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COPYRIGHT ARBITRATION ROYALTY PANEL

In the Matter of:	)	
	)	
Distribution of DART Royalty Funds	)	**Docket No. 99-3 CARP DD 95-98**
	)	
For 1995, 1996, 1997 and 1998	)	
	)	

THE CLAIMANTS

The American Society of Composers, Authors and Publishers ("ASCAP), Broadcast Music, Inc. ("BMI"), SESAC, Inc. ("SESAC"), The Harry Fox Agency, Inc. ("HFA"), The Songwriters Guild of America ("SGA"), and Copyright Management, Inc. ("CMI") (collectively, the "Settling Parties").

Eugene "Lambchops" Curry/Tajai Music Inc. ("Mr. Curry")

Alicia Carolyn Evelyn

REPORT OF THE ARBITRATION PANEL

For the reasons set forth below, we find that the Musical Works Funds, Writers and Publishers Subfunds for 1995, 1996, 1997, and 1998, should be allocated as follows:

To Mr. Curry: 0.001966% of both the Writers and Publishers Subfunds in 1995; and 0.001027% of both the Writers and Publishers Subfunds in 1997.

To Ms. Evelyn: 0.000614% of the Writers Subfund in 1995; 0.000130% of the Writers Subfund in 1997 and 0.000144% of the Writers Subfund in 1998.

To the Settling Parties: 99.997420% of the Writers Subfund and 99.998034% of the Publishers Subfund in 1995; 99.998843% of the Writers Subfund and 99.998973% of the Publishers Subfund in 1997; and 99.999856% of the Writers Subfund in 1998.

BACKGROUND

A. The Audio Home Recording Act of 1992.

1. On October 28, 1992, Congress enacted the Audio Home Recording Act of 1992, Pub. L. No. 102-563(1992) (the "Act"), 17 U.S.C. §1001 *et seq*. to respond to advances in digital audio recording technology. This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) distributed in the United States.

2. The Act contains a royalty payment system that provides "modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music." S. REP. No 294, 102d Cong., 2d Sess. 31 (1992). Manufacturers and distributors of digital audio recording devices and media bear the cost of copyright license fees that are collected by the Copyright Office ("Office") and deposited in the Treasury of the United States. 17 U.S.C. §1005.

3. By statute, the royalty fees paid are divided into two funds from which allocations are to be made: the Sound Recordings Fund, to which two-thirds are apportioned; and the Musical Works Fund, to which one-third is apportioned. 17 U.S.C. §1006(b). The Musical Works Fund is further divided evenly into the Writers Subfund and the Publishers Subfund. 17 U.S.C. 1006(b)(2)(b). This proceeding addresses only the distribution of Musical Works Fund royalties for the years 1995, 1996, 1997 and 1998.

4. The Act, as originally enacted, authorized the Copyright Royalty Tribunal ("CRT") to distribute the royalties. On December 17, 1993, Congress abolished the CRT and replaced it with copyright arbitration panels ("CARPs") administered by the Office. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 (1993), 107 Stat. 2304 (1993).

5. This Panel has been appointed to determine the distribution of royalties for both subfunds of the Musical Works Funds for the years 1995 and 1997 and the Musical Works Fund, Writers Subfund for 1998. *See* 17 U.S.C. §§801(b)(3), 802.

6. The Act sets forth the statutory criteria to be considered in a Musical Works Fund royalty distribution determination. 17 U.S.C. §1006 (c)(2). The only relevant criteria under the statute are "the extent to which, during the relevant period . . . musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." *Id.*

7. The Act further provides that during the first two months of each calendar year, every interested copyright party seeking to receive royalties to which such a party is entitled shall file a claim for payment with the Librarian of Congress. 17 U.S.C. §1007(a)(1). According to the Act, interested copyright parties within each fund may agree among themselves, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf. 17 U.S.C. §1007 (a)(2). An "interested copyright party" is defined broadly by the Act to include individuals, copyright owners, and associations or other organizations representing individuals or engaged in licensing rights in musical works to music users on behalf of writers or publishers. 17 U.S.C. §1001 (7).

8. Initially, the CRT established rules and regulations governing DART distribution proceedings. 57 Fed. Reg. 54542 (1992). Thereafter, the Office established rules governing both DART distribution proceedings and administration of the arbitration panels. *See* 59 Fed. Reg. 63025 (1994); *see generally* 37 C.F.R. § 251.1 *et seq*.

B. Relevant Aspects of the 1992, 1993 and 1994 Musical Works Fund Royalty Distribution Proceeding.

9. In the first distribution proceeding under the Act, "92-94 Proceeding," thirty individual and joint claimants, including each of the Settling Parties, filed claims to either or both Subfunds of the Musical Works Funds for 1992, 1993, and/or 1994. *See generally* claims filed in DART Musical Works Funds for 1992, 1993 and 1994. Among them were Mr. Curry, who filed claims for both the Writers and Publishers Subfunds for each of the three years, and Ms. Evelyn, who filed claims only for the Writers Subfund for the years 1993 and 1994. *Id*.

10. In the '92-94 Proceeding, ultimately involving only members of the Settling Parties, Mr. Curry and Ms. Evelyn,[1] CARP determined,[2] and the Librarian of Congress (the "Librarian") concurred, that the methodology for determining distribution of the Musical Works Funds as presented by the Settling Parties in their direct case was "logical and consistent" and, accordingly, acceptable for establishing the value of individual claims.[3] *See* Librarian's Decision in the '92-94 Proceeding, Docket No. 95-1

[1] In the '92-94 Proceeding, the Gospel Music Coalition ("GMC") was a member of the Settling Parties. In the current proceeding, GMC has settled with BMI, ASCAP, SESAC and HFA and its claims are subsumed in those of these four claimants. *See* Comments on the Existence of Controversy and Notice of Intent to Participate of the Settling Parties in the '92-94 Proceeding, Docket No. 99-3 CARP DD 95-98 (July 2, 1999).

[2] The CARP Report in the '92-94 Proceeding adopted in large part the Findings of Fact and Conclusions of Law submitted by the then settling parties.

[3] In the '92-94 Proceeding, Ms. Evelyn was found entitled to less than 0.0001% of the total fund (amounting to $0.13) and Mr.Curry was found entitled to less than 0.01% (amounting to $10.90). *Id* at 6562.

CARP DD '92-94, 62 Fed. Reg. 6558, 6561 (1997); *see also* Panel Decision, in the '92-94 Proceeding, Docket No. 95-1 CARP DD '92-94 (December 16, 1996).

