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**In the Matter of**

**1990-92 Cable Copyright  
Royalty Distribution Proceeding**

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

## **ORDER**

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

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

### **DISCUSSION**

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

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<sup>1</sup> The Office is making these rulings pursuant to Section 801(c) of the Copyright Act: "The Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel."

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

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

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

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

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

#### **RULINGS:**

The following rulings apply to the discovery motions filed September 22, 1995. Parties required to furnish underlying documents shall do so no later than November 9, 1995, except where the parties are directed to negotiate the terms of a protective order, in which case the underlying documents shall be furnished no later than November 17, 1995. If they are not produced, all motions to strike shall be ruled on by the CARP.

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

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

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

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

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

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

in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

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

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

Joint Sports Claimants reply that they have offered to enter into a protective order to maintain the confidentiality of Nielsen data. They do not agree that paying Nielsen to perform additional analyses is as good as having the information furnished to them so they can perform their own analysis, because they do not believe they should be put to the expense and because they do not believe that the study can be verified by the company who performed the study, but only by opposing parties.

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

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

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

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

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

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

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

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

(b) Joint Sports Claimants reply that they are prepared to receive the database in whatever format it was compiled by Nielsen, provided that format is adequately explained to Joint Sports Claimants computer specialists, and provided that the database does contain the information necessary to replicate and verify the study results. Joint Sports Claimants state they need to know the time periods for each program because a given time period which ordinarily shows a movie might have broadcasted a baseball game on that date. Joint Sports Claimants also state that they need to know the location of the Nielsen households only to verify that they were distant to the broadcast station, but it does not need to know the actual address.

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

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

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

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

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

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

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

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

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

In reply, Joint Sports Claimants renew their request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

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

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

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

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

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

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

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

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

In reply, Joint Sports Claimants renew their request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, Joint Sports Claimants renew their request.

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

## **SUPPLEMENTAL REQUEST**

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

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

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

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

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

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

Joint Sports Claimants reply that Program Suppliers did respond to Joint Sports Claimants in a letter dated September 27, 1995, but Joint Sports Claimants considers that some of Program Suppliers'

replies were not responsive to Joint Sports Claimants' questions, and that some questions are still unanswered.

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

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

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

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

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

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

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

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

In reply, NAB continues to request the documents.

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

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

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

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

**RULING:** Motion is withdrawn.

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

Program Suppliers state that they have supplied the documents, but they have redacted the individual diary viewing and share information. Program Suppliers further state that they will not supply the redacted information because it is not necessary to understand Ms. Kessler's testimony, that it involved Phase II data on a different study than that which is introduced in this case, and, therefore, outside of the scope of this Phase I hearing, and that it would violate the confidentiality of individual claimant shares.

NAB replies that Program Suppliers have put specific limited payments at issue by having Ms. Kessler testify to such payments in relation to program categorization, and that furnishing the information

would not disclose confidential information about an individual claimant represented by Program Suppliers since the payments were for programs not covered by Program Suppliers' Phase I claim, and were returned by the claimants.

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

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

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

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

6. Specifically, with regard to the Nielsen study, NAB asks for (a) all documents showing the viewing study's results by program, station, and period; (b) documents related to the categorization of programs by Phase I category; (c) documents underlying the syndicated programs that were excluded from the Nielsen study because syndicated exclusivity protection was requested; and (d) documents relating to the number of cable systems within which the study's sample households were located. NAB states that

what Program Suppliers furnished - two memoranda and a printout of the final program categorizations - was not sufficient.

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

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

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

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

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

NAB did not reply to (b).

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

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

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

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

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

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

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

Program Suppliers state that they have provided this information.

NAB replies that it is withdrawing its motion.

**RULING:** The motion is withdrawn.

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

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

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

**RULING:** Program Suppliers are directed to furnish NAB the underlying data of the household viewing hours study showing the viewing hours by station, program, and

period so program categorization can be verified in as organized and usable a form as possible.

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

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

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

**RULING:** NAB's motion is denied in part and granted in part. Concerning the two articles cited in Mr. Besen's resume, they are not offered in Mr. Besen's testimony as the underlying support for any of his assertions. Concerning the six out of seven articles and publications cited by Mr. Besen in the body of his testimony, Program Suppliers are directed to furnish these publications to NAB. They are put forward by Mr. Besen to show support for his methodology.

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

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

In reply, NAB renews its request.

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

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

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

In reply, NAB renews its request.

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

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

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

In reply, NAB renews its request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

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

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

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

Program Suppliers respond that this is proprietary information.

In reply, NAB renews its request.

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

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

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

In reply, NAB withdraws its request.

**RULING:** The motion is withdrawn.

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

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

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

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

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

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

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

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

**RULING:** Program Suppliers are directed to furnish PBS the documents underlying the average costs of film production. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and the

movants shall negotiate in good faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

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

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

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

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

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

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

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

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

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

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

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

In reply, PBS renews its request.

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

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

Program Suppliers respond that this is proprietary information.

In reply, PBS renews its request.

**RULING:** Program Suppliers are directed to furnish PBS the requested underlying documents. To the extent that Program Suppliers assert that the documents constitute proprietary business information, Program Suppliers and PBS shall negotiate in good

faith the terms of a protective order to protect those portions of the documents requiring confidentiality.

