Lewis Hall Griffith
10964 Stuart Mill Road
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August 28, 1997

The Honorable James H. Billington
The Librarian of Congress
The Library of Congress
Washington, D.C. 20540-1050

Re: *Docket No. 96-3 CARP-SRA*
Arbitration Panel Report

My Dear Sir:

Pursuant to the provisions of 37 C.F.R. Sec. 251.53 (1996) I hereby deliver to you the report of our Panel containing our determination of the above referenced proceedings.

Accompanying our report is the written record. The report has been certified by me as Chairperson and signed by all of the Arbitrators.

Personally, and on behalf of my fellow Arbitrators, I wish to express to you our sincere appreciation for the opportunity to serve on this panel. We found this experience to be intellectually challenging and rewarding. We are also especially grateful to the members of the CARP staff for their professional procedural expertise and assistance as we pursued and completed this task.

Respectfully submitted,

Lewis Hall Griffith

Lewis Hall Griffith
Chairperson

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

In the Matter of RATE ADJUSTMENT FOR THE SATELLITE CARRIER COMPULSORY LICENSE	)))))	Docket No. 96-3 CARP-SRA

REPORT OF THE PANEL

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

This proceeding was commenced and conducted pursuant to the compulsory arbitration provisions of the Satellite Home Viewer Act ("SHVA") of 1994, 17 U.S.C. § 119(c)(3)(A); Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et. seq. (1994 & Supp. 1995); and Copyright Arbitration Royalty Panel Rules and Procedures, 37 CFR Part 251 (1996). It is the task of this Copyright Arbitration Panel ("Panel") to set the statutory compulsory license fees for the period July 1, 1997 through December 31, 1999, which shall be paid by satellite carriers to copyright owners for the rights to retransmit television broadcast signals to home satellite dish owners for private home viewing.

Pursuant to 17 U.S.C. § 119(c)(2) & (3), the Library of Congress ("Library") established a period of negotiations between copyright owners and satellite carriers for them to reach voluntary agreement upon the rates for the statutory compulsory license. The Library also established a schedule for the initiation of an arbitration proceeding with respect to those parties who failed to reach a negotiated agreement, including the filing of written notices of intent to participate; the conduct of prehearing discovery; and the filing of "written direct cases". 61 Fed. Reg. 29573 (June 5, 1996). By Order dated October 29, 1996, the Copyright Office[1] established an amended schedule, which was further amended by Order dated December 12, 1996.

The parties apparently failed to reach agreement and, pursuant to 37 CFR § 251.43, they filed Notices of Intent to Participate by August 30, 1996, and written direct cases by December 2, 1996. The following copyright owners filed written direct cases: the Joint Sports Claimants ("JSC"), representing national sports associations including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association; the Public Television Claimants representing the Public Broadcasting Service ("PBS"); the Commercial Network Claimants ("Commercial Networks"), representing the National Broadcasting Co., Inc. ("NBC"), Capital Cities/ABC Inc. ("ABC") and CBS, Inc. ("CBS"); the Broadcaster Claimants Group ("Broadcaster Claimants"), representing certain commercial television stations whose signals are retransmitted by satellite carriers; the Program Supplier Claimants ("Program Suppliers"), representing various copyright owners of theatrical movies, made-for-television movies, television series and television specials; the Music Claimants, representing the American Society of Composers, Authors and Publishers, Broadcast Music, Inc.,

[1] Title 17 U.S.C. § 801 (c) provides that "[t]he 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."

and SESAC, Inc.; and the Devotional Claimants, representing various owners of religious programming. These copyright claimants shall be referred to collectively as the "copyright owners". Satellite carriers filed two written direct cases. One case was filed by the Satellite Broadcasting & Communications Association ("SBCA"), representing AlphaStar Television, Inc., BosCom, Inc. (added by Notice of Amendment filed on June 27, 1997), Consumer Satellite Systems, DirecTV, Inc. (a division of Hughes Electronics Corp.), EchoStar Communications Corporation, Netlink USA, PrimeStar Partners L.P., PrimeTime 24 Joint Venture, Southern Satellite Systems, Inc, and Superstar Satellite Entertainment (a division of United Video Satellite Group, Inc). Advance Entertainment Inc. was originally represented by SBCA but deleted by Notice of Amendment filed on June 27, 1997. These carriers shall be referred to collectively as the "satellite carriers". The other written direct case was filed by American Sky Broadcasting L.L.C. ("ASkyB"), an entity that has purchased satellite orbital slots and plans to provide satellite delivered programming later this year.

Pursuant to 17 U.S.C. § 801(c) and 37 CFR § 251.45, the Copyright Office ruled upon all prehearing motions and objections until the Panel was convened. The Panel convened the administrative hearing on March 4, 1997, and pursuant to 37 CFR § 251.47, the parties presented their direct oral cases and concluded them on April 16, 1997. By joint motion, the parties moved for waiver of rebuttal cases and for an opportunity to present final oral argument. Pursuant to 37 CFR §§ 251.42 and .43, by Order dated May 2, 1997, the Panel cancelled rebuttal cases and established a revised schedule for submission of proposed findings of fact and conclusions of law ("PFFCL") and presentation of final oral argument. On May 23, 1997, PBS and JSC filed separate motions which were tantamount to motions to dismiss the case of ASkyB. Because these motions were potentially dispositive with respect to ASkyB, and because other copyright owners advanced similar arguments in their PFFCL, by Order of June 24, 1997, the Panel deferred the motions for final oral argument and reserved ruling until issuance of this Report. Pursuant to 37 CFR 251.52, in accordance with the Panel's Order, the parties filed PFFCL by June 6, 1997 and Replies by June 27, 1997. In accordance with our Order of July 18, 1997, SBCA filed a revised PFFCL on August 4, 1997. By Order of August 6, 1997, the separately filed Reply PFFCL of EchoStar was stricken from the record. Oral argument was heard on July 18, 1997 and the record was formally closed by Order dated August 14, 1997.

ISSUE

The Panel's task is to set the statutory compulsory license fees for the period July 1, 1997 through December 31, 1999, which shall be paid by satellite carriers to copyright owners for the rights to retransmit television broadcast signals to home satellite dish owners for private home viewing. To that end, Congress has directed the Panel to set fees that "most clearly represent the fair market value of secondary transmissions" (retransmissions) of broadcast signals.[2]

DISCUSSION AND FINDINGS

Exhibits

A description of the status and admissibility of all hearing exhibits, in accordance with

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[2] Section 119(c)(3)(B) actually *appears* to prescribe criteria in addition to the fair market value criterion of § 119(c)(3)(D). However, before the Panel was convened, the Copyright Office ruled that Congress had clearly intended to repeal the language of (c)(3)(B), which originally appeared in the 1988 SHVA, to be replaced by the language of (c)(3)(D). Instead, due to a scrivener's drafting error, the old language was retained and the new language was erroneously codified as 17 U.S.C. § 119(c)(3)(D) (1994). Order of Copyright Office, Docket No. 96-3 CARP-SRA (January 6, 1997).

agreements of the parties and Panel Orders of May 14, 1997 and August 14, 1997, is attached hereto as Appendix 1.

Witnesses

JSC presented written and oral testimony of four witnesses: James Michael Trautman, Senior Vice President and Director of Bortz & Company; Edwin S. Desser, President, NBA Television and New Media Ventures; Robert W. Crandall, a Senior Fellow in Economic Studies, Brookings Institute; and Lawrence Gerbrandt, Senior Consultant, Kagan Media Appraisals, Senior Vice President and Senior Analyst, Paul Kagan Associates.

PBS presented written and oral testimony of two witnesses: John F. Wilson, Senior Director of Program Scheduling and Editorial Management, Public Broadcasting Service; and Linda McLaughlin, Economist and Vice President, National Economic Research Associates.

The Commercial Networks presented written and oral testimony of three witnesses: Thomas P. Olson, a partner at the law firm of Wilmer, Cutler & Pickering; Alan Sternfeld, Executive Vice President, ABC Entertainment; and Bruce Owen, President, Economists, Inc.

The Broadcaster Claimants presented written and oral testimony of William Graff, Director of Programming, WPIX, a New York City broadcast station.

The Program Suppliers presented written and oral testimony of two witnesses: Marsha E. Kessler, Vice President, Copyright Royalty Distribution, Motion Picture Association of America; and Allen R. Cooper, Vice President, Motion Picture Association of America.

The Music Claimants presented no testimony.[3]

The Devotional Claimants presented written and oral testimony of David Hummel, an

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[3] *See* Order of Copyright Office, Docket No. 96-3 CARP-SRA (February 12, 1997).

independent marketing consultant.

SBCA presented written and oral testimony of four witnesses: Gerald L. Parker, Vice President of Programming and Legal Affairs for Superstar Satellite Entertainment, Officer of Superstar/Netlink Group, L.L.C.; Thomas A. Larson,[4] President, Cable Data Corporation; John R. Haring, a principal in Strategic Policy Research; and Harry M. Shooshan, III, also a principal in Strategic Policy Research.

ASkyB presented written and oral testimony of two witnesses: Preston R. Padden,[5] then Chairman and Chief Executive Officer, ASkyB; and William B. Shew, Visiting Scholar, American Enterprise Institute.

Industry Background

Under 17 U.S.C. § 119, television broadcast stations are categorized as either "network stations" or "superstations". Network stations are broadcast stations which are licensed by the Federal Communications Commission ("FCC") to provide television service in a particular local market and are (1) owned-and-operated by, or affiliated with, a commercial television network or (2) a noncommercial educational broadcast station. 17 U.S.C. § 119(d)(2); *Tr. 156-57.* Superstations are broadcast stations which are licensed by the FCC to provide television service in a particular local market and are *not* network stations as defined above *and* are secondarily transmitted by a satellite carrier. 17 U.S.C. § 119(d)(9). A "secondary transmission" is the

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[4] Mr. Larson's "written testimony" originally appeared as a "declaration" attached to Dr. Haring's written testimony. However, the parties ultimately agreed that Mr. Larson would testify orally. *Tr. 2894-97.*

[5] Apparently, Mr. Padden is no longer associated with ASkyB but his testimony continues to represent the position of ASkyB. *See ASkyB PFFCL pg. 1.*

further transmitting (retransmitting) of a primary broadcast transmission. 17 U.S.C. § 119(d)(7); 17 U.S.C. § 111(f).

The Commercial Networks purchase and produce programming for distribution through their owned-and-operated local stations and local network station affiliates. These local stations receive the programming "feed" by satellite, add their own programming, and then broadcast the signal over-the-air to viewers free of any charge. Commercial Networks pay their affiliates to distribute their programming which contains network national advertising. *Tr. 2064-68, 3226.* In accordance with their affiliation contracts, the local network affiliates also sell a certain amount of local advertising which is also inserted into the signal that is broadcast locally. *TR. 2070.* The Commercial Networks and their local affiliates rely, almost exclusively, upon the sale of the national and local advertising as their sources of revenue. *Tr. 501, 678-9, 1842, 2070.* Superstations also produce and purchase programming and, relying primarily upon advertising revenues, broadcast their signal free over-the-air. *Id.* Noncommercial public television stations also broadcast their signal free over-the-air, but are financed by direct government funding, corporate underwriting, and viewer contributions. *Tr. 1268-70.*

Cable networks are channels of programming originally developed for distribution to cable systems but are now also delivered to subscribers by satellite carriers and other subscription television distributors ("multichannel video program distributors"). *Written testimony (hereinafter "W.T.") of Trautman, pgs. 15-16.* Over 100 cable networks are available for distribution today. The vast majority of these cable networks present "niche programming" designed to appeal to a narrow audience but some offer more general programming calculated to reach a broader audience. *Tr. 163-65.* Unlike broadcast stations, cable networks are not subject to statutory compulsory licenses.[6] License fees for carriage of cable network signals are established through free market negotiations. *Tr. 168-69.*

Satellite carriers "uplink" and then deliver video programming services directly to satellite dishes located at subscribers' homes. This manner of delivery is known as "direct-to-home" ("DTH"). *Tr. 122-24, 2265.* Pursuant to SHVA (1988), the satellite carriers have been paying compulsory license fees semi-annually into a fund maintained by the Copyright Office for the rights to deliver (retransmit) network station and superstation signals to the DTH market.[7] 17 U.S.C. § 119(b)(1). Entities that have proprietary interests in the programming contained in the retransmitted signals (copyright owners) are entitled to portions of the royalties and, if unable to agree upon their respective allotments, may participate in separate royalty distribution proceedings. 17 U.S.C. § 119(b)(4). The satellite distribution technologies used by the satellite carriers are among several multichannel video program distribution technologies which are available, or soon to be available, to the public. The other technologies include cable television, multichannel multipoint distribution service, local multipoint distribution service, satellite master antenna television, and local exchange telephone carriers. *JSC Exh. 1B.* Multichannel video program distributors ("multichannel distributors"), such as the satellite carriers, sell packages of multichannel video programming directly to subscribers or through third party packagers and distributors. *Tr. 2266-68.* Cable television operators are the dominant distributors of

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[6] Satellite carriers may retransmit broadcast station signals by paying prescribed fees under a compulsory license (without obtaining express consent of the programming copyright owners) pursuant to 17 U.S.C. § 119 and cable operators do so under § 111.

[7] The original SHVA (1988) prescribed license fees of $0.03 per subscriber per month for network station signal and $0.12 p r subscriber per month for each superstation signal that each satellite carrier retransmitted to an individual DTH subscriber. *Tr. 580-81.*

multichannel video programming. Of all subscribers receiving packages of multichannel video programming in 1996, 89% received their programming from cable operators. *JSC Exh. 1B pg. 5.* Satellite carriers deliver similar packages of programming to their subscribers, with greater channel capacities, but have captured less than 10% of the multichannel video market. *Id; W.T. of Trautman pg. 6; W.T. of Parker Exh. JP-F.*

Satellite carriers deliver DTH services by two means. The home satellite dish industry ("HSD"; also known as the "C-band industry") uses the low-powered C-band frequency to transmit (or, in the case of a broadcast station signal, *retransmit*) programming from satellites to subscribers' C-band dishes. These HSD dishes are large and steerable for reception of multiple programming services from multiple satellites. *Tr. 122-23, 2264-65.* HSD carriers include Advance Entertainment Corp., Consumer Satellite Systems, Netlink USA, PrimeTime 24 Joint Venture, Southern Satellite Systems, Inc., and Superstar Satellite Entertainment. *W.T. of Trautman pg. 7* (the method of delivery utilized by BosCom is not reflected in the record). The more recent, direct broadcast satellite industry ("DBS") uses the medium, or high-powered, Ku-band frequency and obtain programming from either C-band satellite sources or ground transmission. It uplinks the programming from the source to transponders on a satellite and then downlinks to individual subscribers' DBS dishes. The DBS dishes are much smaller (18"-36" diameter) than HSD dishes and are fixed in place to receive a package of programming services from an individual DBS satellite. *Tr. 123.* DBS services also deliver a digitalized signal for higher resolution pictures than those delivered by HSD, cable and other analog services. *Tr. 187.* DBS carriers include AlphaStar Television, Inc., DirecTV, Inc., EchoStar Satellite Corporation, and PrimeStar Partners, L.P. ASkyB also intend , to operate as a DBS carrier. *W.T. of Trautman* *pg. 7.* The number of subscribers to HSD services has stabilized, and may be declining, while the number of subscribers to DBS services is rapidly growing. *Id at 9; Tr. 2288.*

<u>**History of the Cable and Satellite Statutory Licenses**</u>

Prior to 1976, cable operators retransmitted broadcast signals with no copyright liability. *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974). In 1976, Congress enacted the Copyright Act of 1976, which established copyright liability for retransmission of broadcast signals but concomitantly provided cable operators a compulsory license and prescribed formulas for the payment of compulsory license fees. 17 U.S.C. § 111. The license fees are calculated by a percentage of certain defined revenues of cable operators and are paid to the Copyright Office semi-annually and ultimately distributed to copyright owners through distribution proceedings. 17 U.S.C. § 111(d)(3). Under the Section 111 compulsory cable license, cable operators do not generally pay any copyright license fees for the retransmission of local broadcast signals[8]. They are assessed one "distant signal equivalent" or "DSE" for each distant[9] independent (superstation) signal and one-quarter of a DSE for each distant network signal that they retransmit to subscribers. *Tr 1091-92, 2930-31.* This 4:1 ratio of license fees, for retransmitting distant superstation signals *vis-a-vis* distant network station signals, reflected a determination by Congress that the copyright owners of network programs had already received full compensation for nationwide distribution when they sold the rights to the networks. At the time section 111 was enacted, network programming constituted approximately 75% of the broadcast day of a typical network affiliate and *non*-network programming (local news, syndicated programming,

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[8] Retransmission of a broadcast station signal back into its local broadcast market.

[9] Retransmission of a broadcast station signal to an area outside of its local market.

etc.) comprised about 25% of a typical network affiliate. Accordingly, Congress reasoned that only 25% of the network affiliate signal should be compensable. 1988 SHVA Rep. at 22-23; *Tr 1093, 3483*. In short, cable operators pay no copyright license fees for any network programming, local or distant, and generally[10] pay no license fees for any retransmission of local broadcast signals. 17 U.S.C. § 111(d); *Tr. 464, 657, 3485*. However, they are also subject to various regulatory obligations which do not burden satellite carriers including syndicated exclusivity rules under 47 U.S.C. § 534(b)(3)(B) and must-carry rules under 47 U.S.C. § 534(b)(1)(B). *Tr. 3812-13, 3985-86.*

After satellite carriers began retransmitting broadcast signals directly to subscribers, Congress enacted the 1988 SHVA to provide a compulsory copyright license for the retransmisson of distant[11] broadcast signals by satellite carriers. The general purpose of the satellite compulsory license appears similar to that for cable operators but contains significant differences. To protect the unique relationship between broadcast commercial networks and their affiliates, section 119 restricts the retransmission of network signals to "unserved households" 17 U.S.C. § 119(a)(2)(B). An unserved household is one that cannot receive a signal of Grade B intensity, as defined by the FCC *and* did not subscribe to cable in the previous 90 days. 17 U.S.C. § 119(d)(10)(B). Areas which contain large concentrations of unserved households are known as "white areas". *Tr. 580*. Congress recognized that the ability of commercial network-affiliated

[10] In the rare circumstances where a cable operator does not retransmit *any* distant broadcast signals, it must pay a minimum license fee. 17 U.S.C. § 111(d)(1)(B)(i).

[11] Satellite carriers did not possess the technology to retransmit local signals and SHVA did not address the issue. 17 U.S.C. § 119. ASkyB claims to be developing the technological capacity to retransmit *local* broadcast signals and has asked the Panel to set a separate rate structure for local retransmissions. *Tr. 3575-77.*

stations to generate advertising revenue would be compromised if satellite carriers were permitted to simultaneously deliver identical network programming from an out-of-local-market affiliated station to the local market served by another affiliate of the same network. H.R. Rep. No. 100-887, pt. 2 at 20 (1988). Unlike the cable compulsory license under section 111, the satellite compulsory license under section 119, prescribes fees based upon the number of subscribers. The originally prescribed fees of $0.12 per subscriber per month for superstations and $0.03 per subscriber per month for network stations were intended to approximate the license fees paid under section 111 for retransmitting similar distant signals by cable operators.[12] *Tr. 733, 735-37, 1082.* While no license fees are required of cable operators under section 111 for the network programming portion of commercial network station signals that they retransmit, network programming is compensable under section 119.[13] Finally, the section 111 cable license appears

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[12] Under the cable compulsory license statute, commercial network programming is explicitly non-compensable. 17 U.S.C. § 111(d)(3). By contrast, all network programming is compensable under SHVA. *See* section 119(b)(3) (fees shall be distributed "to those copyright owners whose works were included in a secondary transmission ... made by a satellite carrier."); 1989 Satellite Carrier Distribution Proceeding, 58 FR 20414 at 20416 (May 3, 1991) ("copyright owners of network programs are entitled to participate ... in the distribution of the satellite carrier fund."); *see also* 1991 Satellite Carrier Rate Adjustment Proceeding, 57 FR 19052 (May 1, 1992) (discussing declaratory ruling cited above). However, when enacting SHVA, Congress curiously maintained the 4 to 1 ratio of license fees, adopted from the cable statute. Apparently, Congress attempted to mechanically duplicate cable rates without considering the disparate copyright treatment accorded commercial network programming under the two statutes.

[13] *See* note 12, *supra*. Arguably, this disparate copyright treatment is reconcilable. The original reasoning applied by Congress, for treating network programming as noncompensable under section 111, does not precisely apply to satellite carriers. Cable operators generally retransmit commercial network signals to areas where the network signal is available over-the-air. Accordingly, copyright owners were already fully compensated when they sold the nationwide rights. More precisely, the copyright owners sold the network the rights to broadcast to all markets *served by that network*. By contrast, satellite carriers generally retransmit network signals only to white areas (unserved by the network) for which rights were not previously sold. However, this explanation is not fully satisfactory because cable operators may retransmit

permanent while the section 119 satellite license is temporary by its own terms and was originally scheduled to "sunset" in 1994. 17 U.S.C. § 111; 17 U.S.C. § 119 (1988). The 1988 SHVA also provided for an adjustment of the originally prescribed rates, to be effective from 1992 until sunset in 1994, through an arbitration proceeding before a panel of arbitrators whose findings were subject to review by the Copyright Royalty Tribunal.[14] 17 U.S.C. § 119(c)(2)(D) (1988). A panel was convened in 1992 to adjust the rates in accordance with the multiple criteria enumerated under the 1988 section 119(c)(3)(D).[15] The Copyright Royalty Tribunal adopted the arbitration panel's findings, with one technical amendment, and the royalty rates established by the panel have been effective since May 1, 1992. 57 FR 19052 (May 1, 1992). Under the 1992 adjusted rates, satellite carriers pay $0.175 per subscriber per month for retransmission of a superstation signal, unless all of the programming contained in the superstation signal is free from syndicated exclusivity protection under FCC rules ("syndex-proof" superstation signals), in which case the satellite carrier pays $0.14 per subscriber per month; and $0.06 per subscriber per month for network signals. *Id.* Under the 1994 SHVA, Congress extended the section 119 satellite compulsory license until December 31, 1999; authorized a rate adjustment arbitration proceeding before this Panel to set new rates effective from July 1, 1997 until the new sunset of December

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broadcast signals to some subscribers located in white areas and satellite carriers retransmit network signals to some unserved households located outside of white areas (*e.g.*, hilly areas). 17 U.S.C. § 119(d)(10)(B); *Tr. 2636.*

[14] Under the Copyright Royalty Tribunal Reform Act of 1993, Congress abolished the Tribunal and transferred its prior responsibilities directly to copyright arbitration royalty panels without any substantive copyright law changes. H.R. Rep. No. 103-286 at 12 (1993).

[15] *See* note 2, *supra*.

31, 1999; and repealed the former rate criteria, substituting a single "fair market value" criterion.[16]

17 U.S.C. § 119 (1994).

The Fair Market Value Criterion

Section 119(c)(3)(D) provides as follows:

> In determining royalty fees under this paragraph, the Copyright Arbitration Panel shall establish fees for the retransmission of network stations and superstations that most clearly represent the **fair market value** of secondary transmissions. In determining the **fair market value**, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including -
>
> (i) the competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;
>
> (ii) the economic impact of such fees on copyright owners and satellite carriers; and
>
> (iii) the impact on the continued availability of secondary transmissions to the public. (Emphasis added).

Congress' intended meaning of "fair market value", within the context of section 119, was the subject of considerable testimony and argument.

The copyright owners are unanimous in their interpretation of fair market value as the price that *would be negotiated* in a free market setting as compensation for the satellite carriers' right to retransmit network and superstation signals containing the copyright owners copyrighted programming.[17] *See, e.g., Tr. 1199-1202.* They argue that Congress intended to adopt the well-

[16] *See* note 2, *supra.*

[17] JSC and the Commercial Networks further assert that these negotiations would proceed between satellite carriers, as "buyers", and copyright owners, as "sellers". *JSC PFFCL pg. 16; Commercial Networks PFFCL pg. 44.* We agree that satellite carriers would be "the buyers". But, negotiations need not necessarily involve copyright owners *directly* as sellers. In those

established willing buyer/willing seller definition among economists and in the law.[18] Moreover, because the meaning is plain, it is unnecessary to examine the legislative history. *See U.S. v. Gonzales*, 117 S. Ct. 1032, 1035 (1997). But, they assert, even if one were to explore the legislative history of the 1994 SHVA, the plain meaning is reinforced. The copyright owners further note that the fair market value standard is the single criterion to be applied and the enumerated list of "information" does not prescribe additional criteria that supplements the fair market value criterion. The non-exhaustive list of "information", they conclude, must be considered only for the purpose of "determining the fair market value."

By contrast, SBCA and ASkyB argue that the determination required by section 119 cannot be based upon a "standard" fair market value definition.[19] Rather, fair market value is defined by the statute itself and must be determined by applying the mandatory *criteria*. Of those criteria, Congress intended that "the cost for similar signals in similar private and compulsory license marketplaces" (the compulsory license fees paid by cable operators under section 111) should serve as the benchmark. SBCA contends that the legislative history reveals that Congress

instances where broadcast stations have purchased the rights to authorize satellite carriers to retransmit the entire signals ("cleared" the copyrights for all programming contained in their signals), the ultimate retransmission negotiations would likely transpire between satellite carriers and broadcast stations (with no *direct* copyright owner involvement). Indeed, in this hypothetical free market scenario, failure of the broadcast stations to clear the rights would require each satellite carrier to negotiate with a myriad of copyright owners for each day's signal -- an extremely cumbersome and, perhaps impracticable process. *See e.g., JSC Exh. 21.*

[18] *See, e.g., BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) (Fair market value means "the price which [a commodity] might be expected to bring ... as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled..."