11. That methodology was based on the direct case of the Settling Parties, which relied exclusively on distributions, as evidenced by SoundScan record sales data, to determine the percentage shares of the two individual claimants and of the Settling Parties.

12. In an extended appeals process, the Librarian's decision was upheld. *See* Curry v. Librarian of Congress, 1998 U.S. App. LEXIS 28476 (D.C. Cir. Nov. 4, 1998) (finding nothing in petitioner's claims warranting modification or remand of the Librarian's orders on review).[4] *See also* Cannings v. Librarian of Congress, et al., 1999 U.S. App. LEXIS 3976 (D.C. Cir. March 2, 1999). This appeals process included both of the individuals who are parties to the current proceeding, namely Ms. Evelyn and Mr. Curry, and Mr. James Cannings ("Mr. Cannings"), who had previously been dismissed from that proceeding for failure to state a claim. Petitions for *en banc* review of the D.C. Circuit Court's decisions, filed by Ms. Evelyn, Mr. Curry and Mr. Cannings, and for a writ of certiorari before the U.S. Supreme Court and for reconsideration of denial of the writ of certiorari, filed by Mr. Cannings and Ms. Evelyn, were all denied. *See* Curry v. Librarian of Congress, 1998 U.S. App. LEXIS 28476 (D.C. Cir. Nov. 4, 1998), *cert denied sub nom* Cannings v. Librarian of Congress, Evelyn v. Librarian of Congress, 527 U.S. 1038 (1999), *petition for reh'g of denial of cert. denied*, 527 U.S. 1058 (1999).

[4] The U.S. Department of Justice, which represented the Librarian, filed for administrative costs against all three of these individual claimants, and was awarded such costs against Ms. Evelyn and Mr. Cannings. Mr. Curry was granted *in forma pauperis* status. *Id.*

C. The History of the 1995, 1996, 1997 and 1998 Proceeding.

13. On May 4, 1999, the Copyright Office published a notice in the Federal Register requesting comment as to the existence of a controversy concerning the distribution of the 1995, 1996, 1997, and 1998 DART royalty fees in the Musical Works Funds and consolidating the consideration of the distribution of the 1995-98 Musical Works Funds into a single proceeding. 64 FR 23875 (May 4, 1999).

14. The following parties filed comments and Notices of Intent to Participate: Carl DeMonbrun/Polyphonic Music, Inc. ("DeMonbrun"); Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc ("SESAC"), the Harry Fox Agency ("HFA"), the Songwriters Guild of America ("SGA"), and Copyright Management, Inc ("CMI") (collectively the "Settling Parties"); James Cannings/Can Can Music ("Cannings"); Alicia Carolyn Evelyn ("Ms. Evelyn"); and Eugene "Lambchops" Curry/Tajai Music, Inc. ("Mr.Curry").

Curry"). Mr. Curry filed claims for both the Writers and Publishers Subfunds for the years 1995 and 1997, and Ms. Evelyn filed claims only for the Writers Subfunds for the years 1995, 1997 and 1998. *Id.*

15. The May 4, 1999 notice also addressed consolidating consideration of the distribution of 1995, 1996, 1997 and 1998 royalties collected pursuant to the Act and requesting comments on the existence of controversies in the consolidated proceeding and notices of intent to participate. 64 Fed. Reg. 23875. Comments on controversies were due to be filed with the Office by July 6, 1999.

16. The Settling Parties, Ms. Evelyn and Mr. Curry filed Notices of Intent to Participate and Comments on Controversies on July 2, 1999, July 14, 1999 and August

23, 1999, respectively. On September 21, 1999, the Office issued an Order announcing the precontroversy schedule for the proceeding, beginning on November 15, 1999. *See* Order in Docket No. 99-3 CARP DD 95-98 (September 21, 1999).

17. Prior to commencement of the 45-day precontroversy discovery period, the Office was notified that Mr. Cannings and Mr. DeMonbrun had settled their respective controversies with the Settling Parties. Thus, the parties who appear before this CARP in the current proceeding are the Settling Parties, Ms. Evelyn and Mr. Curry. *See*, Notices of Settlement and Withdrawals of Claims in Docket No. 99-3 DD 95-98 (November 10, 1999).

18. The September 21, 1999 Order also set the initiation of the arbitration for February 28, 2000. However, the Office's duty to publish every two years a new list of arbitrators eligible to serve on a CARP rendered the February 28 initiation date unworkable. *See* 37 CFR 251.3

19. On November 15, 1999, pursuant to the Office's scheduling Order dated September 21, 1999, the Settling Parties, Mr. Curry and Ms. Evelyn timely filed written direct cases.[5] As part of their direct case, the Settling Parties incorporated by reference their direct case from the '92-94 Proceeding, including exhibits and testimony presented therein, as permitted by Section 251.43 of Office regulations. *See* 37 C.F.R. § 251.43. Also on November 15, 1999, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of written pleadings alone. On December 23, 1999, the Office certified the issue for decision by this Panel. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 23, 1999). In addition, on November 15,

1999, the Settling Parties filed a motion for full distribution of royalties for years and funds in which no controversy existed and for partial distribution of all remaining DART royalties for the years at issue in this proceeding. The Office granted the motion for full distribution with respect to years and funds not in controversy (namely, the entire 1996 Musical Works Fund and the 1998 Publishers Subfund of the Musical Works Fund) and granted in part the motion for partial distribution for the remaining funds and years. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 23, 1999.)

20. On December 16, 1999, the Settling Parties filed a motion to compel production of documents from Mr. Curry regarding the assertion in his direct case that he had sales amounting to at least 300,000 units. In an Order dated January 7, 2000, the Office granted this motion to compel. *See* Order in Docket No. 99-3 CARP DD 95-98 (January 7, 2000). No response to the Office's Order was received from Mr. Curry.

21. On January 14, 2000, in accordance with Sec. 251.3(b), the Office published the list of arbitrators eligible to serve on a CARP initiated during 2000 and 2001. 65 FR 2439 (January 14, 2000). Because the time period between the publication of the Arbitrator list and the February 28 initiation date was not sufficient to complete the selection of arbitrators for this proceeding, the Office reset the initiation of the arbitration to April 10, 2000. *See* Order in Docket No. 99-3 CARP DD 95-98 (March 14, 2000).

