Subject Firm	Location	Date received at Governor's Office	Petition No.	Articles Produced
Midland Steel Products (Co.)	Janesville, WI	12/05/2001	NAFTA–5,616	steel.
Electronic Assembly Corp. (Wkrs)	Neenak, WI	12/04/2001	NAFTA–5,617	electronic products.
Cherry Automative (Wkrs)	Pleasant Prairie, WI	11/13/2001	NAFTA–5,618	electronic products.
Graham Tech (Co.)	Cochranton, PA	12/07/2001	NAFTA–5,619	gaging.
EM Solutions (Wkrs)	Longmont, CO	12/06/2001	NAFTA–5,620	
Biltwell Clothing—Rector Sportwear (Co.).	Rector, AZ	12/05/2001	NAFTA/05/2001	men's tailored pants and slacks.
Lexmark International (Co.)	Lexington, KY	12/05/2001	NAFT–5,622	inkjet printers and cartridges.
Protel, Inc. (Wkrs)	Lakeland, FL	12/03/2001	NAFTA–5,623	pay phones.
AVX Corporation (Wkrs)	Vancouver, WA	12/04/2001	NAFTA–5,624	electronic capacitor.
Alcatel USA Marketing	Andover, MA	11/30/3001	NAFTA–5,625	router.
Milmaukee Electric (Wkrs)	Blytterville, AR	12/05/2001	NAFTA–5,626	electric power tools.
Freightliner PMP (Wkrs)	Gastonia, NC	12/04/2001	NAFTA–5,627	trucks and parts.
Cooper Bussman (Wkrs)	Goldsboro, NC	12/05/2001	NAFTA–5,628	fuses & fuseholders.
ASARCO (Co.)	Strawberry Plains, TN	12/05/2001	NAFTA–5,629	zinc.
Meridian Automotive Systems (UAW).	Controlia, IL	11/30/2001	NAFTA–5,630	fixtures, water jets, heat shield molds.
VF Jeanswear Limited Partnership (Wkrs).	Shenandoah, VA	12/05/2001	NAFTA–5,631	men's and women's bluejeans & casualwear.
VF Jeanswear Limited Partnership (Wkrs).	El Paso, TX	12/07/2001	NAFTA–5,632	men's and women's pants.
Evergreen Wholesale Florist (Wkrs)	Seattle, WA	12/10/2001	NAFTA–5,633	florist—flower arrangement.

[FR Doc. 01–31633 Filed 12–26–01; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–5254]

Fashion Works, Inc. Dallas, TX; Notice of Termination of Investigation

Pursuant to Title V of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182) concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2331), an investigation was initiated on August 23, 2001, in response to a petition filed by the company on behalf of workers at Fashion Works, Inc., Dallas, Texas.

The petitioner requests the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 10th day of December, 2001.

Edward A. Tomchick,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 01–31630 Filed 12–21–01; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[NAFTA–005302]

Tyco Electronics, TDI Division, Romeoville, Illinois; Notice of Termination

Pursuant to Title V of the North American Free Trade Agreement Implementation Act Pub. L. 103–1 concerning transitional adjustment assistance, hereinafter called NAFTA–TAA and in accordance with section 250(a), Subchapter D, Chapter 2, Title II, of the Trade Act of 1974, as amended (19 U.S.C. 2331), an investigation was initiated on September 4, 2001, in response to a petition filed on behalf of workers at Tyco Electronics, TDI Division, Romeoville, Illinois. Workers produced battery packs.

An active certification covering the petitioning group of workers remains in effect (NAFTA–004168). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 11th day of December, 2001.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 01–31627 Filed 12–21–01; 8:45 am]

BILLING CODE 4510–30–M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000–2 CARP CD 93–97]

Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, announces his rejection of the initial and revised reports of the Copyright Arbitration Royalty Panel (''CARP'') in the Phase II proceeding in the syndicated programming category for distribution of the 1997 cable royalty funds, and remands the case for a new proceeding before a new CARP.

EFFECTIVE DATE: December 26, 2001.

ADDRESSES: The full text of the CARP's initial report and revised report to the Librarian of Congress are available for inspection and copying during normal business hours in the Office of the Copyright General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, SE, Washington, DC 20559–6000.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, Copyright Arbitration Royalty Panel (''CARP''), P.O. Box 70977, Southwest Station, Washington, DC 20024–0400. Telephone (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

Background

Each year, cable systems in the United States submit royalties to the Copyright Office under a statutory license which allows cable systems to retransmit over-the-air television and radio broadcast signals to their subscribers. 17 U.S.C. 111. These royalties are, in turn, distributed in one of two ways to copyright owners whose works were included in the cable retransmissions of over-the-air television and radio broadcast signals and who timely filed a claim for royalties with the Copyright Office. The copyright owners may either negotiate a settlement agreement amongst themselves as to the distribution of the royalty fees or, if they cannot agree, the Librarian of Congress may convene one or more Copyright Arbitration Royalty Panels (''CARPs'') to determine the distribution of the royalty fees which remain in controversy. *See* 17 U.S.C. chapter 8.

Cable royalty distribution proceedings are conducted by the Librarian under the CARP system in two phases. In a Phase I proceeding, the total cable royalty pool for a given year or years is divided among different categories of copyrighted programming that typically appear on broadcast programming. These categories are movies and syndicated programming, sports programming, devotional or religious programming, musical programming, commercial and noncommercial broadcast programming, and Canadian programming. Once the royalty pool is divided into these categories, the Librarian conducts one or more proceedings at Phase II to resolve disputes within a particular category as to the division of the royalties. Today's royalty distribution determination is a Phase II proceeding in the movie and syndicated programming category (often referred to collectively as the ''program supplier'' category).

The litigants in this Phase II proceeding in the program supplier category are the Motion Picture Association of America, Inc. (''MPAA''), which represents the majority of copyright owners who filed claims for a distribution of 1997 cable royalties, and the Independent Producers Group (''IPG''), which represents the remaining copyright owners who filed claims for a cable royalty distribution. The Librarian was required to convene a CARP to resolve this Phase II proceeding because MPAA and IPG could not agree as to the division of royalties in the program supplier category.

After a protracted discovery period, the Librarian convened the CARP in this proceeding on October 17, 2000. As provided by section 802(e) of title 17, United States Code, the CARP had six months to hear the evidentiary presentations and arguments of MPAA and IPG and to render a decision. The CARP delivered its initial report to the Librarian on April 16, 2001, awarding IPG 0.5% of the royalty pool and the remainder to MPAA. After review, the Librarian returned the case to the CARP. By Order dated June 5, 2001, the Librarian dismissed all of the claimants comprising IPG's case except for Litton Syndications, Inc. and directed the CARP to adjust its award to IPG and MPAA to account for the dismissal. In addition, the Librarian directed the CARP to articulate the methodology it was using to assign the new distribution percentages and to detail the application of the methodology to the facts before it. *See* Order in Docket No. 2000–2 CARP CD 93–97 (June 5, 2001). The Librarian fully explains his reasoning for rejecting the initial determination of the CARP in this Order.

On June 20, 2001, the CARP returned a new determination. It awarded IPG 0.212% of the royalty funds, with the remaining 99.788% to MPAA. The Librarian permitted IPG and MPAA an additional round of petitions to modify the CARP's determination and replies. The Register now makes her recommendation to the Librarian following her review of the CARP's determination.

Part One—Decisions of the CARP

The Initial CARP Report

The 108-page initial report of the CARP has three essential parts. The first part deals with the validity of the royalty claim filed with the Copyright Office in July 1998 under 17 U.S.C. 111(d)(4) that forms the basis for IPG's participation in this proceeding. The second part addresses and ascribes the proper representation of specific television programs as between MPAA and IPG. The third part of the report resolves the division of the royalties in the program supplier category between MPAA and IPG. The Panel awarded MPAA 99.50% of the royalties and 0.50% to IPG.

1. IPG's Claim

The validity of IPG's claim was hotly contested in this proceeding. The first challenge was raised in the precontroversy discovery period when MPAA moved to dismiss IPG's Phase II case on the grounds that IPG's claim (marked as No. 176 by the Copyright Office) did not comply with the Office's rules and regulations. MPAA asserted that none of the entities listed in exhibit D of IPG's written direct case, which forms the basis of IPG's claim for royalties, appeared on claim No. 176 as required by § 252.2 of the rules. 37 CFR 252.2. According to MPAA, IPG entered into representation agreements with the exhibit D parties after July 31, 1998 (the closing date for filing cable royalty claims with the Office for calendar year 1997), thereby circumventing the requirement of § 252.2 that all claimants to a joint claim be identified on the claim as filed with the Office.

IPG's compliance with § 252.2 was questionable. Stylized as a ''joint claim,'' IPG identified only one claimant—Artists Collection Group (''ACG''). After the Copyright Office questioned the claim in July of 1998, IPG amended the claim to include ACG and Worldwide Subsidy Group (''WSG''). This amendment appeared, on its face, to satisfy the requirements of § 252.2, and the Office did not pursue the matter further. However, when IPG filed a written direct case identifying 16 other parties as claimants, the Library considered MPAA's motion for possible violation of the rule.

In an Order dated June 22, 2000, the Library determined that the prudent course of action was to designate the matter of MPAA's motion to the CARP for further factual findings and final resolution. The Library did this after consideration of IPG's objections to MPAA's motion to dismiss, the language of § 252.2, and the provisions of the Copyright Act related to filing cable royalty claims. The Library rejected IPG's argument that it was acceptable for ACG to file a single claim on behalf of 16 other parties and chastised IPG for not listing the 16 in its joint claim as provided in § 252.2 . However, the Library declined to dismiss IPG's case and designated the MPAA motion to the CARP because:

> [T]he Library cannot say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. It is sometimes the case that the Copyright Office will receive a single claim filed by a production company that does not identify any joint claimants. Whether this production company owns all or some of the copyrights represented by the claim, or is just a representative of unidentified copyright owners, is unknown to the Office. To the Library's knowledge, these claims have not been challenged in the past, and this is a case of first impression. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim. However, what is clear, and what the law requires, is a factual determination as to which of the owners and distributors identified by IPG in exhibit D of its written

direct case were in fact represented by Worldwide Subsidy Group [1] at the close of the filing period for 1997 cable claims. Any party listed in exhibit D (with the exception of Lacey Entertainment, which filed its own claim) that was not represented by Worldwide Subsidy Group before August 1998 cannot be said to have filed a timely claim, and therefore testimony contained in IPG's written direct case regarding such party must be stricken.

Order in Docket No. 2000–2 CARP CD 93–97 at 7 (June 22, 2000). The Library directed the CARP to make factual determinations as to whether there existed written agreements between WSG and each of the exhibit D claimants dated on or before July 31, 1998, the close of the cable royalty claim filing period. IPG submitted, as directed by the Library, copies of the representation agreements between WSG and the exhibit D claimants, along with additional corroborating documents to prove the existence of a representation arrangement on or before July 31, 1998.[2]

Upon its convocation, the CARP turned to the task of examining the representation agreements and supporting documents to determine which, if any, of IPG's exhibit D claimants would be allowed to remain in the proceeding. The representation agreements are standard form contracts for representation by WSG in collecting (among other things) cable compulsory license royalties. The contract is effective upon the date identified in the lead paragraph of the contract, which provides that ''as of (date),'' WSG and the identified party have entered into the agreement. With only two exceptions, none of the signature pages in the representation agreements bore a date indicating when the agreement was signed and executed. Some of the additional documents provided by IPG (copies of letters and faxes) provided context to some of the representation agreements to indicate the time period in which they were signed and executed.

In its report, the CARP examined the documents for each of the exhibit D claimants and decided which claimants had a signed agreement with WSG on or before July 31, 1998, and which did not. The CARP determined that a valid representation agreement existed for the following: Abrams/Gentile Entertainment; Raycom Sports; Flying Tomato Films; Funimation Productions; Golden Films Finance Corporation IV and American Film Investment Corporation II; Litton Syndications, Inc.; Sandra Carter Productions; and The Tide Group d/b/a Psychic Readers Network. The CARP found that while there may have existed a valid representation agreement between WSG and Mendelson/PAWS, WSG's claim of representation was trumped by General Mills, a claimant ascribed to MPAA's claim. The CARP dismissed the United Negro College Fund from IPG's case because it determined that a representation agreement did not exist until sometime in November of 1998, well after the July 31, 1998, deadline.

2. IPG's Programs

As provided in the section 111 cable license, copyrighted works that are retransmitted by cable systems on a distant basis are entitled to royalties collected from cable systems. In the program supplier category, which is the subject of this proceeding, these works are movies and syndicated television programs.

After resolving the matter of which IPG claimants remained in the proceeding, the CARP turned to the task of determining which of the programs claimed by IPG claimants were entitled to a royalty distribution.[3] Some programs were claimed by both IPG and MPAA. The following is a summary of the programs that the CARP credited to IPG's claimants.

a. *Abrams/Gentile Entertainment.* The CARP awarded all five programs claimed by IPG—*Dragon Flyz; Happy Ness, Secret of the Loch; Jelly Bean Jungle; Sky Dancers*; and *Van Pires*—to IPG. MPAA asserted that *Jelly Bean Jungle* belonged to Audio Visual Copyright Society d/b/a Screenrights, rather than Abrams/Gentile, but the CARP determined that ''Audio Visual Copyright Society's own 1997 [program] Certification [did] not list such program in its claim.'' CARP Report at 53.

b. *Raycom Sports.* The CARP awarded all four programs claimed by IPG—*Elvis, His Life and Times; Journey of the African American Athlete; More Than a Game; Our Holiday Memories*—to IPG, finding that the MPAA did not contest any of these titles. CARP Report at 53–54.

c. *Flying Tomato Films.* The CARP did not credit the one program, *Just Imagine*, to Flying Tomato Films, because it determined that Litton Syndications held the syndication rights to the program. CARP Report at 54–55.

d. *Funimation Productions.* The CARP identified only one program belonging to Funimation Productions: *Dragon Ball Z.* The CARP determined that Fox Family Worldwide, not Funimation Productions, was the proper syndicator for *Dragon Ball Z*, and therefore IPG was not entitled to a distribution for this program. CARP Report at 55–56.

e. *Golden Films Finance Corporation IV and American Film Investment Corporation II.* Two programs were claimed by IPG for these companies: *Enchanted Tales* and *Thumbelina.* The CARP determined that *Enchanted Tales* is a series of videos, one of which is *Thumbelina*, and that the syndication rights to these programs belong to Eyemark Entertainment and Summit Media, not Golden Films and American Films. CARP Report at 58. Further, the CARP determined that both *Enchanted Tales* and *Thumbelina* were not retransmitted by cable systems during 1997. *Id.* Consequently, the CARP did not give credit to IPG for these programs.

f. *Litton Syndications, Inc.* IPG identified thirteen programs belonging to Litton in its written direct case: *Algo's Factory; Jack Hanna's Animal Adventures; Dramatic Moments in Black Sports History; Dream Big; Harvey Penick's Golf Lessons; Shaka Zulu; Story of a People; Mom USA; Nprint; Critter Gitters; Sophisticated Gents; The Sports Bar;* and *Bloopy's Buddies.* The CARP eliminated *Shaka Zulu* and *Story of a People* from IPG's claim, finding that syndication rights to *Shaka Zulu* were properly held by Harmony Gold USA, not Litton, and that the proper syndicator for *Story of a People* was unknown. CARP Report at 60–61. The CARP also eliminated *Dream Big*, determining that Warner Brothers, not Litton, was the syndicator of that program. *Id.* at 62. Although both IPG and MPAA claimed *Dramatic Moments in Black Sports History*, the CARP determined that Litton was indeed the syndicator and credited IPG's claim with this program. *Id.* The remaining programs were credited to IPG.

g. *Mendelson/PAWS.* The single program claimed by Mendelson/PAWS, *Garfield and Friends*, was claimed by both MPAA and IPG. MPAA supplied documentary evidence from General Mills indicating that it was the syndicator of *Garfield and Friends*, even though Mendelson/PAWS produced the program. The CARP did not credit IPG with *Garfield and Friends*, determining that Mendelson/ PAWS resolved the

[1] IPG by this time had informed the Library that ACG had withdrawn its claim and that WSG was the sole claimant remaining for claim No. 176

[2] The Library amended its regulations after the June 22, 2000 Order to prevent future confusion as to the filing of single and joint claims. *See* 66 FR 29700 (June 1, 2001).