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

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

In reply, PBS renews its request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Devotional Claimants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Devotional Claimants respond that they have already provided computer runs that identify which stations Mr. Larson included in his calculation as being religious programming specialty stations.

Requesting that all specialty stations be grouped as either religious or foreign language specialty stations is more of an interrogatory than a document request and is beyond the scope of permitted discovery. In any event, the requested information is available from the Licensing Division of the Copyright Office.

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

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

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

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

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

**RULING:** Program Suppliers' request for documentation identifying the cable systems operated by Milestone Media Management, Inc. and/or Milestone Communications, Inc. is granted. The Copyright Office grants Devotional Claimants'

request to produce the relevant page of the Milestone monograph identifying the systems, in lieu of producing the entire monograph, provided that such document is responsive to Program Suppliers' request.

C. National Association of Broadcasters (NAB)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Joint Sports Claimants

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

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

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

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

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

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

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

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

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

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

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

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

**RULING:** Program Suppliers' request is denied because (a) Mr. Lemieux represents that he does not recall the dates of the Boston Globe television schedules he consulted and because Joint Sports Claimants lack the requested schedules; (b) he relied on his personal knowledge and experience with regard to WGN and WWOR's programming practices; and (c) Program Suppliers never requested from Joint Sports Claimants information regarding how Mr. Lemieux converted blacked-out programs to his tables during the precontroversy discovery period, and is precluded from making such a request now.

3. Program Suppliers request all research studies done by Paul Bortz for entities comprising Joint Sports Claimants to support the statement in his resume that he has been responsible for survey

research studies regarding consumer demand for sports programming and that he has analyzed the economics of delivering sports programming by cable TV. Program Suppliers argue that these studies may call into question the claims made in Mr. Bortz's direct testimony regarding the value of cable operator surveys and other methodologies in measuring distant signal programming value.

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

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

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

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

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

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

First, Joint Sports Claimants submit that they have already fully disclosed all relevant information regarding the surveys, including complete copies of the questionnaires redacted only to preserve the confidentiality of the respondents. Joint Sports Claimants also notes that they have turned over similar material for the pre-1989 surveys referenced in Mr. Trautman's testimony, and object to providing further information on these studies because they are not underlying documents to Mr. Trautman's testimony. Second, Joint Sports Claimants note that they have been submitting the cable operator surveys since the 1978 distribution proceeding, and the Copyright Royalty Tribunal has always allowed them to produce redacted copies of the surveys and questionnaires. They submit that preserving the confidentiality of the surveys is critical to their preparation of future surveys, and that the Tribunal rejected Program Suppliers' claim in the 1990 proceeding that there was no need to protect confidentiality. Third, Joint Sports Claimants argue that Program Suppliers have been unwilling to discuss proposals to provide the requested information without disclosing the identity of the respondents. Joint Sports Claimants further note that it made arrangements in the 1990 proceeding for Program Suppliers to submit their request directly to Bortz for the 1989-1992 surveys, but that Program Suppliers have failed to explain why they did not obtain the information directly from Bortz that is now requested. Fourth, Joint Sports Claimants argue that Program Suppliers' asserted needs for the identity of the respondents and sample cable systems are not sufficient because (a) Joint Sports Claimants are willing to disclose the job titles of the respondents so that Program Suppliers can verify the grouping of titles, (b) Joint Sports Claimants have provided the Copyright Office information used to determine the royalty information and distant signal listings used in the survey, so that

Program Suppliers do not need to know the identity of the sample systems to verify the accuracy of the information, (c) Program Suppliers have failed to show how analyzing the responses from year to year sheds light on the reliability of the surveys, and (d) Program Suppliers have failed to show why the identities of systems excluded from the surveys must be disclosed to check for non-sampling error.

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

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

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

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

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

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

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

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

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

In reply, Program Suppliers renew their request.

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

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

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

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

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

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

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

In reply, Program Suppliers renew their request.

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

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

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

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

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

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

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

In reply, Program Suppliers renew their request.

**RULING:** Program Suppliers' request is denied in part and granted in part. The request is denied with respect to documentation for the surveys from 1978 through 1983 and 1989 because they were the subject of a prior proceeding and discovery is not permissible on testimony from prior proceedings. The request is granted for documentation surrounding the 1986 survey, because it has not been introduced in a prior proceeding, and for the 1990 through 1993 surveys. To the extent that the documentation sought will reveal the identity of the cable systems and respondents

participating in these surveys, Program Suppliers and Joint Sports Claimants shall negotiate in good faith the terms of a protective order to protect those portions of the documentation requiring confidentiality.

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

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

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

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

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

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

In reply, Program Suppliers renew their request.

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

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

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

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

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

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

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

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

**RULING:** Program Suppliers request is denied in part and granted in part. The request is denied with respect to any quality control documentation for the 1989 survey because it was the subject of a prior proceeding and discovery is not permissible for testimony from a prior proceeding. The request is granted with respect to quality control documentation for the 1990 through 1993 surveys, and Joint Sports Claimants are directed to produce any and all documents which reveal efforts made to validate the results obtained during the Bortz surveying, including call backs, and any and all documents which demonstrate that the surveying was conducted in accordance with its established procedures.

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

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

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

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

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

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

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

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

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

[Joint Sports Claimants do not interpose any objection]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: October 30, 1995

James H. Billington  
The Librarian of Congress