

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re

**Distribution of Digital
Audio Recording Technology
Musical Works Royalty Funds**

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Docket No. 2010-8 CRB DD 2005-2008 (MW)

**WRITTEN DIRECT CASE OF BROADCAST MUSIC, INC., AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS, SESAC, INC., AND THE HARRY FOX
AGENCY, INC. IN PAPER PROCEEDING**

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December 16, 2013

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	:	
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WRITTEN DIRECT CASE OF BROADCAST MUSIC, INC., AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, SESAC, INC., AND THE HARRY FOX AGENCY, INC. IN PAPER PROCEEDING

I. INTRODUCTION

Broadcast Music, Inc. (“BMI”), the American Society of Composers, Authors and Publishers (“ASCAP”), SESAC, Inc. (“SESAC”) (BMI, ASCAP and SESAC are collectively, the “Performing Rights Organizations”) and The Harry Fox Agency, Inc. (“HFA”) hereby submit their written direct case in this proceeding in response to the order of the Copyright Royalty Judges (the “Judges”) dated November 15, 2013. See Order in Docket No. 2010-8 CRB DD 2005-2008 (MW) (November 15, 2013) (the “Paper Proceeding Order”).

This proceeding involves the determination of entitlement to distribution of royalties pursuant to 17 U.S.C. § 1007 from the Writers and Publishers Subfunds of the 2006 Digital Audio Recording Technologies (“DART”) Musical Works Fund (hereinafter referred to as the “Funds at Issue”). Only five claimants are participating in this proceeding: the three Performing Rights Organizations and HFA (hereinafter, collectively the “Settling Parties”) and a single individual claimant named David Powell. The Settling Parties have fully settled their claims to the distribution

of royalties from the Funds at Issue through confidential agreements among each of the Settling Parties. Mr. Powell, however, has not settled his claims with the Settling Parties. Accordingly, the sole issue to be determined in this proceeding is the percentage of royalties from the Funds at Issue that should be allocated and distributed to the Settling Parties, collectively, and the percentage of the royalties that should be allocated and distributed to Mr. Powell.

The Settling Parties will establish in their direct case herein that the Settling Parties are entitled to one hundred percent (100%) of the royalties from the Funds at Issue and that Mr. Powell is not entitled to any of the Funds at Issue.¹ The direct case includes testimony from Ellen Meltzer-Zahn, Vice President of Member Services at ASCAP, and from Lisa Robinson, Director of Accounts Receivable and Income Tracking at HFA. Ms. Meltzer-Zahn's testimony will show that the Settling Parties represent all of the musical works that have been performed publicly in 2006 or that have been distributed as sound recordings in 2006, for which claims have been filed in this proceeding. Ms. Robinson's testimony will show that the Settling Parties have been unable to identify any sales in 2006 of recordings embodying Mr. Powell's musical works in their own or publicly available records and databases. In addition, and in the event Mr. Powell does demonstrate sales of recordings of his works, Ms. Robinson's testimony will provide data regarding the sales of recordings in the United States in 2006 which can be used to calculate Mr. Powell's individual entitlement to a portion of the Funds at Issue, consistent with the precedent in prior proceedings that all funds should be awarded to the Settling Parties less any amounts to which an individual non-settling claimant proves his entitlement.

¹ The Settling Parties have already received one hundred percent (100%) of the royalty distributions from both subfunds of the 2005, 2007 and 2008 DART Musical Works Funds in this proceeding, as well as a ninety-five percent (95%) distribution from the 2006 DART Funds at Issue. See Order in Docket No. 2010-8 CRB DD 2005-2008 (MW) (April 14, 2011) and Order in Docket No. 2010-8 CRB DD 2005-2008 (MW) (April 12, 2013).

II. THE SETTling PARTIES CLAIM OF ENTITLEMENT

The Settling Parties, in compliance with 37 C.F.R. § 351.4(b)(3) and the Paper Proceeding Order, hereby state the following claim to royalties collected pursuant to the Audio Home Recording Act (“AHRA”), Pub. L. No. 102-563, 106 Stat. 4237 (1992):

2006 DART Musical Works Fund, Writers Subfund – 100%
2006 DART Musical Works Fund, Publishers Subfund – 100%

III. THE PARTIES TO THIS PROCEEDING

A. The Settling Parties

The Settling Parties represent all participating publishers and songwriters claiming royalties to the Funds at Issue except for a single claimant described below.² The Performing Rights Organizations, in the aggregate, represent the public performing rights of hundreds of thousands of composer, lyricist, songwriter and publisher members and affiliates with combined repertoires of millions of copyrighted musical works. See Meltzer-Zahn Testimony at 2. On behalf of their members and affiliates, the Performing Rights Organizations license the public performance rights granted to their respective members and affiliates as copyright owners under Section 106(4) of the Copyright Act (17 U.S.C. § 106(4)). The Performing Rights Organizations are also affiliated with about ninety foreign performing rights societies around the world and license the repertoires of those societies in the United States. Id. HFA acts as licensing agent for thousands of music publishers in the United States – who in turn represent the interests of hundreds of thousands of

² Indeed, the Settling Parties represent all publishers and all songwriters claiming royalties in the Writers and/or Publishers Subfunds of the DART Musical Works Funds for 2005, 2007 and 2008. However, those funds are no longer in controversy.

songwriters. HFA also represents multiple foreign societies that represent foreign songwriters and music publishers through agreements with such foreign mechanical rights organizations.³ Id.

The Settling Parties therefore represent collectively the vast majority of U.S. songwriters, composers and music publishers, and many thousands from around the world, and represent collectively the vast majority of U.S. musical works and many tens of thousands of foreign musical works. Id. at 3. The Copyright Act expressly recognizes the Settling Parties as “interested copyright part[ies]” in 17 U.S.C. Section 1001(7). The Settling Parties have been awarded well over ninety-nine percent (99%) of all DART musical works royalties in final DART distributions since the enactment of the AHRA in 1992.

B. The Only Non-Settling Claimant

In addition to the Settling Parties, only one other party with claims to the Funds at Issue filed a Petition to Participate in this proceeding – an individual named David Powell, proceeding pro se. Mr. Powell’s claims consisted of separate filings of claims to the 2006 Musical Works Fund Writers Subfund and Publishers Subfund, copies of which are attached as Exhibits 1 and 2. In his filings, Mr. Powell identifies a single work entitled “Liberation Movement.”

IV. BACKGROUND OF THIS PROCEEDING

By notice dated July 16, 2012, 77 Fed. Reg. 42764 (July 20, 2012) (“Notice”), the Judges announced the commencement of a proceeding to determine the distribution of the royalties in the 2005, 2006, 2007 and 2008 DART Musical Works Funds collected pursuant to the AHRA. The Notice also directed that petitions to participate in the consolidated proceeding be filed with the Judges by August 20, 2012. The Settling Parties complied with this request by filing their Joint

³ Lists of the individual songwriters and music publishers and affiliated foreign performing rights and mechanical rights organizations represented by each of the Settling Parties in this proceeding were submitted with their respective claims and are incorporated herein by reference.

Petition to Participate on August 20, 2012. Mr. Powell filed a Petition to Participate on August 21, 2012 and the Judges accepted his late filing.

The Judges later determined that Mr. Powell had filed a timely claim for DART royalties only for the 2006 DART Musical Works Fund Writers and Publishers Subfunds, and authorized final distribution to the Settling Parties of all remaining DART royalties from the 2005, 2007 and 2008 funds. See Order in Docket No. 2010-8 CRB DD 2005-2008 (MW) (April 12, 2013). Accordingly, the proceeding continued with respect only to the final distribution of royalties from the 2006 Musical Works Funds, i.e., the Funds at Issue.

With respect to the Funds at Issue, the Settling Parties pursued in good faith throughout this proceeding a settlement with Mr. Powell but have been unable to reach a mutually satisfactory resolution. Following the close of a voluntary negotiation period, the Settling Parties moved that the Judges institute a paper proceeding pursuant to Section 803(b)(5) of the Copyright Act. 17 U.S.C. § 803(b)(5). Following a comment period, the Judges granted the motion of the Settling Parties and issued the Paper Proceeding Order commencing this proceeding.

V. BASIS FOR THE SETTLING PARTIES' DISTRIBUTION AWARD

The Settling Parties present affidavits from the following two witnesses in support of their claim: Ellen Meltzer-Zahn, Vice President of Member Services at ASCAP, and Lisa Robinson, Director of Accounts Receivable and Income Tracking at HFA.

Ms. Meltzer-Zahn testifies to the Settling Parties' interest in this proceeding and the Settling Parties' investigation into the authorship and copyright ownership of the work identified in Mr. Powell's claims.

It is well established that royalty payments with respect to the DART Musical Works Fund are restricted to allocations to an interested copyright party (17 U.S.C. § 1006(a)) and only based upon the extent to which “each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions.” 17 U.S.C. § 1006(c)(2). A party is an “interested copyright party” only if it meets one of four statutory criteria set forth in 17 U.S.C. § 1001(7).⁴

It is clear from the rulings in all prior DART proceedings, as well as the Settling Parties’ Petition to Participate in this proceeding, that the Settling Parties are well-established, interested copyright parties pursuant to 17 U.S.C. § 1001(7)(D)(ii) (each of the Settling Parties is an “association or other organization engaged in licensing rights in musical works to music users on behalf of writers and publishers”). As the representatives of millions of musical works that have been distributed in the form of digital and analog musical recordings and have been disseminated to the public in transmissions during 2006 (see Meltzer-Zahn Testimony at 2; Robinson Testimony at 1), the Settling Parties are clearly entitled to distributions pursuant to Section 1006.

However, in the absence of proving any record sales or performances of Musical Works in 2006, Mr. Powell does not meet any of the Section 1006 criteria for receiving a distribution. As Ms. Meltzer-Zahn testifies, the Settling Parties have been unable to verify that Mr.

⁴ Section 1001(7) reads: “An ‘interested copyright party’ is —

(A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

(B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed;

(C) a featured recording artist who performs on a sound recording that has been distributed; or

(D) any association or other organization —

(i) representing persons specified in subparagraph (A), (B), or (C), or

(ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers.”

Powell is an author or the legal or beneficial owner of, or a person who controls, any musical composition that was transmitted or sold in 2006. Meltzer-Zahn Testimony at 4.

In July 2006, Mr. Powell registered two unpublished works entitled or incorporating the title “Liberation Movement” with the Copyright Office. The first is a registration on a Form TX (number TXu 1-344-005) dated July 31, 2006 for a textual work entitled “David Powell Liberation Movement.” The second is a registration on a Form SR (number SRu 628-683) dated July 28, 2006 for a sound recording work entitled “Liberation Movement D. Powell Life Story,” the underlying authorship of which is described as “drama, literary work lecture text, words, multimedia kit.” Copies of the Copyright Office registration certificates for these works are attached hereto as Exhibits 3-4. Neither of these registrations appears to be associated with a musical work, but rather appears to be associated with textual material. Meltzer-Zahn Testimony at 6. Moreover, there is no evidence that either of these works were ever transmitted or sold in 2006. Id. at 6. Therefore, unless Mr. Powell can prove entitlement to his claims through his written direct case, he is not entitled to an allocation of the Funds at Issue collected pursuant to the AHRA.⁵

⁵ The Settling Parties have received all but a token amount of DART Musical Works Funds royalties over the years. In the first DART distribution proceedings, concerning the 1992-1994 DART royalties, a Copyright Arbitration Royalty Panel (“CARP”) determined, and the Librarian of Congress (the “Librarian”) concurred, that the methodology for determining distribution of the Musical Works Funds as presented by the Settling Parties in their direct case – that of comparing the sales of recordings of an individual claimant’s works to total universe of sales – was “logical and consistent” and, accordingly, completely acceptable for establishing resolution of de minimis individual claims. See Librarian of Congress Distribution Order in Docket No. 95-1 CARP DD 92-94, Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 Fed. Reg. 6558, 6561 (February 12, 1997), attached as Appendix 1. See also Copyright Arbitration Royalty Panel Report, In the Matter of Distribution of DART Royalty Funds for 1992, 1993 and 1994, Docket No. 95-1 CARP DD 92-94 (December 16, 1996), attached as Appendix 2. The Librarian’s decision in the first DART proceeding was upheld on appeal by the U.S. Court of Appeals for the D.C. Circuit. See Curry v. Librarian of Congress, No. 97-1119 (D.C. Cir. November 4, 1998) (Appendix 3), petition for en banc review denied, No. 97-1119 (D.C. Cir. February 4, 1999) (Appendix 4), cert. denied sub nom. Cannings v. Librarian of Congress, 527 U.S. 1038 (1999) (Appendix 5), petition for reh’g of denial of cert. denied, Cannings v. Librarian of Congress, 527 U.S. 1058 (1999) (Appendix 6) (finding nothing in petitioners’ claims warranting modification or remand of the Librarian’s orders on review).

In the second DART proceeding, concerning the 1995-1998 DART royalties and again involving the Settling Parties and an individual pro se claimant, the same methodology for distribution was accepted by the Librarian. See Librarian of Congress Distribution Order in Docket No. 99-3 CARP DD 95-98, Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360, 9363 (February 7, 2001), attached as Appendix 7; Copyright Arbitration Royalty Panel Report, In the Matter of Distribution of DART Royalty Funds for 1995, 1996,

Ms. Robinson testifies to the sales of sound recordings in 2006. Ms. Robinson submits data from Nielsen's SoundScan music sales measurement service regarding the sales of all sound recordings in 2006 for the purposes of allocating shares of the Funds at Issue, if necessary, consistent with allocations made in the past DART proceedings. As Ms. Robinson testifies, based upon an evaluation of sound recordings of musical works that may have been authored or owned by Mr. Powell, Nielsen's SoundScan data shows no sales for Mr. Powell. Robinson Testimony at 3.

The Librarian has deemed it appropriate in royalty distribution proceedings for de minimis claims under the AHRA to use an award allocation formula whereby the total sales of recordings of an individual claimant's works is the numerator, and the universe of sales of all musical recordings is the denominator, of the award allocation ratio. See Librarian's Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (February 12, 1997) (noting that "the Panel acted properly in basing its determination solely on the evidence of record sales"); see also Librarian's Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360, 9362-9363 (February 7, 2001) (approving the same approach). Chapter 8 of the Copyright Act requires the Judges not only to act in accordance with the Act but also in accordance with "prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels...and decisions of the court of appeals" 17

1997 and 1998, Docket No. 99-3 CARP DD 95-98 (November 9, 2000), attached as Appendix 8. An appeal was docketed but withdrawn pursuant to the appellant's motion and the case was ultimately dismissed. See Evelyn v. Librarian of Congress, No. 01-1117 (D.C. Cir. April 25, 2001), attached as Appendix 9.

In the third DART proceeding, concerning the distribution of 1999-2001 DART royalties, the Settling Parties filed their case and the proceeding was terminated due to the failure to submit a timely filed written direct case by the only non-settling party, an individual pro se claimant whose claim was duly dismissed with prejudice. See Order, In the Matter of Distribution of 1999, 2000 and 2001 Digital Audio Recording Funds, Docket No. 2002-6 CARP DD 99-01 (January 31, 2003), attached as Appendix 10.

Likewise, the fourth DART proceeding, concerning the 2002-2004 DART royalties, was terminated due to a failure to submit a timely filed written direct case by the only non-settling party, an individual pro se claimant whose claim was also dismissed with prejudice. See Order, In the Matter of Distribution of 2002, 2003 and 2004 Digital Audio Recording Funds, Docket No. 2006-5 CRB DD 2002-2004 (June 24, 2009), attached as Appendix 11.

U.S.C. § 803(a)(1). Using this allocation formula, unless Mr. Powell demonstrates actual sales of recordings of his musical works, he is not entitled to any royalties. Thus far, Mr. Powell has failed to establish that he owns or controls any musical work that was sold or transmitted in 2006, making the numerator of the allocation formula zero. Therefore, Mr. Powell is not entitled to an allocation of any royalties.

Based on Ms. Meltzer-Zahn's and Ms. Robinson's testimonies regarding the alleged musical work claimed by Mr. Powell and the sales of sound recordings embodying musical works represented by the Settling Parties, Mr. Powell should receive a zero percent (0%) share of the award of the Funds at Issue, and the Settling Parties should receive one hundred percent (100%) of such Funds at Issue. See Librarian's Decision in Docket No. 99-3 CARP DD 95-98, 66 Fed. Reg. 9360, 9365 (February 7, 2001); see also Librarian's Decision in Docket No. 95-1 CARP DD 92-94, 62 Fed. Reg. 6558, 6561 (February 12, 1997) (approving of the CARP Panel's methodology, based on the mathematical concept that "the sum of the parts must equal the whole," to conclude that the Settling Parties share was equal to the total amount of the royalties in question minus the non-settling parties' shares).

VI. RECORDS FROM PREVIOUS DISTRIBUTION PROCEEDINGS

Pursuant to 37 C.F.R. § 351.4, the Settling Parties hereby incorporate by reference their direct cases from the four previous DART royalty distribution proceedings under the AHRA, including the complete testimony and exhibits presented therein by Ms. Alison Smith of BMI dated March 21, 1996, November 8, 1999 and January 9, 2003; Mr. Milt Laughlin of BMI dated November 5, 1999, January 10, 2003 and May 28, 2009; and Mr. Seth Saltzman of ASCAP dated May 27, 2009.


VII. CONCLUSION

As the Settling Parties represent the publishers and writers for all copyrighted musical works at issue in this proceeding that have been distributed in the form of musical recordings or disseminated to the public in transmissions, the Settling Parties are entitled to, and request, one hundred percent (100%) of the royalties in the Funds at Issue.