[19] *But see Tr. 3478* (SBCA witness concedes Congress intended the Panel to apply the commonly accepted meaning of "fair market value".)

included the fair market value provision only upon the condition that parity with cable rates was preserved as the ultimate guideline.

The Panel perceives sufficient ambiguity[20] with respect to the term "fair market value" to warrant a review of SHVA legislative history. Our examination confirms the SBCA-ASkyB claim that some of the "information" considerations enumerated in section 119(c)(3)(D) were added through "difficult negotiations"[21] and "hard fought compromise".[22] However, while the list of considerations was ultimately expanded, the unitary fair market standard was never questioned nor modified. We find no support for the proposition that Congress did not mean what it said. The legislative history reveals no intent to attach a unique meaning to the commonly understood and well-established "fair market value" term. If Congress had intended the Panel to simply set an *appropriate* rate derived from prescribed *criteria*, it could have quite easily so directed. And if Congress had intended, as SBCA-ASkyB further suggest, that the Panel set a rate that most closely achieves parity with cable operators, it could have declined to modify the 1988 statute; included satellite carriers under section 111; or simply so directed. Congress did none of these. A few legislators expressed their desire to promote viable competition by fostering parity with cable operators. *See* 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994). But, the language,

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[20] *See, e.g., Tr 3950-53* (ASkyB witness opines that the Congressionally mandated considerations are not relevant to a traditional fair market value inquiry). Moreover, one can reasonably argue that Congress created ambiguity when it *required* the Panel to consider any *particular* factors rather than simply directing the Panel to determine "fair market value". The fair market rate, as would be negotiated in a free market, should not vary according to *which* factors are considered.

[21] 140 Cong. Rec. S14105 (daily ed. Oct. 4, 1994)

[22] 140 Cong. Rec. H9270 (daily ed. Sept. 20, 1994)

structure, and legislative history of the 1994 amendments to section 119 suggest the Panel is directed to determine actual *fair market value* and "in determining the fair market value ... base its decision ..." upon the non-exhaustive list of *considerations*. We interpret the phrase "base its decision" to require the Panel to *consider* each enumerated type of information but, the weight to be accorded each consideration must necessarily depend upon the quality and quantity of the evidence adduced and *its relative significance to a determination of actual fair market value*. All evidence falling within the enumerated types of information must be considered but evidence which is more probative of *fair market value* must be accorded greater weight than less probative evidence. Accordingly, we generally accept the copyright owners' interpretation. The Panel agrees that the fair market value rate is that which most closely approximates the rate that would be negotiated in a free market between a willing buyer and willing seller.

The Appropriate Benchmark for Determining Fair Market Value

Having concluded that Congress intended the Panel to determine the "fair market value", in accordance with its ordinary and generally accepted meaning, of retransmitted broadcast signals, we direct our attention to that determination. Numerous witnesses testified regarding the availability and value (importance to viewers) of particular types of programming and programming services; the technologies used; the business dynamics and structure of the various industries; the financial health of the industries; and the general economic models governing each industry. Witnesses for PBS, JSC, the Commercial Networks, SBCA, and ASkyB also sponsored economic analyses and testified as to their calculation of "fair market value". Two general approaches to the valuation problem emerged. The copyright owners used empirical data of license fees paid to certain cable networks by multichannel distributors (primarily cable operators) for the rights to carry cable network programming. This programming closely resembles broadcast programming and, presumably, the fees paid were the result of free market negotiations. Accordingly, the copyright owners advocate using these license fees as a valuation "benchmark" to determine fair market value of broadcast signals. The satellite carriers and ASkyB reject this approach. They urge the Panel instead to focus primarily[23] upon the license fees paid by cable operators, under the section 111 compulsory license, for the retransmission of broadcast signals by cable operators. A brief description of each analysis follows.

The PBS Analysis

Network stations, superstations, and cable networks are all in competition to be carried in programming packages for sale to satellite subscribers. *Tr. 2656*. Basic cable networks, channels that have typically been included in basic packages of services offered by cable operators and satellite carriers, are the closest alternative to receiving retransmitted broadcast stations available to satellite subscribers--particularly subscribers residing in white areas. *Tr. 163-64, 1612-13*. The PBS expert, Linda McLaughlin, concluded from viewer rating surveys that subscriber demand for broadcast stations was at least as high as the demand for 12 popular[24] basic cable networks and, consequently, satellite carriers would be willing to pay at least as much for the rights to retransmit broadcast stations as for these 12 popular basic cable networks. *Tr. 1617-18*. Ms. McLaughlin used data from Paul Kagan Associates ("Kagan") reflecting average license fees paid by all

[23] The satellite carriers also advance alternative arguments, such as the value of primary transmissions, the history of retransmission consent negotiations and the nature of commercial network--affiliate relationships, discussed *infra*, to support a determination of fair market value.

[24] These 12 basic cable networks are distributed to about 90% of cable households. *Tr. 1626*. They consist of A&E; CNN; Headline News; DSC; ESPN; FAM; Life; MTV; Nick; TNN; TNT; and USA. *W.T. of McLaughlin Table 2*.

multichannel distributors[25] to the 12 popular basic cable networks. *Tr. 1757-58.* She divided the total license fees by 12 (number of cable networks) and then by the estimated total number of subscribers.[26] This figure was again divided by 12 to determine the average license fee per subscriber per month. This calculation was performed for the years 1992, 1993, 1994 and 1995, and the results were $0.18, $0.20, $0.22, and $0.24, respectively, reflecting an *annualized* increase of 10% from 1992 to 1995. Presuming a continuation of the annualized increase of 10% through 1997, Ms. McLaughlin calculated the projected average license fee for 1997 to be $0.26 per subscriber per month. However, for 1998 through 1999, Ms. McLaughlin utilized an annual increase of only 4.7%[27] and calculated the projected average license fees for the 12 basic cable networks to be $0.27 for 1998 and $0.28 for 1999. This analysis is premised upon a presumption that satellite carriers are actually paying no less than the average fees paid by all multichannel distributors for these basic cable networks.[28] Accordingly, PBS argues that $0.27 per subscriber

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[25] Because cable operators comprise almost 90% of the multichannel video market (*JSC Exh. 1B at pg. 5*), these figures primarily reflect average license fees paid by cable operators. Discrete figures representing license fees paid only by satellite carriers have not been made available for analysis. *Tr. 1654, 1758-59.*

[26] The number of subscribers was adjusted by deducting an estimated 8% of subscribers reported as non-paying--illegal, citing *Cable TV Programming, September 30, 1995, pg. 5.*

[27] Again citing *Cable TV Programming, supra, at pg. 2.*

[28] *See note* 25, *supra*. Because data reflecting license fees paid by satellite carriers for cable networks are within the possession of the satellite carriers and they failed to present them, the copyright owners urge us to draw an "adverse inference" that the satellite carriers are paying average rates as high, or higher, than those paid by other multichannel distributors (cable operators). *See e.g., Commercial Networks Reply PFFCL pg. 28.* The satellite carriers respond that pursuant to standard confidentiality clauses contained in their cable network contracts, they are not permitted to reveal the rate figures. Moreover, they contend, in isolation, the license fees are meaningless. Mar, inter-related provisions are negotiated in conjunction with the license fees which are reflected in the ultimate price including marketing fees, advertising availabilities, and

per month represents a *minimum* rate (averaged over the 3 year statutory period) and no adjustments (e.g., for special costs incurred by satellite carriers or the unavailability of advertising inserts under section 119--both discussed *infra*) need be deducted from this benchmark rate.

Finally, Ms. McLaughlin examined the historical growth of the satellite industry, the impact of past royalty fee increases upon the revenues and marginal profits of two carriers, and the impact of past price increases upon subscriber demand. She concluded that a rise in the compulsory license fee rate to $0.27 per subscriber per month would have no significant adverse impact on the satellite carriers or the availability of secondary transmissions to satellite subscribers. Tr. 1628-33; 1772-73.

The JSC Analysis

JSC sponsored a study supervised and presented by Larry Gerbrandt. Mr. Gerbrandt approached the valuation problem in a manner very similar to Ms. McLaughlin's study. Mr. Gerbrandt first examined the types of programming carried by the broadcast stations whose signals are retransmitted by the satellite carriers. He then identified those cable networks that carried programming most comparable to programming carried by the retransmitted broadcast stations. *Tr. 2001; 2003-16.* The study revealed that both USA and TNT carry general entertainment programming comparable to that of broadcast stations designed for appeal to a broad based audience. *Tr. 2025-26.* Using Kagan data, Mr. Gerbrandt then determined the total license fee revenue paid by all multichannel distributors (again, primarily by cable operators) to

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"launch support" for new cable networks. *Tr. 2526-28, 2552-53.* Finally, the satellite carriers argue that because the Commercial Networks own significant interests in some cable networks, the Commercial Networks could have produced similar data but declined. Hence, they urge us to draw no adverse inference. *Satellite carriers Reply PFFCL pgs. 31-32. Also see Tr. 2552-53.*

USA and TNT, divided by the estimated number of subscribers to each network (as adjusted for illegal subscribers), and divided again by 12 to calculate the fee per subscriber per month for USA and TNT. *Tr. 2014-17.* Mr. Gerbrandt opined that although TNT did not regularly program news, TNT programming was most comparable to broadcast station programming because USA did not carry valuable sports programming. Consequently, the calculated fee per subscriber rate for TNT exceeded that of USA. *Tr. 2026; W.T. of Gerbrandt pg. 12.* However, "in the interest of being conservative", Mr. Gerbrandt chose to advocate using the calculated USA fee per subscriber rate to establish "the lower bound". *Tr. 2026-27.* The USA fee per subscriber per month rate was based upon data for the years 1992 and 1995 and calculated as $0.22 for 1992, and $0.31 for 1995. Fees per subscriber per month for 1997, 1998, and 1998, were projected based upon Kagan estimates[29] of future fees for these years and calculated to be $0.35, $0.36, and $0.38, respectively.[30] *Tr. 2027; W.T. of Gerbrandt pgs. 13-14.* Mr. Gerbrandt opined that the broadcast stations retransmitted by satellite carriers are "roughly comparable in value to each other -- that is, in a free market (absent compulsory licensing) satellite carriers ... would pay approximately the same license fee to retransmit each ..." *W.T. of Gerbrandt pg. 7.*

Mr. Gerbrandt did not analyze the economic impact, nor the impact on the continued

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[29] The estimates for 1997 revenues were published prior to this proceeding while the 1998 and 1999 figures were estimated specifically for this proceeding. *Tr. 2017-18.*

[30] Mr. Gerbrandt also presented a higher, alternative proposed rate pursuant to an "updated Silberman analysis". *W.T. of Gerbrandt pgs. 17-19.* It would appear that JSC presented this "update" more as an illustration of how Mr. Gerbrandt addressed criticisms expressed by the 1992 panel of the original Silberman analysis, rather than as a serious valuation proposal. *See Tr. 2032, 2123-24.* In any event, the Panel rejects the use of "top-of-the-ratecard" data employed in this analysis. We similarly reject the SBCA sponsored updated Silberman analysis which utilized average license fees for some calculations but top-of-the-ratecard data for others. *Tr. 3129-31.*

availability of secondary transmissions, of his proposed rates. However, JSC argues that the totality of evidence supports a conclusion that the satellite carriers can fully absorb their advocated higher rates. Should the satellite carriers elect to fully pass on the higher retransmission rates to their subscribers, the impact would similarly be minimal because the recent history of subscriber fee increases reflects an inelastic demand. *See JSC PFFCL pgs. 68-71.*

Excepting the Commercial Networks, all other copyright owners, including PBS, support the rates advocated by JSC. PBS maintains that because Ms. McLaughlin derived her rates from license fees paid for a group of widely carried basic cable networks, rather than confining her study to those cable networks that carry programming comparable to the more "valuable" programming carried by broadcast stations, the McLaughlin study merely established a "minimum benchmark". *PBS PFFCL pg. 16.*

The Commercial Networks Analysis

The Commercial Networks expert, Bruce Owen, also examined the license fees paid to basic cable networks by multichannel distributors.[31] He found a compelling statistical correlation between the amount a cable network spends for its programming and the license fees paid by multichannel distributors for the rights to carry that cable network. This correlation reveals that multichannel distributors are willing to pay higher license fees to carry cable networks with more expensive programming. *Tr. 1810-12.* Accordingly, Dr. Owen concluded that multichannel distributors (including satellite carriers) would be willing to pay proportionally higher license fees

[31] In his testimony, Dr. Owen consistently referred to "license fees paid by cable operators". However, he clearly meant license fees paid by all multichannel distributors consisting *primarily* of cable operators. *W.T. of Owen, Table A-2; W.T of Gerbrandt, Appendix B, Pg. 22; Tr. 2014.*

for the Commercial Network signals which contain much more expensive programming. He calculated that figure by regression analysis which essentially entails linearly projecting the empirical data with respect to the license fees paid for cable networks and the program expenditures of those cable networks. *Tr. 1813-16; W.T. of Owen pgs. 7-10.* The extrapolated figure, reflecting the much higher Commercial Network programming expenditures, is $1.30 per subscriber per month. Dr. Owen then deducted $0.08 to:

> account for the facts, which may or not be a fact, that satellite carriers don't or didn't get the opportunity to assert (sic) advertising in the cable networks, whereas the cable operators do get that opportunity. And the eight cents comes from the previous proceeding,[32] and it was also used by John Herring (sic) in his testimony. So I don't think it's a controversial number. *Tr. 1824-25.*

Because the Commercial Networks' programming expenditures vastly exceed those of the basic cable networks (the empirical data) with a concomitant huge increase in extrapolated license fees for Commercial Networks, the potential for prediction error is also huge. Accordingly, in order to achieve a 95% statistical confidence level for his calculated $1.22 rate, Dr. Owen conceded an error margin of plus or minus $0.55. *Tr. 1821-22.*

Dr. Owen then explored the potential impact of his proposed rate. His examination revealed that a rate of $1.22 per subscriber per month would have no significant negative impact on the satellite carriers or their subscribers. Indeed, he opined that subscribers would *benefit* because broadcasters and copyright owners would likely use the increased revenues to enhance program quality. *W.T. of Owen pgs. 31-37.*

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[32] The correct figure was actually $0.71 but after accounting for inflation since 1992, the figure increases to approximately eight cents. *W.T. of Owen, Appendix A pg. 44.*

The SBCA Analysis

The satellite carriers naturally approached the valuation issue primarily in accordance with their concept of "fair market value" discussed *supra*. John Haring conducted a study of the actual license fees paid by all cable operators in 1995, under section 111, for retransmitting distant broadcast stations. He calculated the average rate for retransmission of superstation (distant) signals to be $0.098 per subscriber per month and distant[33] network signals to be $0.0245 per subscriber per month in the second accounting period of 1995.[34] When the study sample is confined only to Form 3 cable operators,[35] the calculated rates are $0.1132 and $0.0283 respectively. *W.T. of Haring pgs. 4-6; SBCA Hearing Exhs.4 and 5; Tr. 3084.*

Alternatively, Dr. Haring opined that because the satellite carriers' retail revenue per signal has declined by almost 35% since the 1992 section 119 rates were imposed, it would be reasonable to set a new rate 35% below existing section 119 rates. This implies rates of $0.0917 (assumes no non-syndex-proof rate) and $0.031 respectively. *W.T. of Haring pg. 11-12; SBCA*

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[33] Cable operators generally pay no license fees for local retransmissions.

[34] As described *supra*, distant network signals are assessed a one-quarter DSE. *Tr 1091-92, 2930-31.*

[35] Cable operators pay license fees under section 111 according to variously prescribed factors including their size (revenues). Smaller operators pay in accordance with flat fees prescribed for "Form 1" and "Form 2" operators while the larger operators (over $292,000 in semi-annual gross receipts) pay under "Form 3". Under Form 3, a base rate is paid for distant broadcast signals which would have been permitted under FCC signal carriage quotas that prevailed during the 1970s. The base rate varies according to the number of DSEs assessed. The first DSE is charged at .893% of the gross receipts, the second through fifth DSEs are charged at .562%, and the sixth DSE or higher are charged at .235%. A separate rate of 3.75% of gross receipts is paid for retransmission of a distant broadcast signal which would not have been permitted under the FCC signal carriage rules. *W.T. of Haring pg. 5; Tr. 735-36, 10?5, 1143-44, 1151-53.*

Hearing Exhs. 5 and 7: Tr. 3088-91.

SBCA advances three other arguments which, they assert, suggests a fair market value (under the *conventional definition*) as the rate paid by cable operators under section 111, or less. It notes firstly, unlike cable networks, the primary transmission of broadcast signals is voluntarily "broadcast" to the public free of any charge with an open invitation to all viewers with receiving equipment. It should be of no concern to broadcasters whether the viewer purchases rabbit ears, a rooftop antenna, a cable subscription, or a satellite dish in order to view the free primary transmission. As SBCA further notes, the broadcasters pay for the programming contained in their signals but only for the purpose of selling advertising. The fair market value of these primary transmissions to viewers is necessarily zero and, SBCA infers, the fair market value of retransmitting a primary transmission must also be zero. *See e.g., SBCA Reply PFFCL pgs. 80-81.*

Secondly, SBCA cites the recent history of retransmission consent negotiations between certain network owned-and-operated affiliates and certain cable operators. Cable operators are required to carry (under FCC "must-carry rules") a significant number of local broadcast stations (local retransmissions) up to one-third of their total channel capacity. Pursuant to the 1992 Cable Act, "retransmission consent" rules were also promulgated.[36] Effective in 1993, every three years, broadcast stations must elect between must-carry and retransmission consent. 47 U.S.C § 325(b)(3)(B). If a broadcast station elects retransmission consent, it forfeits its unconditional right to local retransmission by the local cable operator. However, it would be free to negotiate

[36] Satellite carriers are not subject to must-carry rules but, *with major exemptions*, they are subject to retransmission consent rules. 47 U.S.C §§ 325(b)(2) and 534.

for remuneration (beyond any compulsory license fees the operator must pay, if any) from any local cable operator (or distant cable operator that seeks to retransmit its signal) in consideration for its consent to permit retransmission of its signal by that operator. *Id*; *Tr. 2108.* In 1993, and apparently again in 1996, several owned-and-operated commercial network stations (ABC, NBC and CBS affiliates) elected retransmission consent and sought to extract cash remuneration from cable operators. They generally failed in this endeavor. *Tr. 1648-53, 2108-2112.* The cable operators refused to pay any cash consideration (above the royalty payments required under section 111) but most agreed to carry newly "launched" cable networks created and owned by the commercial networks such as ABC's ESPN2 and NBC's MSNBC.[37] SBCA suggests these *actual free market* results confirm its view that the fair market value of retransmitted broadcast signals, particularly commercial network signals, is little or nothing beyond the section 111 compulsory license fees.

Finally, SBCA stresses that Commercial Networks pay their affiliates to distribute their programming which contains network national advertising. *Tr. 142, 2064-68, 3226.* Satellite carriers perceive themselves as performing an identical function on behalf of the commercial networks. They expand the reach of the network signals into white areas thereby delivering millions of additional viewers of network national advertising. *Tr. 3225.* The Commercial Networks (through their affiliates) could reach these valuable additional viewers by constructing translators in white areas but they have instead enjoyed the benefits of the satellite carriers

[37] Though no cash was paid, the Commercial Networks deemed the mere commitment by cable operators to carry these upstarts as worth "potentially hundreds of millions of dollars" to the Commercial Networks. *Tr. 2175.* The last retransmission consent negotiations involving CBS owned-and-operated stations did not even yield a cable network carriage commitment for CBS. Retransmission continued without consideration of any kind. *Tr. 1651-52, 2109-10.*

investments and entrepreneurial endeavors. Tr. 693, 3533-34. Accordingly, SBCA argues, the Commercial Networks should compensate the satellite carriers as affiliates; not *vice-versa.* Tr. 3225-28.

The ASkyB Analysis

Heretofore, satellite carriers have not possessed the technology to retransmit local signals and, consequently, SHVA has not previously addressed an applicable license rate. 17 U.S.C. § 119. ASkyB, possibly in cooperation with other DBS carriers, claims to be developing the technological capacity to retransmit *local* broadcast signals and has requested the Panel to set a separate rate structure for local retransmissions. *Tr. 3575-77.* As discussed *supra*, motions to deny ASkyB's right to request a special rate for local retransmissions are pending and shall be addressed *infra.*

As did SBCA, ASkyB adduced evidence of value in accordance with its concept of the term "fair market value" within the context of section 119. After analyzing the enumerated considerations of section 119(c)(3)(D), the ASkyB expert witnesses, Preston Padden and William Shew, opined that the *appropriate* rate for the *local* retransmissions of broadcast signals is zero. *Tr. 3849-50, 3950.* In the only other "similar marketplace", cable operators generally pay nothing for retransmission of local signals under section 111. *Tr. 3596-98.* The "competitive environment" is dominated by cable operators because satellite carriers have not possessed the technology to locally retransmit broadcast signals and cable operators have effectively exploited that inability. *W.T. of Padden pgs. 15-16*; *Tr. 3593-95.* ASkyB witnesses also addressed the "economic impact" of a zero rate on copyright owners and satellite carriers. They opined that copyright owners are not negatively impacted by local retransmissions because the programming is delivered only to viewers for whom the rights have already been sold. *Tr. 3576.* Indeed, both broadcasters and copyright owners benefit from retransmission. *W.T. of Shew pgs. 6-7.* Moreover, they note, satellite carriers must obtain the prior retransmission consent of commercial network stations and some superstations (superstations that were *not* retransmitted by a satellite carrier as of May 1, 1991) which they intend to locally retransmit. 47 U.S.C. § 325(b). They contend this requirement protects the copyright owners, whose works are contained in such signals, in two ways: (1) a *traditional* fair market value retransmisson rate is guaranteed because the broadcaster is free to attempt to extract any sum above the zero rate that the market can bear; and (2) any fees extracted by the broadcaster will ultimately be reflected in future negotiations between the copyright owners and the broadcasters.[38] Thus, they conclude, the copyright owners are free to capture any alleged increase in the value of their programming which results from local retransmission. *W.T. of Padden pgs. 19-20*; *Tr. 3887, 3946,* 3972-73. As to the impact on satellite carriers, ASkyB argues that any rate above the rate paid by cable operators for local retransmissions (generally zero) would harm ASkyB and perpetuate the economic disadvantage of satellite carriers. *W.T. of Padden pg. 10.* Finally, a zero rate will foster "continued availability of [local] secondary transmissions to the public" because parity with cable operators will encourage satellite carriers to invest in the expensive equipment required for local retransmissions while a rate above that paid by its entrenched competitor would discourage such investments. *W.T. of Padden pg. 22*; *Tr. 3603.*

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[38] Some copyright owners could benefit immediately if their contracts contain performance clauses based upon viewer ratings. *Tr. 3946-47.*

The Panel's Adopted Benchmark

Both general approaches advocated by the parties suffer significant flaws. The copyright owners urge us to utilize the cable network marketplace as a valuation benchmark. However, we agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters. Broadcasters produce and purchase programming and attempt to capture broad audiences with free over-the-air signals to satisfy *advertisers* -- if they deliver a larger audience, they charge a higher advertising fee. *Tr. 501, 678-9, 1842, 2070.* Indeed, commercial networks are willing to *pay* their affiliates to carry the network signal, containing their national advertising, in order to maximize advertising revenue. *Tr. 2064-68, 3226.* Cable networks rely primarily upon license fees, based upon viewer demand, as their revenue source. While many cable networks also advertise, it appears that the greater their reliance upon advertising revenue, the *lower* their license fee. *Tr. 1900.* In short, carriage of a cable network by a multichannel distributor, such as a cable operator or a satellite carrier, is not the equivalent of a "secondary transmission" of a broadcast station.

The satellite carriers urge us to set a rate based upon the average rate paid by cable operators under section 111. As discussed *supra*, satellite carriers provide virtually identical, arguably superior, services as cable operators but they have captured only a fraction of the multichannel video market. It might appear eminently reasonable to set compulsory royalty fees comparable to those paid by their entrenched competitor in order to foster fair competition. Unfortunately for the satellite carriers, this is not our charge. As we stated *supra*, Congress has directed us to find the fair market value of secondary transmissions. The *compulsory* rates prescribed under section 111 reflect Congressional judgment about the compensability of network programming and the unique regulatory scheme governing cable operators including must-carry and exclusivity rules. In any event, the compulsory rates prescribed under section 111 are not fair market rates and cannot be utilized as a benchmark for a fair market valuation.

We adopt the copyright owners' *general* approach using the *most similar* free market we can observe. However, because we recognize that the economics of cable networks differ from those of broadcasters, we adopt the most conservative analysis -- the PBS approach articulated by Linda McLaughlin. Ms. McLaughlin's analysis yielded a rate of $0.27 per subscriber per month averaged over the three year statutory period.[39] We are more persuaded by Ms. McLaughlin's analysis of a broad range of basic cable networks as contrasted by Mr. Gerbrandt's attempt to isolate one or two cable networks with programming most similar to broadcast station programming or by Dr. Owen's regression analysis. Indeed, our responsibility is to determine the fair market value of *retransmitted* broadcast signals *with advertisements and self promotions intact*; *not* the fair market value of the programming contained within those advertisement laden signals. Programming value is relevant but certainly not dispositive. In light of the different economic models involved, the fees ultimately negotiated between satellite carriers and broadcasters,[40] in a free market scenario, for secondary transmissions may not directly correlate to royalty fees negotiated between copyright owners and broadcasters for *primary* transmissions. Accordingly, we cannot determine with any confidence that the fair market value of a broadcast station in a hypothetical free market is closer to the royalty fees paid for USA than for the royalty

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[39] *See note 27, supra.* We would have preferred a fuller explication of Ms. McLaughlin's inflation projections but we accept them as unrefuted by any credible evidence of record.