22. On April 10, 2000, the Office published a notice initiating the 180-day arbitration period for this proceeding. 65 FR 19025 (April 10, 2000). Once the arbitrators for this proceeding were selected, the Office scheduled the initial meeting between the arbitrators and the parties for May 16, 2000. However, the chairperson of

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[5] Ms Evelyn asserts that she was not served with her copy until November 17, 1999. However, the CARP rules do not require that each party receive pleadings simultaneously with the CARP. 37 C.F.R.

the panel resigned out of concern that potential conflicts of interest, which were not known to the arbitrator at the time of selection, may exist under Sec. 251.32. Because of these concerns, the Copyright Office canceled the May 16, 2000 meeting between the parties and the original panel of arbitrators.

23. Pursuant to Sec. 251.6(f), the remaining two arbitrators selected a new chairperson. On June 14, 2000, in accordance with Sec. 251.6(f), the Office announced the suspension of the 180-day arbitration period from May 16, 2000 to June 16, 2000, the resumption of the 180-day period on June 16, 2000, the new chairperson of the panel, and the time and place of the rescheduled initial meeting, which took place on June 19, 2000. *See* 65 FR 37412 (June 14, 2000).

24. On June 19, 2000 the parties to this proceeding met with the arbitrators for the purpose of setting a schedule and discussing the procedural aspects of this proceeding. A key procedural issue before the panel at the outset of the proceeding was the consideration of the issue designated to this CARP of whether to suspend formal hearings and make the determination as to the distribution of the 1995-98 DART royalties in the Musical Works Funds on the written pleadings. *See* Order in Docket No. 99-3 CARP DD 95-98 (December 22, 1999). The CARP heard argument from all parties. The CARP announced its decision to waive the requirement of oral evidentiary hearings, to proceed upon the written record alone, and to permit the filing of written rebuttal cases. The panel issued an Order that set forth the schedule that would govern the remainder of the proceeding. *See* Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000), 65 Fed. Reg. 41737 (June 30, 2000).

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§251.44(f). In any event, Ms. Evelyn suffered no prejudice by the two-day delay.

25. In its order, the Panel offered the parties the opportunity to revise their claims (on or before July 7, 2000) and to submit a rebuttal case (on or before July 28, 2000), and set deadlines for the submission of proposed findings of fact and conclusions of law (on or before August 18, 2000) and reply findings (on or before August 28, 2000). The Panel requested that the proposed findings of fact include specific calculations of royalty entitlements. Preconference Hearing Before the Panel In the Matter of Distribution of 1995, 1996, 1997 and 1998 Digital Audio Recording Funds, June 19, 2000, Tr. at 93. *See also* Schedule, 65 Fed. Reg. at 41738.

26. On July 3, 2000, Mr. Curry revised the claim in his direct case to be 1% of the Writers Subfund and 1% of the Publishers Subfund of the Musical Works Fund. Mr. Curry stated: "I am claiming this percent because I am one person and believe the lowest dominator in my case is 1 (one)" *See* Revision of Claim in Direct Case of Eugene Curry in Docket No. 99-3 CARP DD 95-98 (July 3, 2000) ("Revision of Claim of E. Curry").

On July 27, 2000, Ms. Evelyn filed a rebuttal case, which consisted in large part of a document dated November 21, 1999, previously submitted to and rejected by the Office as inappropriate under Office rules. *See* Order in Docket No. 99-3 DART DD 95-98 (November 24, 1999); *see also* Rebuttal Case of Alicia Carolyn Evelyn in Docket No. 99-3 CARP DD 95-98 (July 27, 2000) ("Rebuttal Case of A. Evelyn"). In her rebuttal case, Ms. Evelyn revised the claim in her direct case to 1% of the Writers Subfund of the Musical Works Fund for the years 1995, 1996, and 1998. *See* Addendum to Rebuttal Case of A. Evelyn.

FINDINGS OF FACT

27. The Settling Parties proposed that the Musical Works Fund royalties at issue be distributed among themselves, Mr. Curry and Ms. Evelyn proportionately according to the extent the evidence establishes that musical works claimed by each party were distributed in the form of recordings in the United States during the relevant time period. *See* Written Direct Case of Settling Parties ("direct case") in Docket No. 99-3 CARP DD 95-98, at 7-8. A Musical Works Fund distribution determination can be based on either performance data, sales data, or both. *See* 17 U.S.C. §§ 1006 (c)(2), 1001 (6). In the interest of minimizing costs, and given the small amount in controversy, the Settling Parties presented a direct case based on sales data alone. *See* Testimony of Alison Smith ("Smith test"), Tab A of Direct Case of the Settling Parties at ¶ 9.

28. The Settling Parties' analysis was in three parts. First, as representatives of virtually every songwriter and music publisher with claims to Musical Works Fund royalties other than Mr. Curry and Ms. Evelyn, the Settling Parties claimed, on behalf of those songwriters and music publishers, credit for all record sales in the United States during 1995, 1996, 1997 and 1998, other than those sales attributable Mr. Curry and Ms. Evelyn. Second, the Settling Parties established the universe of record sales for 1995, 1996, 1997 and 1998, the years still in controversy in the current proceeding. And finally, they determined what portion of that total universe of record sales are attributable to song titles authored and/or published by Mr. Curry and Ms. Evelyn in the years for

which these two individuals filed claims in this proceeding.[6] *See generally* Direct Case of the Settling Parties.

A. The Settling Parties Represent All Claims Except Those of Mr. Curry and Ms. Evelyn.

29. The Settling Parties consist of BMI, ASCAP, SESAC, HFA, SGA and CMI. In the aggregate, the Settling Parties represent hundreds of thousands of domestic songwriters and music publishers, as well as the songwriters and music publishers of foreign performing rights and mechanical rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding. *See* claims of each of the Settling Parties and accompanying lists of the individual songwriter and music publisher claimants represented in this proceeding by each of the Settling Parties.

30. The Settling Parties introduced testimony from Alison Smith, Vice President, Performing rights, of BMI. Ms. Smith has been an employee of BMI since 1985 and, for the past eleven years, her concentration within BMI has been in the area of royalty distributions for radio and television performances. As Vice President of Performing Rights, she is familiar with those aspects of BMI's operations designed to monitor performances of music on radio and television stations, as well as broadcast and cable television networks. Ms. Smith is generally familiar with the music industry. Smith Test. at ¶¶ 2-3.