[3] Because all remaining monies in the 1997 program supplier category automatically belonged to MPAA's claimants once IPG's claim was determined, the CARP focused its attention only on IPG's programs.

dispute by removing its claim. CARP Report at 64–65.

h. *Sandra Carter Productions.* IPG identified five programs belonging to Sandra Carter: *Bottom Line; By River, By Rail; Flex; Parenting in the 90's; Til Earth and Heaven Ring.* MPAA asserted that *Parenting in the 90s* belonged to Audio Visual Copyright Society d/b/a/ Screenrights, but the CARP determined that Screenrights did not list that program in their certification to MPAA and credited it to IPG. CARP Report at 66. The CARP determined that *Bottom Line; By River, By Rail*; and *Til Earth and Heaven Ring* appeared on television station WBAL-TV, Baltimore, Maryland, and was not subject to a distant retransmission by a cable system. These programs were removed from IPG's claim. *Id.* at 66–67. Finally, the CARP credited *Flex* to IPG.

i. *The Tide Group d/b/a Psychic Readers Network.* IPG claimed several programs for the Tide Group that had multiple titles. The CARP credited IPG with *Alcatraz* as one program, *Kenny Kingston* as one program, and *Psychic Readers* (with its alternate title *Psychic Readers Network*) as one program. CARP Report at 68.

j. *United Negro College Fund.* IPG claimed one program for the United Negro College Fund: *Lou Rawls Parade of Stars.* However, the CARP determined that the United Negro College Fund did not have a valid representation agreement with WSG by July 31, 1998. Consequently, IPG did not receive credit for *Lou Rawls Parade of Stars.* CARP Report at 69–70.

k. *Lacey Entertainment.* Both MPAA and IPG claimed credit for Lacey Entertainment's two programs: *America's Dumbest Criminals* and *Mega Man.* The CARP found that Lacey confirmed that MPAA was its representative for section 111 royalties for *Mega Man* and that Lacey was not the U.S. distributor for *America's Dumbest Criminals.* Consequently, the CARP did not credit IPG with these programs. CARP Report at 71–72.

3. The Distribution Percentages

The third part of the CARP's report, which awards IPG 0.5% of the royalties and MPAA 99.5%, is the most troubling portion. After leveling a number of criticisms at both MPAA's and IPG's proposed distribution methodologies, the CARP failed to articulate the method it settled upon in assigning the 0.5% and 99.5% awards.

Both MPAA and IPG proposed detailed methodologies for determining the royalty awards in this proceeding. MPAA's methodology is based upon viewership analysis of movies and syndicated television programs retransmitted by cable systems in 1997 on a distant signal basis. The underlying premise of the MPAA formula is that actual viewing of movies and syndicated television programs by cable subscribers is the best way to determine the marketplace value of the programming. The source elements for determining actual viewership are: (1) TVData station logs, which show the programs broadcast by the stations and the date and time of their broadcast, for the 82 television stations used by MPAA in its sample survey; (2) a special study of the same 82 stations for the sweeps period conducted by Nielsen Media Research; (3) program ownership data (i.e. which claimants to the 1997 cable royalties own which programs) as contained in the Cable Data Corporation ("CDC") database; and (4) the weighting factors used by CDC to interpolate viewing for non-sweeps months when data from Nielsen is not available. CARP Report at 81.

The CARP described the details of MPAA's distribution methodology as follows:

> MPAA selects 82 of the most heavily carried stations retransmitted as a distant signal by Form 3 system operators. Form 3 systems subscribers comprise the largest group of cable subscribers—89% and their gross receipts represent the largest portion—96.5%—of the 1997 cable royalty fund.
>
> The program schedules of these stations are acquired from TVData. The program information is matched to viewing data provided by Nielsen Media Research ("Nielsen"). In particular, Nielsen provides the number of quarter hour segments (QH) each program aired on the station and the average number of cable subscribers who viewed each program on that station on a distant basis.
>
> For each station in the MPAA sample, Nielsen goes into the diary database of approximately 150,000 homes for each sweep, eliminates diaries in local area of the station (as supplied by MPAA), sums the weights by quarter hour for each diary and generates estimated projections on quarter-hour-by-quarter-hour basis.
>
> MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study. Household viewing hours for every program (claimed and unclaimed) is [sic] calculated for each program using the Nielsen data and interpolated audience data for non-sweeps periods.
>
> After reconciling programs with broadcast times, MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study using the Nielsen data and interpolated audience data.
>
> The HHVH formula is: $(\Sigma QH/4) \times DCHH = HHVH$. The formula may be stated as follows: Add the total number of QH segments a program is broadcast in a particular time slot on a particular station. The sum is divided by four to get an hourly measure. The result is multiplied by the average number of distant cable households (DCHH) that actually watched the program on that station during the time period.

CARP Report at 81–82 (footnotes omitted). Applying MPAA's formula to the 1997 data yields, according to MPAA, a determination that programming represented by MPAA received 99.9292% of the total distant viewing—3,474,810,364 viewing hours out of 3,477,272,694 total viewing hours. MPAA therefore asked for 99.9292% of the 1997 cable royalties. MPAA Findings of Fact at 20, ¶ 55.

IPG proposed a different distribution methodology which yields a greater distribution percentage to IPG. Instead of focusing on viewership as the main valuation method, IPG's methodology operates from the premise that it is best to look at the availability of programming offered to subscribers and the benefits received by the cable operators who retransmit that programming. IPG submits that while the decision of a television station to transmit a particular program is driven by a desire for viewership ratings, cable systems are not concerned with viewership of a particular program, but rather are concerned with attracting and holding the greatest number of subscribers by offering multiple programming choices. IPG attempts to place a value on each and every broadcast using the following data: (1) The number of distant cable subscribers capable of receiving the program broadcast during 1997; (2) the distant retransmission royalties generated during 1997 that are attributable to stations broadcasting a particular program; (3) the time placement of the broadcast; and (4) the length of the particular broadcast. CARP Report at 95.

The CARP described IPG's distribution methodology as follows:

> IPG expanded MPAA's station sample to 99 television stations, including only those with a combined percentage of distant cable subscribers and "fees gen." (fees generated) significantly greater than the original selection. The added stations were heavily retransmitted according to distant subscribership data for Form 1, Form 2, and Form 3 cable systems.
>
> IPG secured data from TVData reflecting all programs broadcast on the 99 Sample Stations, 24 hours a day, for the entire year of 1997 and segregated programming compensable in the syndicated programming category.
>
> IPG accorded a "Station Weight Factor" to each and every compensable broadcast blending of (i) the average percentage of distant cable subscribers capable of viewing the station of broadcast and (ii) the average percentage of "fees gen." attributable to the station of broadcast, as compared to the other 99 Sample Stations.

IPG then accorded a ''Time Period Weight Factor'' based on the time period or daypart of the program broadcast, weighted according to data derived from the ''1998 Report on Television'' published by Nielsen Media Research, and factored in the length of each such broadcast.

CARP Report at 96 (footnotes omitted; parenthetical not in original). Applying IPG's methodology to its data yields, according to IPG, a determination that 0.881% of the aggregate Sum Weighted Value of all programs claimed in this proceeding belongs to IPG. IPG Findings of Fact at 16–17, ¶ 51.

Both MPAA and IPG leveled criticisms at each other's methodologies, and the CARP details those criticisms. *See* CARP Report at 82–94 (IPG); 97–102 (MPAA). The CARP accepted the following criticisms of MPAA's approach:

—MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
—The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
—The number of sampled stations [in MPAA's station survey] has declined without adequate explanation.
—Station selection criteria was excluded Form 1 and Form 2 cable systems.
—The number of ''zero'' viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
—There are unanswered technical questions regarding relative error rates and mixing diary and meter data.
—The method of interpolation of non-sweep month estimated viewing needs statistical validation.
—There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

Id. at 102–103.

The CARP found the following criticisms of IPG's methodology:

—A mathematically sound basis for the creation and application of the station weight factor and time period weight factor should have been presented by a statistician.
—Daypart data was misapplied thus overstating ''all other'' viewing.
—It doesn't directly address the marketplace value of the works transmitted, a primary criteria.

Id. at 103.

After stating that it was ''recogniz[ing] the strengths and weaknesses'' of MPAA's and IPG's approaches, the Panel proceeded to summarily award IPG 0.5% of the 1997 cable fund and the remaining 99.5% to MPAA. The CARP did observe that ''certain ''claimants'' had not satisfied the criteria for asserting their claims and certain programs were not qualified. The Panel did not award any royalty allocation for such unqualified ''claimants'' nor did it award any royalty allocation for unqualified programs.'' *Id.* at 106.

Standard of Review

Section 802(f) of the Copyright Act directs that, upon the recommendation of the Register of Copyrights, the Librarian shall adopt the report of the CARP ''unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title.'' The narrow scope of review has been discussed in great detail in prior decisions which have concluded that the use of the term ''arbitrary'' in this provision is no different than the ''arbitrary'' standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A). *See* 63 FR 49823 (September 18, 1998); 63 FR 25394 (May 8, 1998); 62 FR 55742 (October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 28, 1996). Thus, the standard of review adopted by the Librarian is narrow and provides that the Librarian will not reject the determination of a CARP unless its decision falls outside the ''zone of reasonableness'' that had been used by the courts to review decisions of the Copyright Royalty Tribunal (''CRT''). *See National Cable Television Ass'n.* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 182 (D.C. Cir. 1983). Moreover, based on a determination by the Register and the Librarian that the Panel's decision is neither arbitrary nor contrary to law, the Librarian will adopt the CARP's determination even if the Register and the Librarian would have reached conclusions different from the conclusions reached by the CARP.

The U.S. Court of Appeals for the District of Columbia Circuit has stated, however, that the Librarian would act arbitrarily if ''without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award.'' *See National Ass'n of Broadcasters* v. *Librarian of Congress,* 146 F.3d 907, 923 (D.C. Cir. 1998).

For this reason, the Panel must provide a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. *See National Cable Television Ass'n.* v. *Copyright Royalty Tribunal,* 689 F.2d 1077, 1091 (D.C. Cir. 1992) (requiring CRT to weigh all relevant considerations and set out its conclusions in a form that permits the court to determine whether it has exercised its responsibilities lawfully).

It is then the task of the Register of Copyrights to review the Panel's 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.

Remand to the CARP

After receiving the CARP's initial determination, the Register of Copyrights recommended, and the Librarian accepted, that the Report be rejected and remanded to the CARP for further consideration. It was apparent from reviewing the Report that the CARP had acted arbitrarily in three instances: (1) The CARP misapprehended the intent of the June 22, 2000, Order designating consideration of the circumstances of IPG's representation agreements with its exhibit D claimants; (2) the CARP awarded programs to an IPG claimant when there was no introduction of evidence as to the value of the program and assigned another program to IPG without adequate explanation of its decision; and (3) the CARP failed to articulate the reasoning it used in arriving at a distribution percentage of 0.5% for IPG and 99.5% for MPAA. *See* Order, Docket No. 2000–2 CARP CD 93–97 (June 5, 2001).

1. Dismissal of Additional IPG Claimants

As discussed above, the status of IPG's claim No. 176 has been a focal point of this proceeding. MPAA has moved to dismiss IPG's entire claim no less than three times, claiming that claim No. 176 flouts the Copyright Office's rules and the statute, and is a fraud on the Library. The CARP appears to agree with MPAA's contentions, but stops short of dismissing most if not all of IPG's exhibit D claimants, noting that it ''is attempting to accommodate the Copyright Office's previously created, one-time exception to the strict enforcement of the Copyright Office's claim filing rules, while aspiring to achieve fairness for all affected claimants.'' CARP Report at 42.

The Register concludes that the CARP did not follow the direction and intent of the June 22, 2000, Order directing it to consider the status of IPG's representation of the exhibit D claimants. The rule and intent of that Order are as follows.

Section 111(d)(3) of the Copyright Act states that royalties collected from cable systems under the cable statutory license may only be distributed to copyright owners ''who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period.'' 17 U.S.C. 111(d)(3). This means that it is copyright owners—individuals or entities that own one or more of the exclusive rights granted by section 106 of the Copyright Act—that are entitled to royalty fees, not those who represent them in CARP proceedings. The statute also provides that royalty fees may only be distributed to ''claimants'' that file a claim with the Copyright Office during the month of July for royalties collected in the previous calendar year. 17 U.S.C. 111(d)(4)(A). Further, the statute states that claims filed with the Copyright Office shall be submitted ''in accordance with requirements that the Librarian of Congress shall prescribe by regulation.'' *Id.*

The Librarian adopted such regulations, which are found at part 252 of 37 CFR. Section 252.3 of the rules prescribes the content of a cable claim, distinguishing between ''individual claims'' and ''joint claims.'' An ''individual claim'' involves royalties that are being sought by a single ''claimant,'' whereas a ''joint claim'' involves two or more ''claimants.'' The requirements for an ''individual claim'' are ''a general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a cable system of such works establishing a basis for the claim.'' 37 CFR 252.3(a)(4). ''Joint claims'' have an additional requirement. If the claim is a ''joint claim,'' there must be ''a concise statement of the authorization for the filing of the joint claim, and the name of each claimant to the joint claim.'' 37 CFR 252.3(a)(3). Additionally, the ''joint claim'' must have ''a general statement of the nature of the joint claimants'' copyrighted works and identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint claim.'' 37 CFR 252.3(a)(4).[4]

The June 22, 2000, Order recounts the history of § 252.3, and it will not be repeated here. *See* June 22 Order at 2–5. The importance about § 252.3 in the context of this proceeding is that it uses the word ''claimant'' in the text, as opposed to the terms ''copyright owner'' or ''holder of one or more of the exclusive rights granted by section 106 of the Copyright Act.'' IPG argued to the Library in response to MPAA's initial motion to dismiss its claim that it was acceptable for Artists Collection Group (''ACG'') to file an individual claim, even though it represented several copyright owners, because it was the only ''claimant'' submitting a claim. June 22 Order at 5. If § 252.3 had used the term ''copyright owner'' instead of ''claimant,'' then this clearly would not be a permissible interpretation of the rule. The Library disagreed with IPG's interpretation of § 252.3, concluding instead that what ACG had filed was in reality a joint claim, because it was representing only a group of copyright owners who would ultimately be entitled, under 17 U.S.C. 111(d)(3), to the royalties. *Id.* at 6. However, ACG did not list the exhibit D claimants it represented on the claim, as required by § 252.3(a)(3) for joint claims, other than to list Worldwide Subsidy Group (''WSG'') which, as was revealed in the proceedings before the CARP, was nothing more than an unregistered, fictitious business name for ACG. CARP Report at 35. The Library did not take the harsh step of dismissing IPG's claim for ACG's failure to list the exhibit D claimants on claim No. 176. Instead, the Library made a one-time exception to the requirement by affording IPG the opportunity to prove that ACG/WSG had entered into valid written representation agreements with each of the exhibit D claimants on or before July 31, 1998, the last day for filing claims to 1997 cable royalties. The Library did this because it could not

> say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. It is sometimes the case that the Copyright Office will receive a single claim filed by a production company that does not identify any joint claimants. Whether this production company owns all or some of the copyrights represented by the claim, or is just a representative of unidentified copyright owners, is unknown to the Office. To the Library's knowledge, these claims have not been challenged in the past, and this is a case of first impression. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim.

June 22 Order at 7.

In designating to the CARP for factual determination the status of ACG/WSG as representatives of the exhibit D claimants, the Library offered some decisional guidelines:

> First, because Worldwide Subsidy Group did not list any joint claimants, IPG has the burden of proving that it represented each of the exhibit D parties for distribution of 1997 cable royalties on or before July 31, 1998. Second, IPG must submit written proof of representation for each exhibit D party. Written proof is required because claim No. 176 does not identify any of the exhibit D parties, and because testimonial evidence alone will not preserve the integrity of the law and the regulations which prohibit adding parties to a joint claim after the fact. Proof must be in the form of written agreements of representation between IPG and each of the exhibit D parties executed on or before July 31, 1998. Finally, if the CARP determines that one or more of the exhibit D parties were not validly represented by Worldwide Subsidy Group for distribution of 1997 cable royalties on or before July 31, 1998, the CARP must strike that portion of IPG's written direct case related to that party or parties.

June 22 Order at 7

After issuance of the June 22 Order, IPG petitioned the Library for reconsideration, asserting that it had written material in addition to the standard form contract entered into between WSG and the exhibit D claimants that clarified that a representational arrangement existed on or before July 31, 1998. The Library clarified that the ''June 22 Order's requirement that proof of representation ''must be in the form of written agreements'' does not mean that IPG's standard representational agreement form is the only acceptable document that proves timely representation.'' Order in Docket No. 2002–2 CARP CD 93–97 at 4 (September 22, 2000). The Library allowed IPG to submit additional documentation, but did not permit the introduction of testimonial evidence. IPG submitted the additional documents, which consisted of letters and faxes discussing the representational contracts submitted earlier by IPG, on October 10, 2000 (these documents are hereinafter referred to as the ''October 10 documents'').

The Library has reviewed the representational contracts and the October 10 documents for all sixteen of the exhibit D claimants. Several things are evident from this examination. First, with the exception of two of the contracts, they do not contain any dates of execution of the signature page.[5] Rather, the contract bears a provision, in the lead paragraph, that it is effective ''as of'' a certain date. In all instances this date is on or before July 31, 1998. Second, it is apparent from the October 10 documents that the ''as of'' date in the contract is not the date of execution

[4] See footnote 2, *supra.*

[5] The contract with Jay Ward Productions was dated ''11/02/99.'' IPG, however, voluntarily withdrew Jay Ward Productions from its case. Likewise, Mainframe Entertainment's contract was dated October 8, 1998, and IPG also withdrew Mainframe from its case.

of the contract. Rather, it was the practice of WSG to send a copy of its contract to a potential client during negotiations for representation and type in the ''as of'' date at that time. The contract may not have been signed and executed for weeks, or even months, after the ''as of'' date. Third, there are not October 10 documents for all of the exhibit D parties. For some, the only document evidencing representation is the contract itself bearing the ''as of'' date.