[40] See note 17, *supra.*

fees paid for other basic cable networks. Similarly, we've no confidence that Dr. Owen's regression analysis yielded a rate of any significance. Dr. Owen convincingly demonstrated a strong correlation between cable network programming expenditures and license fees paid for those cable networks. However, he failed to demonstrate that broadcasters should be legitimately plotted on the same graph. As discussed *supra*, broadcasters purchase programming for free over-the-air viewing to deliver audiences to their advertisers while cable networks purchase programming to support license fees. Though we adopt generally the cable network benchmark, we recognize that this marketplace does not provide a perfect valuation solution. We decline to magnify the inherent uncertainty in constructing a hypothetical free market by drawing precarious inferences. Stated in other terms, we are unconvinced that the fair market value of retransmitted *intact* broadcast signals exceeds the fair market value of the 12 basic cable networks that Ms. McLaughlin examined. Our decision to adopt the more conservative PBS-McLaughlin approach is further bolstered by "special features and conditions of the retransmission marketplace", addressed *infra*. Though many are not amenable to quantification, they *generally* militate in favor of the more conservative benchmark we have selected.

Applying the Statutory Considerations

Based upon our review of "economic, competitive and programming information presented by the parties"[41], we have adopted the PBS-McLaughlin approach as the most appropriate benchmark, or starting point, for determining fair market value of retransmitted distant broadcast signals. We now specifically address each statutory consideration.

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[41] Section 119(c)(3)(D).

[T]he competitive environment in which such programming is distributed ...[42]

The satellite carriers implore us to promote competitive parity with their entrenched competitor by setting rates which replicate those prescribed under section 111. For reasons previously discussed, the royalty rates paid by cable operators cannot provide a basis for determining fair market value and a mechanical replication would not achieve true parity because satellite carriers are not burdened by similar regulatory obligations and network programming is not compensable under section 111. Moreover, in many white areas, satellite carriers do not directly compete with cable operators.

The satellite carriers also note that, as evidenced by declining dish installation fees and declining fees per channel, DTH providers fiercely compete with each other. *SBCA PFFCL pg. 65.* However, this competition among carriers, in addition to the competition with cable operators, may actually tend to *increase* the marketplace rates for *both* cable networks and broadcast stations. *Tr. 1396-97, 1808-13.* In any event, no measure of quantification was adduced.

Accordingly, our consideration of this factor supports adoption of the PBS-McLaughlin rate.

[T]he cost for similar signals in private ... marketplaces[43]

Our reasoning for adopting the royalty fees paid by multichannel distributors for carriage of basic cable networks as the most appropriate benchmark is fully set forth *supra*. We add only briefly to that discussion here. Implicit in the McLaughlin analysis is that satellite carriers pay no

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[42] Section 119(c)(3)(D)(i).

[43] *Id.*

less than the average fees paid by all multichannel distributors for carriage of the 12 basic cable networks she identified. Ms. McLaughlin opined that satellite carriers indeed pay as much or more. We need not draw any adverse inference[44] from the satellite carriers' failure to refute this evidence. However, we do accept the uncontroverted opinion of Ms. McLaughlin. We similarly accept the uncontroverted Kagan data, upon which Ms. McLaughlin based her analysis, as accurate.

[T]he cost for similar signals in similar ... compulsory license marketplaces[45]

We have previously set forth our reasoning for declining to adopt as a benchmark the rates paid by cable operators for retransmitting broadcast signals under their statutory compulsory license. Accordingly, a detailed discussion of Dr. Haring's methodology for calculating average cable fees paid under section 111 is unnecessary. Whether the study sample should be confined to only Form 3 cable operators, as urged by the copyright owners, is of no consequence to a true fair market analysis. Nor do we render any opinion as to whether rates should be calculated based upon existing satellite carrier program packages which, depending upon the methodology utilized, could yield higher rates by several multiples. *See e.g., Tr. 1158-63, 2996-97.* Our review of the structure and context of the section 111 compulsory license leads us to conclude that, in isolation, it cannot serve as a vehicle for determining the fair market value of retransmitted broadcast signals by satellite carriers.[46]

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[44] *See note 28, supra.*

[45] Section 119(c)(3)(D)(i).

[46] We also find Dr. Haring's alternative argument unconvincing. Dr. Haring suggests that because satellite carriers' retail revenue per signal has declined since the 1992 section 119 rates were set, it would be reasonable to reduce the 1992 rates by a corresponding percentage. This

However, the satellite carriers have raised a related issue which could *potentially* shed light upon fair market valuation -- the history of retransmission consent negotiations. Because in 1993 and 1996 several commercial network owned-and-operated stations failed to extract any cash remuneration from cable operators beyond the section 111 fees, the satellite carriers reason that the section 111 fees represent actual fair market value. We agree that these retransmission consent negotiations are relevant to a determination of fair market value and represent potentially probative evidence.[47] Unfortunately, the evidence adduced is so vague and replete with qualifiers as to provide little guidance. For example, on cross examination, SBCA did elicit a concession from Ms. McLaughlin that some cable systems obtained retransmission consent from ABC and

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argument fails analysis. Even assuming *arguendo* that revenue per signal was a reasonable barometer of fair market value, the 1992 rates were not established under a fair market value criterion and cannot be used as a benchmark or starting point for valuation.

[47] The copyright owners adamantly disagree. *See e.g., Commercial Networks Reply PFFCL pg. 24; JSC Reply PFFCL pg. 26; Broadcaster Claimants Reply PFFCL pg. 9; Tr. 4183-93.* They argue that signal retransmission rights are separate and distinct from copyright owner rights. Because retransmission consent confers no copyright interests, the outcome of retransmission consent negotiations are irrelevant to fair market value. We cannot fully agree. The purpose of this proceeding is to determine the fair market value of *retransmitted broadcast signals*; not the fair market value of the copyrighted material contained in those signals. After paying the royalty fees required under section 111, cable operators must engage in free market negotiations to obtain certain broadcasters' signals. The *total* payments presumably reflect the parties assessment of fair market value of the retransmitted signals. As the copyright owners correctly suggest, this total fee *may* not equate with the total payments which *might* be negotiated directly with all copyright owners in a hypothetical free market. But, we suspect few such negotiations would transpire. A free marketplace loathes inefficiency. It would likely favor an arrangement wherein broadcasters have cleared the rights for DTH distribution and negotiate directly with satellite carriers. We recognize that the broadcasters' cost of purchasing that clearance is a matter of speculation. Accordingly, the copyright owners correctly argue that we cannot be certain whether the total retransmission consent payments accurately reflect fair market value *in the absence of the compulsory license*. Nonetheless, the retransmission consent negotiations provide a window into the broadcast retransmission marketplace within the context of free market negotiations. Accordingly, they are potentially probative.

NBC without paying any cash,[48] but she also testified that "[s]ome stations obtained cash". *Tr. 1650.* On cross examination, Mr. Gerbrandt similarly acknowledged that commercial network owned-and-operated stations were retransmitted without payment of cash but testified that he was unsure if cash was paid for retransmisson consent of other broadcast stations. *Tr. 2108, 2112.* Testimony by SBCA witness, Mr. Shooshan, regarding the retransmission consent negotiations appeared to be limited to *local* retransmissions of owned-and-operated commercial network stations. Tr. 3235 ("Without that retransmission consent, cable couldn't carry the local broadcast signal"); Tr. 3242 (["The history of retransmission consent negotiations] establishes ... a lower bound on what the networks ... should be compensated under a compulsory license, which is zero." -- the rate paid under section 111 for *local* retransmissions); *W.T. of Shooshan pg. 10* ("Cable companies typically carry the local network affiliates subject to retransmission consent"). Another SBCA witness, Dr. Haring, similarly appeared to discuss the retransmission consent negotiations only in the context of *local* retransmissions. *Tr. 3139* ("... I cite the example of retransmission consent where the end result was that cable operators were paying zero to start with and they were paying zero at the end ..." -- the rate under section 111 for *local* retransmissions). No witness testified with respect to the history of retransmission consent negotiations involving network stations *not* owned by the commercial networks. This testimony upon which SBCA relies lacks sufficient scope and specificity to rebut or modify the PBS-McLaughlin analysis.[49]

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[48] *But see note 37, supra.*

[49] We note parenthetically that the number of superstations carried by satellite carriers has not grown. *W.T. of Desser pg. 17.* SBCA cites this fact as evident of the declining value of broadcast signals in the DTH marketplace. *SBCA PFFCL pgs. 77-78.* The Broadcaster Claimants

[S]pecial features and conditions of the retransmission marketplace[50]

The parties identified a myriad of facts and circumstances they deemed relevant to a final determination of fair market value. We shall address the salient concepts.

1. Satellite Carriers Expand the Reach of Broadcast Signals

SBCA counsel convincingly argued that by expanding the penetration of broadcast signals, satellite carriers benefit the broadcasters and copyright owners by increasing advertising revenue. The copyright owners' denial defies logic. The fundamental mission of broadcasters is to expand their audiences to maximize advertising revenues.[51] At their own expense and risk, the satellite carriers developed a DTH market which expands the broadcasters reach at no cost to the broadcasters. However, we agree that no empirical evidence demonstrating an increase in advertising revenues was adduced. Though the broadcasters (and hence the copyright owners) clearly benefit from expanded reach,[52] these benefits may not be amenable to measurement and

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advance an equally respectable interpretation. *Broadcaster Claimants Reply PFFCL pg. 9.* They note that superstations which were retransmitted by a satellite carrier as of May 1, 1991 are exempted from the retransmission consent provisions of 47 U.S.C. § 325. The Broadcaster Claimants suspect that satellite carriers retransmit *only* those superstations to avoid *paying cash* necessary to procure the retransmission consent of other potential superstations.

[50] Section 119(c)(3)(D)(i).

[51] PBS does not rely upon advertising *per se* but rather upon government financing, corporate underwriting, and viewer contributions. Accordingly, PBS similarly benefits from additional viewers by furthering their educational mission; increasing the number of potential contributors; and possibly encouraging additional corporate underwriting (more viewers see the corporate underwriting "acknowledgements"). *Tr. 1270-76.*

[52] *See e.g., Tr. 2222, 2858-62* (Recognizing the benefits of retransmission of their signals to other markets, some superstations substitute national advertising, in place of local advertising, in the feed they deliver to satellite carriers for retransmission and they generally cooperate with the carriers); *Tr. 1968-69* (Though an examination of demographics is important, additional white area viewers should increase network advertising revenues); *Tr. 3452* (Some commercial network

quantification. The copyright owners further argue that because most basic cable networks also advertise, to the extent that broadcasters do benefit from expanded reach, that benefit is already reflected in the cable network benchmark. We agree *to a point*. Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees[53]). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price. Though some downward adjustment from the copyright owners' *general* approach seems appropriate, we are unable to quantify such adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

2. Market Transactions Provide Additional Compensation to Copyright Owners

The satellite carriers cite agreements between professional sports leagues and retransmitted superstations that provide compensation, in addition to section 119 license fees, to copyright owners directly resulting from DTH distribution. *Tr. 398-401, 408-10.* Again, it appears that copyright owners *do* indirectly benefit from expanded reach provided by satellite carriers. Though a downward adjustment of the benchmark is conceptually appropriate, we are unable to quantify such adjustment from the evidence adduced.

3. Commercial Networks Pay Their Affiliates

A related argument advanced by SBCA addresses the issue of affiliate compensation. *See e.g., SBCA PFFCL pg. 39.* By distributing the signals of the Commercial Networks to white areas, satellite carriers perceive themselves as "affiliates in the sky" deserving similar

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affiliates substitute national advertising for local advertising in cooperation with satellite carriers).

[53] *See e.g., Tr. 1900-03.*

compensation. The Commercial Networks counter that their relationships with affiliated stations are complex and interdependent. Local affiliates add local programming, particularly local news, tailored to enhance the attractiveness of the Commercial Networks to the local audience. Affiliates also build goodwill by promoting Commercial Network programming and by actively participating in local civic affairs. *W.T. of Sternfeld pgs. 13-16.* We agree that satellite carriers are not the functional equivalents of affiliated stations. But as we stated *supra,* satellite carriers do enhance the value of *all* broadcast signals they retransmit by penetrating new markets. Again, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration.

4. Exclusivity Rules

In the 1970s, the FCC promulgated syndicated exclusivity rules to protect local broadcast stations which purchased the exclusive rights to broadcast certain syndicated programming. Cable operators were required to black out such programming from any distant signal retransmitted into that local market. In 1980, the FCC repealed the syndicated exclusivity rules. 79 F.C.C. 2d 683 (1980). Consequently, the Tribunal imposed a syndex surcharge on Form 3 cable operators to compensate copyright owners for the loss of their ability to sell exclusive programming. 47 FR 52146 (Nov. 19, 1982). However, in 1990, because the FCC reinstated blackout protection with respect to cable operators (but not satellite carriers), the Tribunal removed the syndex surcharge and cable royalty payments declined about 20%. 57 FR 19052 (May 1992). At the 1992 satellite rate adjustment proceeding, the panel observed that while copyright owners could demand blackout of programming retransmitted by cable, they had no comparable protection with respect to programming retransmitted by satellite carriers.

Accordingly, the panel recommended, and the Tribunal adopted, a 20% surcharge for satellite retransmission of superstation signals.[54] *Id.*

The copyright owners cite this continuing lack of syndicated exclusivity protection (and analogous protection under the "Sports Rule") vis-a-vis satellite carriers as a special feature of the retransmission marketplace warranting an *upward* adjustment of the benchmark. *See e.g., JSC PFFCL pg. 66; W.T. of Desser pg. 34.* We tend to agree conceptually. However, the copyright owners failed to adduce any quantifying evidence to justify an adjustment. Unlike our predecessors, we are bound by the solitary fair market value criterion and, absent empirical data, cannot presume that a 20% surcharge would be an appropriate fair market surcharge today.

5. Compensability of Commercial Network Programming -- the 4 to 1 Ratio

As previously addressed, commercial network programming is explicitly noncompensable under section 111, but is compensable under section 119. *See* notes 12 and 13, *supra.* In 1992, our predecessor panel apparently adopted the original Congressional reasoning behind the 4 to 1 ratio (the copyright owners of commercial network programming had already received full compensation for nationwide distribution). But because they found that in 1991 the proportion of network programming had declined to about one-half of the typical affiliate's program day (down from 75%), they contemplated a 2 to 1 ratio (a royalty rate for network stations 50% that of superstations). However, after applying the controlling statutory criteria, they concluded that a unitary rate would cause "industry disruption" and apparently settled upon a 3 to 1 ratio. 57 FR 19052 at 19060-61 (May 1992).

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[54] The surcharge would not apply if all of the programming contained in the superstation signal were free from syndicated exclusivity protection under FCC rules. 57 FR 19052 (May 1992).

This reasoning is inapposite to the current section 119 fair market value criterion. We agree with the SBCA position that we are not bound to set a unitary rate -- "the pay-in may not necessarily correlate to the pay-out." *Id* at 19052. However, whatever rate we set must be based upon a fair market valuation. We find no credible evidence that retransmitted network stations are worth less than retransmitted superstations. Indeed, even assuming *arguendo*, we were to conclude that network programming is worth less, or even wholly uncompensable, we find no record support for any particular ratio -- no evidence was adduced as to the *present day* average proportion of network to non-network programming. And imposition of the original 4 to 1 ratio by rote, merely to replicate section 111 rates, would not be consistent with a fair market value analysis.

6. Many Satellite Carriers Deliver High Resolution Digital Signals and Provide Electronic Guides to Subscribers

SBCA argues that, unlike cable operators, satellite carriers enhance the value of broadcast signals by delivering digital quality pictures and sophisticated electronic guides to their subscribers. *Tr. 187, 3230*. We agree, but no quantifiable benefit was identified and no evidence adduced that this benefit would materially affect fair market value -- the rate negotiated in a hypothetical free market.

7. The Costs of Complying with the White Area Restrictions

Satellite carriers incur considerable costs in order to comply with the "unserved households" restrictions prescribed pursuant to section 119(a)(2)(B). These extra costs, they contend, diminish the value of commercial network signals which would be reflected in a free market transaction. *W.T. of Parker pg. 19; Tr. 2341-46.* We agree that the satellite carriers incur costs to retransmit network signals that they do not incur when carrying a cable network. However, SBCA was unable to quantify those costs. Moreover, we are unconvinced that in a hypothetical free market. as a result of these extra costs uniquely incurred by satellite carriers, broadcasters would necessarily agree to "discount" their product proportionally, if at all. We, therefore, decline to attempt any adjustment of the benchmark rate.

8. Under a Compulsory License Setting, Broadcasters Save the Costs of Clearing their Signals

Under the section 119 compulsory license, *all* parties obviously save the transaction costs which they would incur if required to negotiate rates in a free market. No benchmark adjustment is required. But, SBCA further argues that in a free market, it would be virtually impossible for satellite carriers to negotiate directly with every copyright owner of every program contained in each day's signal they retransmit. Accordingly, they reason, broadcasters would invariably be compelled by market forces to clear all rights and negotiate with satellite carriers for retransmission of their entire signals. Those costs which the broadcasters would incur in purchasing the clearances are unknown. Hence, SBCA concludes that the section 119 rates should not be raised without considering the broadcasters' cost savings. *See SBCA Reply PFFCL pg.69.* We tend to agree with both of SBCA's premises but not its conclusion. In a hypothetical free market, it is quite conceivable that the higher the costs broadcasters must pay to clear their signals for DTH distribution, the higher the royalty rates they would charge satellite carriers. Accordingly, the impact of high clearance costs on fair market value (based upon a hypothetical free market analysis) could be positive rather than negative. No adjustment to the cable network benchmark is required. Merely because the rates we set shall be paid under the compulsory license (whereby broadcasters have no necessity to clear the rights), the broadcasters will not enjoy a windfall as SBCA seems to imply. The royalty payments are, of course, subject to distribution to all copyright owners.

9. Section 119 "Sunsets" after 1999

Satellite carriers note that cable operators enjoy the competitive advantage of greater certainty and stability with respect to the section 111 compulsory license while section 119, by its own terms, is temporary. *W.T. of Shooshan pg. 6.* We agree but, again, our charge is to determine a fair market rate; *not* to achieve absolute competitive parity with cable operators. Accordingly, even if quantified, no benchmark adjustment would be appropriate.

10. Launch Support

SBCA correctly notes that some programmers actually pay cable operators to carry their newly launched cable networks. *Tr. 254, 1389.* However, launch support is not paid for established cable networks such as those studied by Ms. McLaughlin. *Tr. 2074.* Hence, no offset to the McLaughlin benchmark is appropriate.

11. Broadcast Signals Contain Local Programming of Little Value to Satellite Carrier Subscribers

Satellite carriers contend that to the extent primary transmissions (which are being secondarily transmitted), contain programming produced by primary transmitters for their local markets (e.g., station-produced local news and community events), that programming has little value to subscribers in distant markets. A satellite customer in Arizona probably has little interest in local news from Raleigh-Durham. *Tr. 1553-54.* While we generally concur with this assessment, no adjustment from the benchmark is appropriate. We are attempting to set a rate which most closely approximates the *average*[55] fair market value of *retransmitted* broadcast signals. As frequently stressed by the satellite carriers, the value of the programming contained in each signal varies widely among broadcast signals and cable network signals. By example, some viewers may have no interest in the local news programming of a particular retransmitted commercial network affiliate but may generally prefer the commercial network programming to that of the basic cable networks. The satellite carriers themselves implore us not to base a fair market value determination upon this kind of analysis of *primary* transmission programming.

12. The Primary Broadcast Transmission is Free to the Public

Satellite carriers contend that because primary transmissions of broadcast stations are broadcast free over-the-air to the public, this implies a zero fair market value of retransmissions. This argument is unpersuasive with respect to distant retransmissions[56] because the signals are retransmitted outside its licensed geographic area into distant areas where acceptable quality signals are generally *not* available free over-the-air.

13. Advertising Inserts

The final two "special features" that we shall address, "advertising inserts" and "uplink costs," present among the most challenging issues for the Panel to resolve. As they have consistently throughout these proceedings, counsel ably argued their respective positions.

Cable networks typically grant multichannel distributors, such as cable operators and satellite carriers, a certain number of time slots or "availabilities" to insert advertising. This

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[55] Of course, *if warranted by the evidence adduced*, we may categorize signals and establish separate rates for each category as did our predecessors.

[56] See our discussion of local retransmissions *infra*.

insertion generates revenue for the multichannel distributor which can defray the cost of the license fees in an amount equivalent to about $0.08 per subscriber per month. *W.T. of Haring pg. 10; see also Tr.* 2078-89, 2196-98 (Mr. Gerbrandt attempting to explain SBCA Exh. 35X which implies even higher advertising insert revenues) and *Tr. 1824-25;* note *32, supra* (Dr. Owen deducted $0.08 to account for lack of advertising inserts). By contrast, satellite carriers are legally precluded from inserting advertising into retransmitted broadcast signals. They must retransmit the signal intact without alteration. 17 U.S.C. § 119(a)(4). Accordingly, the satellite carriers naturally argue that because the benchmark is based upon the rate paid by multichannel distributors to cable networks, we must deduct $0.08 to obtain the "real cost" of cable networks. The copyright owners counter that most satellite carriers don't insert advertising into cable network signals anyway. Indeed, HSD carriers don't possess the technology to insert advertising. *Tr. 1622-23.* Moreover, multichannel distributors *appear* to pay the same cable network license fee regardless of whether they insert advertising. *Tr. 1623-24, 2198-99.*

If this last assertion is accurate, one would expect that in a hypothetical free market negotiation, broadcasters would similarly decline to reduce their license fees to satellite carriers for their lack of advertising availabilities and no benchmark adjustment would be appropriate. Both Ms. McLaughlin and Mr. Gerbrandt opined that, based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers ability to insert, affects the prices that cable networks charge. *Id.* They did not support this opinion with any documentary evidence or empirical data. However, the satellite carriers allowed this testimony to stand essentially unrefuted. Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined *Tr. 3137-40.* In the final analysis, we accept the copyright owners' expert testimony and decline to deduct $0.08 from the benchmark as advocated by the satellite carriers.

14. Extra Uplink Costs

The license fees paid to cable networks include delivery of their signals. The cable networks incur the cost of uplinking their signal, arranging for transponder time, and downlinking the signal. By contrast, under the compulsory license scheme, multichannel distributors pay for *access* to the signal only. The multichannel distributors, such as satellite carriers, incur the costs of delivery. Cable operators incur an average cost of approximately $0.65 per subscriber per month to retransmit broadcast signals in addition to royalties paid. Accordingly, the satellite carriers naturally assert that these costs should be deducted from the benchmark rate. *Tr. 3094, 3130-31; W.T. of Haring pgs. 9-10.* The copyright owners counter with an argument akin to that they advanced vis-a-vis advertising inserts. Cable network license fees do not vary based upon the multichannel distributors' costs. *Tr. 2199, 2528.* Accordingly, one would not expect broadcasters to offer discounts to compensate multichannel distributors in a hypothetical free market for their additional costs. Again, we must agree with the copyright owners. The record is devoid of any credible evidence to the contrary. Mr. Parker was invited to demonstrate whether carrier costs impacted the rates negotiated between satellite carriers and cable networks. He could not. Indeed, Mr. Parker conceded, for example, that despite additional costs incurred by DBS carriers (beyond those of HSD carriers), DBS operators were unable to negotiate lower rates on that basis. *Tr. 2528.* Moreover, he declined to urge the Panel to set a discounted rate for DBS carriers to account for their higher costs than HSD carriers. *Tr. 2398-99.* We must similarly decline to discount the cable network benchmark to account for higher delivery costs of broadcast signals.

[T]he economic impact of such fees on copyright owners[57]

The parties devoted little hearing time to this issue. We accept the obvious, general notion that higher royalty rates provide greater incentive to copyright owners while lower rates would render broadcast stations a "... less attractive vehicle at the margin for program suppliers." Tr. 1465-66.

[T]he economic impact of such fees on ... satellite carriers;[58] *and the impact on the continued availability of secondary transmissions to the public*[59]

Obviously, higher section 119 rates will potentially reduce the marginal profits of satellite carriers unless they successfully pass on the increase to their distributors or subscribers (if demand is inelastic). Although Ms. McLaughlin did not perform a demand elasticity study, she testified that after the 1992 rate increases, the number of broadcast stations retransmitted and the percentage of satellite subscribers to retransmitted broadcast signals remained constant .[60] *W.T. of McLaughlin pg. 9; Tr. 1630, 1786.* She concluded that despite an increase in the compulsory rate to $0.27 per subscriber per month, the number of subscribers to retransmitted broadcast stations would continue to grow at substantially the same rate as the number of satellite subscribers generally. *Tr. 1628-33.* Ms. McLaughlin also examined the retail prices charged by satellite distributors and concluded that if the rates for retransmitted broadcast signals were increased to

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[57] Section 119(c)(3)(D)(ii).

[58] *Id.*

[59] Section 119(c)(3)(D)(iii).