Date: December 16, 2013


Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer T. Criss, hereby certify that on this 16th day of December, 2013, a copy of the foregoing Settling Parties' Comments on the Commencement of a Paper Proceeding was served by overnight delivery to the following:

David Powell
P.O. Box 010950
Miami, FL 33101



Jennifer T. Criss

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Ellen Meltzer-Zahn	A
Lisa Robinson	B

EXHIBITS

<u>Exhibit Number</u>	<u>Title or Description</u>	<u>Sponsoring Witness(es)</u>
1	David Powell 2006 DART Musical Works Fund Writers Subfund Claim	Meltzer-Zahn, Robinson
2	David Powell 2006 DART Musical Works Fund Publishers Subfund Claim	Meltzer-Zahn, Robinson
3	Copy of Certificate of Registration of Copyright in "David Powell Liberation Movement"	Meltzer-Zahn
4	Copyright of Certificate of Registration of Copyright in "Liberation Movement D. Powell Life Story"	Meltzer-Zahn

APPENDIXES

<u>Tab</u>	<u>Document</u>
1	Librarian of Congress Distribution Order in Docket No. 95-1 CARP DD 92-94, Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 Fed. Reg. 6558, 6561 (February 12, 1997)
2	Copyright Arbitration Royalty Panel Report, In the Matter of Distribution of DART Royalty Funds for 1992, 1993 and 1994, Docket No. 95-1 CARP DD 92-94 (December 16, 1996)
3	<u>Curry v. Librarian of Congress</u> , No. 97-1119 (D.C. Cir. November 4, 1998)
4	<u>Curry v. Librarian of Congress</u> , No. 97-1119 (D.C. Cir. February 4, 1999) (denial of petition for rehearing)

- 5 Cannings v. Librarian of Congress, 527 U.S. 1038 (1999) (June 24, 1999)
(denial of petition for writ of certiorari)
- 6 Cannings v. Librarian of Congress, 527 U.S. 1058 (1999) (August 23, 1999)
(denial of petition for rehearing)
- 7 Librarian of Congress Distribution Order in Docket No. 99-3 CARP DD 95-98,
Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology
Royalties, 66 Fed. Reg. 9360, 9363 (February 7, 2001)
- 8 Copyright Arbitration Royalty Panel Report, In the Matter of Distribution of DART
Royalty Funds for 1995, 1996, 1997 and 1998, Docket No. 99-3 CARP DD 95-98
(November 9, 2000)
- 9 Evelyn v. Librarian of Congress, No. 01-1117 (D.C. Cir. April 25, 2001); Ms.
Evelyn's Motion for Voluntary Dismissal dated April 12, 2001
- 10 Order, In the Matter of Distribution of 1999, 2000 and 2001 Digital Audio
Recording Funds, Docket No. 2002-6 CARP DD99-01 (January 31, 2003)
- 11 Order, In the Matter of Distribution of 2002, 2003 and 2004 Digital Audio
Recording Funds, Docket No. 2006-5 CRB DD 2002-2004 (June 24, 2009)

TESTIMONY OF ELLEN MELTZER-ZAHN

Background and Qualifications

1. My name is Ellen Meltzer-Zahn. I am currently Vice President of Business & Membership Affairs of the American Society of Composers, Authors and Publishers (“ASCAP”). I am testifying as a witness on behalf of ASCAP, Broadcast Music, Inc. (“BMI”), SESAC, Inc. (“SESAC”) (collectively the “Performing Rights Organizations”) and The Harry Fox Agency (“HFA”), the leading mechanical licensing, collection and distribution agent for music publishers in the U.S. (collectively with the Performing Rights Organization, the “Settling Parties”). My testimony concerns the allocation of DART Musical Works Fund royalties to the Settling Parties in this proceeding.

2. I have worked at ASCAP since 1983, and have held my current position since 2007. The Business & Membership Affairs Department focuses on assisting members and other ASCAP Departments with complex issues that arise in various aspects of ASCAP’s core businesses of licensing and tracking the performances of ASCAP members’ works in all media, royalty distributions and finance, and the systems that support these activities. My responsibilities include overseeing and managing a staff which monitors quarterly distribution activity and researches claims related to works registration, copyright status, royalty distributions and disputes. I have worked closely on special projects with major publisher and high-profile writer members concerning various copyright and financial issues. Included in these responsibilities are issues related to song ownership.

3. During my early tenure at ASCAP, I held various positions in the Distribution Department (now a department within ASCAP’s Performing Rights Group) including Director of

Performance Membership Services. My responsibilities in that position included overseeing and managing a staff who responded to routine member questions and resolved member complaints. I also had occasion to prepare answers to member protests regarding various distribution issues that were brought before the ASCAP Board of Review (an internal ASCAP grievance process). In that position, I became familiar with the operation of all ASCAP Departments and their interdependencies.

4. Based on my longstanding experience at ASCAP and consequent exposure to the general operations as BMI, SESAC and HFA, I have extensive knowledge about the music industry, music repertoires and song ownership issues in general.

The Parties

5. The Performing Rights Organizations, in the aggregate, represent the public performing rights in the U.S. of many hundreds of thousands of composer, lyricist, songwriter and publisher members and affiliates with combined repertoires of many millions of copyrighted musical works. The Performing Rights Organizations are also affiliated with about ninety foreign performing rights societies around the world and license the repertoires of those societies in the U.S.

6. HFA acts as licensing agent for thousands of music publishers in the United States – who in turn represent the interests of hundreds of thousands of songwriters. HFA also represents multiple foreign societies that represent the interests of hundreds of thousands of songwriters and music publishers through agreements with such foreign mechanical rights organizations.

7. The members and affiliates of the Settling Parties authorize one or the other of the Settling Parties to file claims to DART Musical Works Fund royalties each year on their behalf -- including for the years 2005, 2006, 2007 and 2008 -- and to collect and distribute to them such royalties. In the aggregate, the Settling Parties represent in this proceeding nearly a million U.S.

songwriters, composers and music publishers, as well as the hundreds of thousands of songwriters, composers and music publishers of many dozens of foreign performing rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding.

8. Moreover, collectively, the Settling Parties represent the vast majority of U.S. songwriters, composers and music publishers, and many thousands from around the world, and represent collectively the vast majority of U.S. musical works and many tens of thousands of foreign musical works.

9. I understand the only other party in this proceeding is one individual claimant, David Powell (“Mr. Powell”).

10. Mr. Powell is not currently a member of, or affiliated with, any of the Settling Parties, nor was he a member or affiliated with any of the Settling Parties in 2005, 2006, 2007 or 2008.

11. Mr. Powell filed claims on his own behalf to royalties from both subfunds of the 2006 Musical Works Fund: the Writers Subfund and the Publishers Subfund (the “Powell Claims”). Other than the Powell Claims, Mr. Powell filed no other claims to royalties at issue in this proceeding. Accordingly, I understand that the only issue in this proceeding is the distribution of royalties from the 2006 Musical Works Fund, Writers and Publishers Subfunds.

12. The purpose of my testimony is to assist the Copyright Royalty Judges in determining, on the one hand, the entitlement to DART royalties from the 2006 Musical Works Fund, Writers and Publisher Subfunds, of the hundreds of thousands of writers and publishers represented by the Settling Parties, and, on the other hand, Mr. Powell’s entitlement to DART royalties from such Subfunds.

Basis for Allocation of Royalties

13. Counsel had advised me that there are two statutory criteria on which to allocate royalty payments: (1) transmissions of musical works to the public, *i.e.*, broadcast performances; or (2) distributions of phonorecords containing those musical works to the public, that is, sales of CDs, tapes, records and digital copies. I understand that all prior distributions to individual claimants in DART distribution proceedings have been based solely on sales data.¹

14. Regardless of which of these two criteria is used to allocate royalty distributions to the parties, in order to determine what percentage of the royalties are attributable to Mr. Powell (and, therefore, to the Settling Parties) it is necessary to first identify the number of musical works in or to which Mr. Powell has ownership rights or can claim sales or performances (whichever metric is appropriate). Once it can be determined which works are attributable to Mr. Powell, it can then be logically determined that all other musical works would be attributed to the Settling Parties.

15. In order to determine whether any musical works sold or transmitted in 2006 were attributable to Mr. Powell and thereby verify his claim, the Settling Parties first looked to the work listed in the Powell Claims. The Settling Parties also searched our internal databases and publicly available sources including the Copyright Office's public database. After thorough investigations, the Settling Parties failed to identify any musical works, authored, owned by or associated with Mr. Powell, including the work listed as part of the Powell Claims.

¹ There have been four prior DART Musical Works Fund distribution proceedings, involving the 1992-1994 Funds, 1995-1998 Funds, 1999-2001 Funds and 2002-2004 Funds. Each of these proceedings, like this one, involved an allocation between individual claimants, like Mr. Powell in this proceeding, and a group of settling parties which included the Settling Parties in the current proceeding. In the prior proceedings, the allocation was made on the basis of sales data from SoundScan alone – the individual claimant being entitled to a percentage of royalties equal to the percentage of sales of recordings containing the individual claimant's works in relation to total sales (with the Settling Parties thereby entitled to the remaining royalties). See Librarian of Congress Distribution Order in Docket No. 95-1 CARP DD 92-94, Distribution of the 1992,1993, and 1994 Musical Works Funds, 62 Fed. Reg. 6558 (February 12, 1997) (Appendix 1); Librarian of Congress Distribution Order in Docket No. 99-3 CARP DD 95-98, Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360 (February 7, 2001) (Appendix 7); Order, In the Matter of Distribution of 1999, 2000 and 2001 Digital Audio Recording Funds, Docket No. 2000-6 CARP DD 99-01 (January 31, 2003); and Order, In the Matter of Distribution of 2002, 2003 and 2004 Digital Audio Recording Funds, Docket No. 2006-5 CRB DD 2002-2004 (June 24, 2009).

The Powell Claims

16. The Powell Claims constitute two filings submitted by Mr. Powell to the U.S. Copyright Office on May 24, 2007. Copies of the Powell Claims are attached hereto as Exhibits 1 and 2. In his filings, Mr. Powell claims to fit within the definition of “interested copyright party” under 17 U.S.C. Section 1001(7)(B) as “a legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under [the Copyright Act] that has been distributed.”

17. In order to establish a basis for his claims, Mr. Powell identifies in his filings a single work entitled “Liberation Movement” (the “Claimed Work”). The Powell Claims do not include any additional information regarding this work, including whether it was performed in 2006 as a musical work or embodied in a digital musical sound recording or analog musical sound recording and distributed as a phonorecord.

18. The Settling Parties searched the U.S. Copyright Office records for any registration information regarding the Claimed Work or any other work authored or owned by Mr. Powell. The Settling Parties were able to locate two copyright registrations from the U.S. Copyright Office with a registration for a work in Mr. Powell’s name. The first is a registration on a Form TX (number TXu 1-344-005) dated July 31, 2006 for a textual work entitled “David Powell Liberation Movement.” The second is a registration on a Form SR (number SRu 628-683) dated July 28, 2006 for a sound recording work entitled “Liberation Movement D. Powell Life Story,” the underlying authorship of which is “drama, literary work lecture text, words, multimedia kit.” Copies of the Copyright Office registration certificates for these works are attached hereto as Exhibits 3-4.

19. Neither of the two copyright registrations appears to be associated with a musical work, but rather appears to be associated with textual material.

20. The Settling Parties additionally searched their own internal databases that contain ownership and authorship information regarding the millions of works in each of the Settling Parties' repertoires. The Settling Parties did not find, based on such research, any information regarding any musical work attributed to, or owned or authored by, Mr. Powell, including the Claimed Work.

21. The Settling Parties additionally searched numerous other available sources of musical works information, including information available through general Internet searches, and did not find any information evidencing or demonstrating a musical work attributed to, or owned or authored by, Mr. Powell, including the Claimed Work.

Allocation of Royalty Payments

22. From the information contained on the copyright certificates for the Claimed Work listed as part of the Powell Claims and from other investigations of internal and other databases and online sources, there are no musical works attributed to, owned or authored by, Mr. Powell for the purposes of this proceeding.

23. Based on my experience in the music performing rights field for nearly 30 years and my extensive knowledge of the music catalogs represented by the Settling Parties (particularly the Performing Rights Organizations), it is my opinion that the Settling Parties represent the writers and publishers for all copyrighted titles contained in recordings sold, distributed or performed during the relevant period and are entitled to all royalties from the 2006 Musical Works Fund, Writers and Publisher Subfunds.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
DISTRIBUTION OF DIGITAL)
AUDIO RECORDING TECHNOLOGY)
MUSICAL WORKS ROYALTY FUNDS)
_____)

Docket No. 2010-8 CRB DD 2005-2008(MW)

WITNESS DECLARATION

I, Ellen Meltzer-Zahn, declare under penalty of perjury that the Statement of Ellen Meltzer-Zahn presented as part of the Direct Case of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., SESAC, Inc., and The Harry Fox Agency, Inc. in connection with the above-titled proceeding is true and correct to the best of my knowledge, information and belief.



Ellen Meltzer-Zahn

Dated this 10 day of December, 2013.

TESTIMONY OF LISA ROBINSON

Background

1. My name is Lisa J. Robinson. I am the Director, Accounts Receivable and Income Tracking, at The Harry Fox Agency, Inc. (“HFA”). My responsibilities at HFA include tracking and collecting royalties due to HFA in connection with mechanical licenses issued on behalf of HFA’s affiliated publishers and self-published songwriters. Prior to joining HFA, I was in the Royalty Income Tracking Department at EMI Music Publishing from 1999 to 2007 where I began as an Administrative Assistant and was later promoted to Manager. I began my career in the music publishing business at Broadcast Music, Inc. (“BMI”) where I worked as a Coordinator in the Research Department. I received a Bachelor of Science from Syracuse University in 1994. In these roles, I have developed an expertise in using commercially available and publicly available databases and information to track both physical and digital distributions of recordings of musical works in order to ensure that publishers and songwriters are paid the appropriate amount of royalties due under license.

The Parties

2. I am testifying as a witness for HFA, BMI, the American Society of Composers, Authors and Publishers (“ASCAP”), and SESAC, Inc. (“SESAC”) (collectively, the “Settling Parties”). Based on my experience in the music publishing business, the Settling Parties represent hundreds of thousands of U.S. songwriters, composers and music publishers. In addition, I understand that thousands of songwriters, composers and music publishers represented by foreign performing rights organizations have authorized the Settling Parties to act on their behalf in this proceeding.

3. I understand that the purpose of this proceeding is to determine the relative entitlements of the Settling Parties and a single individual claimant, David Powell, to shares of the Writers and Publishers Subfunds of the Musical Works Fund of the 2006 Digital Audio Recording Technology (“DART”) royalty fund (the “Funds at Issue”).

4. I have reviewed Mr. Powell’s claims to the Funds at Issue, both of which were received by the U.S. Copyright Office on May 24, 2007. In them, Mr. Powell identifies a single work entitled “Liberation Movement” as the basis for his claims to a share of the Funds at Issue.

5. The purpose of my testimony is to assist the Copyright Royalty Judges in determining (a) whether Mr. Powell is entitled to a share of the Funds at Issue and, if so, (b) the amounts of the Funds at Issue to allocate between the hundreds of thousands of writers and publishers represented by the Settling Parties, on the one hand, and Mr. Powell, on the other.

The Standard Publishing Databases Do Not List Mr. Powell’s “Liberation Movement,” Nor Does Nielsen’s SoundScan Data for 2006 Identify Any Sales of Such a Work

6. Based on the information provided by Mr. Powell, I have conducted a search for “Liberation Movement” and any other compositions or recordings attributed to Mr. Powell in HFA’s song database, ASCAP’s ACE music repertory database, BMI’s repertoire database, and SESAC’s repertory database.

7. I have been unable to locate “Liberation Movement” by Mr. Powell or any other work credited to Mr. Powell in any of these databases, which are used by the music industry to identify and license musical compositions.

8. In addition, I conducted a search for “Liberation Movement” and any other tracks credited to Mr. Powell in Nielsen’s SoundScan music sales measurement service. Nielsen’s SoundScan is a widely used service that collects point-of-sale data regarding digital and physical record sales from venues, mass merchants, retail chains, independent record stores and digital

download providers across the U.S. Data regarding these sales can be viewed by title, artist, album, label, UPC or ISRC code, among other search fields. Nielsen's SoundScan data serves as a major source for the Billboard charts and is used by HFA and the music industry to track physical and digital sales of recordings.

9. I was unable to locate any sales in Nielsen's 2006 SoundScan data of "Liberation Movement" or any other tracks credited to Mr. Powell. Indeed, I did not locate any sales at all of "Liberation Movement" or any other tracks credited to Mr. Powell since Nielsen SoundScan began collecting such information.

Apportionment of DART Royalties Based on Sales

10. I understand that one method by which shares to DART royalties may be apportioned among claimants is through an analysis of the sales of sound recordings in which copyrighted musical works owned or controlled by claimants are embodied.

11. I, therefore, am providing data regarding the total number of "album" (CDs, LPs, cassettes and digital albums) and "singles" sales in 2006, the subject year, as reported by Nielsen's SoundScan data service. Then, I will calculate the total number of individual tracks sold during 2006 by using the following formula: First, I will multiply the total physical album sales reported by Nielsen SoundScan by 10, based on my experience that participants in the music industry assume, on average, an album contains 10 individual songs. Second, I will add to the resulting figure the total number of digital tracks sold during 2006, which includes both digital "singles" sales and individual digital tracks on digital albums sold. Third, I will add to the resulting figure the total number of both physical "singles" sold during 2006.

Calculation of Royalty Payments

12. According to Nielsen SoundScan, the total number of physical albums sold in 2006 in all formats was 555,563,000. The total number of digital tracks sold during 2006, which includes both digital “singles” sales and individual digital tracks on digital albums sold was 581,952,000. The total number of physical singles sold in 2006 in all formats was 3,811,000. The total number of individual tracks (albums and singles) sold in 2006, therefore, was 6,141,393,000. This number is obtained by multiplying the number of physical albums (555,563,000) by ten, adding the number of digital tracks (581,952,000) and then adding the number of singles (3,811,000).