In each instance, with the exception of the United Negro College Fund, the CARP accepted the ''as of'' date on the representational contracts as evidence that a representational agreement existed on that date. The Register determines that that decision is arbitrary because it runs contrary to the evidence presented to the CARP. The Register also determines that the Panel's decision on this point countervails the June 22 Order. Pursuant to the terms of that Order, the burden was squarely on IPG to demonstrate through documentary evidence that a valid representational arrangement existed on or before July 31, 1998. The ''as of'' date is not evidence of such an arrangement, because it is clear from the October 10 documents that the contracts were signed sometime after the ''as of'' date. In those circumstances where there is documentary evidence that the contract was signed on or before July 31, 1998, IPG has met its burden of proving a representational arrangement.

For Raycom Sports, Abrams/Gentile Entertainment, Funimation Productions, and Sandra Carter Productions, the only documents supplied by IPG are the representational contracts. Because the ''as of'' dates on these contracts do not prove the dates of their execution, it cannot be determined whether they were signed, and a valid representational arrangement existed, on or before July 31, 1998. Consequently, these parties are dismissed from this proceeding.

There are October 10 documents for The Tide Group d/b/a Psychic Readers Network, but they do not prove that the representational contract had been signed or that a valid representational arrangement had been reached on or before July 31, 1998. Consequently, this party is dismissed.

The CARP dismissed the United Negro College Fund because the October 10 documents suggested that the representational contract was not signed on or before July 31, 1998. The contract bears no date on the signature page, and an ''as of'' date of July 30, 1998, is handwritten in the first paragraph. There are October 10 documents discussing entering into a representational agreement in November of 1998, which led the CARP to conclude that a representational arrangement did not exist as of July 30, 1998. IPG has not met its burden of demonstrating that a representational arrangement existed on or before July 31, 1998. Consequently, the Register accepts the CARP's determination to dismiss the United Negro College Fund.

The only exhibit D party for which IPG has met its burden is Litton Syndications.[6] While there is no date of execution on the Litton/WSG contract, there is a June 16, 1998, letter from Peter Sniderman of Litton to Raul Galaz of WSG stating that ''enclosed are four copies of the executed Litton Syndications, Inc.—Worldwide Subsidy Group agreement.'' In addition, there is a June 18, 1998, letter from Galaz to Sniderman stating that ''enclosed herein please find two (2) fully executed originals of the above-referenced agreement.'' It is clear from these documents that a valid representational arrangement existed between Litton and WSG prior to July 31, 1998. IPG has therefore met its burden as provided in the June 22 Order.

2. The Status of ACG, WSG and IPG

After the extended discussion and analysis of claim No. 176 in the June 22 Order and above, one might believe that the validity of claim No. 176 is definitively resolved. This is not so, because of issues surrounding the names—ACG and WSG—that appeared on the claim. The Library must therefore resolve whether claim No. 176 was a deliberately perpetrated fraud on the Copyright Office and the section 111 filing system.

The CARP Report devotes a considerable amount of discussion to the identity and status of ACG, WSG, and IPG. It is a complicated discussion. When claim No. 176 was originally filed with the Copyright Office on July 11, 1998, it listed ACG as the sole claimant. ACG was incorporated in May of 1998 in the state of California by Raul Galaz, its principal, for the apparent purpose of representing claimants before the Library for cable and satellite television royalties. Although ACG was the only claimant on claim No. 176, the claim stated that it was a joint claim being filed on behalf of ACG and ''on behalf of others.'' Claim No. 176. Mr. Galaz signed the claim. When Mr. Galaz was informed by the Copyright Office that in order for claim No. 176 to be a joint claim it must identify at least one other claimant, he amended claim No. 176 to include WSG. At that time, WSG was nothing more than an unregistered, fictitious business name for ACG. The following year, Mr. Galaz moved from California to Texas, whereupon he filed articles of incorporation for WSG in Texas. Before leaving California, Mr. Galaz also registered the name WSG in California as a fictitious business name for WSG.

Once in Texas, Mr. Galaz took steps in 2000 to dissolve ACG by filing articles of dissolution in California for ACG. This left WSG as a Texas corporation. Mr. Galaz then adopted an unregistered, fictitious business name for WSG in Texas: IPG. When MPAA moved to dismiss claim No. 176 in June of 2000, IPG informed the Library in a footnote of its opposition to the motion that ACG had voluntarily withdrawn its claim from the proceeding, leaving WSG Texas/IPG as the sole claimant in this proceeding.

The first question is whether these various changes in identity were an attempt to perpetrate a fraud on the Copyright Office by hiding from the Office the real claimants in this proceeding. In other words, did IPG deliberately refrain from listing its exhibit D claimants in claim No. 176 (Litton, Flying Tomato Films, et al.) because it was hiding something from the Office? Assuming that listing only ACG and WSG (California) on claim No. 176 was not an honest mistake, as IPG vigorously claims that it was, the only reason the Library can divine for not listing the exhibit D claimants was that ACG/WSG did not then represent some or all of those claimants or, in the alternative, ACG/WSG did not want to preclude the possibility of signing up additional claimants after the July 31, 1998, deadline.

Whether or not this was ACG/WSG's true motivation is unknown, although the CARP at least suggests a sinister element in Mr. Galaz's actions. CARP Report at 42. In any event, the Register believes that the Library has satisfactorily dealt with the status of IPG's representation of the exhibit D claimants in the June 22, 2000, Order and the above discussion. It is apparent that WSG—i.e., Mr. Galaz—had a valid

[6] The remainder of the exhibit D parties have been either withdrawn from the preceeding, or their programs have been credited to another. The programs of Beacon Communications Corp., Cosgrove-Meurer Productions, Jay Ward Productions, Mainframe Entertainment, and Scholastic Entertainment were withdrawn by IPG. Flying Tomato Films' program was credited to Litton. CARP Report at 55. Mendelson/PAWS, Inc.'s programs were credited to MPAA. *Id.* at 64. The CARP determined that Golden Films Finance Corporation IV and American Film Corporation II were not entitled to a distribution because their programs were not retransmitted by a cable system on a distant basis. *Id.* at 58. Lacey Entertainment's programs were credited to MPAA. *Id.* at 71–72.

representation arrangement with Litton Syndications in July of 1998 before the close of the cable claim filing period. The Library need not make any determination as to whether Litton's agreement was with ACG/WSG California, WSG Texas, or IPG. Any attempt to do so would necessarily involve questions of state law with respect to the effect of incorporation of a company and use of fictitious business names. Such determinations are beyond the jurisdiction of the Library and are unnecessary in this proceeding. Mr. Galaz/WSG had a valid representation agreement with Litton in July of 1998, and Litton affirms this relationship by allowing IPG to represent it in this proceeding. Because the Library has agreed—this one time [7]—that it was acceptable that Litton did not appear on claim No. 176, *supra,* Litton has a valid claim in this proceeding.

The second question surrounds ACG's voluntary withdrawal from this proceeding. MPAA contends that when ACG withdrew its claim that left only WSG California on claim No. 176, and WSG California was nothing more than a fictitious business name for ACG. MPAA Petition to Modify CARP Report at 33. Litton's representation agreement is with WSG Texas, which is not a claimant in this proceeding, and therefore claim No. 176 must be dismissed. IPG responds that it was counsel's mistake to inform the Library that ACG had withdrawn its claim and that such mistake should be discounted because it appeared in a footnote to an opposition to MPAA's motion to dismiss. IPG Reply to MPAA Petition to Modify CARP Report at 27–29.

Once again, the legal status of ACG, WSG California, WSG Texas, and IPG involve questions of state law beyond the jurisdiction of the Library. While it is true that IPG did state that the claims of ACG were withdrawn, it is illogical to assume that IPG was effectively ending its case by rendering claim No. 176 void. Rather, it is apparent that IPG believed that it held all rights of ACG when it sought to dissolve ACG in California, particularly since Mr. Galaz was the principal for both organizations. It would work a serious injustice to deny Litton royalties based upon a determination that Mr. Galaz made a technical error in assuming that all rights of ACG were held by IPG before ACG withdrew from the proceeding. Indeed, while IPG stated that it was withdrawing ACG's claim, the Library did not enter any order to that effect, leaving the status of ACG in this proceeding unresolved. Certainly, the actions of Mr. Galaz are not to be condoned and should serve as a warning to future claimants to make sure that proper transfers of rights between corporations are effected prior to seeking dismissal or dissolution of a claimant. However, the Library has determined that a valid representation arrangement existed for Litton and that, in this instance, it is appropriate that Litton's claim be allowed to go forward.

Finally, there is the question of the programs listed on claim No. 176. Section 252.3(d)(4) requires that for joint claims there must be an ''identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint claim.'' 37 CFR 252.3(a)(4). ACG listed two programs on claim No. 176, *Unsolved Mysteries* and *Garfield and Friends,* neither of which was ultimately credited to IPG. *Unsolved Mysteries* was dropped from IPG's case because it was determined that it was a network program not eligible for section 111 cable royalties. Both IPG and MPAA claimed *Garfield and Friends,* and the CARP ultimately determined that it was properly credited to MPAA. This means that ACG did not identify a secondary transmission on claim No. 176 that belonged to one or more of its joint claimants.

The purpose of requiring identification of at least one secondary transmission by a cable system is to permit the Copyright Office to determine if the claim is facially valid. In other words, if a claimant lists a network program, or a program that was not retransmitted in the calendar year for which royalties are sought, the Office can take immediate action either to request further information, or to dismiss the claim. The Office has contemplated amending its rules to require claimants to identify all the programs that comprise their claim, but is aware that there is considerable opposition among copyright claimants to adopting such a requirement. If the program listed on a claim appears facially valid, the Office does not attempt to resolve its ownership status and the claim is allowed to go forward. In this case, it is apparent that IPG had a colorable claim to *Garfield and Friends*, believing that it had a valid representation agreement with Mendelson/PAWS, the producer of the *Garfield* programs. The CARP determined, however, that MPAA had a stronger claim, ruling that General Mills held the syndication rights to the programs. Consequently, this is not a case where IPG had no realistic claim to *Garfield and Friends*.[8]

Given the dispute over ownership rights of *Garfield and Friends*, the Register determines that it would be unjust to invalidate all of the claims covered by claim No. 176 because it was ultimately determined that MPAA held the superior claim to the program. Were we to rule the other way, it would make § 252.3(a)(4) a trap for unwary joint claimants. Since the rule requires identification of only one secondary transmission, hundreds of joint claims could potentially be invalidated if a single program is identified that, after litigation before a CARP, is determined to have a superior claimant. There is also the question of what might happen if the joint claimant with the single identified program withdraws its claim or changes representation in the proceeding. Such gamesmanship could potentially wipe out many otherwise valid claims from the proceeding. Because IPG had a colorable claim to *Garfield and Friends* at the start of this proceeding, it would be unjust to invalidate claim No. 176 because the program was ultimately awarded to MPAA.

In sum, the Register concludes that claim No. 176 is sufficiently valid to allow the claim of Litton, as described below, to go forward in this proceeding and receive a distribution of royalties.

3. Programs Credited to Litton

During proceedings before the CARP, IPG claimed thirteen programs for Litton: *Algo's Factory; Jack Hanna's Animal Adventures; Dramatic Moments in Black Sports History; Dream Big; Harvey Penick's Private Golf Lessons; MomUSA; Nprint; Critter Gitters; Shaka Zulu; Sophisticated Gents; The Sports Bar, Bloopy's Buddies* and *Story of a People.* The CARP did not credit IPG with *Shaka Zulu,* finding that the program properly belonged to Harmony Gold USA, and determined that *Story of a People* was an unclaimed program. The CARP also did not credit IPG with *Dream Big,* determining that it was properly claimed by Warner Bros. as the syndicator of the program. The remaining programs were credited to IPG.

In its petition to modify the initial decision of the CARP, MPAA challenges

[7] See footnote 2, *supra.*

[8] The same cannot be said for *Unsolved Mysteries. Unsolved Mysteries* is a network program which can never be eligible for section 111 royalties. *See* 17 U.S.C. 111(d)(3)(A) (only nonnetwork programs are eligible for distributions). ACG should have known that *Unsolved Mysteries* failed to satisfy the requirements of 37 CFR 252.3(a)(4). If this had been the only program that ACG listed in claim No. 176, there would be solid grounds for dismissal of the claim.

the CARP's determination to credit Litton with *Dramatic Moments in Black Sports History, Critter Gitters,* and *Bloopy's Buddies.* The CARP credited *Critter Gitters* and *Bloopy's Buddies* to Litton because these programs appeared on Litton's representation agreement with WSG. CARP Report at 59. Both MPAA and IPG claimed *Dramatic Moments in Black Sports History.* After allowing evidentiary supplements to IPG's and MPAA's claim on this program, the CARP stated that ''[i]n view of the entire supplemented record, therefore, the CARP finds that *Dramatic Moments in Black Sports History* is represented under the IPG rather than the MPAA claim.'' *Id.* at 61–62.

With respect to *Critter Gitters* and *Bloopy's Buddies,* MPAA asserts that ''IPG made no claim for either program'' and ''presented no evidence of their value.'' MPAA Petition to Modify CARP Report at 44. Further, MPAA asserts that the CARP ''cites no evidence that either program was broadcast in the United States.'' *Id.* With respect to *Dramatic Moments in Black Sports History,* MPAA argues that:

> The program is listed in MPAA's list of claimed programs. The claimant—New Line Cinema Corporation—appears on MPAA's list of claimants. It appears on the alpha list as owned by New Line Cinema. New Line *has* certified its entitlement to royalties for *Dramatic Moments in Black Sports History.* The record, therefore, only will support a conclusion that MPAA represents New Line.

Id. at 43–44 (footnotes omitted).

In response to MPAA's challenge of *Critter Gitters* and *Bloopy's Buddies,* IPG acknowledges that it made no claim in these programs and did not present any evidence of their value ''because both programs appear to have been broadcast exclusively on non-commercial television stations.'' IPG Reply to MPAA Petition to Modify CARP Report at 34. IPG ''does not challenge modification of the Panel Report to reflect that such programs were not claimed by IPG.'' *Id.* IPG does assert, however, that there was evidence supporting its claim to *Dramatic Moments in Black Sports History,* stating that the program is ''expressly identified in the contract between Litton and WSG'' and was therefore properly credited to IPG. *Id.*

It is apparent that the CARP acted arbitrarily in crediting IPG with *Critter Gitters* and *Bloopy's Buddies,* and the Register recommends rejecting this determination and removing the programs from Litton's list. With respect to *Dramatic Moments in Black Sports History,* the CARP offered no reasons or explanation as to why it was awarding the program to IPG rather than MPAA, other than to state that such result was obtained ''[i]n view of the entire supplemented record.'' CARP Report at 61–62. Unexplained decisionmaking is the hallmark of arbitrary action. The Register therefore recommends rejection of the CARP's award of *Dramatic Moments in Black Sports History* to IPG. The June 5, 2001, Order directed the CARP to explain its reasoning for awarding *Dramatic Moments in Black Sports History* to IPG.

In sum, the June 5, 2001, Order directed the Panel to credit the following programs to Litton: *Algo's Factory; Jack Hanna's Animal Adventures; Harvey Penick's Private Golf Lessons; Mom USA; Nprint; Sophisticated Gents; The Sports Bar;* and *Just Imagine.*[9] The Order also directed the CARP to explain its reasons for crediting *Dramatic Moments in Black Sports History* to IPG and, if it continued to believe that it made the correct determination, to credit IPG with that program.

4. The Royalty Awards

The CARP awarded IPG 0.5% of the program supplier category funds, and the remaining 99.5% to MPAA. The CARP, however, failed to explain its reasoning or its methodology for bestowing these awards. Because unexplained decisionmaking by a CARP is arbitrary, the CARP's awards must be rejected. The June 5, 2001, Order remanded the matter to the CARP to determine new awards for IPG and MPAA, in light of the decision announced in that Order to dismiss additional IPG claimants and programs, and to explain the reasoning for the new awards.

The CARP's failure to articulate any reasons for the 0.5% and 99.5% awards, and the methodology it used to produce these numbers, is puzzling. The CARP began its analysis in an appropriate fashion, fully detailing in its report the distribution methodologies proposed by IPG and MPAA. As discussed above, IPG's and MPAA's methodologies were premised on fundamentally different principles. MPAA addressed the marketplace value of the programs it represented by attempting to evaluate the amount of viewership they received, while IPG examined the value of the programs to cable operators who retransmitted them. IPG's methodology accorded the programs it represented a higher award—0.881%—than if the MPAA's methodology were applied to the same programs—0.0708%. The CARP then analyzed each side's criticisms of the other's methodology and concluded that a number of the criticisms were valid. It found the following shortcomings for MPAA's methodology:

—MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
—The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
—The number of sampled stations [in MPAA's station survey] has declined without adequate explanation.
—Station selection criteria excluded Form 1 and Form 2 cable systems.
—The number of ''zero'' viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
—The method of interpolation of non-sweep month estimated viewing needs statistical validation.
—There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

CARP Report at 102–103. For IPG, the CARP found the following criticisms:

—A mathematically sound basis for the creation and application of the station weight factor and time period weight factor should have been presented by a statistician.
—Daypart data was misapplied thus overstating ''all other'' viewing.
—It doesn't directly address the marketplace value of the works transmitted, a primary criteria.