[60] She could not ascertain if the 1992 price increa-es were passed on to the subscribers. Tr. *1638-40.*

$0.27 per subscriber per month and *not* passed on to subscribers, those rates would constitute only 30% of the average retail prices charged to subscribers leaving sufficient profit margin for the satellite carriers to avoid significant adverse impact to them or their subscribers. *Tr. 1635, 1638.*

Again, we recognize that *any* rate increase, particularly if rates are set above those paid by their entrenched competitor, tends to adversely impact the satellite carriers. However, the satellite carriers did not attempt to quantify the impact of increased rates and adduced no credible evidence that the availability of secondary transmissions would be interrupted. Accordingly, we conclude that a rate increase to $0.27 per subscriber per month would have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public.

The Fair Market Value of Retransmitted Distant Signals

We began our analysis by adopting a conservative valuation benchmark of $0.27 per subscriber per month based upon an evaluation of the statutory considerations. We carefully considered all proposed adjustments to that benchmark but remain unpersuaded that any adjustment is appropriate to achieve a rate that *"most* clearly" represents the fair market value of retransmitted distant broadcast signals.

Local Retransmissions -- ASkyB

Motions to Dismiss

As we noted *supra*, PBS and JSC filed separate motions to dismiss, as a matter of law, the rate request of ASkyB. PBS moved only for dismissal of ASkyB's rate request with respect to the local retransmission of network signals while JSC moved for dismissal with respect to both network and superstation local retransmissions

1. Network Local Retransmissions

17 U.S.C. § 119 (a)(2)(B) provides:

> The statutory license [for network stations] shall be limited to secondary transmissions to persons who reside in *unserved households*. (emphasis added).

An "unserved household" is defined under 17 U.S.C. § 119 (d)(10) and provides in pertinent part:

> The term "unserved household", with respect to a particular television network,[61] means a household that
> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity ... of a primary network station affiliated with that network ...

Accordingly, network signals generally may not be retransmitted to the local coverage area of local network signals.[62] The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to *served* households.[63] Section 119 does not provide a compulsory license for these retransmissions. Hence, we lack subject matter jurisdiction to set a rate for local retransmissions of local *network* signals.

ASkyB's opposition is founded on three grounds. First, they assert that the Copyright Office has already ruled on this issue. Secondly, they argue that the section 119 unserved areas limitation applies only to areas unserved by *other* affiliates of the same network. Thirdly, they argue that the motions are untimely and unfairly prejudicial. We disagree.

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[61] Under section 119, "networks" include PBS stations. 17 U.S.C. § 119 (d)(2)(B).

[62] There may be rare instances where households are situated within the local market of a network station (defined under 17 U.S.C. § 119 (d)(11) as "the area encompassed within a network station's predicted Grade B contour"), but cannot receive signals of Grade B intensity. These households qualify as unserved but, under section 119, ASkyB would pay the conventional "rate for non-local signals". *W.T. of Padden note 4.*

[63] *W.T. of Padden page 3.*

By letters dated September 17, 1996 and October 4, 1996, JSC requested the Copyright Office to rule upon the legal permissibility of requests for separate local retransmission rates and requested a bifurcated or preliminary proceeding to resolve these issues. By Order of October 29, 1996, the Copyright Office rejected JSC's request for a separate proceeding. It further declined to rule upon the legal issues raised by ASkyB's request, apparently viewing JSC's arguments as "standing" challenges. Whether the Copyright Office properly characterized JSC's objections as relating to standing rather than fundamental jurisdiction is now moot. The Copyright Office did not reach the merits or substance of the JSC arguments articulated in its pending motion. The Copyright Office clearly reserved these issues for the Panel to resolve.

With respect to the second argument raised by ASkyB, it has utterly failed to support its unique interpretation of the section 119 unserved areas limitation with any legal authority. We acknowledge that an amendment of section 119 to allow such retransmissions may be reasonable and appropriate. Local retransmission of network signals would *not* appear to undermine the network-affiliate relationship. But we are not legislators. The existing language of section 119 regarding unserved areas is clear and unambiguous.

Finally, ASkyB cites no authority for the proposition that the pending motions were untimely filed. Nor can ASkyB legitimately claim unfair prejudice. For the sake of economy, JSC diligently attempted to resolve these issues prior to the evidentiary hearing. Moreover, at the outset of the hearing, both JSC and PBS openly expressed their intention to file motions to dismiss. *Tr. 48, 50.* ASkyB was not unfairly prejudiced by the motions.

2. Superstation Local Retransmissions

JSC additionally moves to dismiss the rate request of ASkyB with respect to local retransmissions of superstations on the ground that Congress did not envisage a zero rate for any retransmission under section 119. We find no merit in this argument. Congress directed the Panel to determine the fair market value of retransmitted signals and the Panel is not precluded from establishing reasonable categories with separate rates for each category. Accordingly, it is certainly conceivable that we might determine the fair market value of a particular category to approach zero.

3. Rulings on Motions to Dismiss

The Panel grants the motion of PBS and grants in part, and denies in part, the motion of JSC. The separate rate request of ASkyB with respect to locally retransmitted network signals is dismissed for lack of subject matter jurisdiction. The Panel shall proceed to determine the fair market value of locally retransmitted *superstation* signals.

The Fair Market Value of Locally Retransmitted Superstations

ASkyB claims to be developing the technology to retransmit local signals within the respective stations' local market as defined under section 119(d)(11) (within stations' Grade B contours). *Tr. 3731.* Currently, a satellite subscriber who desires to view local broadcasts must utilize an A-B switch in conjunction with a conventional antenna or additionally subscribe to a cable service. *W.T. of Shaw pg. 2.* There is no guarantee that this innovation will prove technologically or commercially viable. *See e.g., Tr. 3655; ASkyB PFFCL pg. 2.* However, this potential development promises to significantly promote competition within the multichannel video marketplace and confer important benefits to subscribers. Moreover, should ASkyB ultimately decline to pursue local retransmissions, other similar ventures could shortly appear on the horizon.[64] Accordingly, it is appropriate to set a rate for local retransmissions of superstations during the prescribed period of the statutory compulsory license.

The task facing the Panel is particularly challenging because neither side presented any empirical data or study to support a particular fair market value rate. The cable network analyses, including the PBS-McLaughlin study, performed by the copyright owners are inapposite to local retransmissions. The license fees paid by multichannel distributors for cable networks simply cannot serve as a benchmark for the fair market value of broadcast signals that are retransmitted almost exclusively to subscribers who can obtain the same signal free over-the-air. Unfortunately, ASkyB did not, or could not, provide a true fair market valuation study. Indeed, no similar free market exists from which to draw data. The Panel must base its decision essentially upon expert opinion testimony.

In assessing the enumerated considerations of section 119 (see discussion *supra)*, ASkyB did present compelling expert testimony in support of a zero fair market rate.[65] Local retransmission of broadcast stations benefits the broadcast station and the copyright owners of the programming. If a local broadcast station is not available on a satellite carrier service, subscribers to that service are less likely to view that station. The viewer may not wish to install an A-B switch/antenna or additionally subscribe to a cable service or may find the system too inconvenient for regular use. Accordingly, retransmission of the local station prevents audience

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[64] *See* Panel Order of August 6, 1997 permitting EchoStar Communications Corporation to adopt the evidence adduced and the PFFCL filed by ASkyB.

[65] As addressed *supra*, we disagree with the ASkyB interpretation of "fair market value". Nonetheless, certain opinions and arguments expressed by ASkyB remain relevant to a true fair market value determination.

(and advertising revenue) loss. Indeed, local broadcast stations would likely welcome carriage by satellite carriers, or any other multichannel distributor, retransmitting into their respective markets. The history of retransmission consent negotiations, discussed *supra*, appears consistent with this desire.[66] A zero rate would also seem consistent with Congressional reasoning behind their decision to require no royalty payments by cable operators under section 111 for distant retransmissions of network programming.[67] The copyright owners have already sold the rights to transmit their programming to the entire local market. They have been fully compensated and are not injured by retransmission into the same market. *Tr. 3576*; *W.T. of Padden pgs. 18-19*. We recognize that copyright owners are free to *attempt* to obtain additional compensation for this separate use of their work. We simply believe they would likely fail in that endeavor.

No finder of fact can be expected to anticipate all of the complexities of a hypothetical free market negotiation and predict a precise rate. However, in the local retransmission context, we believe the parties would likely negotiate a rate of zero.[68] Indeed, because satellite carriers are not

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[66] As previously discussed, the anecdotal evidence adduced regarding the retransmission consent negotiations lacks sufficient precision to establish a fair market value, or rebut an empirical study, but the evidence does *corroborate* an otherwise unrefuted fair market value rate of zero with respect to local retransmissions. We also note here ASkyB's assertion that because broadcast stations are subject to retransmission consent, fair market compensation is ultimately guaranteed. *W.T. of Padden pg. 19; W.T. of Shaw pg. 11*. This assertion is generally inapposite to retransmission of superstations. None of the superstations currently retransmitted by satellite carriers is subject to retransmission consent. 47 U.S.C. § 325(b)(2)(D); *W.T. of Desser pg. 17*.

[67] *See* note 13, *supra*.

[68] We recognize that satellite carriers currently pay the rates prescribed under the section 119 compulsory license for retransmission of superstations to *all* of their subscribers including those subscribers residing within the Grade B contours of where the signals are originally broadcast. *See Tr. 214*. However, we believe a rate of zero would likely be negotiated in a free market with respect to these subscribers.

subject to must-carry rules,[69] it is conceivable that some broadcasters would be willing to *pay* for retransmission carriage. See *Tr. 3812-13.*

The copyright owners cite record testimony that the ability to retransmit local broadcast stations (including superstations) would be of great value to ASkyB and "will result in substantial revenues." *JSC PFFCL pg. 73; see also PBS Reply PFFCL pgs. 19-20.* Accordingly, they argue, the fair market value of retransmitted broadcast stations cannot be zero. This reasoning fails the copyright owners' own interpretation of fair market value as the rate that would be negotiated in a free market. ASkyB *and* the copyright owners benefit from local retransmissions. We are unpersuaded that in a hypothetical free market, superstations would risk non-carriage in their local markets by insisting upon cash payments. Admittedly, our conclusion is based upon the opinion of expert witnesses (Padden and Shew) unsupported by empirical evidence , and anecdotal corroborating evidence (retransmission consent negotiations of 1993/1996). However, our charge is to establish royalty fees that "most clearly represent the fair market value of secondary transmissions." We find the rate that *most* clearly represents the fair market value of local superstation secondary transmissions is zero.

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[69] The copyright owners argue that a zero rate would not establish absolute parity with cable operators who are uniquely subject to must-carry and other regulatory burdens. We agree. But as we have frequently stated, our statutory mission is to determine fair market value; not to achieve *or ensure* parity. Must-carry, retransmission consent, or other regulatory features are matters for Congress or other regulatory bodies to explore if appropriate.

DETERMINATION AND ASSESSMENT OF COSTS

In accordance with the foregoing Discussion and Findings, the Panel determines pursuant to 17 U.S.C. § 119(c)(3), that the compulsory license fees to be paid from July 1, 1997 through December 31, 1999, by satellite carriers for the right to retransmit broadcast station signals to the public for private home viewing should be as follows:

$0.27 per subscriber per month for all distant broadcast retransmissions; and

$0.00 for all local, as defined under section 119(d)(11), superstation retransmissions.

To the extent the parties' PFFCL are consistent with this Report, we accept said findings. To the extent they vary, we reject them.

Pursuant to 37 CFR § 251.54(a)(1), the Panel determines that the entire cost of this arbitration proceeding should be borne equally by the respective sides, the copyright owners on the one side and the satellite carriers (including ASkyB) on the other.

CERTIFICATION BY CHAIRPERSON

Pursuant to 37 CFR § 251.53(b), on this 28th day of August, 1997, the Panel Chairperson hereby certifies the Panel's determinations contained herein.

Lewis Hall Griffith

Honorable Lewis Hall Griffith,
Chairperson

John W. Cooley

Honorable John W. Cooley,
Arbitrator

Jeffrey S. Gulin

Honorable Jeffrey S. Gulin,
Arbitrator

APPENDIX 1

Definitions:

IN EVIDENCE -- Admitted into evidence by CARP Panel prior to 4/17/97.
ADMISSIBLE WITHOUT OBJECTION -- Parties agree that exhibit may be admitted into evidence, but that admission cannot be treated as binding precedent for admissibility of additional exhibits.
ALL OTHER EXHIBITS -- May be used only to clarify testimony of a witness concerning the exhibit that was shown to and discussed with that witness.

SBCA DIRECT EXHIBITS

1 United Video Pre-1989 Cable Copyright Refunds. 3/10/95 (Parker 4/8) Marked: 2891: Received **IN EVIDENCE** 2892 by motion at hearing

2 Southern Satellite Pre-1989 Cable Copyright Refunds. 3/3/95 (Parker 4/8) Marked: 2891: Received **IN EVIDENCE** 2892 by motion at hearing

3 EMI Pre-1989 Cable Copyright Refunds, 3/3/95 (Parker 4/8) Marked: 28911. Received **IN EVIDENCE** 2892 by motion at hearing

4 Revised Table JH-1 "Copyright Royalties Paid by Cable Television Operators Under Section 11 1 (1992-1995)" (CONFIDENTIAL) (4/10 Haring) Marked: 3061; Received **IN EVIDENCE** 3067 by motion at hearing

5 Haring Testimony Errata re JH-1 (CONFIDENTIAL) (4/10 Haring) Marked: 306 1; Received **IN EVIDENCE** 3067 by motion at- hearing

6 Revised Table JH-3 "Rate Card - Selected Cable Networks (1992, 1995, 1997)" (4/10 Haring) Marked: 3062; Received **IN EVIDENCE** 3067 by motion at hearing

7 Haring Testimony Errata re JH-3 (4/10 Haring) Marked: 3062; Received **IN EVIDENCE** 3067 by motion at hearing

8 Revised Table JH-5 "Netlink 'One-Stop' Program Package Prices (1992, 1995)" (4/10 Haring) Marked: 3064; Received **IN EVIDENCE** 3067 by motion at hearing

SBCA CROSS EXHIBITS

1X Donaldson, Lufkin and Jenrette, JT4 (Trautman 3/13) Marked: 2961

2X Cable World Article (Trautman 3/13) Marked: 212

3X Broadcasting & Cable 5/13 (Desser 3/14) Marked: 378

4X Chicago Professional Sports v. NBA, 95 F.3d 595 (7th Cir. 1996) (Desser 3/14) Marked: 388; **ADMISSIBLE WITHOUT OBJECTION** (official notice)

5X Desser Pre-filed Testimony - 1991 Satellite Rate Adjustment Proceeding (Desser 3/14) Marked: 419; **ADMISSIBLE WITHOUT OBJECTION** (prior testimony already incorporated by reference)

6X Desser Live testimony - 1991 Satellite Rate Adjustment Proceeding (Desser 3/14) Marked: 420; **ADMISSIBLE WITHOUT OBJECTION** (prior testimony incorporated by reference)

7X Kagan Cable TV Programming (Desser 3/14) Marked: 456; Withdrawn: 459

8X Kagan's The State of DBS 1996 pp. 134-135 (Desser 3/14) Marked: 495

9X Congressional Record 11/29/94 - Hughes statement (Olson 3/17) Marked: 634; **ADMISSIBLE WITHOUT OBJECTION** (Official Notice)

10X SHVA Hearings 1/27/88 (Olson 3/17) Marked: 714; **ADMISSIBLE WITHOUT OBJECTION** (Official Notice)

11X WPIX Program Listing 3/23/97-3/29/97 (Graff 3/18) Marked: 833

12X Comparagraph - WGN/KTLA/WPIX Weekdays Schedule (Graff 3/18) Marked: 852

13X Satellite Orbit March 1997 - C-band Satellite program schedule (Hummel 3/18) Marked: 954

14X Decision in 1989 Cable Royalty Dist. Proceeding (April 27, 1992) (Kessler 3/18) Marked: 1011; **ADMISSIBLE WITHOUT OBJECTION** (official notice)

15X Jack Valenti Transcript 12/20/95 (Kessler 3/18) Marked: 1021; **ADMISSIBLE WITHOUT OBJECTION**

16X Decision in 1991 Satellite Carrier Rate Adjustment Proceeding (May 1, 1992) (cross-reference: SBCA 36X) (Cooper 3/19) Marked: 1094; **ADMISSIBLE**

SPORTS
EXHIBIT 2

USE OF THE CONSTANT SUM MEASURE AND NIELSEN AUDIENCE DATA IN CABLE ROYALTY DISTRIBUTION PROCEEDINGS

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August 1991

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I. INTRODUCTION

In previous proceedings before the Copyright Royalty Tribunal (CRT), the Joint Sports Claimants (JSC) presented surveys designed to measure cable operators' perceived value of sports programming in relation to other categories of distant-signal non-network programming. The surveys, conducted first by the advertising agency of Batten, Barten, Durstine, and Osborne (BBDO), and later by the consulting firm of Browne, Bortz & Coddington, Inc. (BBC), used the constant sum technique to establish program-category valuation of randomly selected samples of cable operators. In the same proceedings the Motion Picture Association of America (MPAA) presented studies based on A.C. Nielsen audience data. These studies were offered as evidence of the amount of cable subscriber "viewing" that each distant-signal program category received.

The CRT said that it accorded "far greater weight" to the MPAA viewing study than to the constant sum surveys in allocating the 1983 cable copyright fund (see p. 12808 of 1983 Final Determination). The CRT favored the MPAA viewing data for two primary reasons (see p. 12808-12809).

The first reason involved the relationship between the survey results and actual behavior. The CRT concluded that the

MPAA viewing study was "the only study to measure behavior," and that constant sum studies reported results which are not indicative of actual behavior. In the words of the Tribunal (see p. 12809):

> ...it is recognized by surveyors that how people say they behave and how they do behave are quite different. This difference is exacerbated by the very nature of asking a subscriber or a cable employee over the phone to engage in a twenty minute exercise of allocating program preferences.

Such an exercise, added the Tribunal, "takes into account no 'real world' factors" and "carries no consequences."

The second reason involved recall problems associated with the time of data collection. The Tribunal concluded that the viewing study was more reliable because it was the only one conducted during 1983, the relevant year (see p. 12808). The Tribunal agreed with the MPAA that the 1983 JSC constant sum survey was flawed by "recall" problems because it was conducted in 1985.

In order to address the CRT's concerns, two changes were made in the 1989 constant sum survey conducted by Bortz & Company for the Joint Sports Claimants. First, cable operators were asked to estimate the relative value of the distant-signal non-network programming they carried in 1989 by allocating 100 percent of a "fixed program budget;" in the 1983 survey the respondents allocated 100 percent of the "value" of their distant signals. Second, the interviews in the 1989 survey were conducted in late 1989 and early 1990.

It should be noted that I was retained by the Joint Sports Claimants prior to their conducting the 1989 survey, and that I recommended the foregoing changes in consultation with Bortz & Company.

II. PURPOSE OF REPORT

I have been requested by the Joint Sports Claimants to comment on the CRT's concern with the constant sum technique -- specifically, the relationship between constant sum survey results and actual behavior. I also have been asked to evaluate the MPAA viewing study in light of the CRT's concerns regarding behavior and recall.

III. SUMMARY OF VIEWS

The constant sum technique, such as that employed in the 1989 JSC survey, is a valid and well-accepted research tool. It is often used in marketing research because:

- it is simple in design and easy to use.
- its measurement properties allow the application of sophisticated statistical procedures.
- it reveals relative comparative judgments of items in an alternative set.
- it eliminates consistent positive, negative, or neutral response patterns.

* it yields substantial information that is predictive of behavioral tendencies.

In marketing and other research, the constant sum is frequently utilized as a means of determining how surveyed respondents are likely to act in a choice situation. In any instance where self-reported measures are used to collect information, one cannot be absolutely certain that such information is predictive of actual behavior. Nevertheless, those engaged in market research have traditionally relied upon constant sum measures as an accurate gauge of behavioral intentions. Furthermore, the studies that exist demonstrate that the constant sum technique provides a reliable and useful indicator of actual behavior.

The concerns over behavior and recall that the Tribunal expressed in the 1983 proceeding over the JSC constant sum survey are similar to the types of concerns that have been expressed by market researchers over Nielsen diary-based audience data. Such data are not direct measures of actual viewing behavior. Rather, they are dependent upon individual reporting of past behavior; they are thus susceptible to faulty recall and other problems affecting accuracy. Considerable sums of money of course have been invested by advertisers and others in relying upon Nielsen diary-based audience data. The same, however, may be said about reliance upon data derived from constant sum surveys and similar research.

The above views are discussed more fully in the following pages. By way of summary, I believe that the constant sum technique is an appropriate research tool to determine (among other things) how cable operators would likely have allocated their program rights payments. Also, from the standpoint of the CRT's concerns regarding behavior and recall, I see no valid reason to favor the MPAA's viewing studies over the JSC's constant sum surveys.

IV. DISCUSSION

A. The Constant Sum Measure

1. Character of the Constant Sum Scale

The constant sum scale was introduced to the field of marketing research through the work of J. P. Guilford and W. S. Torgerson. Both Guilford and Torgerson were psychologists who published major books on psychological measurement: Guilford published Psychometric Methods in 1954, and Torgerson published Theory and Methods of Scaling in 1958.

The constant sum scale is a widely accepted and often-used measurement tool in marketing research (see for example, Alreck and Settle, 1985; Axelrod, 1986; Churchill, 1983; Green and Tull, 1978; Hughes, 1971; Parasuraman, 1986; Peterson, 1988; Tull and Hawkins, 1987). The measurement technique is used for concept testing, price sensitivity studies, simulated shopping studies, advertising testing, and segmentation research (Axelrod, 1986).

It has been used to study consumer preferences for branded goods, medical services, travel decisions, and radio stations (e.g., Abernethy, 1989; Conant, Mokwa, and Wood, 1987; Green and Srinivasan, 1978; Monahan, 1987; Mulbacher and Botschen, 1988; Pasumarty, Karney, and Morley, 1987; Sutherland and Brown, 1991; Woodside and Carr, 1988; Woodside and Shinn, 1988; Woodside and Wilson, 1985). Other applications of the constant sum measure can be found in psychology (e.g., Budescu, Zwick, and Rapoport, 1986; Spence, 1990), anthropology (e.g., Roberts, Chaio, and Pandey, 1975; Roberts, Strand, and Burmeister, 1971), and game theory (e.g., James, 1990; Michener, Clazer, and Richardson, 1989; Wolf and Shubik, 1977).

The constant sum is a popular measurement technique because of its simplicity, ease of use, suitability for sophisticated statistical procedures, and ability to yield substantial information (Green and Tull 1978). As noted by a number of authors, including Pamela L. Alreck and Robert B. Settle in <u>The Survey Research Handbook</u> (1985) and Donald Tull and Del Hawkins in <u>Marketing Research</u> (1987), the constant sum technique is particularly well-suited for measuring behavioral intentions, pact actions, and evaluative preferences.

In practice, the constant sum scaling technique is employed to determine how proportions of some resource (e.g., money, time, etc.) or activity (e.g., purchase behavior) are allocated among two or more alternatives (Churchill, 1983; Peterson, 1988; Tull and Hawkins, 1987). The proportions to be allocated are numerically defined, generally 10 or 100 points (Tull and Hawkins, 1987). The allocation is based on each respondent's perceived judgment of the alternatives being evaluated, and provides diagnostic information on the relative preference for and importance of each alternative in the alternative set (Churchill, 1983; Tull and Hawkins, 1987). According to Robert Peterson (1988), the constant sum scaling technique allows fine discriminations to be made among evaluated alternatives, based on respondents' relative judgment of the alternative set.

As a scaling technique, the constant sum scale falls into the comparative scale category. Unlike the noncomparative rating approach, comparative scales involve judgments with direct reference to the other alternatives being evaluated. That is, subjects are asked to evaluate each alternative relative to the others in an alternative set.

As a comparative scaling technique, the constant sum scale has a natural starting point of zero, which means the sum to be divided is fixed across all respondents (e.g., lowest possible rating is zero; the highest possible is one hundred) (Parasuraman, 1986). Alternatives can be evaluated two items at a time in a paired-comparison procedure or more than two at a time in a quadric procedure. According to Donald S. Tull and Del I. Hawkins (1987), the quadric procedure is most common in marketing research. It should be noted that the 1989 JSC survey, as well as past JSC surveys, used the quadric procedure.

Because respondents more readily understand numerical differences, the constant sum scale directly addresses one of the basic problems of psychological measurement -- the assessment of psychological distance between alternative items (Hughes, 1971). By virtue of the technique's fixed-scale format, the constant sum scale measures how much more important one alternative is relative to others -- meaning that an allocation of 50 and 25 points between two alternatives confirms that one alternative is perceived as twice as important as the other (Tull and Hawkins, 1987).

As a measurement approach, the constant sum scaling technique tends to eliminate "halo effects," that is, the tendency of respondents to answer in a consistent positive, neutral, or negative pattern with regard to the alternative set (Clancy and Garsen, 1970). As noted by G. David Hughes in <u>Attitude Measurement for Marketing Strategies</u> (1971), the constant sum technique is less susceptible than noncomparative scales to individual response style such as "yea saying" or "nea saying" and to differences in interpretation of scale labels (such as good, very good, etc.). In other words, compared to other evaluative scales the constant sum technique tends to reduce "false reporting" tendencies.

WITHOUT OBJECTION (official notice)

17X "Programmers Warehouse" (Cooper 3/19) Marked: 1106.

