis. PTV Response at 7; s*ee also* CCG Response at 4 (noting Dr. Erdem's decision not to take the time to test fully Professor Crawford's algorithm).

Finally, Program Suppliers rely on a footnote in Dr. Erdem's written rebuttal testimony (and accompanying text), in which Dr. Erdem explained that he had received from CTV (who sponsored Professor Crawford's testimony) additional codes underlying Professor Crawford's work. Erdem WRT n.13. Dr. Erdem claimed these additional codes still did not address the alleged underlying sorting flaw, but did allow him to continue his analysis of Professor Crawford's regressions. In these further analyses, Dr. Erdem alleged that he identified *slight* differences between his results and the results obtained by Professor Crawford. *Id.*

Dr. Erdem's assertion that the results were "*slightly* different" does not support a finding that Professor Crawford's results should have been rejected as not replicable. Moreover, as SDC candidly acknowledges, Dr. Erdem (whose testimony was sponsored by SDC) did not proffer "evidence … *quantifying* the effect" of the alleged underlying flaw he supposedly found in Professor Crawford's algorithm. SDC Response at 6 (emphasis added). Without quantification, there is no credible record evidence that Dr. Erdem's claimed attempts to replicate Professor Crawford's algorithm revealed anything beyond a *de minimis* difference, let alone a difference sufficient to call into question the reasonableness of Professor Crawford's findings. Moreover, as noted in the *Determination*, Dr. Erdem simply ignored this issue in his oral testimony, and SDC did not assert this argument in its post-hearing proposed findings and conclusions. The abandonment of this issue underscores the meagerness of the criticism. Further, as PTV notes, because Program Suppliers did not raise this replication issue in their proposed findings and conclusions, Program Suppliers waived the right to make the replication argument thereafter. PTV Response at 7 (citing 37 C.F.R. § 351.14(b)).

For these reasons, the Judges do not find that they engaged in any error, let alone clear error, based on Program Suppliers' replication argument.

C. Alleged Failure to Articulate a Basis for Ranges of Reasonableness and Alleged Disparate Treatment of Similarly Situated Claimants through Upward Adjustments

Program Suppliers argued that the Judges failed to articulate a reasoned basis for the ranges of reasonable royalty allocations set forth in Table 18 in the *Determination*, and "failed to explain precisely how they calculated each party's shares within the ranges." Motion at 6. The Judges disagree.

As the Judges stated in the Initial Determination,

> The Bortz and Horowitz Surveys, together with the McLaughlin "Augmented Bortz" results and the Crawford and George regressions, taking into account the confidence intervals (when available) surrounding the point estimates, define the … ranges of reasonable allocations for each program category in each year.

Determination at 119. In other words, in establishing the ranges of reasonable allocations, the Judges employed all of the methodologies that (as explicated at length elsewhere in the *Determination*) they found to be credible and helpful on the present record. They used not only the point estimates but, where available, the upper and lower bounds of the confidence intervals surrounding those point estimates. For each program category the lowest and highest of these values define the bottom and top of the range.

The Judges derived the ranges of reasonable allocations from substantial record evidence. They conclude that Program Suppliers have failed to identify any clear error or manifest injustice in connection with the ranges of reasonable allocations that would justify rehearing or reconsideration.

As to the determination of specific allocations, the Judges (as stated in the *Determination*) used the point estimates from the Crawford duplicate minutes analysis as the starting point for final allocations in the JSC, CTV, Program Suppliers, and PTV categories. *Id.* at 119. They did so because (again, as stated in the *Determination*) they found the Crawford duplicate minutes regression analysis generally to be the most persuasive methodology. *See id.* at 37, 80, 119. The Judges then adjusted the allocations for each of these categories downward proportionally to account for the Judges' upward adjustment of the allocations for the SDC and CCG categories.[15] *Id.*