Id. at 103. The Register has reviewed the record evidence in this proceeding and finds that there is ample support for these criticisms. They are not arbitrary. What is arbitrary, however, is what the CARP did next. Rather than address these criticisms in the context of its decision making process, the CARP immediately awarded the 0.5 and 99.5 percentages without any explanation as to how they arrived at these numbers. Since no reasoning was provided for these numbers, they must be rejected. *National Ass'n of Broadcasters* v. *Librarian of Congress,* 146 F.3d 907, 923 (D.C. Cir. 1998)(royalty distribution award arbitrary if rendered without explanation). The June 5, 2001, Order directed the CARP to provide a full explanation of the approach it was using in adopting new distribution awards.[10]

[9] The CARP determined that Just Imagine was properly credited to Litton, and not to Flying Tomato Films. Both of these parties are represented by IPG. No challenge to the CARP's determination on this matter was made.

[10] In explaining their final numbers, CARPs have flexibility in the methodologies or approaches they

Continued

The Revised CARP Report

On June 20, 2001, the CARP delivered its revised report. The revised report assigns new distribution percentages to IPG and MPAA and explains the CARP's reasoning for both its initial awards and the revised awards.

As directed by the June 5, 2001 Order, the CARP only credited IPG with programs belonging to Litton Syndications. The programs are: *Algo's Factory, Jack Hanna's Animal Adventures, Harvey Pennick's Private Golf Lessons, MomUSA, Nprint, Sophisticated Gents, The Sports Bar* and *Just Imagine.* The CARP did not credit IPG with *Dramatic Moments in Black Sports History,* reversing its earlier determination that Litton was the syndicator of the program. *See* Initial report at 62; Revised report at 2. The CARP determined that ''[a]lthough both parties claim this program, New Line Cinema's program certification with MPAA indicates that it claims the program as syndicator.'' Revised report at 2.

With respect to awards, the CARP modified its initial determination by reducing IPG's award from 0.5% to 0.212% , and increasing MPAA's award from 99.5% to 99.788%. The CARP then explained how it determined the initial 0.5% and 99.5% awards, and then modified them in light of the June 5, 2001, Order to produce the new percentages.

Although the CARP was presented with disparate methodologies for calculating the royalty awards-MPAA's methodology based on Nielsen household viewing hours and IPG's methodology based on value of the programming to cable operators—the CARP did find two elements of these competing methodologies in common. MPAA based its methodology upon a database obtained from CDC that contained 82 commercial television broadcast stations that were retransmitted by large (Form 3) cable systems on a distant basis during 1997. IPG based its methodology upon a CDC database that contained 99 commercial television broadcast stations (which included the same 82 stations used by MPAA) that were retransmitted by small, medium, and large (Form 1, 2, and 3) cable systems on a distant basis during 1997. Both of these databases have two overlapping categories: ''Rebroadcasts,'' the number of times a particular program was retransmitted; and ''Airtime,'' the length of the program multiplied by the number of times it was rebroadcast. The CARP stated that the purpose of examining the two databases was two-fold: ''First to verify the accuracy of the numbers presented in the testimony and exhibits; and secondly to give the CARP a sense of the relative positions of MPAA and IPG represented claimants in the 1997 marketplace by comparing the only two categories included in both databases, Rebroadcasts and Airtime.'' Revised report at 18.

Appendix A of the revised CARP report compares the Rebroadcasts of the eight programs credited to Litton (as directed by the June 5, 2001 Order) for both the IPG and MPAA databases. For the IPG database, these programs accounted for 0.4394782365% of the total number of program titles Rebroadcast in 1997. For the MPAA database, the eight programs account for 0.2811997603% of the total number of program titles Rebroadcast in 1997.

Appendix B of the revised CARP report compares the Airtime of the eight programs credited to Litton for both the IPG and MPAA databases. For the IPG database, these programs accounted for 0.3494840195% of total Airtime of all programs retransmitted in 1997. For the MPAA database, the programs accounted for 0.2171099164% of the total Airtime of all programs retransmitted in 1997.

The numbers described in Appendices A and B provide a range of comparison as to the amount of time that Litton's eight programs were available on distant broadcast signals retransmitted by cable systems. But this range did not account for how much these programs were watched, or the value ascribed to these programs by cable operators. To account for this, the CARP turned to MPAA's and IPG's methodologies and applied its criticisms of the evidence presented for each methodology, assessing penalties (percentage deductions from the total award yielded by the methodology) for each criticism depending upon the severity of the criticism. The eight criticisms of MPAA's methodology and the three criticisms of IPG's methodology, and their accompanying deductions, are described in Appendix D of the CARP's revised report. As a result of the eight criticisms, MPAA suffered a 0.450% reduction in the awards yielded by its methodology, and IPG suffered a 0.375% reduction in the awards yielded by its methodology.

As with its comparison of IPG and MPAA databases, the revised IPG and MPAA methodologies (i.e. after the penalty reductions) yielded yet another range of numbers. For IPG, the revised MPAA methodology gave it an award of 0.462% of the 1997 royalty funds, while revision of its own methodology yielded an award of 0.731%. *See* Appendix D. According to the CARP, it is this range of numbers that yielded the 0.5% award to IPG in the initial report. Revised report at 18.

Because the June 5, 2001, Order eliminated programs credited to IPG under both MPAA's and IPG's methodologies, the CARP needed a way to adjust downward IPG's award, and increase MPAA's award, to reflect the eliminated programs. It did this by examining the reduction in the percentages of Rebroadcasts and Airtime credited to IPG for its original claim and derived a median change of minus 57.673%. Appendix C. The minus 57.673% figure represents the median change from the original amount of Rebroadcasts and Airtime credited to IPG. According to the CARP, ''[e]liminating all claimants except Litton, means that on average, IPG now represents only 42.322% of the Rebroadcasts and Airtime that they did before.'' Revised report at 20. This meant that ''IPG is entitled to 42.322% of the Original Award'' of 0.5%. *Id.* Consequently, the CARP awarded IPG 0.212% of the 1997 royalty funds in the syndicated program category, and the remaining 99.788% to MPAA.

Petitions to Modify the CARP's Revised Report

Both MPAA and IPG level a number of criticisms at the conclusions reached by the CARP in the revised report, all of which they charge rise to the level of arbitrary action as a matter of law. MPAA submits that the CARP's award of 0.212 of one percent of the royalty funds to IPG is excessive and must be reduced. IPG counters that the methodology used by the CARP is fundamentally flawed and that its award must be increased.

MPAA charges that the CARP made mathematical, methodological, and evidentiary errors in both the initial and revised reports. The principal mathematical error, according to MPAA,

use. The courts have recognized that there is a considerable ''zone of reasonableness'' when awarding a particular distribution percentage. *See,* e.g. *National Cable Television Ass'n* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 182 (D.C. Cir. 1983). In other words, there are no magical formulas that produce precise results. In this proceeding, the CARP could have chosen either IPG's or MPAA's formulas, adjusted the chosen formula to account for the CARP's criticisms of it, and used that process to yield the final numbers. Or, the CARP could have chosen a combination of both formulas, taking into account the criticisms of both, to arrive at the final numbers. Or, the CARP could have adopted its own distribution methodology or formula, using the data in the record of the proceeding to achieve the final results. Each of these approaches is acceptable *provided* that the CARP articulates the reasons for its choice, explains how it applied its choice to produce its final determination, and the determination itself is reasonable.

concerns the CARP's use of IPG's requested royalty distribution percentage of 0.881. In appendix D to the revised report, the CARP used the 0.881% distribution percentage offered by IPG and adjusted it downward by 0.375% to reflect its three criticisms of IPG's evidentiary presentation. MPAA states that 0.881% is the wrong starting percentage because it reflects all the programs originally claimed by IPG and does not take into account the programs that the CARP eliminated from IPG's claim. Using IPG's valuations for each of its claimed programs, MPAA asserts that the CARP should have adjusted the 0.881% claim of IPG downward to 0.332%, since only 37.68% of the programs originally claimed by IPG were credited by the CARP in its initial report. MPAA Petition to Modify Revised Report at 5. Deducting 0.375% for the three criticisms of IPG's evidentiary presentation from 0.332% yields a negative distribution percentage for IPG.

MPAA challenges the methodology employed by the CARP; in particular the use of Rebroadcasts and Airtime for IPG's and MPAA's represented programming. MPAA asserts that this approach unduly relies upon time considerations (i.e. time on the air) and ignores the marketplace value of the programming in contravention of prior CARP precedent. CARP Report in Docket No. 94–3 CARP CD 90–92 at 19–20 (June 3, 1996). These considerations aside, MPAA also questions the usefulness of comparing Rebroadcasts and Airtime from both MPAA's and IPG's sample surveys, since MPAA's 82 station sample survey contains more rebroadcasts and more hours of airtime than IPG's 99 station survey. The inherent illogic of this result should have, according to MPAA, indicated to the CARP that reliance solely on these numbers is flawed.[11]

MPAA also makes numerous challenges to the CARP's treatment of the evidence presented in this proceeding. In particular, MPAA asserts that the CARP's five criticisms of various aspects of MPAA's evidentiary presentation, that resulted in a 0.450% upward adjustment to IPG's share of the royalties as identified by MPAA, are baseless. First, MPAA argues that the 82 station sample survey it put forth was statistically sound since it ''very nearly reflects the entire universe of distant signal carriage, accounting for 92.5 per cent of aggregate subscribers instances. Therefore, the possibility of a margin for error that is in any way significant is nil.'' MPAA Petition to Modify Revised Report at 12.

Second, MPAA argues that there is no record evidence that demonstrates that exclusion of Form 1 and Form 2 cable systems from the total instances of distant cable carriage of syndicated programming negatively impacts the results of its 82 station sample survey, since the Form 3 cable systems used in the survey account for 89% of all cable subscribers to distant broadcast stations. Third, MPAA argues that the CARP had no grounds to criticize the number of zero viewing instances reported in the Nielsen household viewing hours used in the MPAA survey, especially since Paul Lindstrom, the only qualified expert in economics and statistics testifying in the proceeding, asserted that they did not have a significant bearing on the statistical validity of the survey.

Fourth, MPAA charges that it was inappropriate and unfair for the CARP to criticize MPAA for not presenting relative error figures with respect to its methodology components and for mixing Nielsen diary data with Nielsen meter data. Finally, MPAA charges that it was groundless for the CARP to penalize MPAA 0.10% for its interpolation of data for time periods not measured by Nielsen (i.e. non sweeps periods) and only accord IPG a 0.075% penalty for a similar criticism.

IPG also asserts that the CARP made a series of errors in fashioning both the original awards and the revised awards. IPG asserts that the CARP erroneously assigned two programs—*Dream Big* and *Dramatic Moments in Black Sports History*—to MPAA. *Dream Big* was credited to MPAA in the CARP's original report because it identified Warner Bros. as the syndicator of the program. With respect to *Dramatic Moments in Black Sports History,* the CARP originally assigned it to IPG (as claimed by Litton) but was directed by the Librarian's June 5, 2001, Order to provide an explanation for this decision. In the revised report, the CARP changed its mind and assigned *Dramatic Moments in Black Sports History* to MPAA because it concluded that New Line Cinema was the syndicator of the program, not Litton. IPG submits that if the Librarian does not restore these two programs to Litton's claim, then he should ''place the funds for the[se] program[s] * * * in escrow until the proper recipient is determined.'' IPG Petition to Modify Revised Report at 4.

Like MPAA, IPG criticizes the CARP's reliance upon the number of Rebroadcasts and Airtime in fashioning its awards, noting that undue reliance on time considerations is contrary to precedent of the CRT and is not reflective of the value of the programming. IPG states that it provided the CARP with the unit value for each of its claimed programs (utilizing IPG's methodology), thereby giving the CARP the opportunity to derive an award based on the programs it credited to IPG. The eight programs credited to Litton amount to 79.074% of the original award to IPG of 0.5%, meaning that the CARP should have adjusted the original 0.5% award downward to 0.3958%. Such an award would, according to IPG, reflect the true value of the Litton programs.

With respect to the CARP's criticisms of MPAA's methodology, IPG argues that the CARP did not go far enough. IPG asserts that the CARP never verified the number of household viewing hours attributed to MPAA in its study, noting that MPAA received credit for appreciable numbers of programs not claimed by MPAA or certified by its members. Further, IPG asserts that the CARP should have penalized MPAA for having to call Paul Lindstrom and Thomas Larson as witnesses to provide additional support for MPAA's methodology. And IPG submits that the CARP should have penalized MPAA more than it did for reducing the number of stations in its station sample survey and for the large amount of zero viewing instances of programming contained in the Nielsen data presented by MPAA.

Finally, IPG asserts that certain of the CARP's criticisms of IPG's methodology are not valid. With respect to the CARP's critique that IPG misapplied its daypart data thereby overstating its weighted viewing factor, IPG asserts that no evidence was presented to demonstrate that such misapplication provided any benefit to IPG. And, with respect to the CARP's criticism that IPG's methodology attempted to demonstrate the overall appeal of broadcast stations to cable operators, as opposed to the overall appeal of the programming to cable operators, IPG argues that the CARP simply mischaracterized its summary reference of ''overall station appeal'' by ignoring the elements that comprised this aspect of IPG's methodology.

Rejection of the Revised Report

The Register makes her recommendation as to whether the

[11] IPG counters this argument by noting that MPAA's 82 station data includes all broadcasts, irrespective of whether the program falls in the syndicated programming category or another category (such as sports, local programming, etc.) and irrespective of whether the program is claimed by IPG, MPAA or no party. IPG's 99 station data makes these distinctions, resulting in fewer measured broadcasts and broadcast hours.

revised royalty awards to IPG and MPAA should be adopted by the Librarian of Congress, or whether they are arbitrary or contrary to the provisions of the Copyright Act, title 17, United States Code. In making this recommendation, the Register has reviewed both the initial report of the CARP and the revised report, including the petitions to modify both reports filed by the parties. For the reasons stated below, the Register concludes that both the initial report and the revised report are arbitrary and must be rejected.

Review of the initial report and the revised report reveals a number of arbitrary actions by the CARP. These include: (1) Failure to adequately explain the evidence supporting the CARP's reversal of its award of Dramatic Moments in Black Sports History from IPG to MPAA; (2) failure of the CARP in its initial report to adjust downward IPG's requested distribution percentage after the CARP eliminated a number of IPG's claimed programs; (3) failure of the CARP in its initial report to adjust upward MPAA's requested distribution for IPG given the number of programs which the CARP credited IPG; (4) failure of the CARP in the revised report to adjust both IPG's and MPAA's requested distributions in light of the final programs credited to IPG; (5) failure of the CARP to base any of its downward deductions to both IPG's and MPAA's methodologies (based on the CARP's criticisms) on record evidence; and (6) adoption by the CARP of a distribution methodology that arguably has little relationship to the marketplace value of the programs. In recommending rejection of the CARP's determination, the Register focuses her discussion on the second failure described above-the lack of downward adjustment to IPG's requested distribution in light of the programs credited-because it created a fundamental flaw in the CARP's approach that invalidates the distribution awards granted IPG in both the initial and the revised reports.

The CARP's distribution methodology, articulated only in the revised report, is fully discussed above. Briefly recapped, it is the product of two "ranges." First, the CARP utilized the Rebroadcast and Airtime data-the only data categories common to both methodologies-to give the CARP "a sense of the relative positions of MPAA and IPG represented claimants in the 1997 marketplace." Revised Report at 18. This produced the first range for locating the CARP's final awards. Then, the CARP utilized "the parties competing requests for allocations and the formulas presented advocating their averred distribution percentages," adjusting them by applying deductions reflective of the CARP's criticisms of the respective methodologies. This produced the second range for locating the CARP's final awards. The second range appears to be the one actually used by the CARP to settle upon its original award of 0.5% to IPG. *Id.*

A critical flaw occurs with the inputs for the second prong of the CARP's methodology. The CARP started with IPG's requested distribution percentage of 0.881%, drawn from IPG's proposed findings of fact and conclusions of law. The 0.881% is an inflated percentage, however, because it was based upon inclusion of all programs originally claimed by IPG. Earlier in the CARP's initial report, it spent considerable time discussing the validity of IPG's claimed programs and found a number of the claims invalid. *See,* Initial Report at 72–74 (royalty allocation for *Dragon Ball Z* to MPAA; no royalty allocation for *Enchanted Tales* and *Thumbelina;* royalty allocation for *Dream Big* to MPAA; no royalty allocation for *Bottom Line, By River By Rail, Til Earth and Heaven Ring;* no royalty allocation for *Lou Rawls Parade of Stars;* no royalty allocation for *Psychic Friends, Psychic Friends Network, Psychic Revival Network, Psychic Solution, Psychic Talk, Psychic Talk 2, Psychic Talk USA, Psychic Talk Thirty).* These programs were included in IPG's 0.881% request. It was therefore arbitrary for the CARP to accept the 0.881% figure as a starting point because it had eliminated many of the programs that produced this number.