13. As mention above, I have found no evidence that Mr. Powell owns or controls any songs contained on digital or physical albums or singles sold in 2006. The number of track sales attributable to Mr. Powell, therefore, is zero. However, if Mr. Powell were to prove that recordings embodying his musical works were distributed in 2006, the percentage of the Funds at Issue attributable to Mr. Powell would be calculated by comparing the total number of sales of individual tracks embodying his works to the total number of individual tracks sold, calculated by using Nielsen SoundScan data for the year. In other words, one would compute the percentage of the Funds at Issue attributable to Mr. Powell by dividing the number of sales of individual tracks embodying his works by 6,141,393,000, the total number of individual tracks sold in 2006.

14. Based on my experience in the music licensing industry and with record sales data, the representations made to me by the Settling Parties regarding the appropriate methodology for allocating the Funds at Issue and my understanding of the membership and affiliation of the performing rights organizations (BMI, ASCAP and SESAC) and HFA, the remaining funds in

the Funds at Issue should be attributed to the hundreds of thousands of songwriters and music publishers represented by the Settling Parties.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.


In re :
: **Docket No. 2010-8 CRB DD 2005-2008 (MW)**
Distribution of Digital :
Audio Recording Technology :
Musical Works Royalty Funds :
:

WITNESS AFFIDAVIT

STATE OF NEW YORK) ss:
COUNTY OF NEW YORK)

Lisa J. Robinson, being duly sworn, states:

1. I am Director, Accounts Receivable and Income Tracking at The Harry Fox Agency, Inc. I make this affidavit in support of the Direct Case of Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., and The Harry Fox Agency, Inc., dated December 16, 2013, in the above captioned proceeding.
2. I am fully familiar with the content of the Testimony of Lisa Robinson.
3. To my knowledge, and upon information and belief, that Testimony is true and correct.


Lisa J. Robinson

Sworn to before me this 11th day of December, 2013.



STEPHEN H. BLOCK
NOTARY PUBLIC-STATE OF NEW YORK
No. 02BL5012997
Qualified In New York County
My Commission Expires July 15, 2015

EXHIBIT 1

RECEIVED



COPYRIGHT ROYALTY BOARD

Single Claim for DART Royalty Fees

MAY 24 2007

Copyright Royalty Board

In accordance with Chapter 10 of the Copyright Act, 17 USC, and Part 360 of the Copyright Royalty Board regulations, 37 CFR 360.20-360.25, the claimant named herein files with the Copyright Royalty Board of the Library of Congress a claim to royalty payments collected from manufacturers and importers of digital audio recording devices and digital audio recording media who distribute the products in the United States, collected during the period January 1 through December 31, 2006.

You must provide the requested information for each item on this form.

Filer and Interested Copyright Party Information

FILER FULL NAME AND ADDRESS: Below, provide the full legal name and address (including specific number and street name or rural route), of person or entity filing the claim.

NAME DAVID POWELL JR.
STREET P.O. Box 010950
CITY/TOWN MIAMI STATE FL ZIP 33101

OTHER FILER IDENTIFICATION: Indicate below whether the person filing this claim is the interested copyright party (see no. 5 for definition) or an authorized representative of the interested copyright party. Check only one.

[X] Interested copyright party [] Authorized representative of the interested copyright party

Telephone number of person or entity filing the claim: 305 539-1755

Facsimile number, if any, of person or entity filing the claim:

Email, if any, of the person or entity filing the claim: DAVID POWELL008@YAHOO.COM

INTERESTED COPYRIGHT PARTY FULL NAME AND ADDRESS: Provide the full legal name and address of the interested copyright party below. If the interested copyright party claiming royalty payments is the same person or entity identified in number 1, please enter "SAME."

NAME SATTIE
STREET
CITY/TOWN STATE ZIP

CONTACT PERSON: Write below the name, phone, fax number, if any, and email (if any) of the contact person. This person must be the interested copyright party (see no. 5 for definition), an authorized representative of the interested copyright party, or a designee of either.

NAME DAVID POWELL
PHONE 305 539-1755 FAX
EMAIL DAVID POWELL008@YAHOO.COM

Claim Information

SUBFUND SELECTION: In the appropriate fund space below, select the subfund against which your claim is being made. A separate claim must be filed for each subfund. Select only one subfund below.

Sound Recordings Fund—

[] Copyright Owners Subfund: Check here, then select statement A or D(i) below in item 5, whichever is more applicable.

[] Featured Artists Subfund: Check here, then select statement C or D(i) below in item 5, whichever is more applicable.

Musical Works Fund—

[X] Writers Subfund: Check here, then select statement B, D(i), or D(ii) below in item 5, whichever is more applicable.

[] Publishers Subfund: Check here, then select statement B, D(i), or D(ii) below in item 5, whichever is more applicable.

5

INTERESTED COPYRIGHT PARTY DEFINITION: By selecting a statement below, indicate how the claimant fits within the definition of interested copyright party in 17 USC 1001(7). If the claimant is an interested copyright party under more than one definition, select the most appropriate definition that corresponds to the subfund selected in item 4 (above).

Check only one statement below.

- (A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed (17 USC §1001(7)(A));
- (B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed (17 USC §1001(7)(B));
- (C) a featured recording artist who performs on a sound recording that has been distributed (17 USC §1001(7)(C)); or
- (D) any association or other organization (make your selection below):
 - (i) representing persons specified in subparagraph (A), (B), or (C), (17 USC §1001(7)(D)(i)) — or —
 - (ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers (17 USC §1001(7)(D)(ii)).

6

CLAIM IDENTIFICATION: To establish the basis for your claim, identify below at least one musical work or sound recording embodied in a digital musical recording or an analog musical recording lawfully made under title 17 USC that has been distributed or disseminated to the public in transmissions between January 1 and December 31, 2006.

LIBERATION MOVEMENT

Declaration

7

The undersigned declares under penalty of law that he or she is the interested copyright party or a representative of the interested copyright party duly authorized to file this claim and further declares under penalty of law that all statements contained herein are true, complete, and correct to the best of the undersigned's knowledge, information, and belief, and are made in good faith. [18 USC 1001 (2000)]

DAVID POWELL JR

(TYPED OR PRINTED NAME)

David Powell Jr.

(SIGNATURE)

5.22.07

(DATE)

EXHIBIT 2



COPYRIGHT ROYALTY BOARD

Single Claim for DART Royalty Fees

MAY 24 2007

Copyright Royalty Board

In accordance with Chapter 10 of the Copyright Act, 17 USC, and Part 360 of the Copyright Royalty Board regulations, 37 CFR 360.20-360.25, the claimant named herein files with the Copyright Royalty Board of the Library of Congress a claim to royalty payments collected from manufacturers and importers of digital audio recording devices and digital audio recording media who distribute the products in the United States, collected during the period January 1 through December 31, 2006.

You must provide the requested information for each item on this form.

Filer and Interested Copyright Party Information

1 **FILER FULL NAME AND ADDRESS:** Below, provide the full legal name and address (including specific number and street name or rural route), of person or entity filing the claim.

NAME DAVID POWELL JR
 STREET P.O. Box 010950
 CITY/TOWN MIAMI STATE FL ZIP 33101

OTHER FILER IDENTIFICATION: Indicate below whether the person filing this claim is the interested copyright party (see no. 5 for definition) or an authorized representative of the interested copyright party. *Check only one.*

Interested copyright party Authorized representative of the interested copyright party

Telephone number of person or entity filing the claim: 305 539-1755

Facsimile number, if any, of person or entity filing the claim: _____

Email, if any, of the person or entity filing the claim: DAVID POWELL @ @ B @ YAHOO . COM

2 **INTERESTED COPYRIGHT PARTY FULL NAME AND ADDRESS:** Provide the full legal name and address of the interested copyright party below. If the interested copyright party claiming royalty payments is the same person or entity identified in number 1, please enter "SAME."

NAME SATIE
 STREET _____
 CITY/TOWN _____ STATE _____ ZIP _____

3 **CONTACT PERSON:** Write below the name, phone, fax number, if any, and email (if any) of the contact person. This person must be the interested copyright party (see no. 5 for definition), an authorized representative of the interested copyright party, or a designee of either.

NAME DAVID POWELL
 PHONE 305 539-1755 FAX _____
 EMAIL DAVID POWELL @ @ B @ YAHOO . COM

Claim Information

4 **SUBFUND SELECTION:** In the appropriate fund space below, select the subfund against which your claim is being made. A separate claim must be filed for each subfund. *Select only one subfund below.*

Sound Recordings Fund—

- Copyright Owners Subfund: Check here, then select statement A or D(i) below in item 5, whichever is more applicable.
 Featured Artists Subfund: Check here, then select statement C or D(i) below in item 5, whichever is more applicable.

Musical Works Fund—

- Writers Subfund: Check here, then select statement B, D(i), or D(ii) below in item 5, whichever is more applicable.
 Publishers Subfund: Check here, then select statement B, D(i), or D(ii) below in item 5, whichever is more applicable.

5

INTERESTED COPYRIGHT PARTY DEFINITION: By selecting a statement below, indicate how the claimant fits within the definition of interested copyright party in 17 USC 1001(7). If the claimant is an interested copyright party under more than one definition, select the most appropriate definition that corresponds to the subfund selected in item 4 (above).

Check only one statement below.

- (A) the owner of the exclusive right under section 106(1) of this title to reproduce a sound recording of a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed (17 USC §1001(7)(A));
- (B) the legal or beneficial owner of, or the person that controls, the right to reproduce in a digital musical recording or analog musical recording a musical work that has been embodied in a digital musical recording or analog musical recording lawfully made under this title that has been distributed (17 USC §1001(7)(B));
- (C) a featured recording artist who performs on a sound recording that has been distributed (17 USC §1001(7)(C)); or
- (D) any association or other organization (make your selection below):
 - (i) representing persons specified in subparagraph (A), (B), or (C), (17 USC §1001(7)(D)(i)) — or —
 - (ii) engaged in licensing rights in musical works to music users on behalf of writers and publishers (17 USC §1001(7)(D)(ii)).

6

CLAIM IDENTIFICATION: To establish the basis for your claim, identify below at least one musical work or sound recording embodied in a digital musical recording or an analog musical recording lawfully made under title 17 USC that has been distributed or disseminated to the public in transmissions between January 1 and December 31, 2006.

LIBERATION MOVEMENT

Declaration

7

The undersigned declares under penalty of law that he or she is the interested copyright party or a representative of the interested copyright party duly authorized to file this claim and further declares under penalty of law that all statements contained herein are true, complete, and correct to the best of the undersigned's knowledge, information, and belief, and are made in good faith. [18 USC 1001 (2000)]

DAVID POWELL JR

(TYPED OR PRINTED NAME)

David Powell Jr.

(SIGNATURE)

5.22.07

(DATE)

EXHIBIT 3

Copyright Office fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

155144073

TXu 1-344-005



EFFECTIVE DATE OF REGISTRATION

7-31-06

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼
David Powell Liberation Movement

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

Volume ▼	Number ▼	Issue Date ▼	On Pages ▼

2 a NAME OF AUTHOR ▼ David C. Powell Jr.

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
 Yes No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of _____ Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No
Pseudonymous? Yes No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
All other text

NOTE
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
 Yes No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of _____ Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No
Pseudonymous? Yes No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

c NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
 Yes No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of _____ Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No
Pseudonymous? Yes No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases. 2006

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK Complete this information ONLY if this work has been published. Month _____ Day _____ Year _____ Nation _____

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼
David C. Powell Jr.
P.O. Box 010950
Miami, FL 33101

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

APPLICATION RECEIVED
JAN 03 2007 7-31-06

ONE DEPOSIT RECEIVED 7-31-06

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

DO NOT WRITE HERE OFFICE USE ONLY

EXAMINED BY	<u>DBW/DS</u>	FORM TX
CHECKED BY		
<input checked="" type="checkbox"/> CORRESPONDENCE		FOR
<input checked="" type="checkbox"/> Yes		COPYRIGHT
		OFFICE
		USE
		ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

Yes No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼

a. This is the first published edition of a work previously registered in unpublished form.

b. This is the first application submitted by this author as copyright claimant.

c. This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ►

Year of Registration ►

5

DERIVATIVE WORK OR COMPILATION

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

Some text by others

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

All other text

a 6

See instructions before completing this space.

b

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. Name ▼ Account Number ▼

a 7

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/Zip ▼

David C. Powell Jr.
P.O. Box 010950
Miami, FL 33101

b

Area code and daytime telephone number ►

Fax number ►

Email ►

CERTIFICATION* I, the undersigned, hereby certify that I am the

Check only one

- author
- other copyright claimant
- owner of exclusive right(s)
- authorized agent of _____

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

8

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

David C. Powell Jr.

Date ► 11/17/06

Handwritten signature (X) ▼

x David C. Powell Jr.

Certificate will be mailed in window envelope to this address:

Name ▼	David C. Powell Jr.
Number/Street/Apt ▼	P.O. Box 010950
City/State/ZIP ▼	Miami, FL 33101

YOU MUST:

- Complete all necessary spaces
- Sign your application in space 8

SEND ALL ELEMENTS IN THE SAME PACKAGE

1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO:

Library of Congress
Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6222

9

*17 USC § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

EXHIBIT 4

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Margybeth Peters

Register of Copyrights, United States of America

Form SR

For a Sound Recording
UNITED STATES COPYRIGHT OFFICE

SERIAL NUMBER
SRU628-683



EFFECTIVE DATE OF REGISTRATION

Month 7 Day 28 Year 06

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK **DAVID POWELL LIBERATION MOVEMENTS: CONSTITUTIONAL CHALLENGE ALASKA HAWAII IN ELECTORAL COLLEGE NUMBER 37 STATUTE POLITICAL PARTIES, SOCIAL INSURANCE ODD LOT, ODD LOT DOCTRINE & GOLD BLOCKS**
PREVIOUS (ALTERNATIVE) OR CONTENTS TITLES (CIRCLE ONE) **DAVID POWELL LIFE STORY DRAMA LECTURE DOCUMENTARY LANDMARK DECISION ANTECEDENT CLAIMS TAPES ENCLOSED**

2 NAME OF AUTHOR **a DAVID C. POWELL JR.**
DATES OF BIRTH AND DEATH
Year Born **8.4.58** Year Died **▼**
Was this contribution to the work a "work made for hire"? Yes No
AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of **U.S.** Domiciled in **▼**
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No Pseudonymous? Yes No
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. **SOUND RECORDINGS, UNDER LYING WORK DRAMA, LITERARY WORK LECTURE, TEXT, WORDS, MULTIMEDIA KIT ***

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire," check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b NAME OF AUTHOR **▼**
DATES OF BIRTH AND DEATH
Year Born **▼** Year Died **▼**
Was this contribution to the work a "work made for hire"? Yes No
AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of **▼** Domiciled in **▼**
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No Pseudonymous? Yes No
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. **▼**

c NAME OF AUTHOR **▼**
DATES OF BIRTH AND DEATH
Year Born **▼** Year Died **▼**
Was this contribution to the work a "work made for hire"? Yes No
AUTHOR'S NATIONALITY OR DOMICILE
Name of Country OR Citizen of **▼** Domiciled in **▼**
WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? Yes No Pseudonymous? Yes No
NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. **▼**

3 YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED **a 1999** DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
This information must be given in all cases. Complete this information ONLY if this work has been published. Month **▼** Day **▼** Year **▼** Nation **▼**

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. **a DAVID POWELL JR. P.O. BOX 010950 MIAMI, FLA. 33101**
TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. **b**

APPROPRIATION RECEIVED
JUL 28 2006
ONE DEPOSIT RECEIVED
JUL 28 2006
TWO DEPOSITS RECEIVED
FUNDS RECEIVED

MORE ON BACK **▶** • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8.

DO NOT WRITE HERE
Page 1 of 5 pages

EXH.0 30f9

*Deposit contains words and sound recording.

EXAMINED BY	<u>OB</u>	FORM SR
CHECKED BY		
CORRESPONDENCE		
<input type="checkbox"/> Yes		

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

- Yes No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼
 - a. This work was previously registered in unpublished form and now has been published for the first time.
 - b. This is the first application submitted by this author as copyright claimant.
 - c. This is a changed version of the work, as shown by space 6 on this application.
- If your answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

5

DERIVATIVE WORK OR COMPILATION BOTH

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼ ANTECEDENT CLAIMS

ART TO BIOGRAPHY OF DAVID POWELL LIFE STORY LIBERATION
a MOVEMENT ABRIDGMENT MANUSCRIPT DRAMA ABOUT
DAVID POWELL FICTION ADAPTION RIGHTS TO PRODUCE
PRODUCE CONSISTING OF EDITORIAL REVISIONS

6

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

b COMPILATION AND ADDITIONAL NEW MATERIAL FOR WHICH
REGISTRATION IS SOUGHT COMPILATION AND FOREWORD
SOUND RECORDINGS UNDERLYING WORK DRAMA LITERARY WORK
LECTURE, TEXT, WORDS MULTIMEDIA KITS ELEMENTS *

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

a

7

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼

b DAVID C. POWELL, JR.
P.O. BOX 010950
MILATTI, FLORIDA 33101
 Area code and daytime telephone number 305 529-1755 Fax number
 Email

CERTIFICATION* I, the undersigned, hereby certify that I am the

- Check only one ▼
- author
 - owner of exclusive right(s)
 - other copyright claimant
 - authorized agent of
- Name of author or other copyright claimant, or owner of exclusive right(s) ▲

8

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

DAVID C. POWELL JR. Date 7-24-06

Handwritten signature (x) ▼
X David C. Powell Jr.

