

In the Matter of Adjustment of Rates for the Satellite Carrier Compulsory License	} } } } } } }	Docket No. 96-3 CARP SRA
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ORDER

The Library of Congress now has before it three motions regarding document production filed by the copyright owner parties in the above-captioned proceeding. The Broadcaster Claimants Group, the Public Broadcasting Service, and the American Broadcasting Companies, Inc. (hereinafter referred to as "Copyright Owner Group A" or "Group A") request that American Sky Broadcasting ("ASkyB") produce certain documents or that, in the alternative, the testimony associated with these documents be stricken.

The Joint Sports Claimants, American Broadcasting Companies, Inc., Broadcaster Claimants Group, National Broadcasting Company, Inc., and CBS, Inc. (hereinafter referred to as "Copyright Owner Group B" or "Group B") request that Satellite Broadcasting & Communications Association ("SBCA") produce a computer disk containing the Cable Data Corporation ("CDC") database and that, in the alternative, the testimony associated with the database be stricken.

The Program Suppliers, the Public Television Claimants represented by the Public Broadcasting Service, the Broadcaster Claimants Group, the Joint Sports Claimants, American Broadcasting Companies, Inc., CBS, Inc., and the National

Broadcasting Company, Inc. (hereinafter referred to as "Copyright Owner Group C" or "Group C") request production of certain documents from SBCA and, in the alternative, that the testimony associated with the documents be stricken.

The oppositions and replies having been filed, the motions are ripe for disposition.

Motions and Rulings

1. Motion of Copyright Owner Group A

Copyright Owner Group A seeks production of certain documents which they argue underlie the written direct testimony of ASkyB. Specifically, Group A seeks twenty-three of twenty-eight studies listed in Exhibit 1 of William B. Shew's testimony. They assert that these studies underlie Mr. Shew's statement that his testimony in this proceeding "draws upon knowledge acquired from more than twenty studies I have done of the market for pay TV, studies which have examined the economics of satellite distribution of TV programming as well as cable TV distribution." Copyright Owner Group A Motion at 3 (quoting testimony of William B. Shew at 1). Group A submits that ASkyB has agreed to produce only ten of the twenty three requested studies, and, of those ten, has now informed Group A that it cannot locate four of the studies and will produce them only if they can be located. Group A asserts that if ASkyB cannot produce all twenty-three requested studies, then Mr. Shew's entire testimony should be stricken.

ASkyB opposes Group A's request, asserting that the requested studies are irrelevant because they do not underlie factual assertions made by Mr. Shew, and

"Mr. Shew did not look at a single one of the requested studies in preparing his testimony." ASkyB Opposition at 3 (citing affidavit of Mr. Shew attached to opposition). ASkyB also asserts that it cannot produce many of the requested studies because they were not prepared for this proceeding and Mr. Shew has confidentiality restrictions which do not permit him to make the studies available. Finally, with respect to the four studies which cannot be located, ASkyB asserts that Mr. Shew will produce the studies if he can find them, but they are, in any event, irrelevant to this proceeding.

In reply, Group A asserts that the requested studies are relevant to this proceeding, that they constitute documents which underlie Mr. Shew's testimony, and that their confidentiality is adequately protected by the protective order in this proceeding.

RULING: Copyright Owner Group A's request is denied. The studies listed in Exhibit 1 of Mr. Shew's testimony are part of his curriculum vitae, and are offered as evidence of his qualifications to testify as an expert. The studies do not underlie testimony of the witness within the meaning of section 251.45(c)(1) of the rules. See Order in Docket No. 94-3 CARP CD 90-92 at 2 (October 30, 1995) ("...articles mentioned in a resume are not discoverable....").

2. Motion of Copyright Owner Group B

Copyright Owner Group B seeks production from the SBCA of a computer disk containing the CDC database that it asserts underlies Exhibit JH-C, Tables JH-1 and JH-2 of John Haring's testimony. Table JH-1 contains figures presented by CDC identifying the royalties paid by cable operators under 17 U.S.C. 111 for 1992-1995, and Table JH 2 contains figures presented by CDC identifying the royalties paid

by satellite carriers under 17 U.S.C. 119 for 1989-1996/1. The figures presented in these tables are used by Mr. Haring to calculate the average rates paid by cable operators for superstation and network signals, and to present the total amounts of royalties paid by satellite carriers for these signals. Group B asserts that the numbers in these tables represent bottom-line figures which must be verified, and that the CDC database from which they are drawn must be produced in disk form. They further assert that any proprietary interests that SBCA and CDC may have are satisfied by the protective order in this proceeding.