Program Suppliers argued that, in adjusting the allocations for the SDC and CCG categories "the Judges (1) failed to consider all record evidence, and (2) improperly treated similarly situated claimants differently, without explanation …." Rehearing Motion at 7.[16] The Judges disagree. The Judges considered all relevant and reliable evidence in determining allocations for all program categories. The Judges explained that they deviated from the Crawford analysis for the SDC program category "based on the Horowitz survey results and the

[15] The Judges described both deviations as "modest upward adjustment[s]." *Determination* at 119. Program Suppliers disputed the Judges' characterization of the adjustment to the SDC share as "modest." *See, e.g.*, Motion at 7 n.30. The Judges should, perhaps, have described it as a modest upward adjustment *on a percentage-point basis* (the uplift ranges from about 3-5 percentage points). In any event, the Judges' characterization is of little importance. Rather, the important consideration is that the magnitude of the adjustment is supported by the evidence, as described in the *Determination* and elaborated further in this Order.

[16] PTV supported Program Suppliers' argument. *See* PTV Response at 3, 8-9. JSC also appeared to agree with the substance of Program Suppliers' argument, without actually supporting it. *See* JSC Response at 3 n.1.

Augmented Bortz survey results, together with testimony concerning the "niche" value of devotional programming." *Id.*; *see* 3/16/18 Tr. 2347 (Sanders); Brown WDT at 7-8; *see also* 2/28/18 Tr. 1414 (Crawford) (defining niche programming). The Judges also deviated from the Crawford analysis for the CCG category "based on Professor George's analysis and testimony that Professor Crawford's analysis (as well as the survey evidence) undervalues Canadian programming to a degree." *Determination* at 119; *see* 3/5/18 Tr. 2146-48 (George); 2/28/18 Tr. 1414 (Crawford). Additionally, the Judges were persuaded to consider other evidence, apart from the Crawford regression, because of testimony by Dr. Israel concerning the relatively lower reliability of regression evidence when applied to lower-valued categories. *See* 3/12/18 Tr. 2824-25 (Israel).

The Judges observe that, under applicable precedent, an award of royalties need not be based on "exact precision," so long as it is within a "zone of reasonableness." *Christian Broad. Network v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1304 (D.C. Cir. 1983) (*CBN v. CRT*). The Judges identified a zone of reasonable allocations based on record evidence they deemed credible. Within that zone the Judges identified specific allocations, again based on credible record evidence. No more is required, notwithstanding Program Suppliers' preference that the Judges rely on other evidence more favorable to them. Program Suppliers thus have failed to identify any clear error or manifest injustice in connection with the Judges' allocations that would justify rehearing or reconsideration.[17]

D. Alleged Failure to Consider Evidence Regarding "Other Sports"

Program Suppliers asserted that the Judges erred by "ignor[ing] evidence of Program Suppliers' overwhelming majority share of the Horowitz Survey's Other Sports category and … reallocat[ing] Other Sports category shares to non-entitled program categories." Motion at 2. The Program Suppliers' assertion of error fails in two respects. First, their assertion of "clear evidence"[18] that Program Suppliers were entitled to the "overwhelming share" of "Other Sports" programming overstates the record. Second, the Horowitz survey question regarding "Other Sports" was flawed, rendering the responses to that question unreliable.

Two facets of the Horowitz Survey fueled special criticism: the inclusion of program examples for the named categories and the creation of the "Other Sports" category. *See Determination* at 67, 73-74. As the Judges explained in the *Determination*, when the Horowitz surveyors inquired about the Other Sports category, they provided examples of programming that was rare or non-existent.[19] Dr. Gray argued that the Other Sports category 'consists of non-live team sports such as tennis and golf tournaments, automobile races including NASCAR, triathlon competitions, the Olympics, boxing, and Mixed Martial Arts (MMA)…." Gray WRT ¶ 64. For Other Sports exemplars, the Horowitz Survey asked about horse racing, NASCAR auto races, professional wrestling, and figure skating. *See Determination* at 74. Broadcasts (and retransmissions) of sporting events matching these examples were rare or non-existent, making

[17] However, as discussed below, the Judges have found an error in their computations that they correct in this order on their own motion.