Certificate will be mailed in window envelope to this address

Name ▼	<u>DAVID C. POWELL JR.</u>
Number/Street/Apt ▼	<u>P.O. BOX 010950</u>
City/State/ZIP ▼	<u>MILATTI, FLORIDA 33101</u>

YOU MUST

- Complete all necessary spaces
- Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE

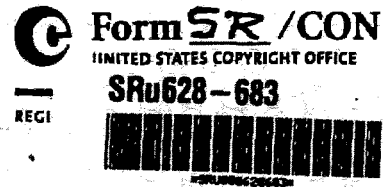
1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO
 Library of Congress
 Copyright Office - SR
 101 Independence Avenue, S.E.
 Washington, D.C. 20558-0237

9

*17 U.S.C. § 508(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

CONTINUATION SHEET FOR APPLICATION FORMS



- This Continuation Sheet is used in conjunction with Forms CA, PA, SE, SR, TX, and VA, only. Indicate which basic form you are continuing in the space in the upper right-hand corner.
- If at all possible, try to fit the information called for into the spaces provided on the basic form.
- If you do not have enough space for all the information you need to give on the basic form, use this Continuation Sheet and submit it with the basic form.
- If you submit this Continuation Sheet, clip (do not tape or staple) it to the basic form and fold the two together before submitting them.
- Space A of this sheet is intended to identify the basic application.
Space B is a continuation of Space 2 on the basic application.
Space B is not applicable to Short Forms.
- Space C (on the reverse side of this sheet) is for the continuation of Spaces 1, 4, or 6 on the basic application or for the continuation of Space 1 on any of the three Short Forms PA, TX, or VA.

PA	PAU	SE	SEG	SEU	SR	SRU	TX	TXU	VA	VAU
----	-----	----	-----	-----	----	-----	----	-----	----	-----

EFFECTIVE DATE OF REGISTRATION

(Month) 7 (Day) 28 (Year) 06

CONTINUATION SHEET RECEIVED
JUL 28 2006

Page 3 of 5 pages

DO NOT WRITE ABOVE THIS LINE. FOR COPYRIGHT OFFICE USE ONLY

IDENTIFICATION OF CONTINUATION SHEET: This sheet is a continuation of the application for copyright registration on the basic form submitted for the following work:

A
Identification
of
Application

- TITLE: (Give the title as given under the heading "Title of this Work" in Space 1 of the basic form.)
**DAVID POWELL LIBERATION MOVEMENT:
CONSTITUTIONAL CHALLENGE**
- NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S): (Give the name and address of at least one copyright claimant as given in Space 4 of the basic form or Space 2 of any of the Short Forms PA, TX, or VA.)
**DAVID C. POWELL JR. P.O. BOX 010950
MIAMI, FL 33101**

NAME OF AUTHOR ▼

d **DAVID C. POWELL JR.**

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼
8-4-58

B
Continuation
of Space 2

Was this contribution to the work a "work made for hire"?
 Yes
 No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of **U.S.**
Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? Yes No
Pseudonymous? Yes No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼

SOUND RECORDINGS UNDERLYING WORK DRAMA, LITERARY WORK LECTURE TEXT, WORDS, MULTIMEDIA KIT*

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼

e

Was this contribution to the work a "work made for hire"?
 Yes
 No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of _____
Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? Yes No
Pseudonymous? Yes No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼

f

Was this contribution to the work a "work made for hire"?
 Yes
 No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of _____
Domiciled in _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? Yes No
Pseudonymous? Yes No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. ▼

EXH. 0 5 of 9

C

Continuation of other Spaces

6(a) BASED ON PREEXISTING PRODUCT CREATION THAT IS IN PUBLIC DOMAIN WITH MATERIAL IDENTIFY UNPUBLISHED DRAMATIC COMPOSITION DRAFT DOCUMENTARY AND OR LECTURE SOUND RECORDINGS PARTICULAR SERIES OF SOUNDS FIXED EMBODIED BY MEANS OF A DIGITAL AUDIO TRANSMISSION. THE DIGITAL PERFORMANCE SOUND RECORDINGS ACT OF 1995, P.L. 104-39 EXTENDS TO TWO ELEMENTS IN SOUND RECORDING: DAVID POWELL JR. CONTRIBUTIONS PERFORMER(S) WHOSE PERFORMANCE IS CAPTURED AND CONTRIBUTION CAPTURING & PROCESSING THE SOUNDS AUTHOR WRITES OR NARRATIVE AND RECORDS IT NATURE OF AUTHORSHIP TEXT AND SOUND RECORDING.

DERIVATIVE WORKS BASED ON OR INCORPORATES AUTOBIOGRAPHY OF DAVID POWELL JR. WHICH CONTAINS JOURNAL ENTRIES AND LETTERS BY DAVID POWELL. DRAMA ABOUT DAVID POWELL JR BASED ON THE LETTERS AND JOURNAL ENTRIES OF DAVID POWELL. SUBSTANTIAL AMOUNT OF MATERIAL THAT IS NOT INCLUDED IN CLAIM.

6 (b) CORPOREAL INTELLECTUAL PROPERTY PROTECTION OBJECT OF A RIGHT AUTOBIOGRAPHY, NEW FOREWORD AND INDEX, COMPILATION OF RECORDINGS AND EMPHEMERALS(S), WEBCASTING, NARROWCAST, INTERNET, CABLE TV, AND SATELLITE TRANSMISSION PRIMARY AND SECONDARY ADAPTIVE RIGHTS, LOOK AND FEEL PROTECTION, DISPLAY & PUBLICITY RIGHTS INTERACTIVE DIGITAL COMMUNICATION PURE SPEECH SOUND ACTIVATED ON & OFF AIR THRU NETWORKS BROADCAST THUS ROYALTY CLAIMS CYBER LAW ISSUES SHAKE DOWN GANG RELATED INNUBIGUS.

INVOLVING ENOUGH CREATIVE EXPRESSION COMPILATION COLLECTION ORIGINAL WORK DOCUMENTARY ABRIDGEMENT ASSEMBLING PREEXISTING AND NEW MATERIALS OF DATA PROTECTED IS SORTING, SELECTING, AND GROUPING OF FACTS TO MERIT PROTECTION INCLUDING EDIT AND EDITING EDITORIAL SELECTION ELEMENTS AND FORMULA MULTIMEDIA KIT UNDERLYING SOUND RECORDING OF DAVID POWELL "BEST LOVE RELATIONSHIPS" W/ KRISTINA ABERNATHY OF WEATHER CHANNEL AND BARBARA BERMUDO PRIMER IMPACTO UNIVISION SELECTED FROM COUNTLESS INFINITE FEMALES 1985-2005 INCLUDING INTERACTIVE DIGITAL COMMUNICATION DOCUMENTARY AUTOBIOGRAPHY TRANSCRIPT.

Certificate will be mailed in window envelope to this address:

Name ▼	DAVID C. POWELL JR.
Number/Street/Apt ▼	P.O. BOX 010950
City/State/ZIP ▼	Miami, FLA 33101

YOU MUST
• Complete all necessary spaces
• Sign your application

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE

1. Application form
2. Nonrefundable fee in check or money order payable to Registrar of Copyrights
3. Deposit Material

MAIL TO
Library of Congress, Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20558-6000

D

Fee schedule is change. For current fee, check the Copyright Office website at www.copyright.gov, send the Copyright Office, or call (800) 787-6464.

CONTINUATION OF (Check which): Space 1 Space 4 Space 6

Continuation of other Spaces

6(A) RECAST OR ADAPTED FORM. BASED ON PREEXISTING PRODUCT CREATION THAT IS IN PUBLIC DOMAIN WITH MATERIAL IDENTIFY THRU CYBERLAW ISSUES COMPUTERS, INTERNET, FREEDOM OF EXPRESSION, CYBERSQUATING, CYBERSTALKING, CYBERTHEFT TO STEAL SOMEONE ELSE'S PROPERTY OR TO INTERFERE WITH INTELLECTUAL-PROPERTY RIGHTS CREATED IN FIXED FORM AND INTERFERING WITH A COPYRIGHT PROTECTED MATERIAL.

WORK IS BASED ON AND INCORPORATES DIGITAL MILLENNIUM COPYRIGHT ACT, AFFIDAVIT IN SUPPORT OF ATTORNEY FEES IN EXCESS OF STATUTORY GUIDELINES, LOOK AND FEEL PROTECTION; DISPLAY AND PUBLICITY RIGHTS HAS FALLEN INTO PUBLIC DOMAIN BASED ON INNIBIBUS ZONE OF PRIVACY, ZONE OF INTEREST STANDING & THIRD PARTY MOVEMENT LIFE STORY VERSION OF ALREADY MADE MOTION PICTURE THE "TRUMAN STORY" STARRING JIM CARREY ADAPTED FORM. COLLECTION ADAPTIVE RIGHTS FOR POSSESSORY INTEREST RESTORATION OF PERSON'S LOST RIGHTS & STATUS POSTLITINIUM AND LECTURES.

6(B) SOUND RECORDING. COMPILATION DESCRIBED DAVID POWELL LIFE STORY LIBERATION MOVEMENT LIBERTY INTEREST ITSELF AND COMPILATION BOTH DESCRIBED. NEW MATERIAL ZONE OF EMPLOYMENT SOCIAL INSURANCE. COMPOUNDING THE CRIMES OF YEARS 2000 - CURRENTLY KRISTINA ABERNATHY OF WEATHER CHANNEL; 2001 - CURRENTLY BARBARA BERMUDO PRIMER. IMPACT TO UNIVISION INTERACTIVE DIGITAL COMMUNICATION WITH DAVID POWELL JR. THRU NETWORKS T.V. BROADCASTS, CABLE, RADIO, AND SATELLITE PRIMARY & SECONDARY TRANSMISSION RETRANSMITTED BY CABLE SYSTEMS AND SATELLITE CARRIERS TO SUBSCRIBERS LOCATED OUTSIDE THAT STATION'S LOCAL MARKET CLAIMS 1ST AMENDMENT RIGHTS PROTECTED PURE SPEECH, VIDEO, IMAGES, VOICE & SOUND ACTIVATED OFF OR ON AIR LOVE RELATIONSHIP(S) SPOILIATION BURSTING-BUBBLE THEORY OBSTRUCTION OF JUSTICE GENERAL INTENT BAD MOTIVE PINKERTON RULE FOR ROYALTY CLAIMS. SECONDLY, INCITEE INCITEMENT INCHOATE OFFENSES UNDUE INFLUENCE POLITICAL OFFENSES FOR ELECTORAL COLLEGE NO. 15 EA. & VOTER HAWAII, ALASKA EQUAL FOOTING AS OTHER 48 STATES ANTENATUS AND POSTNATUS STATES AND CITIZENS POLITICAL RIGHTS IN ESSE AND IN POSSE VOTING RIGHTS ACT 42 USCA § 1971-1974 12TH ADITL. BADGE OF SLAVERY & FRAUD CLASS BASED ANITHUS BASED ON PREVIOUS CONDITION OF SERVITUDE, DISENFRANCHISE AND DISENFRANCHISEMENT.

Certificate will be mailed in window envelope to this address:

Name ▼	DAVID C. POWELL JR,
Number/Street/Apt ▼	P.O. BOX 010950
City/State/ZIP ▼	MIAMI, FLA. 33101

YOU MUST
• Complete all necessary spaces
• Sign your application

SEND ALL ELEMENTS IN THE SAME PACKAGE
1. Application form
2. Nonrefundable fee in check or money order payable to Register of Copyrights
3. Deposit Material

MAIL TO
Library of Congress, Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20558-6000

D
Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, or call (202) 707-0800.

APPENDIX 1

Dated: February 7, 1997.

Cecily A. Rayburn,

*Director, Division of Financial Management,
Office of Management, Administration and
Planning, Employment Standards
Administration.*

[FR Doc. 97-3476 Filed 2-11-97; 8:45 am]

BILLING CODE 4510-27-M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 95-1 CARP DD 92-94]

Distribution of the 1992, 1993, and 1994 Musical Works Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the distribution of the royalty fees collected for Digital Audio Recording Devices and Media (DART) in the 1992, 1993, and the 1994 Musical Works Funds. The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP).

EFFECTIVE DATE: The distribution percentages announced in this Order are effective on February 12, 1997.

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

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, or Tanya M. Sandros, Attorney-Advisor, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380.

SUPPLEMENTARY INFORMATION:

I. Recommendation of the Register of Copyrights

Background

On October 28, 1992, Congress enacted the Audio Home Recording Act, Public Law No. 102-563 (1992). This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are collected by the Copyright Office and deposited with the Treasury of the United States. 17 U.S.C. 1005. These funds are distributed by the Copyright Office to interested copyright

parties who filed claims with the Copyright Office each year during January and February pursuant to either a universal settlement negotiated by the claimants to a particular subfund, or by Order of the Librarian of Congress (Librarian) following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel (CARP).

The Act provides that the royalties are to be divided into two funds: the Sound Recordings Fund, which accounts for 66 $\frac{2}{3}$ % of the royalties, and the Musical Works Fund, which accounts for the remaining 33 $\frac{1}{3}$ % of the royalties. The Act further divides each fund into subfunds.

The Sound Recordings Fund consists of four subfunds, two of which, the Nonfeatured Musicians Subfund and the Nonfeatured Vocalists Subfund, account for 2 $\frac{5}{8}$ % and 1 $\frac{3}{8}$ %, respectively, of the Sound Recordings Fund and are administered by an independent administrator. The remaining 96% of the Sound Recordings Fund is further distributed between two additional subfunds, the Featured Recording Artist Subfund and the Sound Recording Owners Subfund, which receive 40% and 60%, respectively, of the remaining 96% share of the fund. The Musical Works Fund consists of two subfunds, the Publishers Subfund and the Writers Subfund, each of which receives 50% of that Fund. 17 U.S.C. 1006(b).

Thus, the Act establishes the percentages for each fund and subfund, but directs the CARPs, when necessary, to determine what amount each claimant within a subfund is entitled to receive. The determination and a full explanation underlying the conclusions are set out in a written report to the Librarian.

Distribution of Royalties

Royalties are collected on a quarterly basis from any importer or manufacturer that distributes any digital audio recording device or digital audio recording medium that it manufactured in or imported into the United States. 17 U.S.C. 1003(c). As discussed above, these royalties are collected by the Copyright Office and invested in interest-bearing securities with the United States Treasury for subsequent distribution to interested copyright parties. 17 U.S.C. 1005.

An interested copyright party must submit each year a written claim to the Copyright Office during the months of January and February. 17 U.S.C. 1007(a). Within 30 days after the last day for filing claims, the statute instructs the Librarian to ascertain whether there are any controversies among the claimants as to the proper distribution of the

royalties in their fund/subfund. If there are no controversies, the Librarian authorizes the distribution of the funds according to the terms of the negotiated agreements; otherwise, the Librarian is directed to convene a CARP or CARPs to decide the proper distribution of the royalties in each unresolved fund/subfund. 17 U.S.C. 1007(b)(c).

This Proceeding

The parties in this proceeding are Broadcast Music, Inc., the American Society of Composers, Authors, and Publishers, SESAC, Inc., the Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association, Inc.), Copyright Management Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively, the "Settling Parties"), and two pro se claimants, Eugene Curry and Alicia Carolyn Evelyn. Ms. Evelyn and Mr. Curry, both songwriters, chose to represent their own interests in the proceeding. Mr. Curry also represented the publishing interest of Tajai Music, Inc. (Tajai) for the three years in dispute. The Settling Parties represent the over 264,000 remaining publishers and songwriters with a claim to a share of the royalties. Settling Parties Direct Case at 2-3.

The CARP in this proceeding was convened to determine the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds, which totaled approximately \$355,500.00.¹ The Copyright Office received forty-one claims to the 1992 Musical Works Fund—twenty-one claims to the Writers Subfund and twenty claims to the Publishers Subfund. During the next filing cycle, the Office received twenty-two claims to the 1993 Musical Works Fund—twelve claims to the Writers Subfund and ten claims to the Publishers Subfund. In 1995, the Office received twenty-six claims to the 1994 Musical Works Fund, equally divided between the two subfunds.

This proceeding for the determination of the distribution of the DART royalties commenced on November 3, 1993, when the Settling Parties filed a motion with the Copyright Royalty Tribunal (Tribunal)² to consolidate the 1992 and

¹ Claimants to the royalties in the Sound Recordings Fund for 1992, 1993, and 1994 negotiated a settlement amongst themselves. The Library has made a full distribution of these funds to the interested copyright parties who filed timely claims for a share of these royalties. See Order, Docket No. 94-2 CARP-DD (December 15, 1994) and Order in Docket No. 95-1 CARP DD 92-94 (May 16, 1995).

² When the Audio Home Recording Act was passed, the Copyright Royalty Tribunal had the authority to conduct the DART distribution proceedings. The Tribunal, however, was abolished

1993 DART distribution proceedings. The CRT granted this motion on November 29, 1993, see Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993), but further proceedings were suspended upon the abolition of the CRT.

The Copyright Office instituted a new proceeding for the distribution of 1992 and 1993 DART royalties on March 1, 1994. 59 FR 9773 (March 1, 1994). In response to this notice, the Settling Parties and other claimants filed a motion with the Office requesting the Office to consolidate the 1992, 1993, and 1994 DART distribution proceedings. The Office granted this request and announced that it would set a schedule for a DART distribution proceeding in 1995. 59 FR 35762 (July 13, 1994).

On February 23, 1995, the Office published a notice requesting comments as to the existence of controversies in the consolidated proceeding, and notices of intent to participate. 60 FR 12251 (March 6, 1995). Twelve parties filed notices of intent to participate in this proceeding, including the Settling Parties, Ms. Evelyn, Mr. Curry and the publishing company he represents, Tajai.

Through a series of motions to dismiss certain parties and as a result of continued negotiations, nine parties remained in the DART distribution proceeding when the Librarian initiated a CARP to determine the distribution of the Musical Works Fund royalties for 1992, 1993, and 1994. 61 FR 40464 (August 2, 1996).