Likewise, the CARP made the same error when it looked at the distribution percentage for IPG yielded by MPAA's methodology. MPAA's distribution percentage of 0.012% was based on only seven programs credited to IPG. However, in its initial award, the CARP credited IPG with far more than just seven programs. It was therefore arbitrary for the CARP to use the 0.012% figure as a starting point for its application of MPAA's methodology.

In sum, the faulty inputs to the second prong of the CARP's methodology make the range generated by that prong wholly inaccurate, thereby rendering the initial award erroneous. The revised report, since it merely takes the original award to IPG and makes a median change to it based upon the reduction in programs credited to IPG, is likewise erroneous. Although there are other serious flaws in the CARP's approach, as described above, the Register need go no further. The CARP's determination must be rejected, and the Librarian must substitute his own determination.

Part Two—Recommendation of the Register

This is not the first time that the Register of Copyrights has recommended, and the Librarian of Congress has accepted, a rejection of a decision of a CARP. In most of those cases, the Register has recommended that only portions of a CARP's decision be rejected, *see*, e.g., 61 FR 55653 (October 28, 1996)(cable distribution); 62 FR 55742 (October 28, 1997)(satellite rate adjustment). In one case, the Register recommended that the Librarian reject the royalty rate established by the CARP, and substitute his own determination. 63 FR 25394 (May 8, 1998)(digital performance right in sound recording rate adjustment).

Section 802(f) of the Copyright Act provides that "[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall * * * 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." 17 U.S.C. 802(f). As discussed above, the distribution methodology applied by the CARP in this proceeding is so flawed that any distribution percentages generated by it are inherently arbitrary. As a consequence, there must be an independent review of the record to resolve this proceeding.

Distribution Criteria

Section 111 does not prescribe the standards or guidelines for distributing royalties collected from cable operators under the statutory license. Instead, Congress decided to let the Copyright Royalty Tribunal "consider all pertinent data and considerations presented by the claimants" in determining how to divide the royalties. H.R. Rep. No. 1476, at 97 (1976). In the first cable distribution proceedings, the Tribunal fashioned five distribution criteria: three primary criteria and two secondary criteria. The three primary criteria were: (1) The harm caused to copyright owners by secondary transmissions of their copyrighted works by cable systems; (2) the benefit derived by cable systems for secondary transmissions of the copyrighted works; and (3) the marketplace value of the works. The secondary criteria were: (1) the quality of the copyrighted program and (2) time-related considerations. *National Ass'n of Broadcasters* v. *Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). In 1989, the Tribunal eliminated the secondary criterion of program quality from its consideration. 57 FR 15286, 15303

(April 27, 1992). In 1998, the Librarian determined that a CARP did not act arbitrarily by eliminating the primary criterion of harm to the copyright owner. *NAB*, 146 F.3d 907 (D.C. Cir. 1998).

In considering the value of programming in a Phase II cable distribution proceeding, we must simulate the marketplace for that programming. Under the statutory license regime of section 111, programs are not bought and sold in the open marketplace-the statutory license substitutes for the marketplace. Cable operators pay an established fee for the privilege of retransmitting all the programs contained on a particular broadcast signal, rather than license the programs individually. However, just because cable systems pay a single fee for all the programs does not mean all the programs are of equal value. The established distribution criteria, as modified, must be applied in an effort to simulate a marketplace for these programs where one does not exist because of section 111. We now turn to a consideration of the evidence presented by MPAA and IPG as to the value of their programs.

The Programs

Before considering the appropriate methodology for distributing the 1997 cable royalties in the syndicated programming category, the programs to be credited to MPAA's and IPG's royalty distribution claims must be determined.[12] In the Librarian's June 5, 2001 Order, IPG's program claim in this proceeding was pared down to the following eight programs: *Algo's Factory; Jack Hanna's Animal Adventures; Harvey Pennick's Golf Lessons; Mom USA; Sophisticated Gents; Nprint; Just Imagine* and *The Sports Bar.* Order in Docket No. 2000–2 CARP CD 93–97 at 1 (June 5, 2001). Each of these programs is claimed by Litton Syndications. IPG claims an additional two programs on behalf of Litton: *Dream Big* and *Dramatic Moments in Black Sports History.*

A. Dream Big

Dream Big is listed in exhibit D of IPG's written direct case as belonging to Litton. Litton's representation agreement with IPG lists *Dream Big* as a program claimed by Litton, and the representation agreement contains the following boilerplate language:

> Principal (i.e. Litton) warrants that to the best of Principal's knowledge Principal has the right to collect the Distribution Proceeds to Programs, and has not previously conveyed the right to collect the Distribution Proceeds to any third party.

Representation agreement at 2, clause 7. At hearing, on cross-examination of IPG's witness Raul Galaz, the following exchange took place:

Q: The program *Dream Big*, Mr. Galaz, do you know who the copyright owner of that program is?

A: No.

Q: And, again, do you know who the syndicator of that program is?

A: My understanding is that Litton Syndications is the syndicator.

Q: And do you know, again, the nature of the particular right or interest owned by Litton with respect to their entitlement to Section 111 royalties?

A: No, I don't know whether they are, additionally, an owner.

Q: I didn't hear you. I'm sorry.

A: I don't know whether they are, additionally, an owner or not.

Tr. 1063–64. No additional testimony regarding *Dream Big* took place.

In its petition to modify the initial decision of the CARP, IPG requests that the Librarian reopen the record to admit a copy of an agreement between Warner Vision Entertainment and Litton which, according to IPG, conclusively proves that Litton holds the syndication rights to *Dream Big.* The agreement states that Warner Vision ''hereby grants to Litton, and Litton hereby accepts, the right to syndicate a children's audio-visual series tentatively entitled 'Real Kids.'' ' IPG Petition to Modify CARP Report at appendix 2. IPG asserts that Warner Vision is a subsidiary of Warner Bros., and that ''Real Kids'' is the initial name for *Dream Big.*

MPAA claims *Dream Big* in exhibit D of its written direct case. *Dream Big* is identified on MPAA's Alpha List (a listing of all programs broadcast in 1997 and including both MPAA-represented and IPG-represented programs) as belonging to Warner Bros. MPAA also obtained a program certification form from Warner Bros. that lists *Dream Big* as a Warner Bros. program. The certification form, signed by Michael Troxler, Vice President of Finance, contains MPAA's boilerplate language stating that Warner Bros. is entitled to receive 1997 cable royalties for *Dream Big* by virtue of being ''An officer (if a corporation) or a partner (if a partnership) of the legal entity identified as the owner or the authorized agent of the owner of the programs on the printout.'' IPG Exhibit 7XR at 389. Other than the cross-examination of Mr. Galaz identified above, MPAA did not put forth any further information at hearing regarding *Dream Big.*

In reaction to IPG's request to reopen the record and have the Librarian consider the Warner Vision/Litton agreement, MPAA submits an April 11, 2000, letter of Michael Troxler of Warner Bros. stating:

> WarnerVision is the rightful copyright holder to the series Dream Big. This was subdistributed on behalf of WarnerVision by Litton for a clearance fee based upon U.S. coverage. Since Litton was paid a clearance fee, they are not entitled to any of the Cable Copyright Royalties.

MPAA Reply to IPG Petition to Modify CARP Report at appendix 2.

In *National Broadcasting Co., Inc.* v. *Copyright Royalty Tribunal*, 848 F.2d 1289 (D.C. Cir. 1988), the Court reviewed the Copyright Royalty Tribunal's attempt to resolve competing claims for the program *Little House on the Prairie.* NBC created and produced the program and granted to Worldvision, Inc. exclusive rights to distribute the program for a period of 35 years. The Tribunal determined that Worldvision, as the exclusive syndicator of the program, was the party entitled to section 111 royalties. The Court upheld this conclusion, stating:

> The CRT determined that the directly affected party [from the harm caused by retransmission of the program by cable systems] will typically be the exclusive syndicator, and that the CRT will therefore as a general rule always distribute royalties initially to the syndicator. This presumption by the CRT, in the face of congressional silence, is a permissible interpretation of the statute, to which we defer.

848 F.2d at 1296.

Examining the record evidence, the Register cannot ascertain who is currently the exclusive syndicator of *Dream Big.* The non-record evidence, even if admitted, still does not resolve the issue. And section 802(f) of the Copyright Act states that the Librarian shall base his decision only upon the record evidence.

Given the dearth of record evidence, it would be arbitrary for the Register to recommend that *Dream Big* be awarded to either MPAA or IPG. Consequently,

[12] As a practical matter, the focus will be on the programs represented by IPG. The reason for such focus is obvious. There are only two claimants in this proceeding; one that represents most of the programs eligible for distribution (MPAA), and one that represents only a few (IPG). Once it is determined which IPG-represented programs are eligible for a distribution of the 1997 royalty funds, the value of those programs can be ascertained and IPG's distribution share can be established. Assuming that ineligible and unclaimed programs are excluded from consideration, there is no need to focus on the eligibility of MPAA programs (except as they affect IPG's claim to the same program), since the remainder of the 1997 fund will go to MPAA once IPG's share is deducted. *But see* discussion of MPAA's methodology, *infra.*

the Register recommends that the only acceptable course of action is to seek further evidence from the parties to determine the proper status of the program when the proceeding is remanded to a new CARP.

B. Dramatic Moments in Black Sports History

Dramatic Moments in Black Sports History (''*Dramatic Moments*'') is also claimed by both MPAA and IPG. The record for Dramatic Moments is as follows.

IPG identifies *Dramatic Moments* in exhibit D of its written direct case as belonging to Litton. The program is identified in Litton's representation agreement with IPG and contains the same contract warranty provision that applies to *Dream Big.* At hearing, the following exchange took place on cross-examination of Mr. Galaz, IPG's sole witness.

Q: Okay. The program *Dramatic Moments in Black Sports History,* do you know who the copyright owner of that program [is], Mr. Galaz?

A: No.

Q: Do you know the syndicator?

A: My understanding is that Litton Syndications is the syndicator.

Q: And do you know the particular right or interest owned by Litton relative to their entitlement to Section 111 royalties?

A: Whether it's as the owner or syndicator, I don't know.

Q: But if it is the owner or syndicator, do you know who they—when they acquired and how they acquired the right? If they are a syndicator, not if they're an owner?

A: Restate your question.

Q: If they're a syndicator, if indeed they are the syndicator, do you know how that right was acquired?

A: Well, they can be both the owner and the syndicator.

Q: Right.

A: So your question was asking whether or not

Q: Right. If they—

A:—the nature of the right, and the nature of the right could be as both the owner or the syndicator. I don't know which.

Q: You don't know whether they're the owner as well as the syndicator?

A: My understanding is that they're the syndicator. I do not know whether they are, additionally, the owner.

Tr. 1062–63. No further record evidence was presented by IPG regarding the program.

In exhibit 3 of its written direct case, MPAA identifies *Dramatic Moments* as part of its claim. The program appears on the revised Alpha List of MPAA programming, identifying New Line Cinema as the claimant. MPAA presented a program certification form for New Line Cinema, which states that New Line is an officer or partner of the ''legal entity identified as the owner or the authorized agent of the owner of the programs on the printout.'' IPG ex. 7XR at 188. The certification is signed by Frank A. Buquicchio, who identified himself as the Senior Vice president of Television and Ancillary Accounting for New Line. Other than the cross-examination of Mr. Galaz, MPAA presented no other evidence as to the ownership of *Dramatic Moments.*

In its petition to modify the further report of the CARP, IPG argues that the burden should be on MPAA to prove its claim to *Dramatic Moments.* IPG asserts that MPAA did not produce the program certification forms until one day before the start of the hearings, thereby precluding IPG's ability to prepare an effective cross-examination on program ownership. IPG further asserts that if the Librarian cannot resolve the proper ownership of the royalties attributable to *Dramatic Moments,* the money should be placed in escrow to permit resolution between Litton and New Line Cinema.

As with the case of Dream Big, neither IPG nor MPAA have presented sufficient evidence to permit a determination as to who should receive credit for *Dramatic Moments.* Consequently, the Register recommends that further evidence must be adduced on remand to resolve the status of this program.

The Evidentiary Presentations

As discussed above, IPG and MPAA presented competing statistical methodologies to support their claims to the 1997 syndicated programming royalty pool. MPAA's presentation operates from the assumption that viewership of programs retransmitted by cable operators in 1997 is the way to measure the value of those programs, and provides a sample survey purporting to gauge viewing. IPG's presentation operates from the assumption that every program retransmitted in 1997 has value and should be compensated from the royalty pool, and provides a sample survey that attempts to value each program based upon the royalty fees generated by television stations broadcasting the programming.

A. MPAA's Presentation

1. *Description of the methodology.* MPAA's written direct case consists of the testimony of Marsha Kessler, Vice President of Retransmission Royalty Distribution at MPAA, and the nine exhibits that she sponsors. In addition, MPAA designated the direct testimony and exhibits of Paul Lindstrom, Leonard Kalcheim, and James Von Schilling from Docket No. 97–1 CARP SD 92–95 (1992–1995 satellite royalty distribution) and the direct and rebuttal testimony and exhibits of Marsha Kessler, Allen Cooper and Paul Lindstrom from Docket No. CRT 91–2–89CD (1989 cable royalty distribution). During the course of the proceeding, at the behest of the CARP, MPAA presented two additional witnesses: Paul Lindstrom of Nielsen Media Research and Thomas Larson of Cable Data Corporation.[13]

MPAA attempts to demonstrate the marketplace value of movies and syndicated programs retransmitted by cable systems in 1997. As it has done in previous royalty distribution proceedings before the Copyright Royalty Tribunal and the CARPs, MPAA submits that the best way to determine the marketplace value of a television series or movie is to examine how many people watched the program in the given distribution year. The greater the number of people who watched the program, the more valuable the program is. MPAA notes that in cable and broadcast markets where programs are bought and sold without the constraint of a compulsory license, broadcasters purchase the rights to broadcast a particular program based upon the number of viewers they believe the program will attract. The same is true for cable programmers. Kessler Direct at 12–13. And advertisers are willing to pay broadcasters and cable programmers higher fees to have their ads aired during programs that attract many viewers. *Id.* Thus, from MPAA's perspective, viewer avidity for a particular program is the best determinative of the program's marketplace value.

MPAA constructs a study—a sampling of the cable retransmission universe in 1997—that attempts to demonstrate the amount of viewing that the programs claimed by MPAA and IPG garnered on broadcast stations that were retransmitted on a distant basis.[14] It is not a study that reveals how many people in the United States actually watched a given program; the cost of such an undertaking would be too high.

[13] MPAA also presented testimony from David E. Farbman regarding activities of IPG's principal, Raul Galaz. His testimony is not relevant to the calculation of royalty shares.

[14] The study only attempts to estimate viewership for programming retransmitted by cable systems on a distant basis, since local retransmissions of the same program are not compensable under the cable license. *See* 17 U.S.C. 111(d)(3)(A).

Rather, the MPAA study generates estimates of viewing, described as total household viewing hours (HHVH) for each program claimed by MPAA and IPG.

MPAA's study utilizes data from three sources—Cable Data Corporation (''CDC''), TV Data and Nielsen Media Research (''Nielsen''). MPAA Proposed Findings at 20, ¶ 55. First, MPAA determines the number of television stations that it wishes to include in its survey. For the 1997 study, MPAA selected 82 TV broadcast stations. These stations were retransmitted by Form 3 cable systems (MPAA excluded Form 1 and Form 2 systems) and account for 92.5% of aggregated subscriber instances. *Id.* ''Aggregated subscriber instances,'' means that subscribers receiving broadcast programming were viewing it on a distant signal basis only, since section 111 of the Copyright Act does not allow compensation for programming that is retransmitted on a local basis. Thus, the 82 stations used in MPAA's study account for 92.5% of distant signal viewing of MPAA and IPG programs. This data was supplied by CDC.

Next, MPAA consults the TV Data television log books to determine what programs were broadcast at what times. For 1997, MPAA examined the log books for the 82 stations it included in its survey. Exhibit 3 of MPAA's written direct case identifies the programs which MPAA claims that it represents in this proceeding, along with the number of broadcasts of each program on the 82 stations surveyed. Of the over 3,700 titles, over 500 of these are television series (sitcoms, dramas, etc.) while the remaining titles are movies. MPAA Proposed Findings at 14, ¶ 42. MPAA makes great effort to demonstrate that its claim includes most of the top-rated syndicated television series and movies. Kessler Direct at 6–7.

Finally, MPAA takes the programming data from these two sources and matches it to viewing data supplied by Nielsen. Nielsen provides the names of the programs that were broadcast for each station in the study, the number of 15-minute segments (referred to as quarter hours (QH)) each program aired on that station, and what MPAA describes as the average number of cable subscribers who viewed each program on that station on a distant basis. Kessler Direct at 8. Using this information, MPAA then calculated the household viewing hours for each program appearing in the study. The formula that MPAA utilized to make this calculation is as follows:

(ΣQH/4) x average DCHH = HHVH

Id. Marsha Kessler stated the formula thus:

> Add together the total number of 15 minute (QH) segments a program is broadcast in a particular time slot on a particular station. Divide that number by 4 to get an hourly measure. Multiply the result by the average number of distant cable households (DCHH) that actually watched [the] program on that station during that time period.