SBCA opposes Group B's request, but propose a compromise whereby certain data can be provided to certain copyright owners, or an examination of the CDC database may be had. SBCA submits that the CDC database does not underlie Mr. Haring's testimony because he only used CDC data contained in CDC's Accounting Period Summaries, and did not rely or even see the data used to produce those summaries. Further, SBCA asserts that it would cost SBCA more than \$35,000 per accounting year, per party, to supply the requested databases in computer disk form. Instead, SBCA states that it has reached an arrangement with CDC to allow the Joint Sports Claimants, along with counsel for SBCA, to inspect the database at CDC's office at a mutually convenient time.

In reply, Joint Sports Claimants, ABC, CBS, and NBC find SBCA's offer unacceptable because they believe the offer is limited to the 1990(2) through 1992(2) database. They submit that they must have access to the 1993-1995 database as well, particularly since Mr. Haring's calculations focus on the 1995 data. The

Broadcaster Claimants Group files a separate reply asserting that they are not intending to gain access to the CDC database for any improper purpose, and that the confidentiality of the information is protected by the protective order in this proceeding.

RULING: Copyright Owner Group B's request is granted in part and denied in part. As the Library has stated in prior proceedings, bottom-line figures offered by witnesses must be verified. See, e.g. Order in Docket No. 94-3 CARP CD 90-92 at 2 (October 30, 1995). Nevertheless, the Library recognizes that witnesses, in preparing their testimony, do rely upon data that comes from outside sources, and that such data is often created by third parties who have no connection whatsoever to a CARP proceeding. This outside data may, in turn, be the product of additional parties and additional sources, such that it could take considerable effort, and expense, to obtain documents in an effort to track the data to its initial source. It is not the intention of the Library to require a party, whose witness states a number in his testimony, to produce all documents which track the history of that number back to its initial source. Such a practice, under the rubric that these are all underlying documents that verify the accuracy of the number, would drive up the cost of the discovery process considerably in CARP proceedings, without a necessarily attending increase in the quality of the parties' presentations before the CARP. It is the CARP that must make the determination as to what evidentiary weight, if any, should be accorded the number.

Production by SBCA of the computer disks of the CDC database that was used to create the accounting program used by Mr. Haring in preparing his testimony (which was produced by SBCA) will apparently cost SBCA several hundred thousand dollars. Group B does not dispute this amount. The Library, therefore, determines that it would not be practicable or efficient, in this instance, to require SBCA to produce computer disks of the CDC database to each of the parties comprising Group B.

Nevertheless, despite the fact that the Library has determined that production of the CDC database in computer disk form is not appropriate in this case, it is appropriate that SBCA be required to make the database available for inspection and copying. SBCA informs the Library that it has made such an

accommodation, and the Library instructs that such arrangements permit counsel for the parties comprising Group B to inspect the CDC database for accounting years 1990/1 through 1995/2 used in compiling Table JH-1 of Mr. Haring's testimony, and the CDC database for accounting years 1989/1 through 1996/1 used in compiling Table JH-2 of Mr. Haring's testimony. SBCA shall make such databases available for inspection as long as reasonable necessary for inspection and copying. Counsel for SBCA may be present during these periods. All material contained in the CDC databases is protected in accordance with the terms of the protective order in this proceeding.

3. Motion of Copyright Owner Group C

Copyright Owner Group C seeks production of certain documents which it asserts underlies the testimony of Jerry Parker, Harry Shooshan, and John Haring.

a) Group C seeks documents underlying several statements made by Mr. Parker regarding the selling of broadcast signals as part of programming packages, as opposed to an individual, or "a la carte" basis. In response to its request, SBCA asserted that Mr. Parker made these statements based upon his knowledge and experience, and also produced a one page "summary sheet" identifying five Denver broadcast stations with a breakdown of subscribers receiving program packages with one or more of the "Denver 5" signals. Group C requests that SBCA identify the source of the produced document, produce all documentation on which the numbers on the summary sheet are based, and produce all documents that identify the universe of satellite subscribers and the program packages the subscribers purchase as described in Mr. Parker's testimony. In the alternative, Group C requests that Mr. Parker's statements regarding the selling of broadcast packages be stricken.

In opposition, SBCA notes that the produced document was not relied upon by Mr. Parker in making his statements, but was in the possession of SBCA counsel and was produced as corroboration of his testimony. SBCA asserts that Mr. Parker's statements are based solely upon his knowledge and experience and that no documents underlie them.