31. Based on her long experience in the music performing rights field and extensive knowledge of the music catalogs represented by the Settling Parties, Ms. Smith

[6] Prior to filing their Direct Case, the Settling Parties requested record identification and sales information from Ms. Evelyn and Mr. Curry but did not receive any such data. The Settling Parties used other available information, including information concerning the catalogues of Mr. Curry and Ms. Evelyn maintained by BMI and ASCAP, respectively, as part of Mr. Curry's affiliation with BMI and Ms. Evelyn's membership with ASCAP, to identify records and to calculate record sales attributable to Ms. Evelyn and Mr. Curry. *See* Smith testimony at 10-12.

stated that the Settling Parties represent the writers and publishers of virtually all song titles contained on records sold during the time period relevant to this proceeding other than sales of titles that may be attributable to Mr. Curry or Ms. Evelyn. Smith Test. at ¶ 15.

32. An essential aspect of making a distribution to claimants in any given distribution proceeding under the AHRA is determining the universe of sales or other form of distribution. Once established, this universe provides a systematic basis for then determining individual shares. The Settling Parties have incorporated by reference the prior testimony of Michael Fine, co-founder and Chief Executive Officer of SoundScan, which established the basis for determining total record sales and record sales for the two individual claimants in the '92-94 Proceeding. *See* Tab B of the Settling Parties' Direct Case in the '92-94 Case, incorporated by reference in this proceeding.[7]

33. SoundScan, which first became available in early 1991, is the premier independent online information system that tracks music sales throughout the United States. Fine Test. at ¶¶ 1 & 3. SoundScan gathers point-of-sale data from over 14,000 reporting entities, including retail and mass merchandisers. *Id. at ¶4.* Each week, these reporting entities from point-of-sale cash registers send the data by modem to SoundScan. *Id.* Data files consist of store ID number, piece counts and the Universal Product Codes. *Id.* Currently, all major record labels and most independent labels subscribe to SoundScan, and *Billboard Magazine* music charts are constructed directly from SoundScan data. *Id.*

[7] 37 C.F.R. § 251.43 provides that "each party may designate a portion of the past records . . . that it wants included in its direct case."

34. Based on his analysis of SoundScan data, Mr. Fine concluded that apart from "a relatively small number of sales" attributable to Mr. Curry and "minimal sales" attributable to Ms. Evelyn, "100% of the remaining record sales should be attributable to the hundreds of thousands of songwriters and music publishers represented by the Settling Parties." Fine Test. at ¶8.[8]

35. This conclusion was adopted by the Librarian in his Distribution Order for the previous distribution under the AHRA. *See* Librarian's Decision in the '92-94 Proceeding, Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (1997) (adopting the Panel's approach of first finding that "the Settling Parties represented all claims except for those of Mr. Curry and Ms. Evelyn" and then accepting the presentation of evidence for the two individual claimants' share of the royalties and deducting this sum from 100% to determine the Settling Parties' share of the royalties).

B. The Settling Parties Introduced Sales Data For the Universe Of All Works Distributed During The Relevant Time Period.

36. For this proceeding, the Settling Parties introduced testimony of Milt Laughlin, the Assistant Vice President of Application Systems at BMI, to establish the universe of SoundScan record sales data for 1995, 1996, 1997 and 1998. When he joined BMI in 1995, Mr. Laughlin had almost 30 years experience in the music industry and had held management positions with various music entertainment companies. *See* Testimony of Milt Laughlin ("Laughlin Test."), Tab B of Direct Case of the Settling Parties at ¶1.

37. Relying upon SoundScan for the periods at issue in the current proceeding, Mr. Laughlin introduced SoundScan data establishing the universe of total sales for the

[8] SoundScan data tracks record sales, which include both "albums" and "singles." The term "album is used to refer to all long-playing music formats including compact discs (CDs), cassette albums, as well as

years in question. Mr. Laughlin then provided testimony to establish, based on the reasonable assumption that, on average, there are 10 song titles on each album,[9] the total sales of song titles in the United States during the three years at issue in the current proceeding. *Id. at ¶7.* The details of Mr. Laughlin's analysis are set forth below:

CHART A

Item	1995	1997	1998
1) Total Album Sales	615,844,812	651,672,412	727,951,653
2) Total Titles on Albums Sold	6,158,448,120	6,516,724,120	7,279,516,530
3) Total Single Sales	98,844,778	134,585,737	111,888,334
4) Total Sales of Titles on Albums and Singles (2 + 3)	6,257,292,898	6,651,309,857	7,391,404,864

Id. at ¶8.

C. The Settling Parties' Data on Sales Information for Mr. Curry and Ms. Evelyn Demonstrate Only A Few Sales for Each During the Relevant Period.

38. During negotiations held prior to the commencement of this proceeding, Mr. Curry and Ms. Evelyn failed to adequately identify the titles of songs that they claim would provide a means to calculate their shares, and did not offer credible alternative method to calculate shares. Nonetheless, the Settling Parties used the list of titles from the '92-94 Proceeding, the songs listed on the Settling Parties' claims for DART royalties, as well as globally searching on "www.allmusic.com"[10] to identify the works of Ms. Evelyn and Mr. Curry that have been released on records to calculate record sales attributable to Ms. Evelyn and Mr. Curry. Smith Test. at ¶10. The Settling Parties then used Phonolog, the industry standard directory of all records, CDs, cassettes, albums and

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the traditional 33 r.p.m. vinyl records. The term "singles" refers to shorter format CDs, cassettes and 45 r.p.m. records.

[9] There is no credible evidence in the record of any other estimate of song titles per album.

[10] This web site provides public access to a comprehensive database of information regarding recording artists, albums and songs.

singles that have been issued in the United States to determine all albums and singles on which these musical works have appeared. Smith Test. at ¶¶12, 13.

39. Phonolog data showed that the following six titles claimed by Mr. Curry appear on five albums and on single sold during 1995 and/or 1997, the only two years of the four implicated in this proceeding in which Mr. Curry filed claims:

CHART B

Album Title (s) = Single	Artist	Song Title
Burnin:	P. Labelle	Somebody Loves You Baby
Burnin:	P. Labelle	Burnin:
This Christmas	P. Labelle	Born In A Manger
This Christmas	P. Labelle	O Holy Night
Patti Labelle Live	P. Labelle	Somebody Loves You Baby
Gems	P. Labelle	If I Didn:t Have You
Put Love To Work	Wooten Brothers	Hasty Decisions

Smith Test. at ¶ 13.