[18] The "clear evidence" cited by Program Suppliers is a single paragraph in Dr. Gray's rebuttal testimony relying on Gracenote data. *See* Gray WRT ¶ 65 (referring generally to Gray WDT, which included no analysis of Gracenote sports category data). In his rebuttal testimony, the strongest argument Dr. Gray made was to state that "[i]t is possible that … respondents conflated Program Suppliers Sports programming with JSC's live team sports programming." *Id.* ¶ 66.

[19] *Determination* at 73-74.

the survey responses suspect at best, and completely invalid at worst. *See Determination* at 74; CCG Response at 6-7; CTV Response at 5; JSC Response at 4-5; PTV Response at 10; SDC Response at 7.

As the Judges noted in the *Determination*, survey experts conclude that use of examples may cut either way. *See Determination* at 73-74. The Judges accepted testimony from Professor Conrad, concluding that "[i]f the example is typical of the category, then citing it will have no effect. An atypical example might help a respondent "think outside the box" and trigger a broader, more accurate response. For other respondents, however, an atypical example might narrow focus to incidents closely related to the particular example and therefore confine the respondent's thinking too narrowly." *Id.* The Judges' analysis was based on the expert testimony of Professors Conrad and Mathiowetz.

Given the weight of opinion by survey experts regarding the effect of category examples and the poor quality of the examples provided by Horowitz surveyors, the Judges had no basis upon which to conclude, as Program Suppliers argue, that any share of the undefined category of "Other Sports" programming might be attributable to Program Suppliers, let alone the "overwhelming majority" of programs in that poorly defined category.

E. Exclusion of Program Suppliers' Corrected Testimony

In the Motion, Program Suppliers assert that the Judges treated them in a discriminatory manner by limiting the admissibility of the Third Errata to Amended and Corrected Written Direct Statement and Second Errata to Written Rebuttal Statement Regarding Allocation Methodologies of Program Suppliers (Third Errata). Program Suppliers filed the Third Errata on January 22, 2018, two weeks before the scheduled commencement and barely three weeks before the actual commencement of the hearing, and many months after the applicable filing deadlines.[20] In the Third Errata, Program Suppliers asserted:

> in the course of preparing his December 29, 2017 Written Direct Testimony for the Distribution Phase of this proceeding, Program Suppliers' witness Dr. Jeffrey S. Gray discovered that Nielsen viewing data for the distant signal WGNA had not been included in the data set that he had been provided for analysis in the Allocation Phase of this proceeding, causing the distant viewing shares previously reported in his Amended And Corrected Written Direct Testimony to be incorrect. Therefore, in order to provide accurate information to the Copyright Royalty Judges …, Dr. Gray corrects his Allocation Phase direct testimony to incorporate the correct WGNA viewing data, which he treats with a separate regression. In addition, in response to the criticisms of other parties, Dr. Gray has now applied Nielsen weights to his analysis. Dr. Gray also further corrects his Written Rebuttal Testimony to reflect the corrected viewing shares that are reported in his further corrected direct testimony.

[20] The Judges commenced this proceeding by published notice seeking petitions to participate in June 2015. *See* Notice Announcing Commencement … , 80 Fed. Reg. 32182 (Jun. 5, 2015). In July 2016, the Judges issued a scheduling order setting the hearing for a date to be determined in January 2018. The Judges subsequently moved the hearing date to February 5, 2018. The July 2016 scheduling order set a deadline in December 2016 for participants to file Written Direct Statements; a deadline in March 2017 for participants to file Amended Written Direct Statements; and, if the participants did not settle all open issues, a deadline in September 2017 for participants to file Written Rebuttal Statements. Ultimately, the hearing commenced on February 14, 2018.

Third Errata at 1-2.