In reply, Group C states that they are entitled to know the source of the "Denver 5" document, and urge the Library to compel production of any and all other documents that underlie Mr. Parker's testimony.

RULING: Copyright Owner Group C's request is denied because Mr. Parker relied upon his knowledge and experience in making the statements regarding the selling of broadcast signals in programming packages. The Library notes that the document produced by SBCA is not an underlying document within the meaning of section 251.45(c)(1) of the rules. Parties are required to produce underlying documents, not corroborating documents. Corroborating documents are not admissible in CARP proceedings unless they are sponsored by a witness in accordance with the CARP rules. While the Library encourages a freedom of document exchange in the discovery process, it discourages production of documents which are outside the scope of the discovery rules. Such documents are not relevant to a CARP proceeding, unless they are introduced into evidence by a sponsoring witness in accordance with the CARP rules.

b) Group C requests production of the surveys underlying the MRI study, cited by Harry Shooshan as support for his assertion that 17 percent of satellite subscribers identified picture quality as the main reason for subscribing to satellite service, as well as the database from which the tabulated results were taken. SBCA produced the MRI study's narrative, survey questionnaire, and final results of the study, but Group C asserts that this is insufficient to permit verification of the accuracy of the

study. Group C seeks the completed questionnaires, computer tape containing the individual responses to each question, and all other data necessary to verify the results. In the alternative, Group C requests that Mr. Shooshan's testimony referencing the MRI study be stricken, or limited as an accurate statement of what the MRI study says, as opposed to the truth of the study's assertions.

In opposition, SBCA asserts that Mr. Shooshan only relied upon the MRI study summary in making his statement, which it produced, and that SBCA was under the mistaken belief that it possessed the MRI survey questionnaire and results when it informed Group C that it would produce these items. SBCA asserts that it does not possess these documents and are not required to produce them.

RULING: Copyright Owner Group C's request is denied because it does not seek documents which underlie Mr. Shooshan's testimony within the meaning of section 251.45(c)(1) of the rules. The CARP will determine the relative weight to be accorded Mr. Shooshan's statement.

c) Group C seek documents which underlie John Haring's statement that "[a] cable operator pays about 6.55 cents per subscriber per month (embodying the average discounts for cable nets) for these transmission services for a broadcast signal, quite apart from payment for the program content." John Haring Testimony at 10. Group C asserts that SBCA produced certain pages from Kagan's Economics of Basic Cable Networks 1996 as the documents underlying this statement, but that such pages only refer to cable networks, not broadcast stations, and are therefore not responsive. Group C requests responsive documents or, in the alternative, that Mr. Haring's statement be stricken.

In addition, Group C seeks documents to support the assertion in table JH 3 of Mr. Haring's testimony that the costs of satellite transmission services are approximately \$0.10 per subscriber per month. Group C asserts that SBCA produced the same pages from the Kagan report described above, and that they are unable to determine which numbers from those pages support the \$0.10 figure. Group C submits that SBCA has not produced the documents supporting this figure and request that it does so now or that the figure be stricken from Mr. Haring's testimony.

In opposition, SBCA states that it has produced responsive documents in both instances, and that Group C has failed to mention that one of the produced pages of the Kagan report is for broadcast signals. SBCA asserts that Group C's argument that SBCA has not produced adequate documentation because Group C cannot figure out how Mr. Haring arrived at his figures is more in the nature of cross-examination than document production.

In reply, Group C informs the Library that its request is now moot.

RULING: The motion is moot.

d) Group C seeks computer disks for all data related to Table JH-1 and Table JH-2 in John Haring's testimony. SBCA has produced documents from CDC, as well as a printout from CDC's accounting program "ACCTPSUM", in support of these tables. Group C submits that these documents are insufficient to verify the numbers in Tables JH-1 and JH-2, and suggests that there must be other data or formulas that were used to create the numbers in these tables. Group C seeks the

computer disks containing the accounting formulas and data that produced the tables and, in the alternative, that Tables JH-1 and JH-2 be stricken from Mr. Haring's testimony.

In response, SBCA states that it will provide the disks containing the formulas used to generate Tables JH-1 and JH-2 provided that Group C "will agree to stipulate to the effective cable royalty rates." SBCA Opposition at 8.

Group C informs the Library that its request is now moot.

RULING: The motion is moot.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: William J. Roberts, Jr.
Senior Attorney

DATED: February 7, 1997