40. Phonolog data showed that the following six song titles claimed by Ms. Evelyn appear on twenty albums sold during 1995, 1996, 1997 and 1998, the only years relevant to this proceeding in which Ms. Evelyn filed claims:

CHART C

Album Title	Artist	Song Title
Hard To Get-The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby
Best of Petula Clark	Petula Clark	I'm Counting On You
Sing All The Biggies	Crests	Six Nights A Week
WCBS-FM-101 History of Rock: The 50's pt. 2	Various Artists	Six Nights A Week
Oldies But Goodies: Doo Wop Classics	Various Artists	Six Nights A Week
Isn=t It Amazing	Crests	The Flower of Love
The Very Best Of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling
Mr. Excitement	Jackie Wilson	I Get The Sweetest Feeling
Higher and Higher (1997)	Jackie Wilson	I Get The Sweetest Feeling
Heart and Soul	Various Artists	I Get The Sweetest Feeling
The Brunswick Years Vol. 1 (1995)	Various Artists	I Get The Sweetest Feeling
Sisters of Soul	Various Artists	I Get The Sweetest Feeling
MVP Classic Soul Vol. 2	Various Artists	I Get The Sweetest Feeling
Soul Inspiration	Various Artists	I Get The Sweetest Feeling
Titan of Soul	Various Artists	I Get The Sweetest Feeling
Love Power: 20 Smash Hits of the 70s	Various Artists	I Get The Sweetest Feeling
Gold	The Platters	I Get The Sweetest Feeling
Masters	Jackie Wilson	I Get The Sweetest Feeling
When You Dance	Turbans	Let Me Show You Around My Heart
Reet Petite	Jackie Wilson	Let Me Show You Around My Heart

Smith Test. at ¶ 13.

41. Mr. Curry was both a co-author and a co-publisher of the songs identified in Chart B above; and Ms. Evelyn was co-author of the last four songs identified in Chart

C above. Smith Test. at ¶ 13. Mr. Curry's and Ms. Evelyn's respective shares were, however, calculated based on their total sales and not the sales of their song titles proportionate to the extent of their respective co-authorship of each work. Laughlin Test. at ¶ 9.

42. Ms. Smith testified that Mr. Curry is entitled to credit as a co-author and co-publisher for each of his six songs as follows:

CHART D

Song Title	Co-author Share	Co-publisher Share
Somebody Loves You Baby	50%	33.33%
Burnin=	50%	33.33%
Born in a Manager	25%	0%
O Holy Night	10%[11]	2.5%
If I Didn=t Have You	50%	50%
Hasty Decision	50%	50%

Id.

43. Ms. Smith also testified that Ms. Evelyn is entitled to credit as author or co-author for her six titles as follows:

[11] Award for co-authorship of an arrangement of a public domain work.

CHART E

Song Title	Co-author Share
Six Nights A Week	50%
The Flower of Love	50%
I Get the Sweetest Feeling	50%
Let Me Show You Around My Heart	50%
Pepper Hot Baby	100%
I-m Counting on You	100%

Id.

44. The Settling Parties provided to Mr. Laughlin the Phonolog information listing the records containing the songs authored and/or published by Mr. Curry and Ms. Evelyn. Smith Test. at ¶ 14.

45. By using the SoundScan data, Mr. Laughlin determined the number of units (albums and singles) sold containing songs claimed by Mr. Curry and Ms. Evelyn. Laughlin Test. at ¶ 9.

46. Mr. Laughlin's testimony showed that Mr. Curry should be credited with song title sales of 123,042 in 1995 and 68,295 in 1997. This panel has not been presented with a credible alternate method of calculating Mr. Curry's share beyond his assertion of entitlement to 1%. Laughlin Test. at ¶ 9. The details of Mr. Laughlin's analysis with respect to Mr. Curry are contained in the following chart:

CHART F

Album Title (s) = Single	Artist	Song Title	Total Sales in Year	
			1995	1997
Somebody Loves You Baby (s)	Patti Labelle	Somebody Loves You Baby	14	-0-
Live!	Patti Labelle	Somebody Loves You Baby	25,521	18,676
Burnin:	Patti Labelle	Somebody Loves You Baby	11,105	6,300
Put Love To Work	Wooten Brothers	Hasty Decisions	108	14
Gems	Patti Labelle	If I Didn:t Have You	55,282	9,703
This Christmas	Patti Labelle	Born In A Manger	9,953	13,651
This Christmas	Patti Labelle	O Holy Night	9,953	13,651
Burnin:	Patti Labelle	Burnin:	11,105	6,300
Total Sales of Titles Credited to Eugene "Lambchops@ Curry			123,042	68,295

Laughlin Test. at ¶ 9 (Exhibit 3), Settling Parties Direct Case.

47. Mr. Laughlin's testimony also showed that Ms. Evelyn should be credited with song titles sales of 38, 424 in 1995, 8,640 in 1997 and 10,625 in 1998. Laughlin Test. at ¶ 9 (Exhibit 2) [12] Ms. Evelyn has not presented this panel with a credible alternate method of calculating her share beyond her assertion of entitlement to 1%. The details of Mr. Laughlin's analysis with respect to Ms. Evelyn are contained in the following chart:

[12] Mr. Laughlin based Ms. Evelyn's sales figures on 100% writers credit, notwithstanding the fact that Ms. Evelyn should only be credited for 50% share based on her co-authorship of many of her works. *See* Laughlin Test. at ¶ 9 fn. 1.

CHART G

Album Title	Artist	Song Title	Total Sales in Year		
			1995	1997	1998
Hard to Get The Best of Gisele Mackenzie	Gisele Mackenzie	Pepper Hot Baby	-0-	217	261
Best of Petula Clark	Petula Clark	I=m Counting on You	-0-	21	76
Sing All The Biggies	Crests	Six Nights A Week	-0-	234	189
WCBS-FM-101 History of Rock: The 50's pt. 2	Various Artists	Six Nights A Week	-0-	1,464	799
Oldies But Goodies: Doo Wop Classics	Various Artists	Six Nights A Weeks	4,355	2,500	2,283
Isn=t It Amazing	Crests	The Flower of Love	-0-	88	51
Very Best of Jackie Wilson	Jackie Wilson	I Get The Sweetest Feeling	-0-	1	4,348
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling	1,224	647	246
Higher and Higher	Jackie Wilson	I Get The Sweetest Feeling	21,098	2,394	345
Heart and Soul	Various Artists	I Get the Sweetest Feeling	-0-	107	27
Brunswick Years, Vol. 1	Various Artists	I Get the Sweetest Feeling	-0-	206	164
Sisters of Soul	Various Artists	I Get The Sweetest Feeling	-0-	508	783

MVP Classic Soul, Vol. 2	Various Artists	I Get The Sweetest Feeling	-0-	-0-	134
Soul Inspiration	Various Artists	I Get The Sweetest Feeling	-0-	-0-	278
Titan of Soul	Various Artists	I Get The Sweetest Feeling	-0-	-0-	44
Love Power: 20 Smash Hits Song of 70's	Various Artists	I Get The Sweetest Feeling	4	1	-0-
Gold	The Platters	I Get The Sweetest Feeling	11,368	82	8
Masters	Jackie Wilson	I Get The Sweetest Feeling	-0-	-0-	274
When You Dance	Turbans	Let Me Show You Around My Heart	52	34	17
Reet Petite	Jackie Wilson	Let Me Show You Around My Heart	323	137	178
Total Sales of Titles Credited to Alicia Carolyn Evelyn			38,424	8,640	10,625

Laughlin Test. at ¶ 9 (Exhibit 2 Settling Parties Direct Case).