Id.

It is important to note that the data supplied by Nielsen does not attempt to measure viewing 365 days a year. Rather, Nielsen conducts ''sweeps'—0limited periods of time in which actual viewing to programming is measured. Nielsen can only provide viewing data for four or six sweeps periods, meaning that substantial portions of the year are not measured. To counteract this problem, MPAA devised a method for interpolating viewing for those periods when Nielsen data is not available. Using data supplied by Nielsen, MPAA assigns an estimated number of viewers for a given broadcast station for a given quarter hour in a given day. For example, there are no Nielsen sweeps in June. To determine viewership for a program broadcast on a specific station during a specific time period in June, MPAA averages the viewing for the same time slot in May (a sweeps month) and July (also a sweeps month) to estimate what viewership would be for the corresponding time slot in June. The process is described as straight line interpolation. Tr. 1615–16.

Once armed with household viewing data for all programs broadcast by the 82 stations in its survey, MPAA determined the household viewing hours for all of its programs and IPG's programs. MPAA determined that the total household viewing hours for MPAA and IPG programming was 3,476,625,750. MPAA Proposed Findings at 73, ¶ 291. MPAA's programming received 3,476,218,917 household viewing hours, while IPG's programming received 406,833. *Id.* This calculation was based on MPAA's assignment of household viewing hours to the following IPG programs:

Algo's Factory—11,707 viewing hours.

Harvey Pennick's Private Golf Lessons—5,193 viewing hours.

Jack Hanna's Animal Adventures—372,488 viewing hours.

Mom USA—0 viewing hours.

Nprint—1645 viewing hours.

Sophisticated Gents—7010 viewing hours.

The Sports Bar—8790 viewing hours.

Id. at 72, ¶¶ 285–291. Missing from this calculation is *Just Imagine,* which the Librarian has credited to IPG's claim. *See* June 5, 2001 Order at 2.

Based on its household viewing hour calculations, MPAA claims that it is entitled to 99.9871% of the 1997 cable royalties, while IPG is entitled to 0.0117% of the royalties (for the seven Litton programs). MPAA Proposed Findings at 73, ¶ 291.

2. *Validity of the methodology.* Throughout the course of this proceeding, IPG has attempted to sully both the construct and the application of the MPAA methodology. Many of these criticisms were accepted by the CARP. *See, generally,* Initial report at 102–103; Revised report at 5–12. We now consider these criticisms as part of our evaluation of the evidentiary presentation of MPAA.

At the outset, we affirm what the Copyright Royalty Tribunal long ago stated: that actual measured viewing of a broadcast program is significant to determining the marketplace value of that program. 51 FR 12792, 12808 (April 15, 1986). In a perfect world, we would know all viewing to all programs that were retransmitted on a distant basis by all cable systems in 1997. We recognize that the cost of attempting to present such evidence would be prohibitive. Even if we had access to such information, the inquiry would not end there because there are other factors besides viewing that can have a bearing on the marketplace value of a program. Because we are charged with the task of simulating the marketplace for a broadcast program in an effort to determine the value of the program, the Register must consider those factors, where relevant, in the equation as well.

Given the recognition that viewing of programs has probative value, we turn to a consideration of MPAA's presentation. The construct of MPAA's methodology is generally similar to that presented in previous cable distribution proceedings before the Tribunal and the CARPs. There are, however, some notable differences. In prior proceedings, particularly at Phase I, experts from Nielsen participated in the construct and presentation of the study, as well as supplying the viewing data. Nielsen's participation in MPAA's study in this proceeding is limited to providing select data for use by others. Lindstrom Tr. 1387–88; 1407; 1421; 1439–42. Consequently, we have refrained from describing the 82 sample station survey as the ''Nielsen'' survey. In addition, MPAA has derived a considerable volume of viewing hours from a process described as ''interpolation,'' which it is has not presented extensively in prior proceedings. ''Interpolation'' is discussed *infra*.

When the MPAA presented its viewing study to the Copyright Royalty Tribunal in Phase I proceedings, the Tribunal described the study as a good ''starting off point.'' 57 FR 15286, 15288(April 27, 1992)(1989 cable Phase I distribution). Is the MPAA's 82 station sample survey a ''good starting off point'' for this proceeding?[15]

The CARP concluded that MPAA's 82 station sample survey was ''stretched to cover more ground and answer more questions than it was originally designed to do.'' It listed eight specific criticisms of the MPAA approach:

—MPAA's direct testimony did not sufficiently lay the foundation for the survey or explain its results.
—The Panel was forced to call its own witnesses, Mr. Lindstrom from Nielsen, and Mr. Larson from Cable Data Corporation to explain their methods of data acquisition and reporting.
—The number of sampled stations has declined without adequate explanation.
—Station criteria excluded Form 1 and Form 2 cable systems.
—The number of ''zero'' viewing hours shows the flaw in attempting to use the Nielsen data as a proxy for the retransmission market especially since Nielsen had 24 hour sampling capability in 1997.
—There are unanswered technical questions regarding relative error rates and mixing diary and meter data.
—The method of interpolation of non-sweep month estimated viewing needs statistical validation.
—There is an overvaluation of WTBS and under-valuation of the other Superstations in the survey.

Initial report at 102–03. There is a theme underlying this critique of MPAA's case that can be summarized as follows: the broad brush that is used to paint the big picture is a poor tool for crafting the details. MPAA's viewer study can paint a statistically useful picture of how much sports programming, for example, the viewing public watches relative to the amount of syndicated programming it watches. But when the same study is used in an effort to determine how much the viewing public watches an individual television program, the accuracy of the results comes into question. Accord 51 FR 12792, 12817 (April 15, 1986)(1983 cable Phase II distribution)(''[O]verall reliability [of the Nielsen study] may be somewhat less when the focus is on individual programs.'').

How much confidence can we place in the results yielded by MPAA's 82 station sample survey? MPAA does not provide an answer. Section 251.48(f)(4) requires parties submitting studies involving statistical methodology to provide confidence levels for the methodology. Specifically, the rule requires calculation of the standard error for each component of the methodology. 37 CFR 251.48(f)(4)(ii). MPAA acknowledges that it did not comply with the rule, but offers that ''the absence of relative error figures has raised no bar to significant reliance on the Nielsen study in [prior] Phase II proceedings.'' MPAA Reply Findings at 38.

Regardless of what may have sufficed in prior proceedings before the Copyright Royalty Tribunal, there is reason to believe there is considerable relative error in MPAA's results in this proceeding. On cross-examination, Paul Lindstrom stated the following:

Q: In past CRT proceedings, it's my understanding that Nielsen reports have been entered into the record, is that correct?

A: That is correct.

Q: And when Nielsen reports have been entered into the record, they have come with qualifications or characterizations to assist the parties and the Panel understand the data and the relative errors, standard error factors and the like, is that correct?

A: It is correct that we have produced the relative error figures for the category data.

Q: And did you produce relative error figures for the 1997 data?

A: The relative error figures were not produced by us because the final data would not be produced by us. We're basically developing a database which is being passed on to Mr. Larson who then takes it and produces the aggregated report. The standard errors are really relevant on the aggregated data and so we're kind of a mid-product in the process.

Q: Is there any—in Mr. Larson's work would you consult with him so that he makes proper assessment of the data?

A: We have had opportunities at times where we have needed to work together in order to work out issues or to make clear on definitions or categorizations, but on a day to day basis, he's not directing us on how to produce our portion of it and we're not directing him on how to produce his.

Q: But again, in terms of the portion you produced, you basically are asked to produce from your database of data, information regarding quarter hours of viewing to particular stations within a subset of counties that would qualify as distant for purposes of cable copyright rules?

A: That is correct.

Q: And in past proceedings you've aggregated the information into program categories and provided relative errors for that. In this proceeding you have not done that, is that correct?

A: That is correct.

Q: And in past proceedings you have not been asked to address, except in incidental situations specific programs, you have only addressed program categories, is that correct?

A: To the best of my knowledge, yes.

Q: Do you see any difference in Nielsen, just focusing on independent Mr. Larson's responsibilities in terms of the way Nielsen data for purposes of this proceeding, should be viewed—should it be viewed the same or differently from prior data presented where you do not have program categories, but the data is solely addressed to quarter hours of particular stations?

A: If I'm understanding correctly, I'll repeat what I think I hear you say, is that is there a difference in—I imagine you're talking about the accuracy or use [sic] that word, for aggregated category data versus individual program information and if that's the question, then that is absolutely correct. Once the data is beginning to get aggregated, the sampling errors go down and go down substantially.

Q: But conversely, if it's not aggregated, the sampling errors would increase?

A: The sampling errors for any—again, any given program on any given station on any given day so that we're talking about an individual week, individual program, individual station will be subject to huge relative errors.

Tr. 1406–10.

Mr. Lindstrom's testimony underscores the pitfalls of using MPAA's 82 station sample survey to measure household viewing hours for individual programs. When large amounts of programming and household viewing hours are measured, such as in a Phase I proceeding, the aggregation of the measuring data is substantial and the relative error is low. This is what makes the MPAA's sample survey ''a good starting off point.'' However, when the number of programs and household viewing hours are small, the aggregation of the data is minimal and, in the words

[15] Although the Tribunal never described the Nielsen study as a ''good starting off point'' for Phase II proceedings, it readily accepted Nielsen results that were presented by MPAA in Phase II proceedings. *See, e.g.* 53 FR 7132, 7136 (March 4, 1988)(1985 cable Phase II)(''[W]e give great reliance on the Nielsen data'')

of Mr. Lindstrom, ''subject to huge relative errors.'' Tr. 1409–10. Of the thousands of programs and billions of viewing hours represented in MPAA's sample survey, IPG's claim only accounts for eight programs and less than 500,000 viewing hours. Although we do not know how large the error factor is for this calculation since MPAA failed to present such information, it is reasonable to presume that it is quite large given that it is drawn from such a small piece of the data. This leads us to the conclusion that, as a methodological approach, it cannot be said that the MPAA sample survey is a ''good'' starting off point; at best, it is simply ''a'' starting point.

Having considered MPAA's sample survey conceptually, we now turn to the specifics of its application. As discussed above, the CARP concluded that there were a number of flaws in certain aspects of the sample survey. Although we do not necessarily agree with the number and severity of the CARP's criticisms, there is no need to discuss them here. What matters are what the Register, and ultimately the Librarian, conclude are the flaws in the sample survey, and what impact those flaws have on the usefulness of the MPAA approach.

(i). *Program ownership.* Program ownership is an important and highly contested issue in this proceeding. The issue, however, has centered on the claim of IPG and the programs it has purported to represent in this proceeding. Little attention was given to MPAA's ownership of programs. The CARP requested that MPAA submit program certifications obtained from its member companies, apparently in an effort to resolve issues surrounding certain programs claimed by both MPAA and IPG. MPAA provided these certifications to the CARP as a ''courtesy,'' carefully noting that it was not ''legally'' required to do so. Tr. 2571–73. MPAA's position is that it is not required to prove its program ownership because it will receive all remaining funds in the 1997 syndicated program royalty pool once IPG's claim is established. While it is true that MPAA will receive all funds less IPG's share, program ownership is nonetheless essential to the application of MPAA's methodology.

As discussed above, MPAA's 82 station sample survey is straightforward in its approach. Calculate the universe of programs in this proceeding, determine the total number of viewing hours for these programs, and then calculate the percentage of the total of viewing hours for IPG programs, yielding IPG's royalty distribution percentage. The so-called ''alpha list'' submitted by MPAA supposedly contains the household viewing hours for all IPG and all MPAA programs. *Id.* at 28, ¶ 79. The number of IPG programs on this list is known; it is the eight programs of Litton Syndications which the Library has determined are properly attributable to IPG. How do we know that all the remaining programs are properly attributable to MPAA? The answer is that we do not know. MPAA created the alpha list, but it did not provide any testimony to verify the accuracy of the list. It may be that the alpha list contains programs which are not properly represented by MPAA. IPG raises concerns about the status of several program certifications submitted by MPAA, including a number of MPAA claimants for which no certifications were submitted. IPG Proposed Findings at 44–48, ¶¶ 153–169. The CARP allowed the record of this proceeding to remain open after argument had ended to allow submission of additional certifications from MPAA. We cannot determine the sufficiency of these additional filings because there is no testimony to review.

The import of these omissions to the confidence to be placed in MPAA's sample survey is considerable. If MPAA's program ownership cannot be verified, then the total number of household viewing hours for programs in this proceeding cannot be verified. What is even more troubling is that if the alpha list does contain programs which are not properly a part of this proceeding, the benefit of those inclusions inures directly to MPAA because the MPAA's methodology measures IPG's claim as a percentage of the total number of household viewing hours. In other words, the more programs—and consequently the more household viewing hours—that are included in the total, the smaller is IPG's percentage share of that total and consequently the smaller is its royalty share under MPAA's formula.

MPAA points out there is no regulation that requires that it put into evidence program certifications. This is correct. However, MPAA is requesting us to accept its methodology as the means of determining the division of royalties in this proceeding. Unless MPAA can prove that it properly represents all the programs it claims on the alpha list, we cannot verify that MPAA's methodology is being correctly applied. We cannot assume that the copyright owners of all the programs claimed by MPAA are actually represented by MPAA simply because it says so.

(ii). *Zero viewing hours.* The amount of zero viewing hours in MPAA's 82 station sample survey—instances where Nielsen recorded no viewing for a particular program—was especially troubling to the CARP, and the CARP penalized MPAA the most for this anomaly. The CARP made the following finding:

> The record reveals that 68% of the quarter hours measured by Nielsen were attributed with ''zero'' viewing. Factoring in broadcasts occurring between 2:00–6:00 a.m. for which the MPAA methodology automatically attributes a ''zero'' value, a total of 73% of the quarter-hour broadcasts occurring on such stations during such measurement period were attributed with ''zero'' viewing. With one exception, each station in MPAA's study has a significant percentage of measured quarter-hour broadcasts accorded ''zero'' viewing, ranging from 26% to 96%. Of the 82 stations in the MPAA study, 64 measured by Nielsen recorded no viewing in excess of 50% of their broadcasts, a figure that increases to 74 of the television stations when ''zero'' viewing for the 2:00–6:00 a.m. daypart is factored in. Eight stations including the New York affiliate of CBS, WCBS–TV, were credited with ''zero'' viewing during more than 90% of their measured broadcasts.
>
> The only exception to the significant percentages of ''zero'' viewing are programs broadcast on Superstation WTBS. The Nielsen study credited WTBS, the most retransmitted station during 1997, with only .5% of ''zero'' viewing. Inexplicably, the Nielsen ''special study'' credited other superstations with significant distant cable subscribers with large percentages of ''zero'' viewing. Of note for example, is WGN–TV, the second most retransmitted station with an average of 28 million distant cable subscribers during 1997. Despite its substantial distant subscribership, WGN–TV was credited with ''zero'' viewing in 52% of its measured broadcasts. Three other ''Superstations'' were credited with ''zero'' viewing ranging between 26% and 62% of their measured broadcasts.
>
> We conclude that of the eight deficiencies we have noted in MPAA's distribution royalties,[16] this ''zero'' viewing hours deficiency is, by far, the most egregious. The evidence offered by MPAA to explain this perceived deficiency in its methodology was less than enlightening. Mr. Lindstrom, who is not a statistician, clarified that attribution of ''zero'' viewing does not mean that no persons were watching, only that no diaries recorded viewing, and that any suggestion to the Panel that no viewing occurred would reflect a misunderstanding of the data. But then he stated that the ''zero'' viewing hour information consists of pieces of data that are imprecise; that they are among a series of estimates that may be either high or low; that such individual quarter hour entries have little usefulness; but that they aggregate up to an accurate result, and ''the more imprecise

[16] The word ''royalties'' should probably read ''methodology.''

bricks you throw in the pile, the more accurate the overall number is going to be.''

Accepting this and other testimony of Mr. Lindstrom at face value, we find that it does not even begin to explain the enormous discrepancies described above regarding the crediting of ''zero'' viewing hours. There is little if any evidence in this record that these high credits of ''zero'' viewing hours were offset in 1997 by credits of excessively high units of viewing hours. Thus, we are left with a record that more than merely suggests that the MPAA methodology is significantly defective in the manner in which it credits ''zero'' viewing hours.

Revised report at 8–10 (citations omitted).

MPAA describes the CARP's rationale as follows: ''Wow. That many zeros must mean something. We haven't a clue what it is, but there are just too many of them to ignore.'' MPAA Reply to IPG Petition to Modify Revised Report at 7. MPAA then summarily concludes that ''[t]he zeros mean nothing.'' *Id.* Contrary to MPAA's assertions, we believe that the zeros mean something. They cannot mean ''nothing.''