18X Other Comparisons (Cooper 3/19) Marked: 1108

19X CPB Web Page (Wilson 3/19) Marked: 1268

20X PBS Fiscal Year 1995 Contributions, PBS 0147-0148 (Wilson 3/19) Marked: 1282; **ADMISSIBLE WITHOUT OBJECTION**

21X Kagan Article 4/30193 (Wilson 3119) Marked-. 1303; **ADMISSIBLE WITHOUT OBJECTION** (PBS P. 0149 ONLY)

22X PBS 0153 (Wilson 3/19) Marked: 1306

23X Crandall Testimony (Crandall 3/20) Marked: 1376

24X New York Times Commentary 9/13/89 (Sternfeld 3/20) Marked: 1524

25X Video-. Piece from NBC for "By Satellite" (Sternfeld 3120) Marked: 1539

26X Broadcasting & Cable article "Does Sky Have a Limit" (Sternfeld 3/20) Marked: 1564

27X Norman Hecht Study 4/93 (McLaughlin 3/22) Marked: 1642

28X Kagan Cable TV Programming 9/30/95 p. 5 of 12 (first page only of SBCA 7X and 35X) (McLaughlin 3/22) Marked: 1664

29X "News Corp Makes $1 Billion Bid to Enter US Satellite TV Market" (McLaughlin 3/22) Marked: 1741

30X From Owen/Wildman's "Video Economics" p. 24 re Network Economics (Owen 3/24) Marked: 1863; **ADMISSIBLE WITHOUT OBJECTION**

31X Modem Models of Program Choice pp. 125-126 (Owen 3/24) Marked: 1881; **ADMISSIBLE WITHOUT OBJECTION**

32X "Big Year for Big Four" Broadcasting & Cable 3/3/97 pp. 4-5 (Owen 3/24) Marked: 1895

33X "Earnings Roundup - GE Gets Record Revenues" Broadcasting & Cable 1/16/97 pp. 4-5 (Owen 3/24) Marked: 1897

34X Gerbrandt transcript 12/12/95 (Gerbrandt 3/25) Marked: 2067

35X Cable TV Programming 9/30/95 p. 5 of 12 (JSC 0043) (cross-reference: SBCA 7X (pp. 5. PBS 0014-0015): (SBCA 28X) (Gerbrandt 3/25) Marked: 2078: ADMISSIBLE WITHOUT OBJECTION (Portion only -- p. JSC 0043. redact bottom 1/3 of page) NOT confidential

36X 1991 Satellite Carrier Rate Adjustment Proceeding (May 1, 1992) (cross reference: SBCA 16X. p. 19052 only) (Gerbrandt 3/25) Marked: 2125

37X Kagan graph "Prime Time Viewing Trends" from The Economics of TV Programming & Syndication 1996 p. 40 (Gerbrandt 3/25) Marked: 2126

38X Gerbrandt transcript 12/13/95 (Gerbrandt 3/25) Marked: 2132

JSC DIRECT EXHIBITS

1 Errata Corrections to be Made to the Direct Written Testimony of Edwin S. Desser

1B Dec. 1996 FCC Video Competition Report Marked: 3061; Received IN EVIDENCE 3067 (by motion at hearing)

JSC CROSS EXHIBITS

1X Sky Report 3/18/97 (Parker 4/7) Marked: 2357

2X Echostar DBS Report 1/22/97 (Parker 4/7) (Padden 4115) Marked: 2362

3X Cable-Telco Report 3/24/97 (Parker 4/7) Marked: 2365

4X Copyright Owners' Request for Documents letter to PG/JDS 12/12/96 (Parker 4/7) Marked: 2400

5X Satellite Carriers' Response to Copyright Owners Joint Document Request 12/17/96 (Parker 4/7) Marked: 2400

6X Joint Sports Claimants follow-up request for documents (Parker 4/7) Marked: 2401

7X CRB Response to follow-up request 1/3/97 (Parker 4/7) Marked: 2401

8X "Top 100 MSOs" Cablevision 1/27197 p. 45 (Parker 4/7) Marked: 2414

9X Super Star Connection Copyright Form SA-3 4/14/89 (Parker 4/8) Marked: 2575: Received IN EVIDENCE 2592 by motion at hearing

10X EMI Copyright Form SA-3 2/27/89 (Parker 4/8) Marked: 2593: Received IN EVIDENCE by motion at hearing

11X Southern Satellite Systems, Inc. Copyright Form SA-3 3/1/89 (Parker 4/8) Marked: 2605; Received IN EVIDENCE by motion at hearing

12X DIRECTV Adds Superstation WGN to Its Channel Lineup" UV press release 3/18/97 (Parker 418) Marked: 2618

13X Comm. Daily "Satellite TV Homes Could Lose Access to Superstations in 1995" 1/25/93 Vol 13 No. 15 (Parker 4/8) Marked: 2629

14X DIRECTV Web Site "Sports Blackouts" (cross-reference - portion of JSC Ex 2) (Parker 4/8) Marked: 2641

15X SA-3 Blank Form (Larson 4/10) Marked: 2913; Received IN EVIDENCE 3038 by motion at hearing

16X Account Period Summary 7/28/96 (SBCA 0150) CONFIDENTIAL (Larson 4/10) Marked-. 2932; Received IN EVIDENCE 3039 by motion at hearing

17X Copyright Licensing Division Report of Receipts 3/27/97 (Larson 4/10) Marked: 2961; Received IN EVIDENCE 3041 (by motion at hearing) (SBCA reserved right to challenge authenticity and completeness; reviewed, and no challenge made)

18X Cable Data Corp. Special Run 95/2 Sample 3/3/97 (SBCA 0209) 51 pp. CONFIDENTIAL (Larson 4/10) Marked: 2971; Received IN EVIDENCE 3045 by motion at hearing

19X CRT 3.75/Syndex Surcharge Decision 47 Fed Reg 52146 (11/19/82) (Larson 4/10) Marked: 2978 IN EVIDENCE 3045 by motion at hearing

20X NCTA v. CRT, 724 F.2d 176 (D.C. Cir. 1983) (Larson 4/10) Marked: 2979; Received IN EVIDENCE 3046 by motion at hearing

21X Enstar Cable SA-3 95/2 (3/1/96) (Larson 4/10) Marked: 3002; Received IN EVIDENCE 3050 (by motion at hearing) (SBCA reserved right to challenge authenticity and completeness; reviewed, and no challenge made)

22X Testimony of G. Todd Hardy 216/92 CRT 91-3-SCRA (cover page & P. 6) (Haring 4/10) Marked: 3108

23X Stephen Silberman Testimony 2/6/92 pp. 1-1 I (Haring 4/10) Marked: 3122

24X Post Hearing Brief for the Satellite Carriers before CRT 2/19/92 cover page & pp. 45-46 (Haring 4110) Marked: 3125

25X 59 Fed Reg 67635-67636 "Definition of Cable System" 12/30/94 (Haring 4/11) Marked: 3197; Received IN EVIDENCE by motion at hearing

26X 57 Fed Reg 3284-3296 "Definition of Cable System" 1/29/92 (Haring 4/11) Marked: 3197; Received IN EVIDENCE by motion at hearing

27X The Observer 3/2/97 "Murdoch Spends $1bn to Make Sky Top in US News Corp's Tie-Up with Echostar Threatens the Supremacy of Cable, Says Edward Helmore in NY' (Padden 4/15) Marked: 3662

28X The Financial Times 2/26/97 "Murdoch Empire Strikes Back in US TV" (Padden 4/15) Marked: 3662

29X Broadcasting & Cable 10/12/92 "Many Players Eye Retransmission Pot..." (Padden 4/15) Marked: 3673

3OX 17 USCA § I 19 pp. 951-956 (Padden 4/15) Marked: 3689

31X Des Moines Register 2/26/97 (Padden 4/15) Marked: 3713

32X Broadcasting & Cable 2/14/97 p.7 (Padden 4/15) Marked: 3713

33X Letter from Padden (ASKYB) to Hewitt (SBCA) 1/8/97 (Padden 4/15) Marked: 3713

34X "Confidential Draft" -- proposed legislative amendment (Padden 4/15) Marked: 3713

35X Rupert Murdoch testimony 4/10/97 before US Senate Committee on Commerce, Science and Transportation (Padden 4/15) Marked: 3713

36X Multichannel News 3/2/92 "Get Govt Out of All Carriage Decisions" (Padden 4/15) Marked: 3763

37X Padden statement before House Subcommittee on Intellectual Property 3/17/93 cover page, pp. 46-49 (Padden 4/15) Marked: 3563

38X Multichannel News 5/28/90 "Once an Enemy. Padden Cuddles Up to Cable" (Padden 4/15) @ED OUT BUT NO TRANSCRIPT ENTRY FOR MARKING FOR IDENTIFICATION; DISCUSSED AT 3744 et seq., Parties have agreed to treat as marked).

39X Comm. Daily 4/11/97 "Murdoch Plans Total Local Carriage From Satellite" pp 2-3 (Padden 4/15) Marked: 3790

40X Electronic Media 3/16/92 "Copyright Report Good for Studios" (Padden 4/15) Marked: 3798

ASKYB DIRECT EXHIBITS

1 Satellite Home Viewer Act: Section 119 (c)(3)(d) (Padden 4/15) Marked: 3586

2 Subscription Totals: Cable vs. Satellite 12/11/95 (Padden 4115) Marked: 3590

3 TCI Cable Advertisement (to stay with cable rather than satellite) (Padden 4/15) Marked: 3593; **ADMISSIBLE WITHOUT OBJECTION**

4 Chart - Copyright Rates Established for Retransmission of Local Television Broadcasts (Padden 4/15) Marked: 3597

BROADCASTER CLAIMANTS CROSS EXHIBITS

1X 47 U.S.C. § 325 (Trautman 3/14) Marked: 1936; Received **IN EVIDENCE** 1941 by motion at hearing

2X "Home & Garden, Game Show Network & WGN ... to be Added to Primestar Channel Line-Up" 12/10/96 (Parker 4/7) Marked: 2502

3X Denver, CO DMA (Nielsen) 11/93 (Shooshan 4/11) Marked: 3512

COMMERCIAL NETWORKS CROSS EXHIBITS

1X Airtime Avails, Inc. Web Page pp. 1-2 3/19/97 (Haring 4/10) Marked: 3182; **ADMISSIBLE WITHOUT OBJECTION**

PROGRAM SUPPLIERS

[None]

PBS DIRECT EXHIBITS

1 Videotape - Fall 1996 (Wilson 3/19) Marked: 1224; **IN EVIDENCE** (by motion at hearing)

2 Videotape - Children's Programming (Wilson 3/19) Marked: 1244; **IN EVIDENCE** (by motion at hearing)

PBS CROSS EXHIBITS

1X 17 F.3d 344 (11th Cir.) (Parker 4/8) Marked: 2678; Received **IN EVIDENCE** 2846 by motion at hearing

2X All Sub Auth/Deauth Count pp. 4-6 (Parker 4/8) Marked: 2694

3X Denver 5 6/30/96 (Parker 4/8) (marked by Dennis Lane, Program Suppliers) Marked: 2759 completion of contract renewal process for long-term water supply contracts.

2. Contract Actions Modified:

(1) Lakeview Irrigation District, Shoshone Project, Wyoming: New long-term water service contract for up to 3,200 acre-feet of firm water supply annually and up to 11,800 acre-feet of interim water from Buffalo Bill Reservoir. Pursuant to Section 9(c) of the Reclamation Project Act of 1939 and Public Law 100-516.

(14) Bostwick ID in Nebraska and Kansas-Bostwick ID, Farwell and Sargent IDs, Frenchman-Cambridge ID, Frenchman Valley ID, Webster ID, and Kirwin ID, P-SMBP, Kansas and Nebraska: Extension of existing water service contracts for irrigation water supplies, pursuant to Public Law 104-206.

(18) Angostura Irrigation District, Angostura Unit, P-SMBP, South Dakota: The District's current contract for water service expired on December 31, 1995. An interim 3-year contract provides for the District to operate and maintain the dam and reservoir. The proposed contract would provide a continued water supply for the District and the District's continued operation and maintenance of the facility.

3. Contract Actions Discontinued:

(6) Corn Creek Irrigation District, Glendo Unit, P-SMBP, Wyoming: Repayment contract for 10,350 acre-feet of supplemental irrigation water from Glendo Reservoir pending completion of NEPA review. NEPA compliance on hold.

(19) Shadehill Water User District, Shadehill Unit, P-SMBP, South Dakota: Water service contract expired June 10, 1995. The proposed contract would provide irrigation water to the District pursuant to terms acceptable to both the United States and the District. No action expected in 1996.

4. Contract Actions Completed:

(21) Belle Fourche Irrigation District, Belle Fourche Unit, P-SMBP, South Dakota: D&MC contract for rehabilitation work on water control structures, lining additional canals, and rehabilitation of bridges and laterals. Public Law 103-434, enacted October 31, 1994, authorized an additional $10.5 million in Federal funds and $4 million in non-Federal cost share for completion of minor construction.

Dated: October 18, 1996.

Wayne O. Deason,

Deputy Director, Program Analysis Office.

[FR Doc. 96-27546 Filed 10-25-96; 8:45 am]

BILLING CODE 4310-94-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 94-3 CARP CD-90-92]

Distribution of 1990, 1991 and 1992 Cable Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is announcing the distribution of royalties collected under the cable compulsory license, 17 U.S.C. 111, for the years 1990, 1991, and 1992. The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP). The rejection takes the form of making some adjustments to the distribution percentages.

EFFECTIVE DATE: The distribution percentages announced in this Order are effective on October 28, 1996.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, DC 20540.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel or William Roberts, Senior Attorney for Compulsory Licenses, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

I. Recommendation of the Register of Copyrights

Background

In 1976, Congress adopted a statutory compulsory license for cable television operators to enable them to clear the copyrights to the broadcast programming which they retransmitted to their subscribers. Codified at 17 U.S.C. 111, the cable compulsory license allows cable operators to submit semiannual royalty payments, along with accompanying statements of account, to the Copyright Office for future distribution to copyright owners of broadcast programming retransmitted by those cable operators. Until December 1993 royalty distribution proceedings were conducted by the Copyright Royalty Tribunal (CRT), at which time Congress abolished the Tribunal and transferred its responsibilities to the Librarian of Congress and the Copyright Office. Public Law No. 103-196 (1993). Distribution proceedings are now conducted by ad hoc Copyright Arbitration Royalty Panels (CARPs) convened by the Librarian of Congress, which determine the proper division of royalties among the participating claimants in a written report and then deliver that report to the Librarian for his review and approval. Today's determination constitutes the first distribution of royalties under the new system enacted by Congress in 1993.

Operation of the Cable Compulsory License

The cable compulsory license applies to cable systems that carry broadcast signals in accordance with the rules and regulations of the Federal Communications Commission (FCC). These systems are required to submit royalties for the carriage of their signals on a semiannual basis in accordance with the prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the broadcast signals carried, the gross receipts received from subscribers for those signals, and other relevant filing information. The Copyright Office deposits the collected funds with the United States Treasury for later distribution to copyright owners of the broadcast programming through the procedure described in chapter 8 of the Copyright Act.

Creation of the cable compulsory license was premised on two significant Congressional considerations: first, the perceived need to differentiate for copyright payment purposes between the impact of local versus distant broadcast signals carried by cable operators; and second, the need to distinguish among different sizes of cable systems based upon the dollar amount of receipts they receive from subscribers for the carriage of broadcast signals. These two considerations played a significant role in deciding what economic effect cable systems had on the value of copyrighted works shown on broadcast television. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976). It was felt that the carriage of local broadcast signals by a cable operator did not affect the value of the works broadcast because the signal was already available to the public for free through over-the-air broadcasting. Therefore, the compulsory license essentially lets cable systems carry local signals for free.[1] Distant signals, however, do affect the value of copyrighted programming because local advertisers, who provide the principal remuneration to broadcasters enabling broadcasters to pay for the programming, are not willing to pay increased advertising rates for cable viewers in distant markets who cannot be reasonably expected to purchase their goods. The increase in viewership of the programming through distant signal importation by cable systems goes uncompensated because advertisers will not pay for it, and hence broadcasters cannot pay greater sums to copyright owners. The distinction among sizes of cable operators, based on their income from subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

Section 111 distinguishes among three sizes of cable systems according to the amount of money they receive from subscribers for the carriage of broadcast signals. The first two classifications are small to medium-sized cable systems known as SA–1's and SA–2's, in accordance with the title of the statement of account form which they file with their royalty payments. SA–1's pay a flat rate (currently $28) for carriage of all their signals, while SA–2's pay a percentage of their gross receipts received from subscribers for broadcast signals irrespective of the number of distant signals that they carry. The large systems, SA–3's, pay in accordance with a highly complicated and technical formula, principally dependent on how the FCC regulated the cable industry in 1976, which allows the systems to distinguish between carriage of local and distant signals and to pay accordingly. The vast majority of royalties available for distribution in this proceeding come from the large cable systems.

The royalty scheme for the large cable systems employs the statutory device known as the distant signal equivalent (DSE). Distant signals are determined in accordance with two sets of FCC regulations: the "must carry" rules for broadcast stations in effect on April 15, 1976, and a station's television market as currently defined by the FCC. 17 U.S.C. 111(f). A signal is distant for a particular cable system when that system would not have been required to carry the station under the FCC's 1976 "must carry" rules, and the system is not located with the station's television market.

Cable systems pay for carriage of distant signals based upon the number of DSE's they carry. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming." 17 U.S.C. 111(f). A DSE is computed by assigning a value of one to a distant independent broadcast station, and a value of one-quarter to distant noncommercial educational and network stations, which do have a certain amount of nonnetwork programming in their broadcast days. Cable systems pay royalties based upon a sliding scale of percentages of their gross receipts depending upon the number of DSEs they incur. The greater the number of DSEs, the greater the total percentage of gross receipts and, consequently, the larger the total royalty payment.

As noted above, the operation of the cable compulsory license is intricately linked with how the FCC regulated the cable industry in 1976. The Commission regulated cable systems extensively in 1976, restricting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where the local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules). However, in 1980, the Commission took a decidedly deregulatory stance towards the cable industry and eliminated the distant signal carriage rules and the syndicated exclusivity ("syndex") rules. *Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub. nom., National Football League, Inc. v. FCC*, 454 U.S. 1143 (1982). Cable systems were now free to import as many distant signals as they desired without worry of any black-out restrictions.

Pursuant to its statutory authority, and in reaction to the FCC's action, the Copyright Royalty Tribunal initiated a rate adjustment proceeding for the cable compulsory license to compensate copyright owners for the loss of the distant signal carriage rules and the syndex rules. This rate adjustment proceeding produced two new rates applicable to large cable systems making section 111 royalty payments. 47 FR 52146 (November 19, 1982). The first, to compensate for the loss of the distant signal carriage rules, was the adoption of a royalty fee of 3.75% of a cable system's gross receipts for carriage of each distant signal that would not have previously been permissible under the former distant signal carriage rules. This 3.75% fee has become known as the "penalty fee" in cable circles and has restricted the number of distant signals carried today by large cable systems.

The second rate adopted by the CRT, to compensate for the loss of the syndex rules, is known as the syndex surcharge. Large cable operators must pay this additional fee when the programming appearing on a distant signal imported by the cable system would have been subject to black-out protection under the FCC's former syndex rules.[2]

Since the CRT's action in 1982, the royalties collected from cable systems have been divided into three categories for distribution to copyright owners to reflect their origin: 1) the "Basic Fund", which includes all the royalties collected from SA–1 and SA–2 cable systems, and the royalties collected from large SA–3 systems for carriage of distant signals that would have been permitted under the FCC's former distant signal carriage rules; 2) the "3.75% Fund," which includes the royalties collected from large cable systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the "Syndex Fund," which includes the royalties collected from large cable systems for carriage of distant signals that contain programming that would have been subject to black-out protection under the FCC's former syndex rules.

Distribution of Royalties

Royalties are collected twice a year from cable systems for the privilege of retransmitting broadcast signals to their subscribers. As discussed above, these royalties are collected by the Copyright Office and deposited in interest-bearing accounts with the United States Treasury for subsequent distribution to copyright owners of the retransmitted broadcast programming.

In order to be eligible for a distribution of royalties, a copyright owner of broadcast programming retransmitted by one or more cable systems must submit a written claim to the Copyright Office. Only copyright owners of nonnetwork broadcast programming are eligible for a royalty distribution. 17 U.S.C. 111(d)(3). Eligible copyright owners must submit their claims in the month of July for royalties collected from cable systems

[1] It should be noted, however, that cable systems which carry only local signals and no distant signals (a rarity) are still required to submit a statement of account and pay a basic minimum royalty fee.

[2] Royalties collected from the syndex surcharge have decreased in recent years because the FCC has reimposed syndicated exclusivity protection in certain circumstances.

during the previous year. 17 U.S.C. 111(d)(4)(A). Once the claims have been processed, the Library begins to determine whether there are controversies among the parties filing claims as to the proper division and distribution of the royalties. If there are no controversies—meaning that the claimants have settled among themselves as to which claimant is due what amount of royalties—then the Library distributes the royalties in accordance with the claimants' agreement(s) and the distribution is concluded. However, the Library must conduct a distribution proceeding in accordance with the provisions of chapter 8 of the Copyright Act for those claimants who do not agree.

Distribution proceedings conducted under chapter 8 are accomplished in two phases. In Phase I, the royalties are divided among the categories of broadcast programming represented in the proceeding. The copyright owner claimants have, traditionally, divided themselves into eight categories during Phase I. These categories of claimants are: (1) Program Suppliers, which are the copyright owners of syndicated television series, movies, and television specials; (2) Joint Sports Claimants, which are the copyright owners of live telecasts of professional and college team sports; (3) National Association of Broadcasters (also known as "Commercial Television"), which are the copyright owners of programs —typically news and local interest programs—produced by broadcast stations; (4) Public Broadcasting Service (also known as "Noncommercial Television"), which are the copyright owners of all programming broadcast by the Public Broadcasting Service that do not fall within another category;[3] (5) Devotional Claimants, which are copyright owners of syndicated programs with a religious theme that do not fall within another category; (6) Canadian Claimants, which are the copyright owners of programs broadcast on Canadian stations that do not fall within another category; (7) Music Claimants, which are the copyright owners of musical works broadcast on all programming, as represented by the performing rights societies ASCAP, BMI and SESAC; and (8) National Public Radio, representing the copyright owners of all programming broadcast on National Public Radio radio stations that does not fall within the Music Claimants category. The copyright owners within each category traditionally agree among themselves to hire counsel to represent all owners within that category during the course of a Phase I distribution proceeding.

In Phase II, the royalties are divided among claimants within a particular category. For example, in a Phase II proceeding within the Music Claimants category, the copyright owners represented by ASCAP may be in controversy with the copyright owners represented by BMI as to the division of royalties allotted to the Music Claimants category after the conclusion of the Phase I proceeding. If such a controversy existed, the Library would conduct a Phase II proceeding under the same provisions of chapter 8 of the Copyright Act applicable to the Phase I proceeding.

The cable distribution proceeding which is the subject of today's recommendation of the Register of Copyrights, and Order of the Librarian of Congress, is a Phase I proceeding. Phase II proceedings will be conducted subsequently to resolve all Phase II controversies for distribution of the 1990–1992 cable royalties.

This Proceeding

At stake in this royalty distribution proceeding is over $500 million in royalties collected from cable systems for the retransmission of broadcast signals during the years 1990–92. A distribution proceeding for the 1990 royalties was begun by the CRT in April of 1993, 58 FR 17387 (April 2, 1993), but was suspended when the Congress eliminated the Tribunal later that year. *See* Order, CRT Docket No. 92–1–90 CD (October 14, 1993).

Royalty distribution proceedings now require the Librarian to assemble a CARP to determine the proper allocation of royalties among the copyright owner claimants. The Librarian assembles a CARP for a period of 180 days—selecting two of the arbitrators and allowing the two selected to choose a third—to make a determination as to the proper distribution or rate adjustment and submit a written report to the Librarian with their findings of fact and conclusions of law. 17 U.S.C. 802(e). The Librarian then has 60 days to review the report and, upon the recommendation of the Register of Copyrights, either accept or reject it. 17 U.S.C. 802(f). The statute directs that the Librarian must adopt the report unless he "finds that the determination is arbitrary or contrary to the applicable provisions of" the Copyright Act, whereupon he must "after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be". *Id.*

Shortly after the elimination of the Tribunal and the assumption of its new duties, the Library published a notice seeking comments on the existence of controversies to the distribution of the 1990 cable royalty fund. 59 FR 64714 (December 15, 1994). Consistent with its position that the Library was not a successor agency to the Tribunal, the Library began 1990 cable distribution proceedings anew. At the urging of the parties submitting comments, the Library consolidated distribution of the 1990, 1991 and 1992 cable funds into a single proceeding and instructed those parties interested in presenting evidence to the CARP to file their Notices of Intent to Participate. 60 FR 14971 (March 21, 1995). Representatives from six claimant groups expressed their intention to participate in the proceeding: Program Suppliers, Joint Sports Claimants (JSC), the National Association of Broadcasters (NAB), the Public Broadcasting System (PBS), the Devotional Claimants, and the Canadian Claimants.[4] The participating parties submitted their written direct cases on August 18, 1995, and precontroversy discovery was conducted on those cases consistent with the new procedural rules adopted by the Librarian to govern CARP proceedings. *See* 37 CFR 251.45.