48. Mr. Laughlin then used the following formula to determine Mr. Curry's and Ms. Evelyn's percentage entitlement for each of the subfunds to which Mr. Curry and Ms. Evelyn had filed claims:

$$\frac{\text{Total song titles sales credited to Claimant in year X}}{\text{Total song titles sold during year X}} = \text{Claimant's proportionate share of total royalties in year X}$$

49. Based on this formula, Mr. Laughlin determined that Mr. Curry's and Ms. Evelyn's percentage entitlement based on total sales to be as follows: Mr. Curry is entitled to 0.001966% of both subfunds for 1995 and 0.001027% of both subfunds for

1997; Ms. Evelyn is entitled to 0.000614% of the Writers Subfund for 1995, 0.000130% of the Writers Subfund for 1997 and 0.000144% of the Writers Subfund for 1998. Laughlin Test. at ¶ 9.

D. Neither Mr. Curry nor Ms. Evelyn Presented Evidence of Record Sales or Performances of Their Works During 1995, 1996, 1997 or 1998.

50. In their direct cases, their amended claims and their rebuttal cases, neither Mr. Curry nor Ms. Evelyn submitted credible evidence of sales or performances during the time period relevant to this proceeding. *See generally* Direct Case of Alicia Carolyn Evelyn in Docket No. 99-3 CARP DD 95-98 (November 15, 1999) ("Direct Case of A. Evelyn"); Direct Case of Eugene "Lambchops" Curry in Docket No. 99-3 CARP DD 95-98 (November 15, 1999) ("Direct Case of E. Curry"); Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

51. Mr. Curry's direct case states "My sales count is more than the parties claim. They are at least 300,000 units." *See* Direct Case of E. Curry.

52. Ms. Evelyn's Exhibit 1 to her direct case lists "songs, works, and artists found at CD and other music sites which would serve to increase claimant's share of DART royalties but which are not included in the Settling Parties' computation of her share." Neither this exhibit, nor any other documentation in Ms. Evelyn's direct case or rebuttal case provides any evidence of actual sales or performances of the works listed during the relevant period. *See generally* Direct Case of A. Evelyn; Direct Case of E. Curry; Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

53. Neither Mr. Curry nor Ms. Evelyn proposed any systematic method or formula for determining their respective awards, or any others claimants' award in this

proceeding. *See generally* Direct Case of A. Evelyn; Direct Case of E. Curry; Revision of Claim of E. Curry; Rebuttal Case of A. Evelyn.

CONCLUSIONS OF LAW

A. The Statutory Criteria For Distribution of DART Musical Works Fund Royalties Are Sales Or Performances During The Relevant Period and Soundscan Data Meets the Statutory Criteria for Calculating Sales.

54. This panel must be guided by relevant provision of the copyright law (particularly the Audio Home Recording Act of 1992), as well as previous decisions of the Librarian and Office rules and regulations. See 17 U.S.C. §§ 801(b)(3) and (c); 802(c); and 37 C.F.R. 251.7. The Copyright Act states that the Panel must act "on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations and (relevant) rulings of the Librarian of Congress." *See* 17 U.S.C. § 802(c); *see, e.g.*, Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6558 (1997).

55. The Audio Home Recording Act of 1992 clearly delineates the statutory criteria to be considered when making distribution of DART royalties. Specifically, a CARP may only consider "the extent to which, during the relevant period . . .each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. 1006(c)(2). "While a CARP is limited to these two statutory criteria in determining a DART royalty distribution, the statute does not require the application of both criteria. Thus, in circumstances where the parties to a DART distribution have presented evidence as to only one of the criteria, there is no requirement that a CARP request evidence as to the

second criteria as well." Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

56. In the '92-94 Proceeding the parties presented credible evidence only as to the distribution criteria (record sales), in the form of SoundScan sales data, rather than evidence of performances. The Librarian ruled that "the Panel acted properly in basing its determination solely on the evidence of record sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determined that the Panel acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr.Curry that was not relevant to the section 1006(c)(2) criteria." *See*, CARP Report, para. 52. Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

B. The Settling Parties Are Entitled to 100% of the Funds Available for Distribution in the Current Proceeding After Deducting the Shares of Both Mr. Curry and Ms. Evelyn.

57. The methodology presented in this distribution proceeding for determining shares of individual claimants has been relied upon and accepted by the Librarian in the '92-94 Proceeding and in other precedential decisions. *See* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94-3 CARP CD 90-92, 63 Fed.Reg. 20428, 20430 (1998); *see also* Phase II Distribution Report in the Matter of distribution of 1990, 1991, and 1992 Cable Royalty Funds, Docket No. 94-3 CARP CD 90-92 (February 25, 1998).

58. "The Settling Parties presented the only systematic method for determining the distribution of the royalties in the Musical Works Funds. The formula divided the total song title sales credited to a claimant during a particular year by the total

song titles sold during the same year." Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997). The formula is as follows:

$$\frac{\text{Total song titles sales credited to Claimant in year X}}{\text{Total song titles sold during year X}} = \text{Claimant's proportionate share of total royalties in year X}$$

The current proceeding involved the relative entitlement of the Settling Parties, on the one hand, and Mr. Curry and Ms. Evelyn, on the other, to the award of shares of Musical Works Fund royalties paid to the Office for the period January 1, 1995, through December 31, 1998 (excluding 1996).[13] After deduction of the costs of this arbitration and reasonable administrative costs incurred by the Office, all of the remaining funds must be distributed. *See* 17 U.S.C. § 1007(c).