On October 4, 1996, the Parties met with the Panel which determined, for good cause shown, to proceed on the basis of the written pleadings alone.³ CARP Order, Docket No. 95-1 CARP DD 92-94 (October 4, 1996). Accordingly, the CARP instructed the parties to file their respective proposed findings of fact and conclusions of law by November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to the material contained

by Congress in 1993, and the authority to distribute DART funds was given to the CARPS, as administered by the Librarian of Congress. See the Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198.

³On June 14, 1996, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of the written pleadings. The Librarian denied the motion, but designated the issue to the CARP for further consideration under their authority to suspend or waive the relevant provision of the regulations. Order, Docket No. 95-1 CARP DD 92-94 (July 25, 1996).

in the written direct cases previously filed on March 25, 1996. Transcript of October 4, 1996 Meeting at 33-35.

On December 16, 1996, the chairperson of the CARP delivered the Panel's written report to the Librarian.

The CARP Report

The Panel, after reviewing the written record, determined that the royalties in the 1992, 1993, and 1994 Musical Works Funds should be allocated as follows:

To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993; and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994. CARP Report, paras. 71-73.

The Panel utilized the only formula presented for calculating a claimant's share of the royalties. CARP Report, para. 53. The formula determines each claimant's proportionate share of the royalties as a percentage of the total song titles sold during a particular year based on evidence of a claimant's total song title sales for that year. *Id.*

Standard of Review

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

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its

legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

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

- (1) Relies on factors that Congress did not intend it to consider;
- (2) fails to consider entirely an important aspect of the problem that it was solving;
- (3) Offers an explanation for its decision that runs counter to the evidence presented before it;
- (4) Issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
- (5) Fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; or
- (6) When the agency's action entails the unexplained discrimination or disparate treatment of similarly situated parties.

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

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

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

We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must

especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully * * *.

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

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal's decisions, he must be presented by the CARP with a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 286, 103d Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the CARP must "weigh all the relevant considerations and * * * set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully." *National Cable Television Association v. CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting Network, Inc. v. CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).

It is the task of the Register of Copyrights to review the CARP report and make her recommendation to the Librarian as to whether the report 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.

Petitions To Set Aside the Panel's Determination

On January 2, 1997, and on January 3, 1997, the two pro se parties filed their petitions with the Librarian to modify and/or set aside the decision of the CARP, along with motions requesting leave to file the petitions late. See 37 CFR 251.55(a). The Office accepted the late filings and issued an order requesting that any replies to the petitions be filed with the Office no later than January 17, 1997. Order, Docket No. 95-1 CARP DD 92-94 (January 3, 1997). The purpose of the petitions to modify or set aside the Panel's determination is to identify aspects of the Panel's report which are arbitrary with respect to record evidence

or contrary to the applicable statutory provisions.

In her petition, Ms. Alicia Evelyn enumerated an array of reasons to set aside the determination of the CARP in this proceeding, stating that "[t]he panel, in its report, failed to address matters in controversy * * *." Petition to Set Aside the Determination of the Copyright Arbitration Royalty Panel in the Above-Referenced Matter Submitted by Alicia Carolyn Evelyn, Individual, Pro Se, Claimant (Evelyn Petition) at 2. The purported controversies which the CARP failed to address include: (1) Failure on the part of the Settling Parties to identify their DART eligible associates and members and at least one DART eligible title for the 1992-94 period, *Id.* at 2; (2) failure on the part of the Settling Parties to provide data to individual claimants pertaining to their DART eligible songs, including, but not limited to the songs "I'm Counting on You" and "I Thank You," *Id.* at 3; (3) selection of SoundScan to determine the extent of record sales rather than use of performance data, *Id.* at 7; (4) use by Mr. Michael Fine⁴, expert witness for the Settling Parties, of an incomplete list of DART eligible songs when evaluating SoundScan data for record sales of Ms. Evelyn, *Id.* at 7; (5) unexplained use of total record sales, as reported by SoundScan, for 1992, rather than record sales for the relevant period, October 28, 1992—December 31, 1992, and concomitant use of total record sales for the claimant during this same period, *Id.* at 7-8; (6) failure to include record club sales and/or computer sales in the calculations for total record sales, *Id.* at 8; and (7) failure on the part of certain Settling Parties to fulfill their fiduciary obligations toward their members. *Id.* at 9-10.

Whereas Ms. Evelyn's petition stated her concerns with certain particularity, Mr. Curry's petition to set aside the panel's determination rests primarily on a fundamental assertion that the Settling Parties never proved their case. Petition to Set Aside the Determination of the Arbitration Royalty Panel, submitted by Eugene Curry (Curry Petition), at 1. Mr. Curry argues that he had to submit specific titles of his works and documentation of record sales whereas the Settling Parties produced no hard numbers for the record sales of any claimant represented by the Settling Parties. *Id.* at 2,3,4. Curry further argues that it was error for Ms. Smith⁵ to

⁴Mr. Fine is the Chief Executive Officer of SoundScan, Inc. Witness Affidavit, Settling Parties' Direct Case.

⁵Ms. Smith is Vice President of Performing Rights of Broadcast Music, Inc. Witness Affidavit, Settling Parties' Direct Case.

supply Mr. Fine with authorship data and not present any data on the number of disseminations of his works through transmissions, i.e. radio play, *id.* at 2, implying that the Panel failed to properly apply the statutory criteria for making its determination. Additionally, Mr. Curry submits that he supplied the Settling Parties with documentation of record club sales in support of his argument that SoundScan was not the only source of record sales data, nor the best source, but this information was not utilized in the final report to adjust the sales figures. *Id.* at 4.

In reply, the Settling Parties request that the Librarian deny Ms. Evelyn's and Mr. Curry's petitions on both procedural and substantive grounds. The Settling Parties contend that the Panel's report was not arbitrary or contrary to the law, when analyzed under the applicable standard of review, and therefore, should be adopted as filed by the Librarian. Furthermore, the Settling Parties oppose the Evelyn and Curry petitions because each petition failed to reference applicable sections of the party's proposed findings of fact and conclusions of law. See 37 CFR 251.55(a).

Sufficiency of Ms. Evelyn's and Mr. Curry's Petitions To Modify

Before the Register can address the issues raised by Ms. Evelyn's and Mr. Curry's petitions to modify the determination of the Panel, the Register must first address the contention raised by the Settling Parties that the petitions must be dismissed for failure to comply with section 251.55(a) of the CARP rules. That section provides that each petition must "state the reasons for modification or reversal of the panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law." 37 CFR 251.55(a).

Review of Ms. Evelyn's and Mr. Curry's petitions reveals that neither comply with the second part of the rule which requires identification of applicable portions of a petitioner's proposed findings of fact and conclusions of law. The purpose of this requirement is to enable the Register, and the Librarian, to locate those portions of the testimony that support each party's petition. However, absent a showing of bad faith, the remedy for failure to comply with the requirement is not dismissal of a party's petition to modify. Rather, the remedy is for the Register to direct the offending party to amend his or her petition to include identification of the applicable portions of their proposed findings of fact and conclusions of law. This approach,

however, is not necessary in this proceeding because the record is relatively small. Therefore, Ms. Evelyn's and Mr. Curry's petitions to modify were accepted.

Review of the CARP Report

In reviewing the determination of a CARP, the Register is required to confine her consideration to the record of the proceeding. 17 U.S.C. 802(f). The record in this proceeding consists solely of the written direct cases of the Settling Parties, Ms. Evelyn, and Mr. Curry. Consequently, despite the protestations of Ms. Evelyn and Mr. Curry, the Register will not address issues raised in their petitions to modify which go beyond the evidence presented in the written direct cases.

The Register's review is in three parts: (1) An analysis of the statutory criteria to be used in the current proceeding; (2) an analysis of the methodology adopted by the Panel to implement the statutory criteria; and (3) an analysis of the application of the adopted methodology to the record evidence.

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

In this proceeding, the parties presented credible evidence only as to the distribution criteria (record sales).⁶ The Register concludes that the Panel acted properly in basing its determination solely on the evidence of record sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determines that the Panel

⁶The Panel found that while the Settling Parties and Mr. Curry did not present any evidence of performances, the evidence presented by Ms. Evelyn as to performances of her works was not competent. Report, paras. 46-47. After reviewing the record, the Register concludes that this determination by the Panel was not arbitrary.

acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr. Curry that was not relevant to the section 1006(c)(2) criteria. *See*, CARP Report, para. 52.

2. *Methodology.* The Settling Parties presented the only systematic method for determining the distribution of the royalties in the Musical Works Funds. The formula divided the total song title sales credited to a claimant during a particular year by the total song titles sold during the same year. This calculation determines the claimant's proportionate share of the royalties for that period of time. The Panel found this formulation acceptable for making its determination because it allows each claimant to receive credit for actual sales during the relevant period. CARP Report, para. 54. Additionally, the Panel noted that Ms. Evelyn and Mr. Curry failed to propose any alternative systematic method or formula for calculating a claimant's share of the royalties. CARP Report, paras. 40 and 48.

Although neither Ms. Evelyn nor Mr. Curry challenge the Settling Parties' formula for determining each claimant's share of the royalties, Mr. Curry does challenge application of the formula solely to himself and Ms. Evelyn,—that is, not the Settling Parties. The Register concludes that the Panel did not act arbitrarily by using the formula to determine Mr. Curry's and Ms. Evelyn's proportionate share of the royalties from actual sales data. First, the Panel found that the Settling Parties represent all claims except those of Mr. Curry and Ms. Evelyn. CARP Report, paras. 36 and 37. Second, based on this finding and application of the simple mathematical concept that the sum of the parts must equal the whole, the Panel accepted the presentation of evidence for the two individual claimants' share of the royalties and deducted this sum from 100% to determine the Settling Parties' share of the royalties. CARP Report, para. 69. Such an approach is logical and consistent and was fully within the discretion of the Panel.

Ms. Evelyn raises a second challenge to the methodology utilized by the Panel. Specifically, she challenges the fact that the Panel considered the total sales figures for 1992, rather than only those sales which occurred during the time period that the Audio Home Recording Act was in effect (October 28, 1992 to December 31, 1992). The Register determines that this challenge is not fatal to the Panel's action. First, Ms. Evelyn did not file a claim to DART royalties for 1992, and her distribution is not affected by the Panel's determination for 1992. Second, there is

no evidence in the record that suggests that the Panel could have ascertained the universe of record sales, and the sales of Mr. Curry, for the period from October 28, 1992, through December 31, 1992. Nevertheless, the Panel determined Mr. Curry's percentage claim from the annual sales data under an apparent assumption that record sales occurred at the same rate throughout 1992. A careful review of the record reveals no evidence suggesting that the rate of record sales during the effective period of the Audio Home Recording Act was statistically different from the rate of sales throughout the remainder of the calendar year. Consequently, the Register finds the Panel's use of the annual sales figures not arbitrary, although evidence of record sales from this period would have provided the ideal precision for application of the formula. *See, National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 379 n.10 (D.C. Cir. 1982) (Tribunal's findings acceptable "though of less than ideal clarity," so long as "the path which the agency follows can reasonably be discerned.").

3. *Application of Methodology to Record Evidence.* The Register finds that the Panel did act arbitrarily in determining Mr. Curry's⁷ share of the 1992, 1993, and 1994 Publishers Subfunds. The Panel erred by determining that Mr. Curry, as writer, and Mr. Curry, as publisher, were to receive the same award.

In determining Mr. Curry's record sales for the Writers Subfunds, the Panel prorated his sales based on his percentage contribution as author to each musical work. For example, the Panel accorded Mr. Curry credit for one-half, 50%, of the total record sales for the musical work "Burnin'" because he was the co-author of the work. CARP Report, para. 34. While this approach is appropriate in determining Mr. Curry's share of the Writers Subfunds, it is contrary to the evidence in determining his share of the Publishers Subfunds. There is no evidence in the record which demonstrates that Mr. Curry was entitled to anything less than a one hundred percent publishing interest from the sales of the musical works credited to him by the Panel for the Publishers Subfunds. The Register is, therefore, recommending that Mr. Curry's award for the 1992-1994 Publishers Subfunds be adjusted to reflect a one hundred percent

⁷In his capacity as sole representative of Tajai Music, Inc., Mr. Curry filed claims to the 1992, 1993, and 1994 Publishers Subfunds.

publishing interest for Mr. Curry as sole representative of Tajai.

One final point raised by Mr. Curry and Ms. Evelyn concerns the use of SoundScan as the definitive source of record sales data. The Report, however, clearly indicates that the Panel did consider evidence submitted by Mr. Curry regarding sales through record companies, and that after due consideration, the Panel rejected the evidence because he failed to provide the universe of record sales for these companies during the relevant time. CARP Report, para. 40. The Panel's decision to reject the record sales data submitted by Mr. Curry and rely upon the SoundScan data was not arbitrary.

Similarly, Ms. Evelyn's contention that the Settling Parties failed to provide

additional data concerning additional DART eligible songs is without merit. The Panel carefully analyzed her direct case and found no credible evidence of sales or performances in the U.S. during the relevant period, CARP Report, paras. 41-48; the Panel did credit her with sales of musical works introduced by the Settling Parties. CARP Report, para. 35. Furthermore, the Register notes that the evidence presented by the Settling Parties, and adopted by the Panel, for record sales of Ms. Evelyn and Mr. Curry credit them both with greater sales than the evidence they presented in their written direct cases, thereby increasing the size of their respective awards. CARP Report, para. 62 and 64.

As discussed earlier in this Order, the Librarian's scope of review is very

narrow. The limited scope certainly does not extend to reconsideration of the relative weight to be accorded particular evidence, and the Librarian cannot second guess a CARP's balance and consideration of the evidence, unless it runs counter to the evidence presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983).

Conclusion

For the above stated reasons, the Register recommends that the following should be the percentages for the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds:

	1992		1993		1994	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Curry	00.007096	00.014745	00.001608	00.003802	00.003398	00.007066
Evelyn	NA	NA	00.000084	NA	00.000082	NA
Settling Parties	99.992904	99.985255	99.998308	99.996198	99.99652	99.992934
Total	100.00	100.00	100.00	100.00	100.00	100.00

II. Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1992-1994 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order setting the distribution of the royalties in the 1992-1994 Musical Works Funds.

Wherefore, *it is ordered* that the royalties in the 1992-1994 Musical Works Funds shall be distributed according to the following percentages:

	1992		1993		1994	
	Writers	Publishers	Writers	Publishers	Writers	Publishers
Curry	00.007096	00.014745	00.001608	00.003802	00.003398	00.007066
Evelyn	NA	NA	00.000084	NA	00.000082	NA
Settling Parties	99.992904	99.985255	99.998308	99.996198	99.99652	99.992934
Total	100.00	100.00	100.00	100.00	100.00	100.00

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

Dated: February 3, 1997.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 97-3316 Filed 2-11-97; 8:45 am]

BILLING CODE 1410-33-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (97-013)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

Copies of patent applications cited are available from the Office of Patent Counsel, Goddard Space Flight Center. Claims are deleted from the patent applications to avoid premature disclosure.

DATES: February 12, 1997.

FOR FURTHER INFORMATION CONTACT: Guy M. Miller, Patent Counsel, Goddard Space Flight Center, Mail Code 204, Greenbelt, MD 20771; telephone (301) 286-7351.

NASA Case No. GSC-13,524-2: A Dual Amplitude and Dual-Time-of Flight Ultrasonic Imaging System;

NASA Case No. GSC-13,681-1: Low Cost GPS Receiver;

NASA Case No. GSC-13,708-1: Segmented Cold Cathode Display Panel;

APPENDIX 2

COPYRIGHT ARBITRATION ROYALTY PANEL

GENERAL COUNSEL
OF COPYRIGHT, U.S.

Dec 16 1996

RECEIVED

In the Matter of:

Distribution of DART Royalty Funds
for 1992, 1993, and 1994

Docket No. 95-1 CARP DD 92-94

The Claimants

Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., the Harry Fox Agency, Inc. (a subsidiary of the National Music Publishers' Association, Inc.), Copyright Management, Inc., The Songwriters Guild of America, and the Gospel Music Coalition (collectively, the "Settling Parties").

Eugene "Lambchops" Curry

Alicia Carolyn Evelyn

Report of the Arbitration Panel

For the reasons set forth below, we find that the Musical Works Funds, Writers and Publishers Subfunds for 1992, 1993 and 1994, should be allocated as follows:

To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993;

and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994.

BACKGROUND

The Audio Home Recording Act of 1992

1. In enacting the Audio Home Recording Act of 1992, Pub. L. No. 102-563 (1992) (the "Act"), Congress responded to recent advances in digital audio recording technology that made the private home copying of music a serious concern of copyright owners. The effective date of the Act was October 28, 1992. 17 U.S.C. §1001 et seq.

2. The Act established the statutory framework for the Digital Audio Recording Technology ("DART") royalty funds. It contains a royalty payment system that provides "modest compensation to the various elements of the music industry for the digital home recordings of copyrighted music." S. REP. No. 294, 102d Cong., 2d Sess. 30 (1992). Importers and manufacturers bear the cost of copyright license fees that are collected by the Copyright Office ("Office") and deposited in the Treasury of the United States. 17 U.S.C. § 1005.

3. By statute, these fees are divided into two funds from which royalty allocations are to be made: the Sound Recordings Fund, to which two-thirds of all fees are apportioned; and the Musical Works Fund, to which one-third of all fees are apportioned. 17 U.S.C. § 1006(b). This proceeding addresses only the distribution of Musical Works Fund royalties. The Musical Works Fund is subdivided evenly into the Writers Subfund and the Publishers Subfund. 17 U.S.C. 1006(b)(2)(B). Under the Act, claims must be filed during January and February of the calendar year following the year for which claims are being made. 17 U.S.C. § 1007(a)(1).