Concurrently with the filing of the Third Errata, Program Suppliers filed a motion seeking a continuance of the hearing date and permission to file amended rebuttal statements on the grounds that the Judges' order requiring Joint Sports Claimants (JSC) to provide additional discovery left Program Suppliers' experts insufficient time to analyze the additional discovery. *See* Program Suppliers' Motion to Continue Hearing … 1-2 (Continuance Motion). Program Suppliers did not include a request relating to its untimely filing of the Third Errata. Four other participants filed responses to the Program Suppliers' Continuance Motion.

In their response, JSC did not oppose the Continuance Motion, but requested to use the continuance time to seek further discovery from Program Suppliers' expert, Dr. Jeffrey Gray, with regard to the Third Errata. *See* [JSC] Response … and … Motion for Relief … 1-2 (JSC Response and Motion). With regard to the Third Errata, the JSC asserted that "Dr. Gray [was] using new data … [and] also employs a new methodology—including a wholly new, additional regression addressing programming on WGNA." JSC Response and Motion at 3.

CTV similarly combined a response to the Continuance Motion with a motion for Parallel Relief. *See* Response of [CTV] … and Request for Parallel Relief (CTV Response). CTV noted that the Judges commenced the captioned proceeding in 2015. CTV was not convinced that the Program Suppliers' receipt of unredacted versions of documents the JSC had previously produced in redacted form was a sufficient reason to continue the hearing. Receipt of the Third Errata, however, convinced CTV that a short continuance should be granted. CTV proposed an alternative hearing commencement date of February 14. *See* CTV Response at 3.

The Settling Devotional Claimants (SDC) opposed any hearing continuance and opposed the JSC Response insofar as it requested delay to address the Third Errata, plus added its own motion to strike the Third Errata. *See* [SDC] Opposition … and Partial Opposition … and Motion to Strike … (SDC Response). The SDC opposed the JSC request for delay to address the Third Errata asserting that the Third Errata was inadmissible and should be stricken. *See* SDC Response at 8-9. The SDC argued that the Third Errata was not merely a correction of Dr. Gray's testimony, but

> in fact introduces substantial revisions to its proposed allocation methodology. In addition to the inclusion of new datasets, MPAA proposes an all-new regression in addition to the regression it previously proposed, and a new sample weighting methodology underlying all of its computations.

SDC Response at 9. The SDC further noted that Program Suppliers filed the Third Errata long after the deadline for written rebuttal testimony,[21] without seeking leave of the Judges to do so.

PTV did not oppose the Program Suppliers' continuance request, so long as the Judges granted all participants an opportunity to file amended written rebuttal statements. *See* PTV Response at 2.

Program Suppliers responded to the motion to strike included in the SDC Response. *See* Program Suppliers' 2/2/18 Response in Opposition (PS Response). The gravamen of the PS

[21] The original deadline for Written Rebuttal Testimony was September 15, 2017. *See Exhibit A, Order Regarding Discovery* (July 21, 2016). In response to the Continuance Motion and responses thereto, the Judges established February 12, 2018, as the deadline for filing of amended written rebuttal testimony relating to the JSC discovery or the Corrected Testimony of Dr. Gray, or both. *See Continuance Order* at 1.

Response, indeed the claim in the Motion at issue here is (1) the Judges' expressed preference for accurate evidence, even if a participant receives accurate information late in the proceeding and (2) other parties had filed amended testimony without leave of the Judges. *See* Program Suppliers Response at 2; Motion at 9-10.

Program Suppliers state accurately the Judges' preference for accurate evidence. The Judges have in the past accepted updates to technical evidence as late as during a hearing—granting opponents an opportunity to review and respond. The circumstance in this proceeding, however, is not a matter of emergent factual evidence. In this proceeding, Program Suppliers' expert used incorrect data when accurate data were available.[22] Only in preparing testimony for the distribution phase of the captioned proceeding did Dr. Gray realize his error. Program Suppliers' plead that Dr. Gray was stretched thin by the "competing obligation to prepare *three* additional written testimonies … all of which were due in December 2017." PS Response at 2. A failure of resource management is not sufficient to support a claim of excusable neglect. Furthermore, Dr. Gray's Third Errata was much more than an attempt to substitute up-to-the-minute data in his methodological calculations. Dr. Gray introduced a new category of data and performed a new regression analysis—less than two weeks before the scheduled hearing commencement date. The filing was not an erratum; it was a significant modification of Dr. Gray's expert testimony.