59. No other alternative systematic method or formula for calculating a claimant's share of royalties has been submitted. Mr. Curry and Ms. Evelyn have suggested that as individuals, they are entitled to a baseline of 1% of royalties. *See* Proposed Distribution Order A. Evelyn, Docket No. 99-3 CARP DD 95-98, August 18, 2000; Findings of Fact and Conclusions of Law E. Curry, Docket No. 99-3 CARP DD 95-98, August 17, 2000. This proposal is neither systematic nor mathematically sound given the thousands of writers and publishers of Musical Works entitled to receive DART royalties. If each of the thousands of claimants represented in this proceeding were to receive 1% of the DART royalties available for distribution, the total claimed would quickly exceed 100%.

60. Applying the Settling Parties' formula, Mr. Curry and Ms. Evelyn receive credit for record sales in proportion to their respective "writers and/or publishers share"

of each title sold. This formula is consistent with the statutory criteria. The Librarian found the approach "logical and consistent and . . . fully within the discretion of the Panel" in the '92-94 Proceeding. Librarian's Decision in the '92-94 Proceeding, 62 Fed.Reg. 6561 (1997).

C. The Settling Parties Have Established the Universe of Record Sales to the Public.

61. The Settling Parties submitted the only credible evidence by which a distribution determination may be made. They submitted data which shows the extent to which musical works have been distributed in the form of recordings during the relevant period. The Settling Parties presented testimony based on an analysis of SoundScan data that established the universe of record sales. For the relevant period, the SoundScan data establishes total album and single unit sales. Assuming, unchallenged, 10 songs on each album, the total number of song titles sold each year were as follows:

1995---------- 6,257,292,898

1997---------- 6,651,309,857

1998---------- 7,391,404,864

62. Mr. Curry and Ms. Evelyn challenge the efficacy of the use of SoundScan data on several basis. They argue that it is incomplete in failing to include record club, computer and foreign sales figures. While it is true that including record club and computer sales may have increased Mr. Curry's and Ms. Evelyn's sales figures, they would increase those figures for all claimants. The Settling Parties are correct that adding to the universe of sales would in all likelihood decrease the amount of any award

[13] Ms. Evelyn, in her rebuttal case, alleges that funds for 1996 and 1998 (Publishers Subfund) are in controversy. *See* Rebuttal Case of A. Evelyn at ¶ 1. No claims, however, were filed for these funds except for those of the Settling Parties. *See* 17 U.S.C. § 1007(a)(1).

to Mr. Curry and Ms. Evelyn. Nevertheless, Mr. Curry and Ms. Evelyn have not presented any alternative means for calculating the universe of sales and/or their own sales, with or without the inclusion of record club and computer sales. Furthermore, the inclusion of foreign sales in sales figures is not authorized by the Act. *See* 17 U.S.C. § 1006(c)(2) (allocating royalty payments based on distributions; 17 U.S.C. § 1001 (6)(3) (defining the term "distribute" to include only sale, lease or assignments of products to consumers in the United States or for ultimate transfer to consumers in the United States).

D. The Evidence Establishes That Mr. Curry/Tajai Music and Ms. Evelyn are Entitled to No More Than 0,001966% of Both the Writers and Publishers Subfunds for 1995 and 0.001027% of Both the Writers and Publishers Subfunds for 1997.[14]

63. The Settling Parties used total sales to calculate the percentage entitlements of Mr. Curry/Tajai Music and Ms. Evelyn, thereby giving each the equivalent of 100% credit (writers and/or publishers) for all of their respective titles. The Settling Parties therefore attributed to Mr. Curry and Ms. Evelyn more than their actual percentage entitlement based on works that were co-authored and/or co-published by each. Mr. Curry did not submit any evidence of record sales or performance data, nor did he provide such information when compelled to do so by the Office. *See* Order in Docket No. 99-3 CARP DD 95-98 (January 7, 2000). Mr. Curry did not provide any information or evidence to support his daim that his sales count "is at least 300,000 units." He has not met his burden of proving entitlement to DART royalty funds.

[14] Mr. Curry and Ms. Evelyn, in their written submissions to this Panel, raise several issues related to data compilations of the Settling Parties, their own listings, etc. This Panel fully considered all of the issues raised and allegations contained therein. The Panel, however, is bound to rely upon only the credible record evidence in its Report.

64. The Settling Parties point out that although Mr. Curry failed to meet his burden of proof, they introduced evidence of sales of Mr. Curry's musical works during the relevant years, and he should be compensated on that basis.

65. The Settling Parties, through their direct case, identified six song titles written by Mr. Curry which appear on five albums sold in the United States during 1995 and 1997. The Settling Parties used these song titles to calculate Mr. Curry's total song title sales of 123,042 units in 1995 and 68,295 in 1997.

66. Using the total song title sales figures from SoundScan for each year, Mr. Curry's award in each year should be determined for each Subfund using the following formula:

$$\frac{\text{Mr. Curry's sales in year X}}{\text{SoundScan Total Sales for Year X}} = \text{Mr. Curry's Percentage Entitlement in Year X}$$

67. Applying this formula to the evidence presented by the Settling Parties of Mr. Curry's total sales, Mr. Curry's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1995		1997	
	Writer	Pub.	Writer	Pub.
Eugene "Lambchops@ Curry (Tajai Music)	0.001966%	0.001966%	0.001027%	0.001027%

68. As Mr. Curry did not provide any support for his statement that his sales were at least 300,000 units, references to this information in Mr. Curry's direct case cannot provide any basis for an award from the 1995 or 1997 DART Musical Works Funds. *See* Panel Decision in the '92-94 Proceeding at ¶ 63 (December 16, 1996)

(finding that Mr. Curry's claim could not be supported in view of the fact that Mr. Curry refused to produce sales or performance data concerning songs claimed, even when ordered to do so by the Office).

69. In her direct case and her rebuttal of the direct case of the Settling Parties, Ms. Evelyn introduced no evidence or sales of performances of her musical works. She provided a list of songs "which would serve to increase claimant's share of DART royalties," which does not include any information concerning sales or dates or numbers of performances. Without this additional information, the document provides no basis for establishing a percentage award for Ms. Evelyn.

70. Ms. Evelyn has failed to meet her burden of proof of her entitlement to DART royalty funds. However, the Settling Parties, through their direct case, identified six song titles written by Ms. Evelyn that appear on twenty albums sold in the United States during 1995, 1997 or 1998, the only years for which Ms. Evelyn filed claims in this proceeding. From this information, the Settling Parties determined that Ms. Evelyn's total song title sales in 1995 were 38,424, in 1997 were 8,640 and in 1998 were 10,625.