4. The Act, as originally enacted, authorized the Copyright Royalty Tribunal ("CRT") to distribute the royalties. Pub. L. No. 102-563, Subchapter C. On December 17, 1993, Congress abolished the CRT and replaced it with ad hoc copyright arbitration panels administered by the Office. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 (1993).

5. This Panel was appointed to determine the distribution of Musical Works Fund royalties for 1992, 1993 and 1994. 17 U.S.C. §§ 801(b)(3), 802. As noted above, the effective date of the Act was October 28, 1992. Therefore, the royalty funds collected for 1992 represent license fee payments made only for the period October 28 through December 31, 1992. On the other hand, the 1993 and 1994 royalty funds represent payments made for each of those two full calendar years.

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

7. Initially, the CRT established rules and regulations governing DART distribution proceedings. 57 Fed. Reg. 54542 (1992). Thereafter, the Office established rules governing both DART distribution proceedings and administration of the ad hoc arbitration panels. 59 Fed. Reg. 63043; 59 Fed. Reg. 63025 (1994).

The 1992, 1993 And 1994 Musical Works Fund Royalty Distribution Proceeding

8. Thirty individual and joint claimants, including the Settling Parties, filed claims

to either or both Subfunds of the Musical Works Fund for 1992, 1993 and/or 1994. See generally claims filed in DART Musical Works Funds for 1992, 1993 and 1994. Among them were Eugene "Lambchops" Curry, who filed claims for both the Writers and Publishers Subfunds for each of these three years, and Alicia Carolyn Evelyn, who filed claims only for the Writers Subfund and only for 1993 and 1994. Id.

9. On November 3, 1993, the Settling Parties filed a motion with the CRT to consolidate the 1992 and 1993 DART distribution proceedings. In an Order dated November 29, 1993, the CRT granted the motion. Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993). On December 17, 1993, Congress abolished the CRT, replacing it with arbitration panels. On June 10, 1994, the Settling Parties and other claimants filed a motion with the Office to consolidate the 1992, 1993 and 1994 DART distribution proceedings. In an Order dated July 7, 1994, the Office granted that motion. 59 Fed. Reg. (1994).

10. On February 23, 1995, the Office published a notice requesting comments on the existence of controversies in the consolidated proceeding and notices of intent to participate. 60 Fed. Reg. 12251 (1995). Comments on controversies were filed by April 20, 1995, and notices of intent to participate were filed by May 5, 1995.

11. On July 10, 1995, the Settling Parties filed a motion to dismiss the claim of John Pillin, Jr., d/b/a Ultra Hot Razor Music,¹ for failure to follow the rules of the Office. On September 18, 1995, the Office granted this motion and dismissed Mr. Pillin's claim.

¹ The motion originally sought to dismiss the claims of two additional claimants (ACEMLA and Performance Record and Tape Distributors). On September 8, 1995, after settling with those two claimants, the Settling Parties withdrew their motion against them, and these two claimants withdrew their respective claims.

12. By December 22, 1995, the Settling Parties had notified the Office that they had settled with or agreed to represent nearly all of the remaining claimants in this proceeding.² The only claimants not included in the Settling Parties' notification were James Gideon Cannings and Can Can Music, Bopp Du Wopp, Inc. (represented by David N. Cone), Ms. Evelyn, and Mr. Curry and the publishing company he represents, Tajai Music.

13. On December 22, 1995, the Settling Parties filed a motion for summary judgment, asserting that no genuine issues of material fact were in dispute. In that motion, the Settling Parties included evidence of both performances and record sales, if any, for each of the four remaining individual claimants. On February 21, 1996, the Office denied the motion, stating that the Library of Congress does not have summary judgment authority when a "valid controversy" exists. In that Order, the Office further set forth a date for the filing of written direct cases (March 25, 1996) and a precontroversy discovery schedule.

14. On March 25, 1996, pursuant to the Office's February 21st scheduling order, the Settling Parties, James Gideon Cannings, Mr. Curry and Ms. Evelyn timely filed written direct cases. Bopp Du Wopp, Inc. filed its case with the Office on March 27, 1996, two days late.

15. On April 2, 1996, the Settling Parties filed motions (1) to resolve their controversy with Ms. Evelyn and to enter an award on her behalf in the amount of the percentage she claimed in her direct case; (2) to dismiss Mr. Cannings for failure to state a claim or to present any evidence in his direct case; and (3) to dismiss Bopp Du Wopp, Inc. for failure to file timely a direct case or to present any evidence in the case it did file. On May

² See Settling Parties' notices to the Office filed on September 8, 1995 and on December 22, 1995.

9, 1996, the Office dismissed the claims of Mr. Cannings³ and Bopp Du Wopp, Inc. and denied the Settling Parties' motion as to Ms. Evelyn on the grounds that the Office's rules permit claimants to amend their claimed shares of royalties at any time up to the filing of proposed findings of fact and conclusions of law. Thereafter, the remaining parties exchanged discovery.

16. On June 14, 1996, the Settling Parties filed a motion to compel production of documents from Mr. Curry regarding the assertion in his direct case that he had written over three hundred songs. In an Order dated July 2, 1996, the Office granted the motion to compel. Mr. Curry failed to comply with the Office's Order.

17. On June 24, 1996, in view of the paucity of evidence in the written direct cases of Mr. Curry and Ms. Evelyn, the only remaining individual claimants in this proceeding, and the small amount of money in controversy, the Settling Parties filed a motion to dispense with formal hearings and to conduct this proceeding on the basis of written pleadings alone. On July 25, 1996, the Office denied the motion, but certified the issue for decision by the Arbitration Panel.

18. On July 8, 1996, by letter, the Office requested the parties to agree to a mechanism to pay the costs of this arbitration. The Settling Parties suggested that, because the cost of a fully-litigated proceeding could exceed the funds available for distribution, the parties should establish an escrow account through which all parties would bear the cost of the

³ Thereafter, on June 10, 1996, Mr. Cannings, *pro se*, filed a motion for a stay and a petition to review the Office's order in the United States Court of Appeals for the Second Circuit. On June 25, 1996, after oral argument, the Second Circuit denied the motion for a stay and dismissed the appeal. On August 8, 1996, Mr. Cannings filed in the Second Circuit a motion for an emergency stay. On August 9, 1996, that motion was denied without briefing. On October 23, 1996, Mr. Cannings filed another motion for an emergency stay, this one in the United States Court of Appeals for the District of Columbia Circuit. This motion, too, was denied on November 13, 1996.

proceeding on an on-going basis. In opposition, Mr. Curry and Ms. Evelyn suggested that the costs be deducted directly from the royalty funds. As a consequence, the parties were unable to agree upon a manner of payment. Thereafter, on September 17, 1996, the Office determined that a prehearing conference should be held by this Panel to address the issue of payment of costs of the proceeding and other pending matters. 61 Fed. Reg. 49799 (1996).

19. On October 4, 1996, the Panel met with Mr. Curry, Ms. Evelyn and representatives of the Settling Parties and, with the consent of all parties, ruled that arbitration costs should be deducted from the royalty funds. The agreement of the parties was facilitated by the Panel's determination that, for good cause shown, it was in the public interest to waive the requirement of an oral evidentiary hearing and to proceed on the written pleadings alone. Order, In the Matter of Distribution of DART Royalty Funds for 1992, 1993, and 1994, Docket No. 95-1 CARP DD 92-94, at 1-3 (Oct. 4, 1996); Prehearing Conference Before the Panel, October 4, 1996, Tr. at 28-32.

20. Accordingly, the Panel ordered the parties to file their respective proposed findings of fact and conclusions of law on or before November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to material contained in the written direct cases filed in this proceeding. Tr. at 33-35.

FINDINGS OF FACT

21. The Settling Parties proposed that the Musical Works Fund royalties at issue be distributed among themselves, Mr. Curry and Ms. Evelyn proportionately according to the extent the evidence establishes that musical works claimed by each party were distributed in the form of recordings in the United States during the relevant time period. See written direct case of Settling Parties ("direct case") at 11-12. In the interest of minimizing costs, and given the very small amount in controversy, the Settling Parties presented a direct case based on sales data alone. See affidavit of Alison Smith, Tab A of direct case, at ¶ 8 (hereinafter "Smith Aff."). The Settling Parties acknowledged that a Musical Works Fund distribution determination can be based on either performance data, sales data, or both and stated that their reliance on sales data in this proceeding was not intended to bind them, either singly or as a group, to presentation of particular evidence in any future DART distribution proceeding. Id. See also 17 U.S.C. § 1006(c)(2).

22. The Settling Parties' analysis was in three parts. First, they established the universe of record sales for 1992, 1993 and 1994. Second, they determined what portion of total record sales was attributable to song titles claimed by Mr. Curry and Ms. Evelyn in the years for which these two individuals filed claims in this proceeding. For this analysis, the Settling Parties did not dispute the titles claimed by Mr. Curry and Ms. Evelyn. And, finally, the Settling Parties claimed, on behalf of the hundreds of thousands of songwriters and music publishers they represent, credit for all other song titles owned by claimants in this proceeding and sold as records in the United States during 1992, 1993 and 1994.

The Settling Parties Introduced Sales Data For All Works Distributed During The Relevant Time Period

23. The Settling Parties introduced the testimony of Michael Fine, co-founder and Chief Executive Officer of SoundScan, to establish total record sales and record sales for Mr. Curry and Ms. Evelyn. See Tab B of the Settling Parties' direct case, the affidavit of Michael Fine (hereinafter referred to as "Fine aff. at ¶ "). SoundScan, which first became available in early 1991, is the premier independent online information system that tracks music sales throughout the United States. Fine Aff. at ¶¶ 1 & 3. SoundScan gathers point-of-sale data from over 14,000 reporting entities, including retail and mass merchandisers. Id. at ¶ 4. Each week, the data is sent by these reporting entities from point-of-sale cash registers by modem to SoundScan. Id. Data files consist of store ID number, piece counts and the Universal Product Codes. Id. Currently, all major record labels and most independent labels subscribe to SoundScan, and Billboard magazine music charts are constructed directly from SoundScan data. Id. at ¶ 3.

24. Mr. Fine introduced SoundScan data establishing that there were in excess of 1,735,015,000 albums⁴ and 317,090,000 singles sold in the United States during 1992, 1993 and 1994. Fine Aff. at ¶ 7. Mr. Fine assumed that, on average, there are 10 song titles on each album, Id., and concluded, therefore, that there were in excess of 17 billion total sales of song titles in the United States during those three years. Mr. Fine's assumption regarding the average number of song titles on albums is uncontradicted by any evidence in the record of this proceeding. The details of Mr. Fine's analysis are set forth below:

⁴ The term "album" is used to refer to all long-playing music formats including compact discs (CDs), cassette albums, as well as the traditional vinyl album.

CHART A

Item	1992	1993	1994
1) Total Album Sales	547,964,000	572,380,000	614,671,000
2) Total Titles on Albums Sold	5,479,640,000	5,723,800,000	6,146,710,000
3) Total Single Sales	107,254,000	110,816,000	99,020,000
4) Total Sales of Titles on Albums and Singles (2 + 3)	5,586,894,000	5,834,616,000	6,245,730,000 ⁵

Id.

The Settling Parties' Data On Sales Information For Mr. Curry And Ms. Evelyn Demonstrate Only A Few Sales For Each During The Relevant Period

25. The Settling Parties also introduced testimony from Alison Smith, Vice President, Performing Rights, of BMI. Ms. Smith has been an employee of BMI since 1985 and, for the past six years, her concentration within BMI has been in the area of royalty distributions for radio and television performances. In 1990, she was made Director, Performing Rights, and in August 1992, Senior Director. In this latter capacity, she is familiar with those aspects of BMI's operations designed to monitor performances of music on radio and television stations, as well as broadcast and cable television networks. Ms. Smith is generally familiar with the music industry. Smith Aff. at ¶¶ 1-3.

26. According to Ms. Smith, Mr. Curry and Ms. Evelyn identified for the Settling Parties the titles of songs that Mr. Curry and Ms. Evelyn claim, respectively, and for which they

⁵ SoundScan rounds total sales figures to the nearest thousand.

believed sales occurred during the relevant period. Id. at ¶ 10. The Settling Parties used Phonolog, the industry standard directory of all records, CDs, cassettes, albums and singles that have been issued in the United States to determine all albums and singles on which these musical works may have appeared. Id. at ¶¶ 11-12.

27. Phonolog data showed that the following seven song titles claimed by Mr. Curry appear on five albums and one single:

CHART B

Album Title (s) = Single	Artist	Song Title
Burnin'	P. Labelle	Somebody Loves You Baby
Burnin'	P. Labelle	Burnin'
Burnin' (s)	P. Labelle	Burnin'
This Christmas	P. Labelle	Born in a Manger
This Christmas	P. Labelle	O Holy Night
Patti Labelle Live	P. Labelle	Somebody Loves You Baby
Gems	P. Labelle	If I Didn't Have You
Put Love to Work	Wooten Brothers	Hasty Decisions

Id. at ¶ 13.

28. Phonolog data showed that the following four song titles claimed by Ms. Evelyn appear on five albums:

CHART C

Album Title	Artist	Song Title
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling
Best of the Turbans	The Turbans	Let Me Show You Around My Heart
Best of the Crests	The Crests	Flower of Love
Best of the Crests	The Crests	Six Nights a Week
Sixteen Candles/Very Best of the Crests and the Duprees	The Crests and The Duprees	Six Nights a Week
Crests Greatest Hits	The Crests	Flower of Love
Crests Greatest Hits	The Crests	Six Nights a Week

Id. at ¶ 13.

29. According to Ms. Smith, Mr. Curry was a co-author with others on the songs identified in Chart B above, and Ms. Evelyn was co-author with others on the songs identified in Chart C above. Id. at ¶ 12. Therefore, the Settling Parties credited Mr. Curry and Ms. Evelyn with shares of their song titles proportionate to the extent of their respective co-authorship of each work. Id. at ¶¶ 13-14.

30. Ms. Smith testified that Mr. Curry is entitled to credit as a co-author for each of his seven songs as follows:⁶

⁶ Mr. Curry acknowledges that he is the co-author of these seven songs, but claims that he is entitled to 100% of any distribution and is currently "in Court to straighten out these percentages" (Curry Response to Settling Parties ¶2). Being an unsworn statement and not contained in Mr. Curry's direct case, no consideration can be given to this claim.

CHART D

Song Title	Co-author Share
Somebody Loves You Baby	50%
Burnin'	50%
Born in a Manger	25%
O Holy Night	10% ⁷
If I Didn't Have You	50%

Id at 13.

31. Ms. Smith also testified that Ms. Evelyn is entitled to a 50% credit as a co-author for each of her four titles. Id.

32. The Settling Parties provided the Phonolog information to Mr. Fine and SoundScan along with the co-author percentages of Mr. Curry and Ms. Evelyn for each of their titles. Id. at ¶ 14.

33. By applying the SoundScan data, Mr. Fine determined the number of units (albums and singles) sold containing songs claimed by Mr. Curry and Ms. Evelyn. From that data, Mr. Fine was able to determine the number of individual song title sales attributable to titles claimed by Mr. Curry and Ms. Evelyn. Fine Aff. at ¶ 8.

34. Mr. Fine's testimony showed that there were 1,486,986 total song title sales in 1992, 1993 and 1994 attributable to titles claimed by Mr. Curry. Id. at ¶ 8 (Exhibit 3). Mr. Fine then applied the co-authorship information about Mr. Curry provided to him by Ms. Smith. Id. at ¶ 8, fn.1. According to Mr. Fine, taking into consideration co-authorship shares, Mr. Curry should be credited with song title sales of 394,467.05 in 1992, 93,816.7

50% of 20% credit for arranging a public domain work.

in 1993, and 212,235.2 in 1994. Id. at ¶ 8. The details of Mr. Fine's analysis with respect to Mr. Curry are contained in the following chart:

CHART E

Album Title (s) = Single	Artist	Song Title	Co-author Share	Total Sales in Year (Sales Credited based on Co-author Share)		
				1992	1993	1994
Burnin'	P. Labelle	Somebody Loves You Baby	50%	302,084 (151,042)	37,334 (18,667)	17,298 (8,649)
Burnin'	P. Labelle	Burnin'	50%	302,084 (151,042)	37,334 (18,667)	17,298 (8,649)
Burnin' (s)	P. Labelle	Burnin'	50%	110,793 (55,396.5)	1,709 (854.5)	67 (33.5)
This Christmas	P. Labelle	Born in a Manger	25%	23,743 (5,935.75)	26,312 (6,578)	12,982 (3,245.5)
This Christmas	P. Labelle	O Holy Night	10%	23,743 (2,374.3)	26,312 (2631.2)	12,982 (1,298.2)
Patti Labelle Live	P. Labelle	Somebody Loves You Baby	50%	61,353 (30,676.5)	91,181 (45,590.5)	36,199 (18,099.5)
Gems	P. Labelle	If I Didn't Have You	50%	-	-	344,175 (172,087.5)
Put Love To Work	Wooten Brothers	Hasty Decisions	50%	-	1,657 (828.5)	346 (173)
Total Sales of Titles Identified by Mr. Curry				823,800	221,839	441,347
Sales Credited to Mr. Curry based on His Co-author Share				396,467.05	93,816.7	212,235.2

Id. at ¶ 8 (Exhibit 3).

35. Mr. Fine's testimony also showed that there were 20,059 total song title sales in 1993 and 1994 attributable to titles claimed by Ms. Evelyn. Id. at ¶ 8 (Exhibit 2). Mr.