During the course of the precontroversy discovery period, the Librarian was called upon to make a number of procedural and evidentiary rulings consistent with 17 U.S.C. 801(c). *See Order*, dated October 30, 1995; *Order*, dated November 7, 1995. In the November 7, 1995 *Order*, the Librarian specifically designated an issue to the CARP for its resolution: "whether programs distributed by the Fox Broadcasting Corp. to its affiliates during 1990–1992 were 'nonnetwork programs' within the meaning of Section 111(d)(3)" of the Copyright Act. *Order*, dated November 7, 1995 at p. 21. The Library permitted the parties to the proceeding "to amend their direct cases to submit such evidence as they consider relevant by December 15, 1995." *Id.*

Arbitration proceedings before the CARP were initiated on December 4, 1995, and the 180 day arbitration was begun. 60 FR 58680 (November 28, 1995). On June 3, 1996, 180 days later, the chairperson of the CARP delivered

[3] An example of a program which would not be in the Public Broadcasting Service category, because it fell within another category, would be the movie "Platoon" that was broadcast by a PBS station. That program would properly fall within the Program Suppliers category.

[4] The Music Claimants and NPR settled their claims to the 1990–92 funds, and did not participate. The Canadian Claimants settled their 1990 claims with the other parties, and therefore only participated in the proceeding for the years 1991 and 1992.

the Panel's written report to the Librarian. As provided in 37 C.F.R. 251.55(a), the parties filed their petitions with the Librarian to modify and/or set aside the decision of CARP by June 17, 1996. Replies were filed by July 1, 1996.[5]

Further Action by the CARP

After preliminary review of the CARP's report, and consideration of the parties' petitions to modify the Panel's decision, the Register of Copyrights determined that she would not be able to make a recommendation to the Librarian regarding the sufficiency of the report. Specifically, the Register determined that the report lacked the full explanation needed to enable her to make a recommendation of either rejection or adoption, as required by the statute. *See* 17 U.S.C. 802(f).

On July 11, 1996, the Register met with representatives of the Program Suppliers, JSC, PBS, National Public Radio (NPR), the Music Claimants, NAB, the Canadian Claimants, and the Devotional Claimants, to discuss the possibility of remanding the report to the Panel for further explanation and development. After considering the parties' reactions to such a proposal, the Register decided to submit a series of certified questions to the Panel in order to expand the explanation of the reasoning behind the Panel's determinations of the distribution percentages.

On July 16, 1996, the Office delivered the certified questions to the Panel chairperson, the Honorable Mel R. Jiganti. After consulting with the other members of the Panel, Judge Jiganti delivered the Response to the certified questions on August 29, 1996. The Response has been made a part of the Panel's report as an addendum.

The parties to the proceeding were given additional time to comment on the Response. *See* Order, dated August 30, 1996. These supplemental petitions to modify were received by September 17, 1996. Replies were filed by September 24, 1996.

[5] National Public Radio (NPR), which settled for all years and did not participate in the proceeding, filed joint comments with the Music Claimants on the Panel's Report on August 2, 1996, and additional comments on September 17, 1996. They request the Librarian to make the following "corrections" to the CARP report: (1) clarify that there are traditionally eight claimant groups to cable royalties, the six described by the Panel plus Music Claimants and NPR; (2) clarify that both the Music Claimants and NPR filed Notices of Intent to Participate in this proceeding; and (3) correct the mathematical error made by the Panel for failing to include the settlements of the Music Claimants and NPR in the total distribution percentages.

The first two points are accepted as accurate. The third point is addressed, *infra*, in this Order.

The Reporting Date

Section 802(f) of the Copyright Act states that the Librarian shall deliver his decision either accepting or rejecting the Panel's report within 60 days of its receipt. The Panel did not deliver its final determination until August 29, 1996, the day on which the Register received the Response to her certified questions. Issuance of this Order is, therefore, in compliance with the statutory deadline.

Standard of Review

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: the Librarian and the Court of Appeals for the District of Columbia Circuit. Section 802(f) directs the Librarian to either accept the decision of the CARP or reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." *Id.* If the Librarian accepts it, then the determination of the CARP has become the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different than the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency is generally considered to be arbitrary when it:

(1) Relies on factors that Congress did not intend it to consider;

(2) Fails to consider entirely an important aspect of the problem that it was solving;

(3) Offers an explanation for its decision that runs counter to the evidence presented before it;

(4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

(5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

(6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Manufacturers Association v. *State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983); *Celcom Communications Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is "arbitrary," prior decisions of the Court of Appeals for the District of Columbia Circuit reviewing the determinations of the former Copyright Royalty Tribunal have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. *See Recording Industry Association of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981); *National Cable Television Association* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Christian Broadcasting Network* v. *CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Association of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985). As one panel of the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. * * *

Christian Broadcasting Network, Inc. v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983), *quoting National Cable Television Association* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented by CARP with a detailed rational analysis of the decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103–286, 103 Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the

CARP must "weigh all the relevant considerations and that it set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Association* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc.* v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).[6]

It is the need for explained decisionmaking that prompted the Register to submit certified questions to the CARP in this proceeding. The Response having now been received and made a part of the CARP's report, it is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

Review of the CARP Report

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this enormous proceeding, in the eyes of the petitioners, are areas where the Panel may have acted arbitrarily or contrary to the provisions of the Copyright Act. The law gives the Register the responsibility to make recommendations to the Librarian on the panel's determination 17 U.S.C. 802 (f) and in so doing she must review the entire report.

After a complete review of the Panel's report and the record in this proceeding, the Register has determined that there are nine issues that require a full discussion and analysis.

The first issue involves the Panel's treatment of the "harm" criterion as a means of calculating the division of royalties among the claimant groups. In order to determine the percentage royalties due to a particular category of programming, the Copyright Royalty Tribunal fashioned three criteria to weigh the relative merit of each party's evidence. The first criterion—the "harm" criterion—required each party to demonstrate how it has been economically harmed by cable systems' importation of distant signals. The CRT typically gave an unquantified credit, or no credit, to each party depending upon how well that party demonstrated it was harmed by distant signal importation. *See, e.g.* 57 FR 15286 (April 27, 1992). The Panel chose to discount the importance of the harm criterion in this proceeding, which requires review.

The second issue concerns the eligibility of copyright owners of Fox programming for a distribution of royalties. As noted above, only copyright owners of nonnetwork programming are entitled to a royalty distribution. The Library specifically designated the "Fox issue" to the Panel for resolution, and the Panel ruled as a matter of law that Fox programming was eligible for a distribution. The question is whether that ruling was proper.

The third issue involves the Panel's distribution percentages for the entire royalty pool. The Panel fashioned its percentages as if the entire royalty pool were subject to distribution, when in fact two categories of copyright owners—Music Claimants and NPR—had settled out of the proceeding and did not participate. The question is whether the Panel's percentages must be adjusted to include the Music Claimants and NPR's settled funds.

The fourth issue concerns the Panel's allocation of royalties from the 3.75% Fund. As discussed above, the 3.75% Fund represents royalties collected from large cable systems for the retransmission of distant signals that would not have been permissible under the FCC's former distant signal carriage rules. Not all parties are entitled to 3.75% royalties, because not all parties own programming that was retransmitted on formerly nonpermitted distant signals. The questions for review on this issue are whether the Panel considered JSC's evidence regarding its claim to the 3.75% Fund, whether the 3.75% award to the Canadian Claimants was correct, and whether the Canadian Claimants 1990 3.75% award (which was reached through settlement with the other parties) is assured as a matter of law.

The fifth issue concerns the Panel's award to NAB. NAB contends that the Panel miscategorized certain programs which belonged in the NAB category, thereby reducing NAB's overall award. NAB also claims that the Panel rejected certain statistical survey evidence that it presented, thereby further reducing its award.

The sixth issue concerns the award to the Devotional Claimants. Like NAB, they allege that the Panel ignored and/or rejected certain evidence and arguments which would have resulted in an increase of their award.

The seventh issue involves the Panel's award of Basic Fund royalties to the Canadian Claimants. The question is on what basis, or what approach, did the Panel use in arriving at the Canadian's award and was it proper.

The eighth issue is the Panel's award to PBS. PBS alleges that the Panel failed to make an adjustment in the statistical survey numbers presented by PBS which would have resulted in an increase in its award.

The ninth, and final, issue was not raised by any of the parties and is being reviewed on the Register's initiative. The Panel made a single, unified award to each claimant for each of the three years of cable royalties available for distribution. The question is whether it was permissible for the Panel to make such an award, or whether it was required to award different percentages for each claimant for each year based upon the evidence each claimant submitted for that year.

A discussion and analysis of these nine issues, and a resolution of each as to whether the Panel acted arbitrarily or inconsistently with the Copyright Act follows. As noted below, those areas where the Panel erred, the Register is recommending that an appropriate adjustment be made to the awards of the affected parties.

Resolution of the Issues

A. The "Harm" Criterion

Since the initial distribution of cable royalties, the Copyright Royalty Tribunal has attempted to determine the correct division of cable royalties among competing claimants through application of three primary criteria to each claimant: (1) the harm suffered by the claimant as a result of distant signal retransmission by cable operators; (2) the benefit accruing to cable operators for the retransmission of the claimant's works; and (3) the predictive marketplace value of the claimant's works. *See National Association of Broadcasters* v. *CRT*, 675 F.2d 367 (D.C. Cir. 1982). The CARP took express notice of these criteria, and discussed the Tribunal's application of the "harm" criterion in various proceedings. Report at 20–21. The Panel concluded that "the Tribunal has generally discounted the 'harm' criterion from its consideration due to an inability to quantify the evidence submitted on this factor," but did note that the Tribunal in the 1989 proceeding "gave Program Suppliers and JSC (but not NAB or PTV) a 'credit for harm' * * *" *Id.* The Panel then stated:

[6] The record in this proceeding is much larger, containing over 12,000 pages of hearing transcripts and several thousand pages of briefs and arguments.

Given this history, and taking into account the evidence and arguments regarding 'harm' which have been presented in this proceeding, we have determined to make explicit what has been implicit since these royalty proceedings were first commenced. In creating the compulsory license scheme, Congress specifically recognized that harm occurs when distant signal [sic] are retransmitted without compensation. Experience has demonstrated the difficulty, if not impossibility, of quantifying this factor or of determining which claimants were 'harmed' more than others by distant signal retransmissions. Consequently, we have concluded that 'harm' should be taken as a given, and we will neither summarize nor address the claimants' arguments in this regard or attempt to grant or deny 'credits' for a showing of harm. Instead, all claimants are deemed to have been equally harmed by virtue of their eligibility to make claim to a share of these royalties.

Id. at 21.

Program Suppliers and Devotional Claimants challenge the Panel's approach to the "harm" criterion, and its decision that "all claimants are deemed to have been equally harmed. * * *" Program Suppliers submit that the Panel's treatment of harm as a nonfactor means that all parties received a zero credit for harm. They argue that such action was contrary to the express direction of the Copyright Royalty Tribunal Reform Act of 1993 which required the Panel to adhere to prior Tribunal decisions and determinations, and that it was arbitrary because there was no evidence in the record to suggest that all parties were harmed equally. Program Suppliers Petition to Modify at 5–8. Program Suppliers submit that they were the only party to prove compensable harm and therefore are entitled to an upward adjustment of their royalty share. *Id.* at 10–13.

Devotional Claimants do not dispute the Panel's authority to treat all claimants as equally harmed, but submit that they did not receive any benefit whatsoever from the Panel's conclusion. The Devotional Claimants note that the Tribunal did give some claimants credit for harm in the 1989 proceeding, but expressly denied the Devotional Claimants any credit based on a finding that they were not harmed by the importation of distant signals by cable systems. Devotional Claimants Petition to Modify at 4. Because the Panel decided to treat all claimants as equally harmed, the Devotional Claimants submit that their award must go up from its 1989 level. They submit that the Panel's decision was arbitrary because it failed to explain why the Devotional Claimants did not receive any credit for harm, despite the Panel's supposed assertion that the Devotional Claimants would now receive a credit for harm. *Id.* at 6.

JSC, PBS, NAB, and the Canadian Claimants object to Program Suppliers' categorization of the harm criterion. These parties, for the most part, argue that Program Suppliers failed to prove adequately that they were harmed by distant signal importation, so that even if the Panel had awarded quantifiable 'harm' credits, Program Suppliers were not entitled to any. NAB Reply at 5–10; JSC Reply at 8–14; Canadian Claimants Reply at 14; PBS Reply at 4–8. Several parties also offer arguments to bolster the reasoning of the Panel to treat all claimants as equally harmed. JSC, NAB, and PBS submit that the Federal Communications Commission's reimposition of the broadcast syndicated exclusivity rules in 1990 are considerable evidence of "changed circumstances" justifying the Panel's break with Tribunal precedent. JSC Reply at 10; NAB Reply at 5–6; PBS Reply at 7. PBS submits that the Panel did consider the evidence the parties presented regarding harm, and "conclud[ed], in effect, that the evidence was inconclusive and did not establish that any party was entitled to a 'harm' credit." PBS Reply at 3. Canadian Claimants acknowledge that the Panel may have "correctly or incorrectly rolled the harm criteria into marketplace value," but submit that they nonetheless proved harm. All in all, JSC, NAB, PBS and the Canadian Claimants believe that their evidence on harm is superior to that of Program Suppliers.

In her certified questions to the Panel, the Register requested clarification regarding the Panel's application of the harm criterion. Specifically, the Register inquired as to "[w]hat record evidence supports your conclusion that all claimants were equally harmed during 1990–92," and asked "[i]f you concluded that the parties were equally harmed during 1990–92, but the Tribunal concluded that the parties were disparately harmed in 1989, how did that affect your awards to each of the six parties?" Certified questions 1–A, 1–B.

The Panel responded to both questions by stating that it "found harm to be of limited utility and not quantifiable. And, other than identifying that a claimant whose program was retransmitted without compensation has been harmed, it does not lend any appreciable information on market value." CARP Response at 4.

Program Suppliers argue that the Panel's answer demonstrates that it eliminated the harm criterion "as a legal matter," which, they submit, is clearly contrary to the statute. Program Suppliers Supplemental Petition at 4. The Devotional Claimants continue their assertion that all parties were treated as equally harmed, requiring an increase in the Devotionals' award. Devotional Claimants Supplemental Petition at 7–8.

In reply, PBS and NAB submit that Program Suppliers' assertion is incorrect, and that rather than "legally" eliminate the harm criterion, the Panel weighed the evidence and determined that none of the parties was entitled to a credit for harm. NAB Supplemental Petition Reply at 5–6; PBS Supplemental Petition Reply at 2–3. JSC contend that Program Suppliers' harm arguments are without merit because they failed to sustain their burden on proving harm, JSC Supplemental Petition Reply at 5–6, and the Devotional Claimants submit that even though the harm criterion is of no value for determining royalty distributions, they are nevertheless entitled to an increase in their award. Devotional Claimants Supplemental Petition Reply at 4–8.

It is clear from the Panel's answer that, rather than treating all parties as equally harmed and awarding equal shares of harm credit, the Panel effectively determined that the harm criterion was a complete nonfactor. The Panel did not consider harm to be of any value in determining the distribution percentages, instead it emphasized the marketplace value criteria. As a result, all parties received a zero credit for harm, and the evidence presented by the parties regarding this factor was given no weight. The issue is, then, whether it is permissible for the CARP to determine the harm criterion was not relevant.

Section 802(c) of the Copyright Act states that CARPs "shall act on the basis of a fully documented written record, *prior decisions of the Copyright Royalty Tribunal*, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)." (emphasis added). Program Suppliers argue that the "prior decisions of the Copyright Royalty Tribunal" language means that all CARPs are bound by, and may not deviate from, Tribunal precedent. This would mean that the Panel in this proceeding was bound to interpret and apply the harm criterion in the same manner that the CRT did in previous cable distribution proceedings.

This is too narrow a reading of the statutory language. The CARPs are vested with full authority "to distribute royalty fees" collected under the cable compulsory license, and "to determine, in cases where controversy exists, the distribution of such fees." 17 U.S.C. 801(b)(3). While the CARP must take account of Tribunal precedent, the Panel may deviate from it if the Panel provides a reasoned explanation of its decision to vary from precedent. *Airmark Corp.* v. *FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985). Such action is fully consistent with judicial interpretation of the role of precedent. It would make little sense to require the CARPs to apply Tribunal precedent in all circumstances, and allow no deviation, especially in the area of determining the relevant factors for distributing royalties. The Tribunal was not itself consistent in application of the harm criterion, and never quantified the value of a "harm credit." The Panel in this proceeding took full account of the harm criterion—i.e. acted on the basis of it—and concluded, consistent with its authority to make distribution determinations, that the criterion was not useful to deciding distribution percentages. The Panel further noted that even the Tribunal itself had, through the years, "generally discounted the 'harm' criterion from its consideration due to an inability to quantify the evidence submitted on this factor. * * *" Report at 20. Because the Panel provided a reasoned explanation for its decision to discount the harm criterion, and clarified in its response to the certified questions that it did not give any claimant credit for harm, it did not act arbitrarily or contrary to the statute.

B. The Fox Issue

On October 2, 1995, before the initiation of the 1990–92 consolidated cable royalty distribution proceeding, JSC filed a motion with the Librarian of Congress requesting him to rule that Fox-distributed programming is network programming ineligible to receive section 111 royalties.

The basis of JSC's motion was that section 111 of the Copyright Code provides that only owners of nonnetwork television and radio programs may claim cable royalties. JSC Motion at 1–3. According to JSC, Fox Broadcasting Corp. had become a network by the years 1990–92, serving 90% of television households and paying independent producers license fees comparable to that of ABC, CBS, and NBC. *Id.* at 3. JSC therefore moved to have the programming licensed by Fox television declared as noncompensable network programming and to dismiss those royalty claims represented by Program Suppliers that are for nationally-distributed Fox programs. *Id.*

Program Suppliers opposed JSC's motion on the basis that cable systems paid for Fox-affiliated stations as a full distant signal equivalent during 1990–92 and continue to do so today because those stations are not network stations as defined by Section 111. Program Suppliers Opposition at 2–4. Program Suppliers further argued that Fox does not have the nationwide reach that ABC, CBS, and NBC have because Fox's stations are mostly UHF stations with lesser coverage, and this lesser coverage has resulted in lower network fees for Fox programs than for ABC, CBS and NBC programs. *Id.* at 3–4. Program Suppliers also noted that Fox affiliates often choose the times when Fox programs air as opposed to the networks which have uniform program times and dates. *Id.*

In reply, JSC stated that it was not basing its argument on the status of Fox-affiliated stations, whether they are network or nonnetwork stations. JSC Reply at 4. JSC accepted Program Suppliers' argument that Fox-affiliated stations were not network stations in 1990–92 because they did not broadcast network programming "for a substantial part of the station's typical broadcast day," which is a requirement for a station to be considered a network station under section 111. *Id.* at 3–4. However, in JSC's view, that did not matter because programs could be network programs even if they aired on a nonnetwork station so long as they were distributed by a nationwide network. *Id.* at 4–5.

On November 7, 1995, the Copyright Office issued an Order designating the following issue to the CARP: "whether programs distributed by the Fox Broadcasting Corporation to its affiliates during 1990–92 were 'nonnetwork programs' within the meaning of Section 111(d)(3)." The Office further ordered that any party could amend its direct cases to submit such evidence as it considered relevant by December 15, 1995.

On December 15, 1995, two parties, JSC and Program Suppliers amended their cases to provide written testimony on the designated Fox issue. On December 29, 1995, PBS filed a partial opposition to JSC's precontroversy motion.

On January 26, 1996, the Panel ruled, as a matter of law, that the definitions section of 111(f) provides that the words defined in that section apply as well to their "variant forms"; that the phrase "network program" was a "variant form" of the phrase "network station"; and therefore a program had to be aired on network stations before it could be considered a network program ineligible for section 111 royalties. Tr. 6899–90. In addition, it ruled that because it disposed of the Fox issue as a matter of law, it would not consider the written testimony JSC and Program Suppliers had furnished on the Fox issue. Tr. 6900.

JSC challenged the ruling of the Panel as contrary to law, and urged the Librarian to declare that "(1) programming may be network programming, ineligible for compensation under section 111(d)(3), even if it was not broadcast over a station classified as a 'network' station under section 111(f), (2) copyright owners are not required to have Fox affiliates declared 'network' stations before they can challenge the allocation of royalties to Fox programming; and (3) the programming distributed by the Fox network to its affiliates does not qualify as 'nonnetwork' programming under section 111(d)(3)." JSC Petition to Modify at 24.

Program Suppliers urge the Librarian to reject JSC's request. They argue that independent stations are paid for as a full (1.0) DSE, whereas network stations are paid for as a one-quarter (0.25) DSE. Program Suppliers Reply at 27–28. They assert that Congress made the decision that cable operators pay for the entire programming on independent stations, and therefore, no program on an independent station could be, as a matter of law, a network program. *Id.* at 28–29.

JSC countered that the 4–1 ratio Congress established for the value of nonnetwork programming on independent and network stations was simply a rough estimate that is often not the case in reality. Just as 40–50% of programs on network stations are nonnetwork programs —instead of Congress' estimate of 25%—it could be the case, JSC posits, that a small percentage of programs on independent stations are network programs—instead of Congress' estimate of 100%. JSC Petition to Modify at 28.

Although the Register did not certify a question to the Panel regarding its treatment of the Fox issue, the Panel nonetheless included a response. They observed:

> The Panel would like to comment on the Fox issue. The Copyright Office views it as a mixed question of fact and law. The Panel respectfully disagrees. We found it to be solely a matter of law. The Joint Sports Claimants in their petition to modify did not suggest that it is a question of fact.
>
> Response at 3.

JSC urged the Librarian to reject the Panel's resolution of the Fox issue as a matter of law. JSC Supplemental

Petition at 6. Further, JSC urged the Librarian to "articulate the appropriate test for deciding whether programming is noncompensable network programming," submitting that the proper test should be "whether the programming has been sold to a single buyer for exclusive distribution across a nationwide network of broadcast affiliates." *Id* at 6–7. Program Suppliers and PBS oppose JSC's requests, submitting that the Panel ruled correctly on the Fox issue, and that there are "no grounds" for the Librarian to adopt JSC's test for determining noncompensable network programming. Program Suppliers Supplemental Petition Reply at 9; PBS Supplemental Petition Reply at 4–5. Program Suppliers further note that it only would be permissible for the Librarian to adopt such a test through a rulemaking proceeding, and not during the course of review in a royalty distribution proceeding. Program Supplier Supplemental Petition Reply at 9.

The House Judiciary Committee Report to the Copyright Act discusses the disparate royalty obligations under the cable compulsory license for network versus independent stations:

> Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of *the different amounts of viewing of non-network programming carried by such stations.* For example, the viewing of non-network programs on network stations is considered to approximate 25 percent.

H.R. Rep. No. 1476, 94th Cong, 2d Sess. 90 (1976) (emphasis added). It appears from the above statement that Congress considered that there were different amounts of viewing of nonnetwork program on all three categories of stations, and estimated that it was 25% on network stations. Therefore, Congress also estimated that it was 100% on independent stations, but did not preclude the possibility that there could be network programs on independent stations.

Congress spoke in the statute and the legislative history only with regard to how cable systems should pay royalties for network stations; it did not define "network programming" for royalty distribution purposes, other than to state that only copyright owners of "nonnetwork programming" are entitled to a distribution. On the payment side, Fox Broadcasting stations are paid for as independent signals, meaning that they are paid for at one DSE, as opposed to the one-quarter DSE for network signals. The reason is that, during the 1990–1992 period, Fox stations did not "transmit[] a substantial part of the programming supplied by such network[] for a substantial part of that station's typical broadcast day." 17 U.S.C. 111(f). The issue, then, is can Fox be a network for distribution purposes, but not a network for payment purposes.

PBS argues in its reply to JSC's petition to modify, that the Copyright Royalty Tribunal ruled, as a matter of law, in the 1978 cable copyright royalty distribution proceeding, in the context of PBS programming, that programs must air on network stations before they can be considered network programs. PBS Reply at 14–17. However, in the 1978 proceeding, the Tribunal considered and ruled on two arguments in the alternative. First, it considered the question of whether public television stations are network stations, as defined in section 111(f). If public television stations were network stations, the Tribunal was prepared to find that PBS programming was network programming. However, the Tribunal found that PBS did not own any public television stations, nor were any public television stations affiliates of PBS. PBS is a membership corporation whose members are public television stations. Therefore, the first requirement of a network station under section 111(f)—that they be owned by or affiliated with a network—was not met; and the Tribunal concluded that public television stations are not network stations.

The Tribunal then considered the second argument: whether PBS programs aired on public television stations—which are not network stations—are nonetheless network programs. The Tribunal stated, "We have looked at the record of this proceeding, which in our view establishes significant distinctions between the functioning of PBS and that of the commercial networks. We find that the operation of PBS in distributing programs is more akin to that of a program syndicator." *1978 Cable Royalty Distribution Proceeding*, 45 FR 63026, 63033 (Sept. 23, 1980). Because the Tribunal ruled, based on the facts, that PBS' distribution of programs is more akin to that of a program syndicator, it did not have to reach the legal question of whether a nationally distributed program appearing on a nonnetwork station is, as a matter of law, a nonnetwork program.

Given both the silence of the statute and the lack of Tribunal precedent, it cannot be said that the Panel acted arbitrarily or contrary to the provisions of the Copyright Act by ruling that Fox programming was nonnetwork programming for distribution purposes. The Panel approached the issue from the payment side and concluded that what is not a network for pay-in purposes must likewise not be a network for pay-out purposes. Ruling in favor of JSC's request would produce an incongruity in the statute, raising the question of why cable systems should pay the full royalty value for Fox stations (one DSE), when the copyright owners of Fox programming have no share in those royalties. The Panel's harmonization of the pay-out with the pay-in is neither arbitrary nor contrary to the Copyright Act.