MPAA continues to insist that Mr. Lindstrom has adequately explained the high number of zero viewing hours, assuring that the aggregation of the viewing data makes up for the zeros; ''the more of these, sort of, imprecise bricks you throw in the pile, the more accurate the overall number is going to be.'' Tr. 1432. We make a layperson's observation that when you aggregate lots of zeros, the result is still zero. As the CARP noted, almost three-quarters of the quarter hour viewing measured by Nielsen for the stations in MPAA's 82 station sample survey received a zero, despite the fact that Mr. Lindstrom stated that a zero viewing rating did not mean that no viewing was actually taking place, only that it was not measured. Tr. 1424. To us the extraordinarily high level of zero viewing does not mean that the overall results of MPAA's sample survey are more accurate; rather, it means that the sample survey actually measures much less viewing than MPAA suggests.

WTBS is the one station with a modest level of zero viewing; 0.5% according to the CARP. This is not surprising, given the large number (52 million) of distant cable subscribers to WTBS. What is surprising is the number of zero viewing instances for WGN which had an average of 28 million distant cable subscribers during 1997. Over half of the measured WGN broadcasts resulted in zero viewing. Revised report at 9. Even further, three other superstations had zero viewing ranging between 26% and 62% of their measured broadcasts. *Id.* How is it possible that some of the most distributed broadcast stations in the cable industry have such little viewing?

MPAA offers a couple of possible explanations for such discrepancies. For WGN, MPAA suggests that the number of zero viewing instances ''could be accounted for by the fact that WGN because WGN (sic) satellite feed to distant cable systems includes programs not part of the station's local broadcast program schedule. These programs are not credited to WGN's distant viewing by Nielsen.'' MPAA Petition to Modify Revised Report at 17–18. This is a *post hoc* speculation, because there is nothing in the record of this proceeding that demonstrates or even suggests that there are substantial differences between the programs contained on the WGN satellite feed distributed to cable operators and the over-the-air feed of the station. MPAA presented no evidence to support this argument. Furthermore, if MPAA's assertion is true, it demonstrates that certain programming contained on WGN is greatly undervalued because Nielsen is not measuring its viewing.

MPAA also points to Mr. Lindstrom's testimony where he states that there could be ''loads of reasons'' why there are so many instances of zero viewing. Tr. 1424. Unfortunately, Mr. Lindstrom does not describe the ''loads of reasons,'' other than to suggest that the FCC's network nonduplication rules may have resulted in a considerable number of distant programs being blacked out in local markets, and consequently not measured in the sample survey. Once again, there is no record evidence to support Mr. Lindstrom's suggestion. Ms. Kessler's testimony that she was unconcerned about the number of zero viewing instances is not helpful. Even if one assumes that Mr. Lindstrom's observation is correct, the network nonduplication rules only apply to network stations and do not explain the vast amounts of zero viewing on superstations which are considered to be independent stations under the section 111 license.

The considerable sums of zero viewing, and MPAA's failure to explain it, further undermines the value of the 82 station sample survey. The practical effect of zero viewing is to overvalue those few stations in the survey that received more measured viewing, and thereby overvalue the programs broadcast on those stations. Meanwhile, programs that even MPAA admits are seen by some viewers are given no value whatsoever. In the future, if MPAA continues to present a Nielsen-based viewer methodology, it needs to present convincing evidence, backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of the results of the survey. In addition, MPAA needs to take steps to improve the measurement of broadcasts in the survey to reduce the number of zero viewing hours, thereby increasing the reliability of its study.

(iii) *The 82 station sample.* According to Ms. Kessler, the 82 stations used in MPAA's sample survey were selected because they each had 90,000 or more Form 3[17] distant cable subscribers as identified by Cable Data Corporation. Tr. 242. MPAA chose the 90,000 subscribers as its minimum in selecting its sample of broadcast stations because such criteria ''hit virtually all subscribers and accounted for generally all of the money that was paid into the fund during that time.'' Tr. 243.

During the proceeding, IPG presented testimony that demonstrated that MPAA did not apply the 90,000 subscriber criteria as it claimed. Several broadcast stations with more than 90,000 subscribers were excluded from the survey, and several with less than 90,000 subscribers were included in the survey. IPG written rebuttal at 30–31. In one extreme circumstance, station KDVR was included in the sample survey despite the fact that it had less than 3,000 distant subscribers in 1997. Id. at 31. MPAA did not refute this testimony, nor did it explain why certain stations that satisfied the criteria were excluded, while others that did not were included in the sample survey.

We cannot determine what effect, if any, MPAA's selection of stations had on the results generated by its sample survey. Likewise, we cannot determine from the record whether MPAA's failure to apply its 90,000 subscriber criteria was deliberate, or the result of oversight. What is clear is that MPAA's failure to apply its chosen selection criteria consistently further undermines our confidence in the accuracy of the results generated by its sample survey. In the future, when presenting a methodological survey, MPAA needs to rigorously adhere to its announced standards and parameters for the survey.

(iv). *Interpolation.* As mentioned above, the MPAA sample survey submitted in this Phase II proceeding is similar to the one it has submitted in

[17] ''Form 3'' refers to the statement of account form used by the Copyright Office in collecting royalty fees under the section 111 cable license. ''Form 3'' cable systems are the largest systems filing with the Office, having in excess of $292,000 in gross receipts from subscribers for the retransmission of over-the-air broadcast signals.

past Phase I proceedings with one exception. The exception is the use of ''straight line,'' ''forward,'' and ''backward'' interpolation. The reason for and operation of interpolation is as follows. Nielsen measures viewing of all broadcast stations in the 82 station sample survey for only four months of the year. These measured viewing periods are referred to as the ''sweeps.'' Nielsen also conducts two partial sweep periods, in which some of the 82 stations' broadcasts are measured, but not others.[18] This leaves six full months of unmeasured viewing, plus an additional two months for stations not covered by the partial sweeps periods. If MPAA relied only upon the sweeps and partial sweeps periods to measure viewing of programs, many programs belonging to MPAA members (as well as to IPG) would receive zero household viewing hours because they were broadcast on stations not covered by the sweeps. To compensate for this considerable omission, MPAA developed an interpolation method that allegedly estimates what the viewing might be for these programs had they been included in the sweeps periods.

Briefly described, MPAA's interpolation method makes three measurements in an effort to estimate viewing for programs outside the sweeps period. The first measurement is ''straight line'' interpolation. In ''straight line'' interpolation, MPAA ascertained the number of household viewing hours for a specific time period from the two closest sweeps periods, and then took the average of those hours. For example, May and July are sweeps periods, but there is no measured viewing for the month of June. MPAA looked at the May sweeps results and the July sweeps results and applied the average of those results to each corresponding time period in the month of June. Thus, the ''straight line'' interpolated viewing result for the quarter hour of 10 a.m. to 10:15 a.m. on June 7, 1997, is the average of the measured household viewing hours for that time period for a particular station on May 7, 1997, and July 7, 1997. Tr. 1614–17.

Both ''forward'' and ''backward'' interpolation use data obtained from Nielsen meter rankings, as opposed to the data obtained from viewing diaries during the sweeps periods. Meter rankings are different from the diary method in that meter rankings do not capture specific viewing, but rather merely record when a television is on in a given Nielsen household (whether or not anyone is actually watching it) and what station the television is tuned to. Tr.1273–74; 1347–50. ''Forward'' interpolation uses the sweeps household viewing measurement obtained from the viewing diaries for the period preceding the time frame to be measured and multiplies that by the ratio of Nielsen meter rankings for the preceding period and the period to be measured. In the above example, ''forward'' interpolation takes the corresponding daypart measurement from the May sweeps period and multiplies that by the Nielsen meter ranking for the same daypart in June divided by the May meter ranking for that daypart. Tr. 1616.

''Backward'' interpolation utilizes the same approach as ''forward'' interpolation, except that it uses the sweep data for the period following the one to be measured, as well as the meter ranking from that period. Again, in the above example, the household viewing hours from the July sweeps period would be multiplied by the June meter ranking for the corresponding daypart divided by the July meter ranking. Tr. 1617. After the three interpolated results have been obtained through ''straight line,'' ''forward,'' and ''backward'' interpolation, they are divided by three to obtain an average number of household viewing hours for the daypart being examined. *Id.* The purported purpose of ''straight line,'' ''forward,'' and ''backward'' interpolation is to provide more accuracy to the Nielsen meter rankings through the process of averaging. Tr. 1602–03, 1614–17.

We recognize the purpose of interpolation and appreciate that MPAA is forced to estimate viewing for programs broadcast during non-sweeps periods. Our problem with interpolation is the manner in which MPAA presented it in this proceeding. First, MPAA laid no foundation for a statistical methodology that it was presenting for the first time in a cable distribution proceeding. Marsha Kessler is not a statistician who could testify as to the statistical validity of the interpolation approach; and moreover, she did not compile or review the interpolation data presented by MPAA and, apparently, did not participate in the creation of the methodology or its application. Tr. 1603. The interpolated data was created by Tom Larson of Cable Data Corporation who only presented testimony on the interpolated data when called as a witness by the CARP. In the future if MPAA uses viewing studies to present data on household viewing hours obtained through interpolation, MPAA should present expert testimony as to the statistical validity of the approach, including the confidence intervals for the data.

Second, the testimony establishes that Mr. Larson made the interpolated data calculations, applying ''straight line,'' ''forward,'' and ''backward'' interpolation ''millions of times'' in order to generate viewing data for programs broadcast during the 6–8 months of 1997 for which Nielsen did not measure viewing. Tr. 1603. MPAA apparently asks us to trust that Mr. Larson performed these interpolations accurately, because there is nothing in the record that permits verification. This is especially troubling given that more than half of the viewing data presented in MPAA's sample survey is obtained from interpolated results. MPAA should in the future present evidence that permits some verification of the results of interpolated viewing, rather than just total household viewing hours for all programs.

Finally, we note the Copyright Royalty Tribunal's admonition that data that is not specific to programs is unreliable in determining actual viewing of specific programs. 57 FR 15286, 15299 (April 27, 1992) (1989 cable distribution). MPAA's interpolation methodology assigns viewing hours to time slots, not to programs. Tr. 1688–89. It is likely that the viewing assigned these time slots was in many cases derived from programs of a completely different type, perhaps not the same programming category, than the programs measured during the Nielsen sweeps periods. And it is certain that many of the individual programs accounted for by interpolation were not actually transmitted during the period of interpolation. This is particularly troubling given the large amount of total viewing hour data presented by MPAA which was obtained from interpolation.

3. *Relevance of the methodology.* While we agree that viewing of programs is probative in assessing their value in a Phase II proceeding, the results generated by MPAA's sample survey are so unreliable that they cannot support an assessment of IPG's and MPAA's claims in this proceeding. All that can be garnered from the MPAA presentation is that MPAA's claim is large and IPG's is quite small, something that is readily ascertainable from that fact that IPG only represents eight programs in this proceeding. Precisely how small IPG's claim is, which is the task at hand, cannot be ascertained using MPAA's results. Further, MPAA's results cannot be used to establish a zone of reasonableness within which to

[18] The partial sweeps periods are confined, for the most part, to broadcast stations in the top television markets in the country.

place IPG's award because of the high probability of error in MPAA's results. Consequently, we cannot accept MPAA's presentation as providing any basis for the determination of the distribution of royalties in this proceeding.

B. IPG's Presentation

1. Description of the Methodology

IPG's written direct case presents the testimony of Raul Galaz, IPG's president and principal, and the exhibits that he sponsors. As a first-time participant in a cable distribution, IPG did not designate any prior testimony, nor did the CARP request IPG to call additional witnesses.

IPG takes a different approach in attempting to demonstrate the value of programming in this proceeding. Rather than rely on the estimated viewing of a particular program, IPG attempts to determine the value of a program based upon the carriage of the program by cable operators. IPG Proposed Findings at 14, ¶ 42. According to IPG, a cable operator is not interested in the viewer ratings generated by a particular broadcast program it retransmits; rather, it is the overall appeal of all the programs on the broadcast signal that is of value to the operator. Galaz Direct at 6–7. ''Overall appeal'' is important to the cable operator because the operator attempts to attract as many subscribers as possible to its system. When deciding which stations to retransmit, the operator will attempt to appeal to as wide a subscriber base as possible by providing multiple program opportunities, so-called ''niche'' programs that appeal to particular tastes.

In some instances it will be the desire of the cable system operator to exhibit certain sports programming, in other instances it may be the desire to have news programming from a market that is of interest to the cable system operator's market, the desire to increase the amount of children's programming offered to the cable system's subscribers, or the desire to carry more game shows.

Id. at 7. According to IPG, in a compulsory license marketplace it is the overall appeal of a broadcast station to the cable operator that determines the value of the programming on that station.

Since overall appeal of a station is equated with value, the greater the number of subscribers to a station, the greater the value of that station and, consequently, the programming on that station. *Id.* at 8. The relative value of the programs contained on the station is determined, according to IPG, by the time placement of the program and the frequency of its telecast. Thus, a program that is retransmitted in prime-time once a week is of greater value than a program broadcast once a month at 2 o'clock in the morning.

In sum, IPG focuses on four elements to determine program value: (1) The number of distant cable subscribers capable of receiving the program broadcast during 1997; (2) the cable license royalties generated during 1997 that are attributable to stations broadcasting the program; (3) the time placement of the broadcast; and (4) the length of the broadcast. IPG Proposed Findings at 14, ¶ 43.

In order to measure these elements, IPG, like MPAA, surveyed a number of broadcast stations that were retransmitted by cable systems on a distant basis in 1997. IPG sampled 99 stations that were carried on Form 1, 2, and 3 cable systems, and examined all the programs that were broadcast by these stations during 1997. *Id.* at 15, ¶¶ 46–47. Such data comprised approximately 1.1 million logged broadcasts. *Id.* at 15, ¶ 47. IPG then segregated all programming not within the syndicated programming category, leaving only movies and syndicated series.

Because of the parallel between the number of cable subscribers receiving a station and the amount of royalty fees generated by that station, IPG created a factor to weigh the relative significance of any given station and the broadcast of any program on that station. Dubbed the ''Station Weight Factor,'' it was ''derived from the concept that the relative significance of any given station should be affected by both (i) the number of distant cable subscribers that could potentially view such station, and (ii) the amount of distant cable retransmission fees generated by such station.'' Galaz Direct at 11. The Station Weight Factor was created as follows. For each of the 99 sampled stations, IPG summed the figure representing the percentage of subscribers in the survey that received the given station with the figure representing the percentage of total cable royalty fees generated by the 99 sampled stations. This figure was then divided in half. *Id.* The figure generated by this equation equals, according to IPG, the relative significance of each of the 99 sampled stations.

Having determined the relative value of each station—and the corresponding programming on that station—IPG then attempted to determine the relative value of each program on each station by examining the number of broadcasts of the program and its time placement within the broadcast day. In order to do this, IPG created a factor that uses data on anticipated viewership of all persons during time periods of the day (referred to as ''dayparts'') in order to weigh the relative significance of any given broadcast. Dubbed the ''Time Period Weight Factor,'' it was determined as follows:

The Time Period Weight Factor was derived from data published by Nielsen Media Research (''Weekly Viewing Daypart'' table within the ''1998 Report on Television''), reflecting the weekly viewing habits of all persons in 1997. Weekly viewing is stated in terms of the number of television hours viewed during the week, specifies the amount of viewing attributable to specific time periods, allowing allocation amongst such time periods. IPG then determined the ''Average Minutes Viewed Per Hour in Viewing Period'' (i.e. the ''Time Period Weight Factor'') in order to apply such Time Period Weight Factor against each and every logged broadcast on the ''99 Sample Stations,'' and according to the period during which such logged broadcast appeared.

Id. at 13.

After ascribing the Station Weight Factor and the Time Period Weight Factor to each broadcast, IPG applied the figures for each broadcast against the length of such broadcast, in order to ascribe a final value to each compensable broadcast. IPG Proposed Findings at 16, ¶ 50.

As a final step to the process, IPG summed the resulting value for its programs and all other programs in its survey and accorded a ''Sum Weighted Value'' to both these categories of programs. *Id.* at 16, ¶ 51.

In its written direct case, IPG applied its methodology for 43 programs that it believed that it represented in this proceeding. Galaz Direct at 5–6. It determined that IPG-represented programs produced a Sum Weighted Value of 2,3791.7968, as compared to the Sum Weighted Value of 1,369,901.837 for all syndicated broadcasts within the 99 sample station survey. *Id.* at 14. This yielded a percentage of 1.7367519% for IPG programs. Because IPG did not have access to the programs claimed by MPAA, it could not apply its methodology to determine the Sum Weighted Value of MPAA's programs. Consequently, IPG argued that ''[t]o the extent that MPAA represents less than 100% of the non-IPG programming appearing on the '99 Sample Stations,' IPG's respective percentage must be adjusted upward.'' *Id.* at 14–15.

Once proceedings began before the CARP, MPAA produced the program certifications for some, but not all, of its claimants.[19] Also, during proceedings before the CARP, a number of IPG-claimed programs were eliminated from consideration, either through voluntary dismissal by IPG or as a result of the CARP's rejection of IPG's representation agreements with Jay Ward Productions, Mainframe Entertainment, and Scholastic Productions. IPG Proposed Findings at 53, ¶ 2. IPG then recalculated its own share, and that of MPAA's, and determined that its programs accounted for 0.881% of the aggregated Sum Weighted Value of all programs claimed in this proceeding.