Fine then applied the co-authorship information about Ms. Evelyn provided to him by Ms. Smith. Id. at ¶ 8, fn.1. According to Mr. Fine, taking into account co-authorship shares, Ms. Evelyn should be credited with song title sales of 4,917.5 in 1993 and 5,112 in 1994. Id. at ¶ 8. The details of Mr. Fine's analysis with respect to Ms. Evelyn are contained in the following chart:

CHART F

Album Title (s)=Single	Artist	Song Title	Co-author Share	Total Sales in Year (Sales Credited based on Co-author Share)		
				1992	1993	1994
Mr. Excitement	Jackie Wilson	I Get the Sweetest Feeling	50%	NA	5,217 (2,608.5)	2,140 (1,070)
Best of the Turbans	The Turbans	Let Me Show You Around My Heart	50%	NA	0	106 (53)
Best of the Crests	The Crests	Flower of Love	50%	NA	1,948 (974)	1,811 (905.5)
Best of the Crests	The Crests	Six Nights a Week	50%	NA	1,948 (974)	1,811 (905.5)
Sixteen Candles/Very Best of the Crests and the Duprees	The Crests and The Duprees	Six Nights a Week	50%	NA	0	3,346 (1,673)
Crests Greatest Hits	The Crests	Flower of Love	50%	NA	361 (180.5)	505 (252.5)
Crests Greatest Hits	The Crests	Six Nights A Week	50%	NA	361 (180.5)	505 (252.5)
Total Sales of Titles Identified by Ms Evelyn				NA	9,835	10,224
Sales Credited to Ms. Evelyn based on Her Co-author Share				NA	4,917.5	5,112

Id. at ¶ 8 (Exhibit 2).

The Settling Parties Represent All Claims Except Those Of Mr. Curry And Ms. Evelyn

36. The Settling Parties consist of BMI, ASCAP, SESAC, HFA, CMI, SGA and GMC. See claims of BMI, ASCAP, SESAC, HFA, CMI, SGA and GMC and accompanying lists of the individual songwriter and music publisher claimants represented in this proceeding by each of these joint claimants.⁸ In the aggregate, the Settling Parties represent hundreds of thousands of domestic songwriters and music publishers, as well as the songwriters and music publishers of foreign performing rights and mechanical rights organizations that have authorized the Settling Parties to act on their behalf in this proceeding. See Claims of the Settling Parties; see also Smith at ¶¶ 4 & 15.⁹

37. Based on her long experience in the music performing rights field and extensive knowledge of the music catalogs represented by the Settling Parties, Ms. Smith stated that the Settling Parties represent the writers and publishers of virtually all song titles contained on records sold during the time period relevant to this proceeding other than sales of titles that may be attributable to Mr. Curry or Ms. Evelyn. Smith Aff. at ¶ 15.¹⁰

⁸ The Settling Parties also represent the interests of nineteen other claimants who filed claims in either or both of the Musical Works Subfunds and who have either settled with or agreed to be represented in this proceeding by one or another of the Settling Parties.

⁹ The Copyright Office has determined that the performing rights organizations (BMI, ASCAP and SESAC) represent all of their respective members and affiliates in this proceeding other than those who have designated some other party to represent them or have filed claims on their own behalf. 58 Fed. Reg. 6441 (1993); 59 Fed. Reg. 63043 (1994).

¹⁰ Any songwriter or music publisher who has not settled with or agreed to be represented by the Settling Parties and who has not appeared as a claimant in his or her own right is not eligible for an award of any royalties in this proceeding.

Mr. Curry Presented Evidence Of Record Sales, But No Evidence Of Performances Of His Works During 1992, 1993 or 1994

38. In his direct case, Mr. Curry submitted two documents that contain sales information provided to him by record companies. The first is an undated earnings statement from Sony Music. The statement shows sales information for five titles: "Born in a Manger," "Burnin' (The Fire Is Still)," "If I Didn't Have You," "O Holy Night," and "Somebody Loves You Baby." The statement reflects total sales of 40,939 units, but contains no information as to when these sales occurred.

39. The second document is a royalty statement from Gamble-Huff Music. This statement shows sales for four titles: "Burnin' (The Fire is Still Burnin') For You," "Somebody Loves You Baby (You Know Who It Is)," "If Everyday Could Be Like Christmas," and "Born in a Manger." The statement reflects total sales of 174,422 units for the period September 30, 1992 through March 31, 1994 as follows:

CHART G

Song Title	Units Sold		
	1992	1993	1994
Burnin' (The Fire is Still Burnin') For You	71,497	57,325	23,789
Somebody Loves You Baby (You Know Who It Is)	0	15,805	5,108
Born In A Manger	0	449	0
If Everyday Could Be Like Christmas	0	449	0
Total	71,497	74,028	28,897

Id. at ¶ 8 (Exhibit 2)

40. While relying on record company sales data to establish the number of units sold containing songs he claims, Mr. Curry provided no information regarding the universe of record company sales data for 1992, 1993 and 1994 against which sales of his songs can be measured. Moreover, Mr. Curry proposed no systematic method or formula for determining his or any other claimants' award in this proceeding.

Ms. Evelyn Presented No Credible Evidence Of Sales Or Performances Of Her Works During 1993 or 1994.

41. In her proposed findings, Ms. Evelyn continues her effort to use this proceeding to express her apparent discontent with certain members of the Settling Parties when they represented her. See Evelyn Proposed Findings at ¶¶ 4-25. Such disputes are not properly before this body. In her direct case, Ms. Evelyn submitted no credible evidence of sales or performances in the U.S. during the time period relevant to this proceeding. See generally direct case of Alicia Carolyn Evelyn.

42. Ms. Evelyn's exhibit A1 includes title registration information from ASCAP for three titles: "Dance," "I'm Counting on You" and "Easy Come Easy Go." This exhibit contains no sales or performance data. Evelyn Ex. A1.

43. Ms. Evelyn's exhibits A2a and A2b are photocopies of copyright registration cards from the Library of Congress. These exhibits contain no sales or performance data. Evelyn Ex. A2a & A2b.

44. Ms. Evelyn's exhibit A2 is a blank ASCAP title registration form. It contains no sales or performance data. Evelyn Ex. A2.

45. Ms. Evelyn's exhibit B contains several unrelated documents. The first is a portion of Ms. Evelyn's BMI catalog. This contains no sales or performance data. Evelyn Ex.

B. The second document is a letter from ASCAP, dated January 29, 1993, indicating that four song titles by Ms. Evelyn had performances at some point prior to the date of the letter. Id. Nothing in that letter, however, indicates that any performances took place during the 29 days in which the letter overlapped the dates of Ms. Evelyn's claim (the period between January 1, 1993, and January 29, 1993). The third document contains information on "I've Found a Better Way," "I Can't Stop Loving You," "You Gotta Move," "Fresh Pain," "Bashful Bumbler" and "Click (The Camera Song)." Id. Again, no information on sales or performances is set forth. The fourth document, a title registration information form for "When We Have Our Kids," provides no sales or performance data. Id. The fifth document, a title registration information form for "My Girl Ivy," also contains no sales or performance data. Id. The sixth document, a copy of Ms. Evelyn's application for membership in ASCAP, contains no sales or performance data. The final document is a second letter from ASCAP updating Ms. Evelyn on a review of her titles. It, too, contains no sales or performance data. Id.

46. Ms. Evelyn's exhibit C, a portion of her BMI catalog printed in June of 1995, contains information on four titles: "I'm Counting On You," "I'm Here To Tell You," "I'm Not Built Like That" and "I'm Sorry for the Guy." Only one title, "I'm Counting On You," is listed as "active, performed, domestic." But this attribution information does not indicate when any performances of the work took place or how many performances, if any, occurred.

47. Ms. Evelyn claims that a song she wrote was included in a movie that "was shown on cable TV in Brooklyn." Evelyn Direct Case at 3. Ms. Evelyn has offered no evidence to establish that this performance occurred during either 1993 or 1994, the years in which she filed

claims in this proceeding.¹¹

48. Ms. Evelyn proposed no systematic method or formula for determining her or any other claimants' award in this proceeding.

CONCLUSIONS

The Statutory Criteria For Distribution Of DART Musical Works Fund Royalties Are Sales Or Performances During The Relevant Period

49. In making this distribution determination, the Arbitration Panel has been guided by the relevant provisions of the copyright law (particularly the Audio Home Recording Act of 1992), as well as by previous procedural decisions of the Copyright Office and its rules and regulations. See 17 U.S.C. §§ 801(b)(3) and (c); 802(c); and 37 C.F.R. 251.7.

50. In clear and unambiguous language, the Act specifies the statutory criteria to be considered in a Musical Works Fund royalty distribution determination. 17 U.S.C. § 1001 et seq. The only relevant criteria to the allocation of royalty payments under the Act are those that establish "the extent to which, during the relevant period . . . each musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions." 17 U.S.C. § 1006(c)(2).

51. The controversy in this proceeding involves the relative entitlement of the Settling Parties, on the one hand, and Mr. Curry and Ms. Evelyn, on the other, to the award of shares of Musical Works Fund royalties paid to the Office for the period October 28, 1992, through December 31, 1994. After deduction of the costs of this arbitration and reasonable

¹¹ In fact, although not before this body, it appears that a document provided by Ms. Evelyn during the discovery phase of this proceeding, showed the performance as having taken place in 1995, clearly outside of the time period here involved.

administrative costs incurred by the Office, all of the remaining funds must be distributed. See 17 U.S.C. § 1007(c).

52. In a distribution proceeding under the Act, each party may receive an award either in accordance with a voluntary agreement among all parties or to the extent they establish their entitlement by the presentation of competent and relevant evidence. In this proceeding, the parties may establish their entitlement only through evidence showing the extent to which their musical works have been distributed in recordings or disseminated in transmissions during the relevant period. Evidence of disputes concerning other matters are irrelevant to this or any Musical Works Fund distribution determination.

53. The Settling Parties proposed a mathematical formula for determining Mr. Curry and Ms. Evelyn's respective shares in this proceeding. That formula is as follows:

$$\frac{\text{Total song title sales credited to claimant in year X}}{\text{Total song titles sold during year X}} = \frac{\text{Proportionate Share of Total Royalties}}{\text{Total Royalties}}$$

54. Applying this formula, Mr. Curry and Ms. Evelyn each receives credit for record sales in proportion to their respective "writer's share" on each title sold. The formula mirrors the statutory criteria for distribution of Musical Works Fund royalties by allocating royalties to each musical work based on its proportionate share of total record sales during each year. In the Panel's view, crediting Mr. Curry and Ms. Evelyn with a share of the sale of each work based on their proportionate co-authorship of that work both furthers the statutory goal of allocating royalties based on sales (and/or performances) and is simply a mathematical necessity. If each co-author of a song were to receive full credit for the sales attributable to that song, there

would be more credit for sales than actual sales. Thus, to give Mr. Curry and Ms. Evelyn, each of whom co-authored their respective song titles, full credit for all sales of each claimed title would either deny any credit to their co-authors or require that more than one hundred percent of the fund be distributed. There is no evidence in the record to suggest that any of Mr. Curry's or Ms. Evelyn's cowriters are not represented by the Settling Parties.

The Settling Parties Have Established The Universe Of Record Sales To The Public

55. The only evidence submitted in this proceeding by which a distribution determination may be made is the evidence submitted by the Settling Parties of the extent to which musical works have been distributed in the form of recordings during the relevant period. This is not to say that evidence of performances (that is, works disseminated to the public in transmissions) is irrelevant. To the contrary, pursuant to statute, evidence of performances during the relevant period stands on the same footing as sales evidence. 17 U.S.C. § 1006(c)(2). However, in the context of this particular proceeding, due to cost considerations, no performance data was submitted by the Settling Parties. The Panel notes that the Settling Parties reserved the right, in a future proceeding, to introduce evidence of performances.

56. The Settling Parties presented testimony based on an analysis of SoundScan data that established the universe of record sales. Specifically, the SoundScan data established that there were in excess of 2,052,105,000 total album and single unit sales during the relevant period. Assuming 10 songs on each album, the total number of song titles sold each year was as follows:

1992 -	5,586,844,000
1993 -	5,834,616,000
1994 -	6,245,730,000

The Evidence Established That Mr. Curry And Tajai Music Are Entitled To No More Than 0.0070963% Of Both The Writers And Publishers Subfunds For 1992, 0.001608% Of Both The Writers And Publishers Subfunds For 1993, and 0.003398% Of Both The Writers And Publishers Subfunds For 1994.

57. In his direct case, Mr. Curry submitted two documents that contain record sales information provided to him by record companies. The first is an undated earning statement from Sony Music that shows the sale of 40,939 units. That statement, however, contains no information as to when the sales occurred. Therefore, that statement cannot form the basis of any award to Mr. Curry in this proceeding.

58. The second statement is from Gamble-Huff Music.¹² It shows the sale of 174,422 units during the period September 20, 1992 through March 31, 1994. This statement by itself cannot form the basis of any award to Mr. Curry in this proceeding because it fails to identify the universe of sales against which this Panel may evaluate the number of sales attributable to songs he claimed.

59. The Settling Parties, through their direct case, identified seven song titles written by Mr. Curry that appear on five albums and one single sold in the United States during 1992, 1993 and 1994. Based on the percentage attributable to Mr. Curry's writer share for each of these songs, Mr. Curry's total song title sales in 1992 were 396,467.05, in 1993, they were 93,816.7, and in 1994 they were 212,235.2.

¹² On its face, the Gamble-Huff document is flawed in ways that raise questions about the weight, if any, that it should be accorded. The document has clearly been redacted as can be seen by a partial date in the upper-right hand corner. The document also is incomplete, as demonstrated by the discrepancy between the total sales claimed on the document (1,038,330) and the total sales actually listed on the document (174,422). Moreover, the document covers a time period (in 1991) completely outside the scope of this proceeding. Finally, the document does not indicate whether the sales were domestic or international.

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

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

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

Claimant	1992		1993		1994	
	Writer	Pub.	Writer	Pub.	Writer	Pub.
Eugene "Lambchops" Curry (Tajai Music)	0.007096%	0.007096%	0.001608%	0.001608%	0.003398%	0.003398%

62. If Mr. Curry's own evidence of his song title sales (174,422 units) were used, and if those sales were measured against the universe of sales identified by SoundScan, Mr. Curry's award actually would be much lower. Using his own sales figures, Mr. Curry's award for each Subfund in each year would be no more than:

1992		1993		1994	
Writer	Pub.	Writer	Pub.	Writer	Pub.
0.001280%	0.001280%	0.001269%	0.001269%	0.000463%	0.000463%

63. Mr. Curry averred in his direct case that he had written over 300 songs. However, when asked by the Settling Parties to produce sales information for these songs, and ordered to provide such information by the Office, Mr. Curry failed to do so. Therefore, the

ordered to provide such information by the Office, Mr. Curry failed to do so. Therefore, the references to these 300 songs in Mr. Curry's direct case have been given no weight and cannot provide any basis for an award in this proceeding.

The Evidence Established that Ms. Evelyn Is Entitled To No More Than 0.000084% From The 1993 Writers Subfund And 0.000082% From The 1994 Writers Subfund

64. In her direct case, Ms. Evelyn introduced no evidence of sales of her musical works. Ms. Evelyn did introduce a single document that indicated that some performances of her musical works had occurred, but that document did not indicate either a date for these performances or the number of performances that occurred. Without this additional information, the document provides no basis for an award to Ms. Evelyn in this proceeding.

65. Because Ms. Evelyn has not submitted any evidence of sales or relevant evidence of performances of works she claims, she has not met her burden of proving entitlement and should receive no award in this proceeding. However, the Settling Parties introduced evidence of sales of Ms. Evelyn's musical works during the relevant years and on which an award may be based.

66. The Settling Parties, through their direct case, identified four song titles written by Ms. Evelyn that appear on five albums sold in the United States during 1993 or 1994 -- the only years for which Ms. Evelyn filed claims in this proceeding. Based on the percentage attributed to Ms. Evelyn's writer share, Ms. Evelyn's total song title sales in 1993 were 4,917.5, and in 1994 they were 5,112.

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

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

68. Applying this formula to the evidence in the record, Ms. Evelyn's entitlement to a percentage award for each Subfund in each year is limited to the following:

Claimant	1992		1993		1994	
	Writer	Pub.	Writer	Pub.	Writer	Pub.
Alicia Carolyn Evelyn	NA	NA	0.000084%	NA	0.000082%	NA

Except For The Limited Entitlement Established In The Record For Mr. Curry and Ms. Evelyn, The Settling Parties Are Entitled To The Remainder Of The Funds In Question

69. The Settling Parties have established the universe of record sales for 1992, 1993 and 1994. They also determined what portion of total record sales are attributable to song titles claimed by Mr. Curry and Ms. Evelyn in the years for which these individuals filed claims in this proceeding. Moreover, the Settling Parties have demonstrated that they represent virtually all songwriters and music publishers and that they represent all claims in this proceeding other than those of Mr. Curry and Ms. Evelyn. Therefore, the Settling Parties, on behalf of the hundreds of thousands of songwriters and music publishers that they represent, are entitled to all royalties other than those apportioned to Mr. Curry and Ms. Evelyn.

ALLOCATION

70. Based on the credible record evidence, the Panel concludes that the Musical Works Funds, Writers and Publishers Subfunds for 1992, 1993 and 1994, should be allocated as follows:

71. To Mr. Curry: 0.007096% of both the Writers and Publishers Subfunds in 1992; 0.001608% of both the Writers and Publishers Subfunds in 1993; and 0.003398% of both the Writers and Publishers Subfunds in 1994.

72. To Ms. Evelyn: 0.000084% of only the Writers Subfund in 1993; and 0.000082% of only the Writers Subfund in 1994.

73. To the Settling Parties: 99.992904% of both the Writers and Publishers Subfunds in 1992; 99.998308% of the Writers Subfund and 99.998392% of the Publishers Subfund in 1993; and 99.99652% of the Writers Subfund and 99.996602% of the Publishers Subfund in 1994.