With regard to Program Suppliers' sauce-for-the-goose argument, even in their own papers, Program Suppliers indicate that other parties' filed amendments to testimony in this proceeding between April 2017 and November 2017. *See* PS Response at 5. Amendment of testimony in November before a February hearing is likely inconvenient and even expensive for opposing parties, but it does not unduly prejudice those parties. Two months is sufficient time to adjust hearing presentation(s). Completely revamping testimony two weeks before the scheduled start of a major hearing projected to last five- to six-weeks, however, is a different situation altogether. The changes attempted by Program Suppliers in the Third Errata were prejudicial to the other parties; particularly because those parties, their counsel, and their witnesses had schedule conflicts that would preclude a lengthy continuance. *See,* responses in opposition to Continuance Motion, *e.g.*, PTV Response 1-2; SDC Response 3.

Given the timing of production of the JSC's additional discovery,[23] the Judges moved the hearing commencement date from February 5 to February 14, 2018, permitting amended rebuttal testimony related to the newly produced JSC discovery and the Corrected Testimony of Dr. Gray. *See Order Continuing Hearing …* (Jan. 26, 2018) (*Continuance Order*). In the January 26 continuance order, the Judges expressly "reserve[d] for later decision, after completion of the briefing cycle, the Settling Devotional Claimants' Motion to Strike MPAA's Purported 'Errata' to the Testimony of Dr. Jeffrey S. Gray." *Id.* at 2.

On the first day of the hearing, the Settling Devotional Claimants (SDC), joined by other participants, renewed their motion to strike the Third Errata, or for guidance on what evidence

[22] Dr. Gray has frequently appeared as a witness in proceedings before the Judges. Typically, he has exhibited extensive knowledge of many material issues litigated in those proceedings and the Judges have cited his testimony in some of their determinations. His failure to recognize missing data with which he presumably was intimately familiar is concerning and is not justification for Program Suppliers' attempt to supplement the record so near to the commencement of the proceeding at the expense of the other litigants.

[23] The Judges acknowledge that they did not issue the order requiring the additional discovery from the JSC until January 17, 2018.

propounded by the Program Suppliers the Judges would admit. *See* 2/14/18 Tr. at 20-22 (Att'y MacLean). At the hearing, the SDC were asking for any evidence relating to the nature of the data that caused Dr. Gray to produce the Third Errata and a timeline of when he discovered the additional data and what he did once he discovered it. *See id.* at 20-28 (colloquy of counsel). In response, Program Suppliers represented that Dr. Gray received the additional data on December 1, 2017. *See id.* at 27 (Att'y Plovnick). Allowing for holidays, Dr. Gray had effectively six weeks to contemplate how best to treat the additional evidence. During that period, Program Suppliers had an equal opportunity to alert other participants of the issue. Instead, Program Suppliers "sprung" the testimony based on changed data on the other participants two weeks before the scheduled hearing commencement.[24]

After considering the written submissions and counsel's request for an expedited ruling, the Judges ruled from the bench on the second day of the hearing, granting the SDC motion to strike the Third Errata. The Judges concluded that

> the [T]hird [E]rrata is not merely an effort to correct typographical errors or minor discrepancies. Rather, it is a new analysis by Dr. Gray. And it is too late in this proceeding to have a new analysis introduced, and for that reason we will grant the motion of SDC and not consider the third errata in this proceeding.

2/15/18 Tr. at 234.