Furthermore, even if the Register were inclined to recommend to the Librarian that the Panel's determination was contrary to the Copyright Act, there would be no factual record for the Librarian to substitute his own determination. The statute makes clear that the Librarian may conduct his review of the CARP's determination on the basis of the "record created in the arbitration proceeding," and does not grant any responsibility or authority to the Librarian to make his own factual findings. 17 U.S.C. 802(f).

Consequently, the Panel did not err in ruling that Fox programming was eligible for a distribution of royalties, and JSC's petition to modify the CARP's ruling concerning Fox-distributed programs is denied.

C. The Mathematical Adjustment

The Devotional Claimants claim that, because of a mathematical mistake, the Panel, contrary to its stated intent, did not give the Devotional Claimants the same award as it received in 1989. Devotional Claimant's Petition to Modify at 2. They submit that the Panel's key finding with respect to them was that there was "no change in circumstances" from their showing in the 1989 cable royalty distribution proceeding. As a result the Panel awarded them 1.25% of the Basic Fund, and 0.95% of the 3.75% Fund, the same as in 1989. *Id.* at 3. However, because the awards in the 1989 cable royalty distribution proceeding were inclusive of the settlement of the Music Claimants, and the awards in this proceeding were exclusive of the settlement of the Music Claimants, the awards to the Devotional Claimants were actually a 5.62% reduction in the Basic Fund to an equivalent of 1.19% of the total Basic Fund and a 4.275% reduction in the 3.75% Fund to an equivalent of 0.91% of the 3.75% Fund.

Id. at 3–4. The Devotional Claimants ask the Librarian to correct this mathematical error and restore the Panel's intended award to the equivalent of what they received in the 1989 cable royalty distribution proceeding.

In reply, the Program Suppliers question the assumption of the Devotional Claimants that the Panel intended to give them the same award as in 1989. Program Suppliers Reply at 31. They note that the only evidence allowing for this inference is that the percentage awards are the same on their face. However, Program Suppliers assert that the Panel never explicitly stated they were awarding the Devotional Claimants the same award they received in 1989, and the Panel could have intended the actual 5.62% and 4.275% reductions that did in fact take place. *Id.* Further, Program Suppliers state that if, indeed, the Panel made a mathematical mistake with regard to the Devotional Claimants, they made the same mathematical mistake with regard to the Program Suppliers who facially received an even 55% award for all three years in the Basic Fund. *Id.* at 32. Program Suppliers conjecture that the Panel could have intended the Program Suppliers should receive 55% inclusive of the Music Claimants settlement, in which case their award would need to be 57.59% of the Basic Fund and 61.36% of the 3.75% Fund, instead of the 55% and the 58.6% they were awarded. *Id.*

The Canadian Claimants make a similar argument as the Program Suppliers, questioning the Devotional Claimants' basic assumption that the Panel intended to give them the same award as in 1989. Canadian Claimants Reply at 8–9. They note that the key evidence in this proceeding, the Nielsen study and the Bortz survey, were both offered exclusive of the music element, and the Panel could have intentionally made its award with full knowledge that it was exclusive of the Music Claimants' settlement. The Canadian Claimants further assert, as the Program Suppliers do, that if the Devotional Claimants deserve an upward adjustment, then all claimants deserve one, in which case an adjustment would be a wash. *Id.* at 9. Last, the Canadian Claimants argue that if the Librarian decides to make an upward adjustment for the Devotional Claimants, the increase must come from parties other than the Canadian Claimants because no devotional programming appeared on Canadian stations and the Canadian Claimants' award was derived from the fees generated by their signals. *Id.* at 10.

JSC make similar arguments. They question the Devotional Claimants' basic assumption, and, alternatively, argue that if it is true for the Devotional Claimants, it is true for them and all other claimants. JSC Reply at 44–45. Similarly, NAB states that if the mathematical mistake is true for the Devotional Claimants, it is true as well for NAB. NAB Reply at 25.

The Devotional Claimants are correct when they state that the Panel found no changed circumstances with regard to them, and that the Panel awarded them percentages that were identical on their face to their 1989 award. The other parties are equally correct when they state that nowhere did the Panel explicitly state that it intended to give the Devotional Claimants the same awards as in 1989. In addition, the parties are justified in positing that, perhaps, the Panel's calculations vis-a-vis the other claimants were similarly mathematically flawed, only less obviously so, because their final numbers happen to be different from those awarded in the 1989 cable distribution proceeding.

Because of these difficulties and the lack of adequate explanation, the Register questioned the Panel as to whether a mathematical mistake had been made as to the Devotional Claimants. In addition, the Register provided the Panel with a chart adjusting the final distribution figures to take account of the settlement reached by the Music Claimants and National Public Radio.

In response, the Panel stated that it intended to award 1.25% of the Basic Fund, plus the additional 0.01% for 1990, because it treated the distribution as if 100% of the cable royalties were involved in the proceeding, and did not consider the settlement of the Music Claimants for all three years as having a bearing on the distribution. Response at 3. The Panel asserted that it was proper to do this "because the parties represented that the Panel should base its award on 100% of the fund, leaving it to the parties to adjust among themselves for settlements with non-participating parties." *Id.* The Panel was unable to provide a record citation for representation of the parties. *Id.* at 3–4.

The Devotional Claimants submit that the Panel's answer has made it unclear as to whether the Panel intended to award Devotionals the same share they received in 1989, and therefore underscores the arbitrariness of its action. Devotional Claimants Supplemental Petition at 3–4. In any event, the Devotional Claimants urge the Librarian to increase their award because "it would be illogical and arbitrary for the CARP to have awarded Devotional Claimants less than they had been awarded in the 1989 determination. *Id.* at 6. Program Suppliers submit that the Panel's answer regarding the Devotional Claimants award underscores the entire report's lack of reasoned explanation, but submit that the Devotional Claimants' evidence does not merit an increase in their award. Program Suppliers Supplemental Petition Reply at 12–15.

The Panel did not act arbitrarily in its award to Devotional Claimants, but a mathematical adjustment must be made to all the distribution percentages determined by the Panel to reflect the total award of all royalties. The Copyright Royalty Tribunal always reported its distribution percentages for all parties receiving royalties, inclusive of those parties who had reached settlement. *See, e.g.* 1989 Cable Royalty Distribution Proceeding, 57 FR 15286 (April 27, 1992). The Panel should have done the same in this proceeding, especially since it did not offer any reasons why it was adopting percentages only for the parties before it, rather than considering the entire distribution. Further, the statute requires the Librarian to publish the distribution percentages for the *entire* cable royalty funds, and not only those amounts that were in controversy. 17 U.S.C. 802(f).

Accordingly, the Register recommends that the Panel's numbers are adjusted to account for the total distribution of the 1990–92 cable royalty funds:[7]

[7] The stipulated award to NPR of 0.18% is subtracted from the funds, as is consistent with CRT precedent. *See,* 1989 Cable Royalty Distribution Proceeding, 57 FR 15286, 15304 (April 27, 1992).

	Basic	Syndex
1990:		
Program Suppliers	52.6336250	95.5000000
JSC	28.2355000	
NAB	7.1820500	
Music Claimants	4.5000000	4.5000000
PBS	5.5049750	
Devotional Claimants	1.1938500	
Canadian Claimants	0.7500000	
1991–1992:		
Program Suppliers	52.5250000	95.5000000
JSC	28.1725000	
NAB	7.1625000	
Music Claimants	4.5000000	4.5000000
PBS	5.4912500	
Devotional Claimants	1.1937500	
Canadian Claimants	0.9550000	

The above adjustment to the Panel's numbers does result in a decline to the distribution for Devotional Claimants vis-a-vis its 1989 distribution percentage. However, the Panel did not state in its report, as the Program Suppliers, Canadian Claimants, JSC, and NAB correctly observe, that it intended the Devotional Claimants to receive the same percentage that they received in the 1989 proceeding. This position was confirmed by the Panel's Response to the certified questions where it stated that it intended for the Devotional Claimants to receive its award based upon only those royalties in the funds that were in controversy. Consequently, the Devotional's award, even after the mathematical adjustment, was not arbitrary.

D. The 3.75% Fund

JSC argue that the Panel erred in its allocation of the 3.75% Fund. First, they claim that the Panel acted arbitrarily when it rejected their proffered evidence concerning the allocation of the 3.75% Fund. Second, JSC claim that the Panel acted arbitrarily in denying them any share of the Canadian Claimants' award of 3.75% Fund royalties. Finally, JSC ask the Librarian to clarify the Panel's intent concerning the Canadian Claimants' 1990 share of the 3.75% Fund.

1. *JSC's evidence.* JSC claim that their proffered evidence on the higher value of sports programs on stations paid for by cable systems at the 3.75% rate was improperly rejected by the Panel. JSC Petition to Modify at 17–18. JSC state that they offered the testimony of Jerry Maglio, Senior Vice President for Marketing and Programming at United Artists Cable, on the value of sports on 3.75% rate signals, and a statistical analysis of the proportion of superstations on 3.75% rate stations, but that this proffered evidence was neither discussed nor evaluated. *Id.* (citing JSC's Proposed Findings of Fact and Conclusions of Law at 157–158).

Program Suppliers counter that the Panel did discuss Maglio's testimony on page 88 of the Report and the carriage of superstations on page 92 of the Report. Program Suppliers Reply at 24. Further, Program Suppliers argue that the discussion by the dissenting arbitrator of JSC's proffered 3.75% Fund evidence can lead to a reasonable inference that these matters were raised and considered by the entire Panel when it deliberated. *Id.*

On the merits, Program Suppliers argue that there is contrary record evidence that undercuts any conclusion that it is the presence of sports that creates the willingness on the part of cable operators to carry signals at the 3.75% rate. Such evidence includes the decline in the carriage of two sports flagship stations, WSBK and WPIX, and that the continued carriage of WTBS[8] and WGN has more to do with their being the first superstations in the country rather than solely their sports offerings. *Id.* at 24–25.

The Panel's discussion of its division of the 3.75% Fund is, at best, terse. The Panel states:

> The 3.75% fund established a royalty rate of 3.75% of gross receipts for newly permitted distant signals. Little new argument is made concerning its distribution. PTV is not a participant in this fund. We make these awards in a similar basis as the Tribunal in 1989. The allocations are as follows: Program Suppliers 58.6%, JSC 32.6%, NAB 7.5%, Devotionals 0.95% and Canadians 0.35%.

Report at 142. In order to determine the Panel's reasoning for these awards, the Register inquired of the Panel as to whether it took "into account JSC's proffered evidence on the value of sports on 3.75% signals and Program Suppliers' counter arguments," and, if so, "what reasons led the Panel to conclude that these presentations did not change the Panel's analysis concerning the allocation of 3.75% royalties." Certified questions 6–A, 6–B.

In response to whether the Panel considered JSC's evidence, the Panel stated that it "took into account the evidence of Jerry Maglio." Response at 5. In answer to why this evidence did not change the Panel's conclusion regarding allocation of the 3.75% Fund, the Panel stated that "we weighed that evidence and found that it was not persuasive." *Id.*

JSC do not contest the Panel's weighing of the testimony of Jerry Maglio, but submit that it was prejudicial for the Register to ask the Panel a question regarding its consideration of JSC's evidence while not asking similar question about other claimants' evidence. JSC Supplemental Petition at 5. Further, JSC argue that the Panel's sole mention of Jerry Maglio's testimony indicates that it overlooked other key evidence, and that the Librarian consequently should adopt the dissenting arbitrator's percentage for JSC. *Id.* at 5–6. Program Suppliers oppose JSC's request, arguing that JSC's evidence does not support an increase in its award. Program Suppliers Supplemental Petition Reply at 6–8.

The Panel has now responded to JSC's contention that its evidence was ignored by stating that it considered the testimony of JSC's witness on the 3.75% Fund, Jerry Maglio, and considered it not to be persuasive. It is troublesome that while the Panel has now identified the evidence that it considered, it declined to identify any reasons as to why it found Mr. Maglio's testimony unpersuasive. The 3.75% Fund represents approximately $45 million of the 1990, 1991, and 1992 funds, or a total of approximately $135 million. JSC Ex. 2, at 2. As the Court of Appeals said

[8] The record also shows that WTBS was heavily promoted on other Turner channels.

in an earlier royalty distribution proceeding, "shorthand and tossaway, conclusory sentences are no way to handle a multi-million dollar proceeding." *National Association of Broadcasters v. CRT*, 772 F. 2d 922, 931 n.10 (D.C. Cir. 1985).

Nevertheless, the Panel did not act arbitrarily in its consideration of JSC's 3.75% evidence. As discussed earlier in this Order, the Librarian's scope of review is very narrow. This limited scope certainly does not extend to reconsideration of the relative weight to be accorded particular evidence, and the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). As the Program Suppliers point out, the 3.75% fees generated for two major sports stations, WSBK and WPIX, declined between the second accounting period of 1983 and the second accounting period of 1992, and the relative position of all superstations other than WTBS and WGN dropped from 22% to 16%. Program Suppliers Reply Findings of Fact and Conclusions of Law at 15–16. The record is further unclear as to whether the relative strengths of WTBS and WGN were due solely to sports programming carried on those signals, or to other factors. In sum, JSC's arguments concerning its 3.75% evidence depended upon the Panel's judgment in ascertaining their merit, and that judgement should not be disturbed.

2. The Canadian Claimants' 1991 and 1992 3.75% award. JSC claim that the Panel erred by awarding the Canadian Claimants an amount of the 3.75% Fund that exceeded the 3.75% royalties paid by cable operators during 1991–1992 for Canadian signals. JSC Petition to Modify at 18–19. JSC begin their argument by noting that in making its award of the Basic Fund to the Canadian Claimants, the Panel seemed to accept the fee generation analysis proposed by the Canadians. Report at 140–141. According to that analysis, carriage of Canadian stations in the United States accounted for 1.95% of the royalties in the Basic Fund, and is 56% attributable to Canadian programs, 29% to sports programs, and 15% to U.S. movies and series. Report at 141.

Since it appears that the Panel accepted the fee generation approach for the Basic Fund, JSC reason that the Panel should have followed the same approach in evaluating the 3.75% Fund. JSC Petition to Modify at 19. However, although carriage of Canadian signals accounted for 0.31% of the 3.75% Fund, the Panel awarded the Canadian Claimants 0.35% of the 3.75% Fund, an amount higher than its fee generation. *Id.* In addition to awarding the Canadian Claimants more than 100% of their fee generation, the Panel did not carry through its analysis of the Basic Fund (in which 29% of the fees generated by Canadian signals were attributable to sports programming) and gave JSC a zero award of Canadian signal generated 3.75% royalties. *Id.* at 20. JSC assert that such a zero award is contrary to CRT precedent and was arbitrary, and request the Librarian award them 30% of the Canadian Claimants' 3.75% royalties. *Id.*

In support of JSC's claim, the Program Suppliers assert that should the Librarian agree that JSC should get 30% of the Canadians' 3.75% Fund award, the Program Suppliers should get a minimum of 15%, as well. Program Suppliers Reply at 28, n.12.

In reply, the Canadian Claimants argue the following: (1) JSC did not make a 30% claim to the Canadian Claimants' allocation of the 3.75% Fund during the hearings or in the findings and are precluded from doing so now; (2) it is possible the Panel may have foregone a strict fee generation analysis when it came to the 3.75% Fund, and JSC may have received its share of the 3.75% Canadian allocation as part of the increase the Panel gave JSC generally for 3.75%, which is permissible if fee generation is not required; (3) but if fee generation is required, it should be required across the board, including PBS whose fee generation in the Basic Fund ranges from 2.1% to 2.5%, depending on assumptions, not the 5.75% the Panel awarded it. Canadian Claimants Reply at 6–8.

The Register inquired how the Panel calculated the Canadian Claimants award. She asked "if the Panel intended to make an allocation to the Canadian Claimants of the Basic Fund on the basis of fee generation, did it also intend to make an allocation to the Canadian Claimants of the 3.75% Fund on the basis of fee generation," and, if so, how did "the Panel account for the award to the Canadian Claimants being greater than their fee generation of 3.75% royalties." If the Panel did not intend to use a fee generation analysis, the Register inquired as to the basis used by the Panel. Certified questions 6–C, 6–D, and 6–E.

The Panel replied by stating in response to all three questions that the allocation of 3.75% royalties that it made to the Canadian Claimants "was an error." Response at 5. The Panel did not, however, make any attempt to substitute what it believed to be the correct percentage.

Canadian Claimants acknowledge that their 3.75% award exceeded the amount of fees that Canadian programming generated. Canadian Claimants Supplemental Petition at 5. They submit, however, that if a part of their 3.75% award must be shared with other parties based on the Panel's analysis for their basic award, then, to be consistent, their basic award must be increased to 1.1%. *Id.* at 6.

In reply, JSC argue that the Canadian 3.75% award was 113% of the fees generated by Canadian signals, and that they are only entitled to 51%, which is consistent with their Basic Fund award. JSC Supplemental Petition Reply at 8.

The Panel's response of "error" is troubling because it fails to shed any light on what the Panel's intended approach was to awarding the Canadian Claimants their share of 3.75% royalties. Was the Panel's error in awarding the Canadian Claimants more than 100% of their fee generation, or was the error in failing to allocate a share of the Canadian's 3.75% royalties to JSC and Program Suppliers, or both?

It appears that the Panel's error was not in the total amount of 3.75% royalties attributable to Canadian signals (0.35%), but rather in the allocation of those royalties among JSC, Program Suppliers and the Canadian Claimants. As the Canadian Claimants point out, the Panel did not follow a strict fee generation analysis for any of the claimants in determining Basic Fund awards, and actually awarded PBS an amount that was two and a half times the amount generated by PBS signals under a fee generation analysis. Canadian Claimants Reply at 8. The award of 0.35% to the Canadian Claimants for 3.75% royalties is not at great variance with the 0.31% the Canadians requested, and falls within the zone of reasonableness. *See, National Association of Broadcasters* v. *CRT*, 772 F.2d 922, 930 (D.C. Cir. 1985). The error committed by the Panel, therefore, rests in its failure to properly allocate the 0.35% of 3.75% royalties generated by Canadian signals among JSC, Program Suppliers and the Canadian Claimants.

In allocating the 0.35% share of 3.75% royalties among JSC, Program Suppliers and the Canadian Claimants, the Panel's approach used in making the Basic Fund award to the Canadians is adopted. The Panel found that 29% of the programming on Canadian signals was attributable to JSC, and 15% was attributable to Program Suppliers. Report at 140–141. The remainder

(56%) was attributable to Canadian Claimants. *Id.* at 141. There is no reason to expect that these percentages would be different for Canadian signals paid for at the 3.75% rate, and the parties did not present any evidence to indicate such. *See* Canadian Claimants Findings of Fact at 82–83, 96. Those percentage are therefore used to adjust the allocation of the 3.75% Funds for 1991 and 1992. The final allocation of those funds should be as follows:[9]

	3.75% royalties
Program Suppliers	56.0131375
JSC	31.2299325
NAB	7.1625000
PBS.	
Music Claimants	4.5000000
Devotional Claimants	0.9072500
Canadian Claimants	0.1871800

3. The Canadian Claimants' 1990 3.75% award. JSC note that on pages 142–143 of the Panel's Report, the Panel announced its decision to award the Canadian Claimants 0.35% of the 3.75% Fund, but is silent as to whether that applies to 1990–92, or just the years for which the Canadian Claimants had a controversy, 1991–92. JSC Petition to Modify at 21. JSC ask the Librarian to clarify that the Panel's intent was simply to make an award for those years that were in controversy. *Id.* JSC further ask the Librarian to reallocate the Canadian Claimants' share of the 3.75% Fund among the other claimants, in proportion to each claimant's share of the 3.75% Fund. *Id.* at 21–22. JSC's motion is supported by NAB which asks for an increase of 0.03% in its 3.75% Fund award. NAB Reply at 24.

In reply, the Canadian Claimants do not claim more than their settled amounts for 1990, but want a declaration that their settled amount for 1990 is assured in both the basic and the 3.75% Fund. Canadian Claimants Reply at 7, n.4.

The Canadian Claimants reached a settlement with all the other parties of their claim for 1990 in which they received 0.75% of the Basic Fund and 0.25% of the 3.75% Fund. The parties notified the Librarian of this settlement and it is assured, as a matter of law. Therefore, the Panel did not have the authority to alter the Canadian Claimants' share of the 1990 3.75% Fund. Moreover, the Panel does not assert such authority. Report at 142–143. Accordingly, the awards listed on page 142 and the allocation table on page 143 are read as making an award of 0.35% of the 3.75% Fund to the Canadian Claimants for 1991 and 1992 only.

However, having concluded that the Canadian Claimants' award in the 3.75% Fund for 1990 is, as a matter of law, 0.25%, the total allocation for the 1990 3.75% Fund is now 99.90% (excluding the Music Claimants settlement), and an adjustment must be made. JSC and NAB have asked that the adjustment be pro rata among the other claimants that have entitlement to the 3.75% Fund. This is the proper basis, and the reallocation should be made accordingly.

E. The NAB Award

1. Program miscategorization. NAB argues that the Panel acted arbitrarily in failing to correct the Nielsen study for miscategorized programs when it awarded NAB a percentage equal to its viewing share. NAB Petition to Modify at 2. NAB notes that the Panel concluded that "NAB's programming was previously undervalued" by the Copyright Royalty Tribunal in its 1989 cable distribution, and then stated that "NAB [programs] attracted and retained subscribers at a level equal to its viewing." Report, at 112–113. According to NAB, the Panel considered that a percentage equal to NAB's viewing was 7.5%, halfway between the range of 7% to 8% which the Panel found was NAB's Nielsen viewing for 1990–92. Because the Panel intended to award NAB its Nielsen viewing share, NAB contends that it should have corrected the study for miscategorized programs which properly belonged to NAB. *Id.*

NAB notes that when the Tribunal considered the relative weight to assign the Nielsen study, it first corrected the study for all perceived deficiencies and miscategorizations. *Id.* at 4. The Panel failed to do this, in NAB's view, and was wrong when it stated that it was "unpersuaded that the criticisms involving miscategorization and nonresponse rate have any real measurable effect on the validity of the results." Report at 42–43. NAB states it offered the measurable effect of the miscategorized NAB programs, and that the Panel was arbitrary in ignoring this effort. *Id.* at 5. Last, NAB argues that the Panel was particularly arbitrary in disregarding the miscategorized programs because, with one exception, NAB's evidence on their miscategorization was not challenged. *Id.*

The one program categorization that was challenged concerned "National Geographic Explorer." *Id.* at 7–10. Program Suppliers asserted that "National Geographic Explorer" was syndicated as "National Geographic On Assignment." *Id.* at 8. NAB asserts that "National Geographic on Assignment" is a re-packaged, but separate program from "National Geographic Explorer," and although "National Geographic On Assignment" is a Program Supplier syndicated series, "National Geographic Explorer" remains a station-produced program belonging in the NAB category. *Id.* at 9.

Program Suppliers disagree with NAB's conclusion that the Panel intended to award them their viewing share, and disagree with NAB's assertions regarding "National Geographic Explorer." First, Program Suppliers question NAB's assumption that the Panel gave NAB a one-to-one correlation between its Nielsen figures and its final award, noting that at an earlier section of the Report, the Panel referred to the Nielsen study "merely as a reference point and not as an absolute value." Program Suppliers Reply at 3. Further, Program Suppliers argue that NAB did not carry its burden to show the Panel how the miscategorizations affected the Nielsen numbers, because NAB did not give the Panel a final exhibit with all the numbers calculated; absent such a showing, the Panel could properly reject NAB's argument. *Id.* at 5–7. Second, Program Suppliers assert that "National Geographic Explorer" does belong to the Program Suppliers category under a Tribunal exception for a program produced by or for WTBS comprising predominantly of syndicated elements. In addition, Program Suppliers assert that there are two programs, "Night Tracks" and "Thirty Years of Andy: A Mayberry Reunion," that were improperly classified as station-produced programs belonging in the NAB category when they should have been classified as syndicated shows belong in the Program Suppliers category. When the effect of "National Geographic Explorer," "Night Tracks" and "Thirty Years of Andy: A Mayberry Reunion" are added together, Program Suppliers assert that the final effect is a wash for both parties. *Id.* at 5–9.

JSC agrees with Program Suppliers that the Nielsen study data were taken "with a grain of salt" and as a "reference point," rather than on a one-to-one basis. JSC Reply at 49–50. However, should the Librarian agree with NAB that the miscategorizations were material and deserving of an adjustment, the JSC argue that the adjustments should come entirely from the Program Suppliers category because they were originally classified as belonging to Program Suppliers and

[9] These figures represent the final overall award, which includes the Music Claimants settlement.

should not result in a lower JSC award. *Id.* at 50.

One of the Register's certified questions to the Panel asked whether the Panel intended "to give an award to NAB equal to its share of the Nielsen study," and, if not, to describe what other factors entered into the award. Certified questions 3–A, 3–B. In response, the Panel stated that the 7.5% award to NAB represented the fair market value of NAB's programming, and therefore was not intended as a measure of its Nielsen viewing. Response at 4.

NAB renews its request that it be awarded its Bortz survey share of 12.6%, but submits that the Panel's response confirms that it is entitled to no less than its corrected Nielsen viewing share of 9.3%. NAB Supplemental Petition at 3–4. Program Suppliers counter that NAB is not entitled to its Bortz survey results because its evidence did not corroborate those results. Program Suppliers Petition Reply at 10. Program Suppliers also argue that the Panel committed error by stating that it found NAB's programming to be "previously undervalued" with respect to the 1989 award, because the Panel cannot reevaluate prior decisions of the CRT. *Id.* at 11–12.