Although IPG's methodology yielded 0.881% for its claimed programs, it argued that it was nonetheless entitled to 2% of the royalty pool. IPG justified the 2% figure based upon certain alleged failures, abuses, and shortcomings on MPAA's part, including: (1) Failure to produce program certifications for 33 of MPAA's claimants, and production of 6 certifications that were not properly authorized; (2) failure to establish entitlement to 1,100 programs that were not, according to a 1986 Advisory Opinion of the Copyright Royalty Tribunal, eligible for compensation in the syndicated programming category; (3) abuse of the discovery process by failing to produce documents underlying its methodology in contravention to Library and CARP discovery orders; and (4) serious shortcomings in the application of MPAA's distribution methodology. *Id.* at pp. 52–55.

2. Validity of the Methodology

This marks the first time that IPG has appeared in a cable royalty distribution proceeding, and the first time its distribution methodology has been presented. As such, we do not have the benefit of prior consideration or acceptance of the IPG methodology by either the Copyright Royalty Tribunal or a CARP, other than the CARP's opinion in this proceeding. We must consider IPG's methodology from a theoretical point of view, as well as examine its particular application to this Phase II proceeding.

At the outset, we note that IPG's methodology attempts to blend two approaches that have been presented to the Tribunal and the CARPs. The first part of the methodology, the Station Weight Factor, is a fee generation approach in that it considers the royalty fees paid by cable systems during 1997 for the 99 broadcast stations used in the IPG survey. Each of the stations in the 99 station sample survey is ranked from highest to lowest depending upon the amount of fees the station generated for the 1997 royalty pool. IPG submits that the Station Weight Factor is relevant to the marketplace value of broadcast programs because cable systems' decisions to retransmit a particular broadcast station are ''based on the ''overall appeal'' of the retransmitted station and its ability to generate additional cable system subscribers, not the ratings of a particular program appearing on the retransmitted station.'' IPG Proposed Findings at 14–15, ¶ 45.

IPG's focus on the value of distant signals to cable operators recalls the Bortz survey that has been presented for many years at Phase I in cable royalty distribution proceedings. The Bortz survey attempts to measure the value of different categories of programming appearing on retransmitted broadcast signals by presenting to persons from cable companies a hypothetical programming budget for a given year, and then asking how much value they place on different kinds of programming (sports, movies, syndicated series, etc.) in compiling their program schedule. 57 FR 15286, 15292 (April 27, 1992). The more value placed on a program category, the more cable Phase I royalties it should receive, according to proponents of the Bortz survey.

The focus on value to the cable operator has been endorsed by both the Tribunal and the CARPs as one of the ways to assess marketplace value, and the results of the Bortz survey have received credit in Phase I proceedings. *See, e.g.* 57 FR 15286, 15301 (April 27, 1992)(1989 cable Phase I) IPG's Station Weight Factor attempts to ride the coattails of the Bortz survey's acceptance by ranking the ''overall appeal'' of stations as an expression of the value of the programming broadcast on those stations. While it must be true that a station such as WTBS, for example, has a significant ''overall appeal'' to cable operators by virtue of the number of cable systems that retransmit it, the ''overall appeal'' does not translate well to a Phase II proceeding dealing with one program category. It is quite possible, and perhaps likely, that the ''overall appeal'' of stations in the 99 station sample survey is based upon programming that is not in issue in this proceeding. Thus, the reason that so many cable operators carry WTBS may have more to do with Atlanta Braves baseball and Atlanta Hawks basketball than it does with syndicated series and movies. IPG failed to present any evidence that established a clear nexus between the syndicated programming category and the ''overall appeal'' of the 99 broadcast stations subjected to the Station Weight Factor.

This is a significant omission which raises serious concerns regarding the validity of IPG's methodology. The Copyright Royalty Tribunal has rejected estimating techniques that are not tied to programming categories because of their inherent unreliability. 57 FR at 15299 (1989 Phase I cable distribution). In the absence of convincing evidence that demonstrates that the ranking of the 99 stations is based upon the syndicated programming category, and not some other, the validity of the Station Weight Factor is not established.

The second element of IPG's methodology is the Time Period Weight Factor. The Time Period Weight Factor uses data from the 1998 Report on Television published by Nielsen. Galaz Direct at 13. The Report on Television provides viewing estimates for early morning (M–F 7–10 a.m.), daytime (M–F 10 a.m.–4 p.m.), prime time (M=—at 8–11 p.m. and Sun. 7–11 p.m.), and late night (11:30 p.m.–1 a.m.) dayparts. For all other dayparts, weekly viewing was extrapolated from the data in the above categories and lumped into the ''All Other'' category. IPG Exhibit H. These viewing estimates enable IPG to rank the dayparts. Like the ranking of the 99 stations in IPG's sample survey, the ranking of dayparts is not tied to programming. The Nielsen viewing estimates for these dayparts are drawn from viewing of all program categories. In fact, the estimates apparently also include viewing of local stations over-the-air and on cable, cable networks, and VCR recording of programming, which are completely outside the scope of the section 111 license. Tr. 1369. As with the Station Weight Factor, the Time Period Weight Factor is not tied to programming. IPG did not present any testimony establishing a link between syndicated programming and the ranking accorded to dayparts by Nielsen. Unless such link is established, the relevance of the Time Period Weight Factor is in question.

This is our evaluation of the theory of IPG's methodology. In addition, there are specific concerns about its application in this proceeding with respect to the use of daypart data obtained from Nielsen. While we acknowledge that obtaining specific daypart data from Nielsen is costly, the dayparts culled by IPG from the 1998 Report on Television are far too broad because they ignore variations in viewing within dayparts. For example, IPG's methodology assigns the same value to any program broadcast within the 1 a.m. to 7 a.m. daypart. MPAA

[19] MPAA submitted additional certifications to the CARP prior to closing arguments in the case. Tr. 2576.

points out that Nielsen estimates that household viewing falls from 18.9% to 8.2% at 4:30 a.m. and then begins to rise back to 19.7% in the 6:30 a.m. to 7 a.m. half hour. MPAA Proposed Findings at 60, ¶ 261. Thus, a program broadcast at 4:30 a.m. gets the same value under IPG's methodology as a program broadcast at 6:30 a.m., even though it has less than half the viewers. Even within IPG's own construct, which attempts to assign value based on relative viewing, this result is illogical. Dayparts must be broken down into smaller increments before the Time Period Weight Factor could be given any credence.

In addition, IPG's extrapolated daypart data, the ''All Other'' category, is plainly overweighted. For example, IPG applies the weight applicable to the ''All Other'' category to the 1 a.m. to 7 a.m. daypart. This is the same weight factor that is applied to programming broadcast between 4 p.m. and 8 p.m., where viewing, according to Nielsen, is considerably higher than in the 1 a.m. to 7 a.m. time frame. The result is that a program broadcast at 3 a.m. is of equal value under IPG's methodology as a program broadcast at 7:30 p.m.[20] Further, the 1998 Report on Television contains viewing estimates for the Saturday 7 a.m. to 1 p.m. daypart and the Sunday 1 p.m. to 7 p.m. daypart, neither of which IPG used in its methodology. Instead, IPG applied the ''All Other'' category to these time periods. As the CARP correctly observed, the value of the ''All Other Category'' is overstated, thereby inflating the value of IPG's claim. Revised Report at 14.

3. *Relevance of the methodology.* As with MPAA's presentation, we conclude that the results of IPG's presentation are so unreliable that they cannot be used as a basis for determining the distribution of royalties in this proceeding. The theory of IPG's case lacks statistical foundation, and places value on programs unconnected to their actual viewership. The evidence demonstrates that IPG's methodology overstates the value of its claim, although by how much cannot be determined. Given the lack of reliability of the results, IPG's presentation cannot be used as a basis for the distribution of royalties in this proceeding.

Determination

1. *Remand.* Having determined that the results presented by MPAA and IPG are wholly unreliable, we examined the record to determine if there is any evidence sufficient to base a distribution of royalties. As part of its distribution methodology, the CARP examined the number of rebroadcasts of programs and the airtime of programs contained in both the 82 sample stations presented by MPAA and the 99 stations presented by IPG. The CARP examined this data because it was the only data common to both MPAA's and IPG's presentations. Revised report at 17. This gave an indication of the relative size of MPAA's and IPG's claims; i.e. that MPAA's was large and IPG's small. *Id.* at 18. The CARP then turned to the methodologies presented by the parties and used them as a means of creating final distribution percentages.

We determine that the number of rebroadcasts and airtime of programs contained in the 82 station and 99 station sample surveys cannot form the basis of a distribution. All that data demonstrates is that MPAA's programming dominated the broadcast marketplace, something that is already known. The number of times a program is broadcast and the amount of time it is on the air is no indication of the marketplace value of the program. While the number of times a program is broadcast might intuitively suggest that it is of more value, the opposite is often true. Programs which garner low syndication fees are often broadcast by television stations many times because the rights are cheap. And other programs, such as motion pictures, may be broadcast relatively few times because the rights are expensive, but they are nonetheless of greater marketplace value. Number of broadcasts and airtime are therefore not the answer.

What then is the answer? We determine that the record of this proceeding is insufficient on which to base a distribution determination. The record does not permit us to assess what is the zone of reasonableness for the distribution awards, let alone determine the awards themselves. Given the lack of reliability of MPAA's and IPG's presentations, crafting awards from the current record would constitute arbitrary action.

We conclude that a distribution of royalties cannot be made based on the current record. Consequently, this case must be remanded to a new CARP for a new proceeding under chapter 8 of the Copyright Act.

2. *New proceeding.* In the new proceeding, the parties will be required to submit new written direct cases and present evidence that takes into account the concerns expressed in this Order, with the new CARP rendering its determination based upon the new record. All procedural and substantive requirements for a CARP proceeding will apply to the new proceeding.

Although the parties will able to present new cases and new evidence in the new proceeding, there are two matters that have been decided. As discussed above, the Librarian has ruled that IPG represents Litton Syndications for distribution of 1997 cable royalties, and no other claimant. Consequently, in the new proceeding, IPG is barred from relitigating whether it represents other claimants. The Librarian also determined that Litton's claim consists of at least 8 programs, and listed them in the June 5, 2001 Order. This part of Litton's claim is decided and may not be relitigated. Whether there are additional programs that should be credited to Litton's claim (such as *Dream Big* and *Dramatic Moments in Black Sports History*) may be addressed in the new proceeding. Likewise, all other matters as to program ownership, and the proper division of the royalties, are open to consideration in the new proceeding.

The Library will issue a scheduling order for the new proceeding once the arrangements have been made.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the initial report and the revised report of the CARP in the above-captioned proceeding, the Librarian determines the following. First, the Librarian has accepted the recommendation of the Register to reject the initial report of the CARP and remand the proceeding to the CARP with instructions for further action. This was done in the June 5, 2001, Order in this proceeding, and the Librarian incorporates that Order as a part of his final determination. *See* Appendix A.

Second, the Librarian accepts the recommendation of the Register to reject the revised report of the CARP. Third, the Librarian accepts the recommendation of the Register to remand this proceeding to a new CARP for a new proceeding to determine the proper distribution of 1997 cable royalties between MPAA and IPG. The Library will issue a scheduling order for the new CARP proceeding once arrangements have been made.

[20] There is record evidence that shows that as much as 30% of IPG's originally claimed programs were broadcast between 1 a.m. and 7 a.m. Tr. 1035–37.

Dated: December 14, 2001.

Marybeth Peters,

Register of Copyrights.

APPENDIX A—LIBRARIAN'S REMAND ORDER DATED JUNE 5, 2001

[Docket No. 2002–2 CARP CD 93–97]

In the Matter of Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds

Order

On April 16, 2001, the Librarian of Congress received the report of the Copyright Arbitration Royalty Panel (CARP) in the above-captioned proceeding. Both the Motion Picture Association of America (MPAA) and the Independent Producers Group (IPG), the two litigants in this proceeding, have filed their petitions to modify and/or set aside the determination of the CARP, and their replies to those petitions.

After a review of the report and examination of the record in this proceeding, the Register recommends that the Librarian reject the decision of the CARP, and remand the case to the CARP for modification of the decision. The Register concludes that the CARP acted arbitrarily in three ways. First, the CARP did not follow the decisional guidelines and intent of the June 22, 2000, Order issued in this proceeding which directed the CARP to dismiss any claimants listed in exhibit D of IPG's written direct case that did not have a written representation agreement with Worldwide Subsidy Group on or before July 31, 1998.

Second, the CARP arbitrarily included two programs—*Critter Gitters* and *Bloopy's Buddies*—in the claim of Litton Syndications, Inc. (represented by IPG) when IPG did not introduce any evidence as to the value of those programs. In addition, the CARP arbitrarily assigned the program *Dramatic Moments in Black Sports History* to IPG without adequate explanation of its decision.

Third, the CARP acted arbitrarily in awarding 0.5% of the 1997 cable royalties to IPG, and the remaining 99.5% of the royalties to MPAA, because it did not provide any explanation of the methodology or analysis it used to arrive at these numbers.

A full discussion of the Register's reasons for these conclusions shall appear in the final order in this proceeding published in the **Federal Register**.

Wherefore, the Register recommends that the Librarian reject the CARP's report and remand to the CARP to take the following actions in modifying its report:

1. That the CARP award royalties to IPG only on the claims of Litton Syndications and not award any royalties to IPG based upon the other claimants in exhibit D of IPG's written direct case;

2. That the CARP credit Litton with only the following programs: *Algo's Factory; Jack Hanna's Animal Adventures; Harvey Penick's Golf Lesson; Mom USA; Nprint; Sophisticated Gents; Just Imagine* and *The Sports Bar;*

3. That the CARP explain its reasons for crediting *Dramatic Moments in Black Sports History* to Litton's claim; and, if it concludes that its initial decision was correct, add the program to the list contained in #2;

4. That the CARP enter a new distribution percentage for IPG, based only on the claim of Litton and the programs listed in #2 and, if appropriate, #3, and allocate the remainder of the royalties to MPAA; and

5. That the CARP fully explain its reasons and methodology for the distribution percentages it assigns to IPG and MPAA.

The Register further recommends that the CARP be given until June 20, 2001, to report its modified decision to the Librarian and that section 251.55 of the rules, 37 C.F.R., apply to the CARP's modified report, except that the periods for petitions and replies be shortened from 14 days to 7 days for petitions, and from 14 days to 5 days for replies, due to the proximity of the time period for issuance of the Librarian's final order in this proceeding.

So recommended.

Dated: June 5, 2001.

Marybeth Peters,

Register of Copyrights.

So Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 01–31607 Filed 12–21–01; 8:45 am]

BILLING CODE 1410–33–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Institute for Environmental Conflict Resolution—Program Evaluation Instruments: Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the U.S. Institute for Environmental Conflict Resolution (the U.S. Institute), part of the Morris K. Udall Foundation, is planning to submit 18 proposed Information Collection Requests (ICRs) to the Office of Management and Budget (OMB). Each of these 18 ICRs is a new collection request; they are being consolidated under a single filing to provide a more coherent picture of information collection activities by the U.S. Institute. The proposed information collection is expected to neither have a significant economic impact on respondents, nor affect a substantial number of small entities. The average cost (in lost time) per respondent is estimated to be $4.91.

Before submitting the ICRs to OMB for review and approval, the U.S. Institute is soliciting comments on specific aspects of the information collection as described at the beginning of the section labeled ''Supplementary Information.''

DATES: Comments must be submitted on or before February 25, 2002.

ADDRESSES: U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tucson, Arizona 85701. Worldwide web: www.ecr.gov.

FOR FURTHER INFORMATION CONTACT: David P. Bernard, Associate Director, U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tucson, Arizona 85701, Fax: 520–670–5530, Phone: 520–670–5299, E-mail: *bernard@ecr.gov.*

SUPPLEMENTARY INFORMATION:

OVERVIEW

To comply with the Government Performance and Results Act (GPRA) (Pub. L. 103–62), the U.S. Institute for Environmental Conflict Resolution, as part of the Morris K. Udall Foundation, is required to produce, each year, an Annual Performance Plan, linked directly to the goals and objectives outlined in the Institute's five-year Strategic Plan. The U.S. Institute is also required to produce an Annual Performance Report, evaluating progress toward achieving its performance commitments. The U.S. Institute is currently developing a program evaluation system to gather and analyze information needed to assist in producing its Annual Performance Report.

The U.S. Institute is committed to establishing, achieving, and maintaining a national standard of excellence in all its programs, products, and services. To do so, the U.S. Institute requires high quality information concerning effectiveness of its various initiatives. Systematic and ongoing monitoring of program outcomes will allow the U.S. Institute to perform a variety of tasks, including giving individual project and program managers, as well as the Institute's management, the ability to accurately assess and report on program and project achievements. The new evaluation system has been carefully designed to support efficient and economical generation, analysis and use of this much-needed information, with an emphasis on program feedback, learning and improvement.

As part of the program evaluation system, the U.S. Institute intends to collect specific information from participants in, and users of, several of its programs and services. Specifically, five of the Institute's programs and services are the subject of this Federal