Considering the fully developed record, the Program Suppliers' assertion of legal error and/or manifest injustice fails.[25]

F. Failure to Consider Changed Circumstances (Sports Migration)

In the Motion, Program Suppliers assert that the Judges "considered changed circumstances evidence presented by other parties, [but] they failed to consider the testimony of Program Suppliers witness John Mansell (Exhibit 6002)."[26] Motion at 10 (footnote omitted). Program Suppliers assert that Mr. Mansell "presented evidence of changed circumstances showing the significant migration of valuable live professional and college team sports from broadcast television to cable networks during the relevant years." *Id*. Program Suppliers contend that "[t]he overwhelming reduction in available JSC content on broadcast signals during the pertinent years was not only compelling evidence supporting a reduction in JSC's royalty share award, it was directly contradictory to the Judges' conclusions that JSC was entitled to a 'significant share … even though the shares are disproportionate to the number of programming hours retransmitted.'" *Id*.

---

[24] As CTV explained, Program Suppliers did not disclose the anticipated change in Dr. Gray's testimony "even as MPAA was negotiating witness order and schedules with other parties …." CTV Response at 3.

[25] As noted by responding parties, this entire issue could also be construed as moot because the Judges gave no credit to the Gray viewership methodology. In the *Determination*, the Judges concluded that the viewership methodology could not be relied on for reasons independent of the absence of WGNA data. *See Determination* at 117; JSC Response at 6; CCG Response at 8.

[26] *See, e.g., Determination* at 75 ("Ms. McLaughlin and Dr. Blackburn criticized both the survey and regression methodologies, but applied their "changed circumstances" analysis to estimate the relative value of PTV programming and PTV's relative claim to royalties deposited in the Basic Fund."); at 102 ("The Judges find that quantifying changes in various unit measures, while not without corroborative value, is not a definitive approach to relative valuation, especially in comparison to other more probative approaches, such as regression analyses."); and at 118, n.240 ("Similarly, the McLaughlin/ Blackburn "changed circumstances" adjustments bolster the results of methodologies valuing PTV programming above the lower bound set by regression analyses.").

The Program Suppliers appear to have drawn the inference that because the Judges did not explicitly refer to Mr. Mandell's testimony in the *Determination* that they somehow ignored it. The inference is incorrect. The Judges considered Mr. Mandell's testimony, but afforded it no weight. Whether deciding royalty rates or royalty distribution, the Judges are obliged to issue a determination "supported by the written record and … [setting] forth the findings of fact relied on by the … Judges." 17 U.S.C. § 803(c)(3). The Judges are not obliged to reiterate every item of evidence propounded by every witness, but only to support their determinations with record evidence and identify the relevant facts upon which they rely. The Judges did not rely on the written testimony of Mr. Mansell in reaching their determination; rather, the Judges found Mr. Mansell's testimony to be without weight or value in this proceeding for two reasons.

First, Mr. Mansell surveyed changes in televised sports that began, in some instances, as early as 1999, and urged adoption of his conclusions as applicable to the period at issue in this proceeding, 2010 to 2013. *See, e.g.*, Testimony of John Mansell 9 (Mansell WDT) (comparing number of Regional Sports Networks (RSNs), fees, and revenues, from 2005 to 2014); *id.* at 10-11 (comparing NBA and NHL telecasts in 1989-90 to telecasts in 2012-13); *see* JSC Response at 9. Even when Mr. Mansell segregated the relevant time period, he assumed comparisons to earlier data were useful and instructive. The Judges disagreed with Mr. Mansell's approach and his conclusions. The Judges found no facts based upon Mr. Mansell's testimony and did not rely on his testimony in any particular.

Second, even if the Judges had found Mr. Mansell's testimony to have probative value regarding the migration of sports programming from broadcast television to regional sports networks during the relevant period, such a migration would not have been determinative of the relative value of retransmitted JSC programming. In this as in prior determinations, the Judges have concluded that volume of live team sports programming does not equate to relative value of that sports programming. Migration of sports matches with regional interest does not mean an automatic drop in the value of professional sports matches that draw a national audience.