71. Using the total song title sales figures from SoundScan for each year, Ms. Evelyn's award in each year should be determined for each Subfund using the following formula:

$$\frac{\text{Ms. Evelyn's sales in Year X}}{\text{SoundScan Total Sales in Year X}} = \text{Ms. Evelyn's Percentage Entitlement in Year X}$$

72. Applying this formula to the evidence in the record, as submitted by the Settling Parties, Ms. Evelyn's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1995		1997		1998	
	Writers	Pub.	Writers	Pub.	Writers	Pub.
Alicia Carolyn Evelyn	0.000614%	N/A	0.000130%	N/A	0.000144%	N/A

73. The Settling Parties have introduced evidence of the universe of total sales of song titles during the relevant years. Furthermore, the Settling Parties have demonstrated that they represent virtually all songwriters and music publishers; and that they represent all claims other than those of Mr. Curry and Ms. Evelyn. The Settling Parties are entitled to all royalties other than those apportioned to Mr. Curry and Ms. Evelyn that will be distributed.

74. Mr. Curry and Ms. Evelyn have challenged the ability of the Settling Parties to represent all other claimants to DART royalties in this and the prior proceeding. *See* Rebuttal Case of A. Evelyn at ¶¶ 1-9; Direct Case of E. Curry at 2. The Settling Parties filed claims, qualify as "interested copyright parties," under 17 U.S.C. § 1001(7), settled with all other claimants to the 1995, 1996, 1997 and 1998 DART Musical Works Funds, as is encouraged by the Copyright Act, and represent all other claimants in this proceeding.[15] The Librarian has found that there was ample evidence to support the fact that the Settling Parties represented all other claimants to DART royalties. *See* 62 Fed.Reg. at 6561; *see also* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, 63 Fed.Reg. at 20430.

[15] The Settling Parties have obtained separate specific and written authorizations from members or affiliates expressly authorizing representation for the purpose of collecting DART royalties in accordance with Office rules, under C.F.R. § 259.2(c).

75. Lists for all of the individual songwriters and music publishers represented by the Settling Parties in this proceeding were filed with the claim of each individual Settling Party in the Office for each year. See 37 C.F.R. § 259.3(d) (1997) (Copyright Office regulations for filing DART claims state that "if the claim is a joint claim, it shall include . . . the name of each claimant to the joint claim"). The lists contain the number of claimants represented by the Settling Parties and are in the public records of the Office, available for inspection by the public, and constitute part of the record in this proceeding.

76. To require that all claimants in a given distribution proceeding prove their entitlement through detailed data of every individual work has been repudiated as wasteful. In National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 939 (D.C. Cir. 1985), the appellate court that generally reviews CRT and Librarian decisions observed: "[w]e would effectively eliminate the likelihood for settlements if we accepted the . . .contention that when one claimant - - no matter how modest that claimant's likely share under even the most sanguine review - -chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required. Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart."

E. The Settling Parties Are Entitled to Incorporate by Reference and to Rely On A Previous Decision of the Librarian Involving the Same Two Individual Claimants.

77. The Settling Parties have the opportunity to incorporate by reference their direct case from the '92-94 royalty distribution proceeding under the AHRA, including complete testimony. 37 C.F.R. § 251.43. They have done so. The Settling Parties are

entitled to ask the Panel to act on the basis of prior panel decisions and rulings of the Librarian, under 17 U.S.C. § 802(c) and have done so. *See* Order, Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Docket No. 94-3 CARP CD 90-92, 63 Fed.Reg. at 20432 ("only prior CARP and Copyright Royalty Tribunal decisions and rulings of the Librarian have precedential value").

78. The Librarian and the panel in the previous proceeding, which also involved Mr. Curry and Ms. Evelyn, determined that the methodology for determining distribution of Musical Works Funds as presented by the Settling Parties was "logical and consistent." The same methodology has been applied in this proceeding. *Id.*

79. Upon a petition for review in the U.S.Court of Appeals for the D.C. Circuit, the Court found that the "Librarian" had offered "a facially plausible explanation bearing a rational relationship to the record evidence." Curry v. Librarian of Congress, 1998 U.S.App. LEXIS 28476 (D.C.Cir., Feb. 4, 1998), *cert. denied sub nom* Cannings v. Librarian of Congress, Evelyn v. Librarian of Congress, 527 U.S. 1058 (1999), *petition for reh'g of denial of cert. denied,* 527 U.S. 1058 (1999); Accord: Cannings v. Librarian of Congress, et. al., 1999 U.S.App. LEXIS 3976 (D.C.Cir. March 2, 1999).

80. In this proceeding, Mr. Curry and Ms. Evelyn have not shown changed circumstances nor new evidence of a material nature that would warrant a rejection of the Settling Parties' record evidence, and the precedent that undergirds it. This panel must act "on the basis of a fully documented written record." 17 U.S.C. § 802(c). Therefore, evidence of disputes concerning other matters are irrelevant to this or any distribution determination.

ALLOCATION

81. Based on the credible record evidence, the Panel concludes that the Musical Works Funds, Writers and Publishers Subfunds for 1995, 1996, 1997 and 1998, should be allocated as follows:

To Mr. Curry: 0.001966% of both the Writers and Publishers Subfunds in 1995; and 0.001027% of both the Writers and Publishers Subfunds in 1997.

To Ms. Evelyn: 0.000614% of the Writers Subfund in 1995; 0.000130% of the Writers Subfund in 1997 and 0.000144% of the Writers Subfund in 1998.

To the Settling Parties: 99.997420% of the Writers Subfund and 99.998034% of the Publishers Subfund in 1995; 99.998843% of the Writers Subfund and 99.998973% of the Publishers Subfund in 1997; and 99.999856% of the Writers Subfund in 1998.

Respectfully submitted,

Arbitration Panel

_____
Cheryl I. Niro
Chairperson

_____
John B. Farmakides
Arbitrator

_____
Harold Himmelman
Arbitrator

Dated: _____

Proof of Delivery

I hereby certify that on Wednesday, May 01, 2019 I provided a true and correct copy of the Attachment to the following:

Kelly, Herman, represented by HERMAN KELLY MR served via Electronic Service at hermankelly@att.net

Powell, David, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

AARC, represented by Linda Bocchi, Esq served via Electronic Service at lbocchi@aarcroyalties.com

Signed: /s/ Eugene Curry Mr.