The Panel did not act arbitrarily in awarding NAB a 7.5% share. The Panel has clarified that it did not intend to award NAB its Nielsen viewing share, but was only using those numbers as a reference point for determining the award. The Panel's use of the so-called "uncorrected" Nielsen numbers is also not erroneous, even though those numbers were used as only a reference point. The Panel, in addressing the miscategorization issue, stated that "none of the witnesses were able to articulate what effect, if any, these alleged problems had on the survey results," and concluded that it was "unpersuaded that the criticisms involving miscategorization and nonresponse rate have any real measurable effect on the validity of the [Nielsen] results." Report at 42–43. NAB did not present any evidence to the Panel as to how the programs which it alleges are miscategorized would change its Nielsen numbers, and NAB's post-hoc rationalization in its Petition to Modify is not acceptable. *See, Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419 (1971).

2. Corroboration of the Bortz survey. NAB claims that the Panel arbitrarily rejected its evidence corroborating the Bortz survey. NAB claims that the Panel stated that it would not award NAB the results it received in the Bortz survey, because "NAB [did] little to corroborate Bortz." Report at 112. NAB argues that, on the contrary, it presented much evidence to corroborate its results in the Bortz survey. They include: (a) subscribers' letters and calls when distant signals are dropped; (b) analogous demand for the CNN cable channel; (c) actions taken by subscribers to avoid losing distant signal news programs; (d) independent research on "parasocial interaction," meaning strong personal attachment to news programs and personalities; (e) a 1991 study commissioned by WTBS finding that subscribers value station-produced newsbreaks and other informational programs; (f) a 1992 study by Beta Research Corporation finding that subscribers highly value cable networks featuring news and other information; (g) subscriber valuation surveys conducted for the 1983 distribution proceeding; (h) evidence of clustering of distant signal carriage in regions close to the market of the station being carried, where interest in news of the community is greatest; and (i) cable operator testimony, including operators testifying for other Phase I categories. NAB Petition to Modify, Attachment A at 64, 134, 152–163.

Program Suppliers counter that NAB did not corroborate NAB's results in the Bortz survey. Program Suppliers characterize NAB's analogy to CNN's license fees as creating an unfair comparison with compulsory license fees, and that the comparison was dismissed by the Panel as "overstated" and "of little value." Program Suppliers Reply at 9–10. Program Suppliers fault NAB for not presenting any data concerning the actual prices paid for station-produced programs in the syndication marketplace. *Id.* at 10. They also state that to show audience avidity is not enough; it must be greater avidity than shown for the other types of programs being compared in Phase I in order to get an increased award. *Id.* Lastly, Program Suppliers consider the Panel's conclusion that there were no changed circumstances as dispositive of NAB's claim for a higher award. *Id.* at 10–11.

JSC submit that if the Librarian believes NAB should get an award equal to its Bortz results, so should JSC. JSC Reply at 51. The Canadian Claimants state that if the Librarian believes NAB's award should be upwardly adjusted, that should not affect the Canadian Claimants' award because no NAB programming was shown on Canadian distant signals. Canadian Claimants Reply at 10–11.

The Panel did not act arbitrarily in rejecting NAB's evidence purporting to corroborate NAB's results in the Bortz survey. In the section entitled "Analysis of and Award to the NAB," the Panel stated that it could not accept NAB's proffered analogy to CNN for the reasons given by Program Suppliers, which was, that it was an unfair comparison between CNN's license fees and compulsory license fees which are limited by law. Report at 112. Further, the Panel stated that NAB's evidence from the Opinion Research study, about "parasocial interaction," and about regional clustering, was credible. But it nonetheless rejected these as justifying an increase for NAB, because it found them to be at the same level as prior to 1990–92—no changed circumstances. Report at 112. Although each and every one of NAB's proffered evidence could have been described by the Panel, the more important evidence was discussed sufficiently to support the Panel's determination.

F. The Devotional Claimants Award

The Devotional Claimants claim the Panel ignored record evidence and/or rejected certain arguments that were accepted for other claimants, that would have supported an increased award to the Devotional Claimants.

First, the Devotional Claimants assert that the Panel erred when it discounted the Bortz survey results for the Devotional Claimants because, "The Tribunal in 1989 found, as we do also, that the price of the programs is much less than what the cable operator is willing to spend." Report at 130. To have made this finding, the Devotional Claimants contend that the Panel would have had to ignore the unrebutted evidence of Dr. David Clark and Mr. Michael Nason who testified that devotional programmers would carefully negotiate to obtain a market price if a free market did exist in distant signal retransmissions. Devotional Claimants Petition to Modify at 7–8. The Devotional Claimants submit that PBS witness, Dr. David Scheffman, conceded there was no reason to discount the Devotional Claimants' award for any "supply-side" considerations. *Id.* at 8. The Devotional Claimants further contend that to discount their award for lack of pricing is another way of saying that their award should be discounted for lack of "harm." *Id.* But the Panel re-evaluated "harm" in this proceeding and found all claimants equally harmed. Therefore, the Devotional Claimants contend, the Panel acted illogically when it continued to discount their award for lack of pricing. *Id.*

Program Suppliers reply that there was countervailing record evidence to rebut the testimony of Clark, Nason and

Scheffman. Program Suppliers Reply at 33–34. JSC contend that while the Panel discounted the Bortz survey results for the Devotional Claimants by 2–3%, it discounted the Bortz survey results for the JSC by 7–10%, and both are equally illogical. However, in the JSC's view, the Panel acted within its discretion to weigh the evidence, and this weighing is not subject to review. JSC Reply at 47.

Second, the Devotional Claimants contend that their evidence corroborative of the Bortz survey was ignored by the Panel while similar evidence was credited to other parties. For example, the Devotional Claimants assert that: (1) while the Panel credited PBS for its increased share in the Nielsen study, the Panel did not credit the Devotional Claimants for its increased share in the Nielsen study; (2) while the Panel credited the JSC for the testimony of cable operators Myhren and Maglio on behalf of sports, the Panel did not credit the Devotional Claimants for the testimony of cable operators Engel and Searle on behalf of devotional programming; (3) while the Panel credited the JSC and NAB with their showings related to the intensity or avidity of viewership, the Panel did not credit the Devotional Claimants' evidence of avidity of viewership; (4) while the Panel credited the JSC and PBS with the marketplace value of analogous program channels, such as ESPN and Arts and Entertainment, the Panel did not credit the Devotional Claimants for the marketplace value of such analogous program channels as the Family Channel and the Faith and Values network; and (5) while the Panel gave increases to all other parties who relied on the Bortz survey—JSC, NAB, and PBS—it gave no increase to the Devotional Claimants, the only other party who relied on the Bortz survey. Devotional Claimants Petition to Modify at 10–14.

In reply, Program Suppliers note that the Nielsen figures for 1989 cannot be compared with 1990–92 because of the change from a diary-based study to a meter-based study. Therefore, instead of concluding that the Panel should have credited the Devotional Claimants with an increase in their Nielsen share, the Panel erred when it credited PBS with an increase in their Nielsen share. Program Suppliers Reply at 37. Further, Program Suppliers state that the Devotional Claimants mathematically exaggerated their increase in the Nielsen study. *Id.* In addition, Program Suppliers argue that the opinion testimony of the cable operators was not rejected, but was discounted for not being quantified by the Devotional Claimants. *Id.* at 38. As for the analogous cable channels, Program Suppliers assert that the Family Channel consists more of movies and television series than devotional programming. *Id.* at 39.

JSC also argue that the 1989 Nielsen study and the 1990–92 Nielsen studies are not comparable because they are based on different methodologies. JSC Reply at 48. NAB agrees with the Devotional Claimants that the Panel ignored their evidence corroborative of the Bortz survey, just as the Panel ignored, NAB asserts, NAB's corroborative evidence, and that both the Devotional Claimants and NAB deserve higher adjustments for their corroborative evidence. NAB Reply at 26.

Third, the Devotional Claimants contend that their fee generation analysis for religious specialty stations was ignored, and that there is no basis for the Panel to have given the Devotional Claimants a different award in the Basic Fund and the 3.75% Fund. Devotional Claimants Petition to Modify at 14.

Program Suppliers contend that the specialty station fee generation analysis was used by the Panel, but discounted. Further, the specialty station fee generation analysis shows the basis for why the Panel gave a different award to the Devotional Claimants in the Basic Fund and the 3.75% Fund, because specialty stations are never carried at the 3.75% rate. Program Suppliers reply at 39–40. JSC make the same point justifying the different awards to the Devotional Claimants in the Basic Fund and the 3.75% Fund. JSC Reply at 49.

The Panel did not act arbitrarily in its award to the Devotional Claimants. First, the Panel did not err in reaching its conclusion that the price of Devotional programs is less than what the cable operators state in the Bortz survey they are willing to spend. The Panel made findings based on record evidence in support of this conclusion when it recited the criticism offered by the Program Suppliers that "Devotionals pay stations for air time and argue this practice indicates a lower value for devotional programming compared with other programs." Report at 129.

Second, the Panel did not act arbitrarily in considering what appears to be similar evidence differently. When a decision-making body weighs evidence, it may often decide to accept one piece of evidence but reject another, even though they appear similar. *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985). For example, it is within the Panel's discretion to accept the testimony of one cable operator, but not another. It is also within the Panel's discretion to consider one cable channel analogous to one claimant, but find that another cable channel is not analogous to another claimant. Program Suppliers and JSC give creditable reasons why the Panel made its distinctions concerning the Devotional Claimants. While the Panel's explanation was less than compelling, in its section called "Analysis and Award to the Devotional [Claimants]," enough can be gleaned from it to support the conclusion that the Panel rationally weighed the differences in seemingly similar evidence.

Third, the Panel did not act arbitrarily in reaching its conclusion that the award in the Basic Fund to the Devotional Claimants should be 1.25% because it found in the findings of fact that "the specialty station royalties for the three years at issue represent less than 1% of the total royalty pool, and are thus consistent with Devotionals' low viewing shares." Report at 129. Further, the Panel incorporated by reference the Tribunal's reason for giving the Devotional Claimants disparate awards in the basic and the 3.75% Funds; that is, that religious specialty stations are not paid for at the 3.75% rate, and therefore, the Devotional Claimants 3.75% Fund award should be correspondingly reduced. Report at 142.

G. The Canadian Claimants Award

In her review of the Panel's Report, the Register discovered what appeared to be a discrepancy in the Basic Fund award to the Canadian Claimants. Specifically, the Report contained language indicating that the Panel would award the Canadian Claimants a 1.1% share of the Basic Fund, but then awarded the Canadian Claimants only a 1.0% share. The Report stated:

> More specifically, the Canadians claim that approximately 1.95% of all basic royalties is for the carriage of Canadian stations. Of that number, JSC should receive 29%, Program Suppliers should receive 15%, and the balance (56%) should be allocated to the Canadians. This 56% is equal to 1.1% of the basic royalties.
>
> The Panel believes that the analysis for this category should be the same as for the other categories. The Bortz survey shows cable system operators value Canadian programming at .3%. This number is totally unreliable as Mr. Bortz suggests that the small numbers are incapable of being accurately measured. The other quantitative evidence we have is the fees generated. While there is a great deal of criticism, particularly by PTV, concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians.
>
> We allocate 1% of the Basic Fund to the Canadians for the years 1991 and 1992.

Report at 140–141.

In light of this language, the Register certified questions to the Panel to determine its intent. The Register inquired as to whether the Panel intended "to make an award to the Canadian Claimants on the basis of fee generation," and, if so, how did the Panel "account for the discrepancy between 1.1% and 1.0%." Certified questions 5–A, 5–B. Finally, if the Panel did not intend to use fee generation, the Register inquired as to what other factors went into the fashioning of the award.

In response, the Panel stated that it "did not wish to use a fee generation method." Response at 5. Instead, the Panel noted that while the Canadian Claimants requested 1.1% of the Basic Fund, it was "[our] collective judgment that, based on past proceeding, an increase of one-third [from the 1989 percentage] was a sufficient increase, so [we] concluded that one percent was the appropriate marketplace value." *Id.* The Panel concluded by stating that "[w]hile we tried to distance ourselves from the fee generated [sic] method, by the first sentence in the second quoted paragraph, we certainly used that method in reaching our conclusion." *Id.*

The Canadian Claimants argue that it was error for the Panel not to use the fee generation approach and award the Canadian Claimants 1.1% of the Basic Fund because "the Panel's Report and Response indicate that they accepted our factual findings and conclusions. . . ." Canadian Claimants Supplemental Petition Reply at 3; Canadian Claimants Supplemental Petition at 2–3. Further, the Canadian Claimants argue that the Librarian is prohibited from reducing the Canadians award in any way "because no party sought its reduction." Canadian Claimants Supplemental Petition at 2.

In reply, Program Suppliers challenge the Canadian Claimants contention that their award cannot be reduced, noting that there is no statutory provision in the Copyright Act, unlike the Natural Gas Act and Federal Power Acts, which preclude the Librarian from considering an issue or award not raised by the parties. Program Suppliers Supplemental Petition Reply at 2–3. JSC submit that there is nothing in the Panel's report or responses to the certified question that indicate that the Panel accepted the Canadian Claimants' evidence in its entirety, and that to request the Librarian at this stage, and not in the initial petitions to modify, for an increase in award is untimely. JSC Supplemental Petition Reply at 7–8.

Having clarified that it was the Panel's intention to award the Canadian Claimants 1.0% of the Basic Fund, the award is reasonable. The Copyright Royalty Tribunal was accorded a substantially broad "zone of reasonableness" in making its determinations, *see National Association of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985), and the Canadian Claimants' award falls within this zone, since they received 0.75% in the 1989 distribution proceeding and were requesting 1.1% in this proceeding. Further, as JSC correctly point out, there is nothing in either the Panel's Report or Response to the certified questions that indicates that the Panel accepted the Canadians' case in its entirety and intended to award them their requested share of 1.1%.

H. The PBS Bortz Adjustment

PBS makes a technically complex argument alleging that the Panel acted arbitrarily in not adjusting its Bortz share in this proceeding. PBS submits that the Panel should have made an upward adjustment in its award to account for the fact that it does not receive any royalties in the 3.75% Fund. Although PBS made a similar adjustment argument to the Tribunal in the 1989 proceeding, which was expressly rejected by the Tribunal, PBS argues that it presented new evidence and argument for adjustment in this proceeding, thereby precluding the Panel from properly relying upon the Tribunal's rejection rationale.

The Panel's analysis of its award to PBS begins with an examination of the raw numbers from the Bortz survey for the PBS category: 2.7% of the royalty fund for 1990, 2.9% for 1991 and 3.0% for 1992. Report at 115–116. The Panel then notes the principal arguments made by PBS for adjusting these numbers upward. The first adjustment was something called the zero value methodology, which attempted to account for the cable operator respondents in the Bortz survey that did not actually import a distant PBS signal. The Panel accepted this adjustment, though somewhat reluctantly. Report at 123 ("The automatic-zero adjustment proposed by Dr. Fairley troubles the Panel."). The Panel then analyzed PBS's analogous marketplace adjustment argument, giving that credit as well. *Id.* Finally, and this is significant to PBS's claim of arbitrary action, is the Panel's handling of PBS's proposed adjustment to account for its zero award in the 3.75% Fund.

PBS's position is the following: The Bortz survey numbers, even after the zero value methodology and analogous marketplace adjustments, are not accurate. Unlike the other claimants, PBS does not receive an award from the 3.75% Fund because none of its stations are carried by cable operators at the 3.75% royalty rate. Thus, PBS only receives an award from the Basic Fund, which represents about 75% of the total royalty pool (the 3.75% Fund representing the other 25%). An award of 6% of the total royalty fund (which represents PBS's adjusted Bortz share) is only 6% of 75% of the total fund, since PBS receives no 3.75% award. Thus, an award of 6% actually works out to be less than 6% when the total fund is considered. PBS therefore submits its award must be raised to roughly 7% total, so that its award when the total royalty pool is considered amounts to 6%. PBS Petition to Modify at 6–8, 12.

In the 1989 proceeding, the Tribunal rejected this argument, noting that the Bortz survey did not require cable operators to allocate value to program categories based on their actual compulsory license copyright payments, but rather based on a hypothetical programming budget. 57 FR 15286, 15295 (April 27, 1993). The operators were therefore allocating PBS percentage of the programming budget on 100% of the royalty funds in this proceeding, not the 75% of the funds that PBS alleges.

PBS now submits that it has presented a reconstituted version of its adjustment argument in this proceeding, arguing that not only is it entitled to an adjustment of the Bortz results, but that all parties must be adjusted upward. PBS Petition to Modify at 10. The Panel rejected this argument "for the same reason given by the Tribunal in the 1989 proceeding." Report at 124. PBS asserts that the Panel acted arbitrarily in applying this reasoning because PBS submits that it has presented a new argument, with attending evidence showing how the other parties' shares of the Basic Fund must be adjusted upwards to reflect their true Bortz shares. *Id.* at 11.

NAB concurs with PBS's logic, and believes that they, too, are entitled to an upward adjustment. NAB Reply at 24. JSC states that if PBS's Bortz share goes up, its share must increase as well. JSC Reply at 51–52. Devotional Claimants do not address PBS's argument. The Canadian Claimants and Program Suppliers object to PBS's position, submitting that it is nothing more than a rehash of the argument made to the Tribunal in 1989. Canadian Claimants Reply at 13–14; Program Suppliers Reply at 11–12. Program Suppliers argue that PBS's asserted difference between adjusting only its share of the

Basic Fund in the 1989 proceeding, and adjusting all parties share in the current proceeding, is "a distinction without substance." Program Suppliers Reply at 15. They note that no matter the adjustment, the Panel did not accept PBS's Bortz share as determinative of its award, nor did it announce an intention to do so. Because it did not accept Bortz as determinative, PBS's post-Panel adjustment is not proper. *Id.*

The Panel did not act arbitrarily in rejecting PBS's Bortz adjustment for the same reasons articulated by the Tribunal in 1989. Whether an adjustment in the Basic Fund award is made for only one party (PBS), or all parties, the approach used in the Bortz survey itself remain unchanged. As in the 1989 proceeding, Bortz did not ask cable operators to base their program share allocation according to the royalties they actually paid. Thus, in awarding PBS programming a specific share, a cable operator did not take into account that its stated share only applied to the Basic Fund and not the 3.75% Fund, since PBS does not receive a 3.75% share. The Bortz survey numbers therefore do not necessarily require the adjustment demanded by PBS. Thus, the Panel was reasonable in adopting the Tribunal's 1989 rationale because PBS's argument, and the design parameters of the Bortz survey, were fundamentally the same.

Furthermore, as Program Suppliers correctly note, the Panel did not state that it was using PBS's Bortz numbers as the sole means of determining its award. In fact, the Panel awarded PBS a share that is less than the unadjusted Bortz survey numbers. Had the Panel stated that it was attempting to award PBS its Bortz share, then PBS's argument might have some validity. However, since the Panel did not, it did not act arbitrarily in denying PBS's requested adjustment.

I. The Unified Award

One issue that troubled the Register in her review of the Panel's Report was its decision to make the same award to each party for all three years, Report at 26, even though some of the parties had requested different awards for different years and had presented different evidence for each year to support those requests. *See, e.g.,* Direct Case of JSC (requesting Basic Fund awards of 31% for 1990, 33% for 1991 and 35% for 1992).

The Register certified a question to the Panel regarding its decision to make a unified award. The Register asked whether the parties had stipulated that they wanted a unified award for the period, and if so, where was that in the record. The Register then asked if the parties did not so stipulate, what were the reasons supporting the Panel's decision. Certified questions 2–A, 2–B, and 2–C.

In response, the Panel stated:

> The parties advised the Panel during the course of the proceedings that the Panel could either make three separate awards or one combined award. The Panel chose the latter. The Panel cannot point specifically to a page in the record that says that. It is not certain that when that statement was made the court reporter recorded that statement. However, the Panel's understanding is supported by the fact that none of the claimants objected to the single award.
>
> Response at 4.

Surprisingly, none of the parties commented upon the Panel's answer in either their supplemental petitions or replies.

Section 111 of the Copyright Act establishes that the Copyright Office shall collect cable compulsory license fees semiannually, but that the distribution of those fees shall be annual. Each July, claimants file their claims to the previous year's royalties. Distributions then occur annually. Where there are no controversies, the entire year's fund is distributed. Where there are controversies, the Librarian of Congress convenes a CARP to resolve those disputes.

The statute describes the distribution of royalties in terms of an annual process. The statute is silent as to whether more than one year's fund may be combined into a single distribution process. Both the Library and all of the parties in this proceeding believe that a consolidation of proceedings is permissible and proper, and that was done in this proceeding by consolidating the 1990, 1991 and 1992 cable royalty funds into a single proceeding. 60 FR 14971 (March 21, 1995). The statute is also silent as to whether, in a consolidated proceeding, a unified award may be made. At the beginning of this proceeding, it is apparent that the parties assumed that the Panel would be making separate awards to each of the claimants for each of the three years, since they presented separate evidence for each year and requested different percentages of royalties for each year. However, that assumption apparently changed somewhat during the course of the proceedings, and only some of the parties continued to present evidence for separate awards in their proposed findings. *See* Proposed Findings of JSC. Further, in its response to the certified questions, the Panel stated that a representation was made during the course of the proceedings that a unified award could be made. None of the parties have challenged the accuracy of the Panel's statement in their supplemental petitions.

It is telling that none of the parties have challenged the Panel's unified award, even when expressly presented the opportunity to do so on two occasions through the original and supplemental petitions to modify. The cable royalties involved in this proceeding are, of course, their money, and apparently none of them have a problem with the unified award. Because the statute is silent, it cannot be said that the Panel acted contrary to the provisions of the Copyright Act. Likewise, it cannot be said that the Panel acted arbitrarily when all of the parties in this proceeding have supported, if not in fact requested, the making of a unified award.

Conclusion

For the above stated reasons, the Register recommends that the following should be the percentages for distribution of the 1990–1992 cable compulsory license royalties:

	Basic	3.75%	Syndex
1990:			
Program Suppliers	52.6336250	56.0125439	95.5000000
JSC	28.2355000	31.1605620	
NAB	7.1820500	7.1688409	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.5049750		
Devotional Claimants	1.1938500	0.9080532	
Canadian Claimants	0.7500000	0.2500000	
1991–1992:			
Program Suppliers	52.5250000	56.0131375	95.5000000
JSC	28.1725000	31.2299325	

	Basic	3.75%	Syndex
NAB	7.1625000	7.1625000	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.4912500		
Devotional Claimants	1.1937500	0.9072500	
Canadian Claimants	0.9550000	0.1871800	

II. Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1990–1992 cable royalty funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order setting the distribution of cable royalty fees. After deducting National Public Radio's 0.18% share per its agreement with the other parties to this proceeding, IT IS ORDERED that the 1990–1992 cable compulsory license royalties shall be distributed according to the following percentages:

	Basic	3.75%	Syndex
1990:			
Program Suppliers	52.6336250	56.0125439	95.5000000
JSC	28.2355000	31.1605620	
NAB	7.1820500	7.1688409	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.5049750		
Devotional Claimants	1.1938500	0.9080532	
Canadian Claimants	0.7500000	0.2500000	
1991–1992:			
Program Suppliers	52.5250000	56.0131375	95.5000000
JSC	28.1725000	31.2299325	
NAB	7.1625000	7.1625000	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.4912500		
Devotional Claimants	1.1937500	0.9072500	
Canadian Claimants	0.9550000	0.1871800	

As provided in 17 U.S.C. 802(g), the period for appealing this Order to the United States Court of Appeals for the District of Columbia Circuit is 30 days from the effective date of this Order.

Dated: October 22, 1996.

So Recommended.

Marybeth Peters,

Register of Copyrights.

So Accepted and Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 96–27573 Filed 10–25–96; 8:45 am]

BILLING CODE 1410–33–P

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of Members of Senior Executive Service Performance Review Board.

SUMMARY: Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB) to review, evaluate and make a final recommendation on performance appraisals assigned to individual members of the agency's Senior Executive Service. The PRB established for the National Capital Planning Commission also makes recommendations to the agency head regarding SES Performance awards, ranks and bonuses and recertification. Section 4314(c)(4) requires that notice of appointment of Performance Review Board members be published in the Federal Register.

The following persons have been appointed to serve as members/alternates of the Performance Review Board for the National Capital Planning Commission: Reginald W. Griffith, Eugene Kinlow, Gary F. Davis, Patricia G. Norry, Patricia Cornwell-Johnson, and Hilda Rodriguez, from October 28, 1996 to October 28, 1998.

DATE: October 28, 1996.

FOR FURTHER INFORMATION CONTACT: Connie M. Harshaw, Executive Officer, National Capital Planning Commission, 801 Pennsylvania Ave, N.W., Suite 301, Washington, D.C. 20576, (202) 482–7213.

Sandra H. Shapiro,

General Counsel.

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BILLING CODE 7502–02–M

NATIONAL SCIENCE FOUNDATION

Advisory Panel for Cell Biology; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Advisory Panel for Cell Biology (1136)—(Panel B).

Date and Time: November 13–15, 1996, 8:30 a.m. to 6:00 p.m.

Place: Room 340, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Eve Barak or Dr. Eliot Herman, Program Directors for the Cell Biology Program, National Science Foundation, Room 655 South, Arlington, VA 22230. Telephone: 703/306–1442.