As for the issue of migration of sports programming to regional cable networks, the Judges did acknowledge the assessment of another Program Suppliers witness, Sue Ann Hamilton, who noted that such migration was a complicating factor in assessing how cable operators differentiate between network and non-network sports telecasts. *Determination* at 73.

The Program Suppliers' reference to other evidence that the Judges did refer to in the *Determination* does not support the premise that the Judges failed to consider evidence that the Program Suppliers presented. As a general matter, the Judges did not *rely* on any "changed circumstances" theories in determining the allocations in this proceeding. At best, the Judges considered some evidence of the alleged changed circumstances as corroborative of, or bolstering, their conclusions based on other methodologies. Other evidence that the Judges did not find persuasive or useful in support of their determination, they chose not to refer to in the decision.

II. Adjustment of Allocations for 2012 and 2013

In preparing the instant Order, the Judges have found that for the years 2012 and 2013, in establishing the ranges of reasonable allocations, and determining the allocations themselves, they inadvertently used Horowitz survey results for 2011. The Judges, *sua sponte*, correct this error in the following tables, which will replace tables 1, 18, and 19 in the *Determination*.

TABLE 1: ROYALTY ALLOCATIONS

	2010	2011	2012	2013
Basic Fund				
Canadian Claimants	5.0%	5.0%	5.0%	5.5%
Commercial TV	16.8%	16.8%	16.2%	15.3%
Devotional Programs	4.0%	5.5%	5.5%	4.3%
Program Suppliers	26.5%	23.9%	21.5%	19.3%
Public TV	14.8%	18.6%	17.9%	19.5%
Sports	32.9%	30.2%	33.9%	36.1%
3.75% Fund				
Canadian Claimants	5.9%	6.1%	6.1%	6.8%
Commercial TV	19.7%	20.6%	19.7%	19.0%
Devotional Programs	4.7%	6.8%	6.7%	5.3%
Program Suppliers	31.1%	29.4%	26.2%	24.0%
Public TV	0.0%	0.0%	0.0%	0.0%
Sports	38.6%	37.1%	41.3%	44.9%
Syndex Fund				
Program Suppliers	100%	100%	100%	100%

TABLE 18: RANGES OF REASONABLE ALLOCATIONS

	2010		2011		2012		2013	
	Min	**Max**	**Min**	**Max**	**Min**	**Max**	**Min**	**Max**
JSC	26.73%	41.85%	24.82%	39.42%	28.03%	43.81%	30.12%	45.88%
CTV	13.28%	20.48%	14.41%	23.91%	14.25%	23.30%	10.30%	22.60%
Program Suppliers	23.88%	40.15%	22.10%	35.70%	19.56%	30.90%	17.27%	30.94%
PTV	6.70%	17.46%	7.90%	21.21%	6.10%	21.61%	8.30%	23.39%
SDC	0.48%	4.20%	0.33%	6.64%	0.25%	6.31%	0.23%	5.20%
CCG	0.01%	6.55%	1.12%	6.61%	0.70%	7.47%	0.38%	7.85%

TABLE 19: BASIC FUND ALLOCATIONS

	2010	2011	2012	2013
JSC	32.9%	30.2%	33.9%	36.1%
CTV	16.8%	16.8%	16.2%	15.3%
Program Suppliers	26.5%	23.9%	21.5%	19.3%
PTV	14.8%	18.6%	17.9%	19.5%
SDC	4.0%	5.5%	5.5%	4.3%
CCG	5.0%	5.0%	5.0%	5.5%
TOTAL	100.0%	100.0%	100.0%	100.0%

III. Conclusion

For all of the foregoing reasons, the Judges **DENY** Program Suppliers' Motion. The Initial Determination in the captioned proceeding, with corrections and updates to Tables 1, 18, and 19, as described herein, shall become the Final Determination.

Digitally signed by Suzanne Barnett
Date: 2018.12.13 16:35:07 -05'00'

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: December 13, 2018.