Respectfully submitted,

Arbitration Panel

Lenore G. Ehrig
Lenore G. Ehrig
Chairperson

Lewis Hall Griffith
Lewis Hall Griffith
Arbitrator

Sharon T. Nelson
Sharon T. Nelson
Arbitrator

Dated: 12-16-96

APPENDIX 3

FILE COPY

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE

2, 17, 99

E. Brown

No. 97-1119

September Term 1998
Order on Costs

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED NOV - 4 1998
CLERK

Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

ON PETITION FOR REVIEW OF AN ORDER
OF THE LIBRARIAN OF CONGRESS

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

J U D G M E N T

These consolidated petitions for review of the orders of the Librarian of Congress, filed May 9, 1996 and February 12, 1997, were considered on the briefs and the appendices filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the petitions for review, insofar as they are against the Registrar of Copyrights, be dismissed. See National Ass'n of Broadcasters v. Librarian of Congress, 146 F.3d 907, 923 (1998) (17 U.S.C. § 802(g) limits court's review to Librarian's decisions). It is

FURTHER ORDERED AND ADJUDGED that the petitions for review against the Librarian of Congress be denied. See National Ass'n of Broadcasters, 146 F.3d at 918, 924 (noting exceptionally deferential standard of review; award will be upheld if Librarian offers facially plausible explanation bearing rational relationship to record evidence). The court finds nothing in petitioners' claims warranting modification or remand of the Librarian's orders on review.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1119

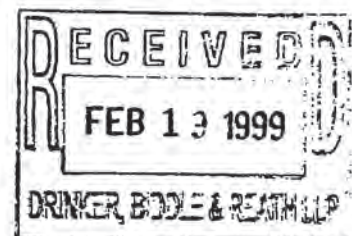
September Term, 1998

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

JWS
KLH

117



APPENDIX 4

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

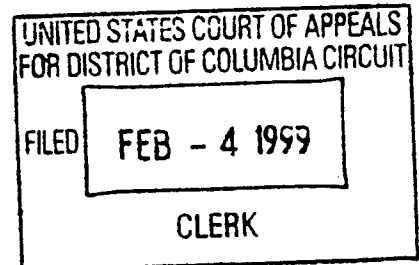
No. 97-1119

September Term, 1998

Eugene Curry,
Petitioner

v.

Librarian of Congress and Register of Copyrights,
Respondents



Broadcast Music, Inc., et al.,
Intervenors

Consolidated with 97-1136, 97-1143

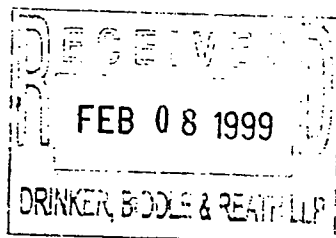
BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams,
Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel
and Garland, Circuit Judges

ORDER

Upon consideration of the Petitions for Rehearing En Banc of petitioners Evelyn and Cannings, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam



FOR THE COURT:
Mark J. Langer, Clerk

BY: *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

APPENDIX 5

FILE COPY

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 24, 1999

Mr. Michael J. Remington
Drinker Biddle & Reath
1500 K Street, N.W., Ste. 1100
Washington, DC 20005

Re: James Cannings
v. Librarian of Congress, et al.
No. 98-1814

Dear Mr. Remington:

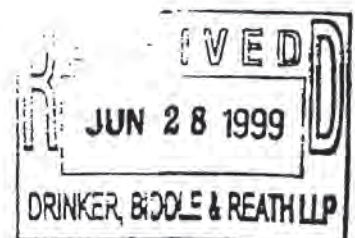
The Court today entered the following order in the above
entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk



APPENDIX 6

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

ORIGINAL

August 23, 1999

Mr. Michael J. Remington
Drinker Biddle & Reath
1500 K Street, N.W., Ste. 1100
Washington, DC 20005

Re: James Cannings
v. Librarian of Congress, et al.
No. 98-1814

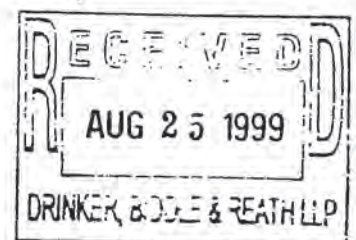
Dear Mr. Remington:

The Court today entered the following order in the above
entitled case:

The petition for rehearing is denied.

Sincerely,

William K. Suter
William K. Suter, Clerk



APPENDIX 7

and (4) the filing of written submissions by parties to the investigation.

The Commission expects to reach a determination in this proceeding without conducting a public hearing or delegating the proceeding to an administrative law judge for a hearing and a recommended determination.

All nonconfidential documents filed in the investigation, listed in the Commission Order issued along with this notice, or filed in the modification proceeding are or will be made available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Commission's Office of the Secretary, Dockets Branch, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202-205-1802.

In addition, the Commission Order issued along with this notice, Littelfuse's written report, the Commission investigative staff's written comments on that report, and all nonconfidential documents filed in the modification proceeding will be available for inspection on the Commission's website. To access them from the Home Page of the Commission's Internet server, click on "EDIS ON-LINE," click on "337" under "Home," click on "337 114 Violation Miniature Plug-In Blade Fuses," and then click on the specific document to be reviewed.

Written Comments. Interested persons who are not parties to the investigation may file written comments on (1) the conditions of fact or law and the public interest reasons set forth in the Commission Order of January 30, 2001, that prompted the Commission to institute the proceeding, (2) the specific modification that the Commission is contemplating, and (3) any other issues that will aid the Commission in determining whether to modify the trade dress/product configuration provision of the exclusion order. Such comments must be filed in accordance with the Commission's Rules of Practice and Procedure, particularly the relevant provisions of 19 CFR 201.6, 201.8 (except for the number of copies prescribed by 201.8(d)), 201.14, 201.16, and 210.4 through 210.7.

Issued: February 1, 2001.

By Order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 01-3195 Filed 2-6-01; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 12, 2001 at 2 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701-TA-413 and 731-TA-913-918 (Preliminary) (Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on February 12, 2001; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on February 20, 2001.)

5. Outstanding action jackets:
(1) Document No. EC-01-003: Approval of final report in Inv. No. 332-413 (The Economic Impact of U.S. Sanctions with Respect to Cuba).

(2) Document No. ID-01-001: Approval of study coverage, objectives, methodology, travel requirements, annotated outline, and revised staffing plan and work schedule in Inv. No. 332-423 (The Effects of EU Policies on the Competitive Position of the U.S. and EU Horticultural Products Sector).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 2, 2001.

By order of the Commission:

Donna R. Koehnke,
Secretary.

[FR Doc. 01-3331 Filed 2-5-01; 3:13 pm]

BILLING CODE 7020-02-U

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: February 13, 2001 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436 Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701-TA-355 and 731-TA-659-660 (Review) (Grain-Oriented Silicon Electrical Steel from Italy and Japan)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on February 23, 2001.)

5. Outstanding action jackets:
(1) Document No. EC-01-003: Approval of final report in Inv. No. 332-413 (The Economic Impact of U.S. Sanctions with Respect to Cuba).
(2) Document No. ID-01-001: Approval of study coverage, objectives, methodology, travel requirements, annotated outline, and revised staffing plan and work schedule in Inv. No. 332-423 (The Effects of EU Policies on the Competitive Position of the U.S. and EU Horticultural Products Sector).

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: February 2, 2001.

By order of the Commission:

Donna R. Koehnke,
Secretary.

[FR Doc. 01-3332 Filed 2-5-01; 3:13 pm]

BILLING CODE 7020-02-U

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 99-3 CARP DD 95-98]

Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution Order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is adopting the determination of the Copyright Arbitration Royalty Panel ("CARP") and issuing an order announcing the allocation of the royalty fees in the 1995, 1996, 1997, and 1998 Musical Works Funds. These fees are paid to the Copyright Office by importers and manufacturers of Digital Audio Recording Devices and Media ("DART") who distribute these products in the United States.

EFFECTIVE DATE: The percentages announced in this Order are effective as of February 7, 2001.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the 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 Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

The Audio Home Recording Act of 1992, Public Law No. 102-563, requires manufacturers and importers of digital audio recording devices and media which are distributed in the United States to pay royalty fees to the Copyright Office. Upon receipt, the Copyright Office deposits these fees with the Treasury of the United States. 17 U.S.C. 1005.

Interested copyright parties must file a claim to these fees each year during January and February to establish their entitlement to a portion of the funds. How these funds are distributed to the various interested copyright parties is decided either by the parties or by Order of the Librarian, following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel ("CARP"). 17 U.S.C. 1007.

On May 4, 1999, the Copyright Office requested comments from the interested copyright parties as to the existence of controversy concerning the distribution of the DART royalty fees in the 1995, 1996, 1997 and 1998 Musical Works Funds, and notices of intent to participate in any proceeding to determine the distribution of these funds. In addition, the Office announced that it was consolidating the consideration of the distribution of the 1995-1998 Musical Works Funds into a single proceeding in order to have sufficient funds to cover the cost of an arbitration proceeding. 64 FR 23875 (May 4, 1999).

Ten parties filed comments on the existence of controversies and notices of intent to participate in this proceeding: Broadcast Music, Inc. ("BMI"); the American Society of Composers, Authors and Publishers ("ASCAP"); SESAC, Inc. ("SESAC"); the Harry Fox Agency ("HFA"); the Songwriters Guild of America ("SGA"); and Copyright Management, Inc. ("CMI") (collectively, the "Settling Parties"); Carl

DeMonbrun/Polyphonic Music, Inc. ("DeMonbrun"); James Cannings/Can Can Music ("Cannings"); Alicia Carolyn Evelyn ("Evelyn"); and Eugene "Lampchops" Curry/Tajai Music, Inc. ("Curry").

Prior to the commencement of the proceeding, Cannings and DeMonbrun notified the Office that they had settled their claims with the Settling Parties and that they were withdrawing from the proceeding. See Notices of Settlement and Withdrawals of Claims in Docket No. 99-3 DD 95-98 (dated November 10, 1999). This settlement resolved the remaining controversy over the distribution of the 1996 Musical Works Funds and left Evelyn's claim to a share of the royalty fees in the 1995, 1997 and 1998 Writer's Subfunds and Curry's claim to a share of the royalty fees in both the 1995 and 1997 Writer's and Publisher's Subfunds to be determined.

Each of the three participants filed his or her direct case with the Office on November 15, 1999, commencing the 45-day precontroversy discovery period. In addition, the Settling Parties filed a motion to dispense with formal hearings and to conduct the proceeding on the basis of written pleadings alone and a motion for full distribution of those funds not in controversy and a partial distribution of all remaining DART royalties.

The Copyright Office granted the motion for a full distribution of those royalty fees that were no longer in controversy and granted in part the request for a partial distribution of the remaining funds. See Order in Docket No. 99-3 CARP DD 95-98 (December 22, 1999). However, the Office did not rule on the motion to dispense with formal hearings, choosing instead to designate the issue to the CARP. *Id.*

On April 10, 2000, the Copyright Office announced the names of the three arbitrators chosen for this proceeding and the initiation of the 180-day arbitration period in a **Federal Register** notice. 65 FR 19025 (April 10, 2000). Shortly thereafter, the Chairperson of the panel resigned due to a perceived conflict of interest. Consequently, the Office suspended the 180-day period from May 16, 2000, until June 16, 2000, and a new chairperson was selected during this period in accordance with 37 CFR 251.6(f).

The first meeting between the parties and the arbitrators took place on June 19, 2000. The purpose of this initial encounter was to set the schedule for the proceeding and to resolve the two remaining procedural issues: whether to grant the Settling Parties' motion to suspend formal hearings and proceed on

the basis of the formal record only and whether to allow the filing of a written rebuttal case. The CARP heard oral argument from the parties on these issues that day; and based upon these hearings, the Panel decided "to waive the requirement of oral evidentiary hearings, to proceed upon the written record alone, and to permit the filing of written rebuttal cases." CARP Report, ¶ 24. See Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000). The Panel delivered its final report to the Copyright Office on November 9, 2000.

The Panel's Report

Based upon the evidence offered in the written record, the Panel determined that the royalties in the 1995, 1997, and 1998 Musical Works Funds should be distributed as follows:

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

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

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

As in the prior proceeding to determine the distribution of the 1992-1994 Musical Works Funds, the CARP adopted the Settling Parties' methodology which gives Curry and Evelyn a share of the royalty fees from a particular subfund based upon the percentage of their song titles sold during the relevant time period. The Settling Parties receive all remaining royalty fees because they represent the interests of the remaining copyright owners entitled to receive a portion of these funds.

Standard of Review

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." The Librarian of Congress has discussed his narrow scope of review in great detail in prior decisions and concluded that the use of the term "arbitrary" in this provision is no different than the "arbitrary" standard described in the Administrative Procedures 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. *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 or contrary to law, the Librarian will adopt the CARP's determination even if the Register and the Librarian would have reached conclusion different from the conclusions reached by the CARP.

The U.S. Court of Appeals for the District of Columbia 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 Copyright Royalty Tribunal 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 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.

Review of the CARP Report

a. Determination of the Panel

The Panel found that the Settling Parties are entitled to 100% of the funds in the 1995, 1996, 1997, and 1998 Musical Works Funds minus the amount owed to Curry and Evelyn. The methodology used to determine Curry's and Evelyn's shares is identical to the method used to determine the distribution of the 1992, 1993, and 1994 Musical Works Funds in an earlier proceeding. *See* 62 FR 6558 (February 12, 1997). It is a simple arithmetic

calculation which determines each individual claimant's share by calculating the number of song titles credited to the claimant and sold in year X and dividing that figure by the total number of song titles sold that year. This computation represents the claimant's proportionate share of the total royalties in year X.

The Panel adopted the Settling Parties' formula, in part, because Curry and Evelyn, while objecting to the use of this same formulation, failed to offer any alternative systematic method or formula for calculating each party's share of the royalties. CARP Report ¶¶ 38, 59. Instead, both Curry and Evelyn suggested that each of them is entitled to 1% of the royalty fees collected for any year to which they filed a claim. The Panel rejected this proposal because it fails to explain why two individual claimants are entitled to 1% of the annual funds when the total claimant pool numbers in the thousands. "If each of the thousands of claimants represented in this proceeding were to receive 1% of the DART royalties available for distribution, the total claimed would quickly exceed 100%." CARP Report ¶ 59.

Evelyn and Curry, however, do not accept the Settling Parties' contention that they represent thousands of claimants, arguing in their respective filings that the organizations and associations comprising the Settling Parties cannot represent individual claimants and act as their agent in these proceedings. *See* Curry's Direct Cast at 2; Evelyn's Rebuttal Case at ¶¶ 1-9; Evelyn Petition at 1-2.

The Panel considered these allegations and found that the Settling Parties are "interested copyright parties," pursuant to 17 U.S.C. 1001(7) and may act as agents for their members. CARP Report ¶ 74. The Panel noted that an agency relationship is established for the purpose of a DART proceeding when an association or organizations files a DART claim on behalf of its members in accordance with § 259.2(c) of the Copyright Office rules. This provision requires an organization or association, which acts as a common agent on behalf of the members of its organization, to obtain separate, specific and written authorization from each of its members or affiliates in order to file a DART claim; and it further requires that each claim list the name of each individual songwriter and music publisher on whose behalf the organization is filing its claim. CARP Report ¶ 75; *see also*, 37 CFR 259.2(c) and 259.3(d). Based on these written expressions of the agency relationship,

the CARP found that each of the Settling Parties has the authority to act as an agent for the members listed in the claims.

The CARP then examined the record evidence and the Settling parties' formula for calculating Evelyn's and Curry's share. First, it considered the Settling Parties' use of SoundScan data to establish the universe of record sales for each year, including testimony from Michael Fine, co-founder and chief executive of SoundScan. It weighted Fine's testimony, which identified Sound Scan as a premier independent online information system that tracks music sales throughout the United States, against challenges from Evelyn and Curry, who argued that the SoundScan data was incomplete because it did not include record club, computer and foreign sales figures. CARP Report ¶¶ 32-33, 62. It found that Evelyn and Curry were correct to conclude that inclusion of such data would indeed increase their total record sales, but went on to note that it would also increase the total record sales figures for other claimants. It then accepted the Settling Parties' conclusion that adding to the universe of sales would in all likelihood decrease the amount of Evelyn's and Curry's awards. CARP Report ¶ 62. The Panel also rejected Curry's and Evelyn's assertion that the total record sales figures should be adjusted to include foreign record sales because it determined that such sales are not compensable under the Audio Home Recording Act. CARP Report ¶ 62. Furthermore, and more importantly, the CARP found that neither Curry nor Evelyn offered an alternative mechanism to use of the SoundScan data for figuring out how many records sales occurred. CARP Report ¶¶ 50-53, 62, 68-69. Thus, finding not other basis for determining the universe of total record sales in the written record, the Panel accepted the testimony of Michael Fine and his methodology for determining the total number of record sales in any given year. CARP Report ¶ 33.

Next, the Panel scrutinized the evidence used to determine the number of record sales of Curry's and Evelyn's works. First, it found that Curry and Evelyn had submitted no evidence into the record of either record sales or performances of their works. This meant that the Settling Parties offered the only evidence on the number of record sales garnered by these claimants. CARP Report ¶¶ 64-65, 70. To make this determination, the Settling parties first identified the names of the record titles to which Curry and Evelyn have a claim for purposes of this proceeding by

reference to the list of titles identified for each claimant in the prior DART distribution proceeding, *see* Panel's Report in Docket No. 95-1 CARP DD 92-94 at ¶¶ 34, 35, the songs listed on the DART claims, and by conducting a search of the allmusic.com website.¹ Next, the Settling Parties identified the albums and singles which included these works by searching these titles in Phonolog, an industry standard directory that lists all records, CDs, cassettes, albums and singles issued in the United States. CARP Report ¶¶ 38-40. Once the titles were identified, it was a simple matter to use the SoundScan data to determine the number of unit sales per work for each year in controversy. CARP Report ¶¶ 44-47.

The CARP found that the evidence introduced by the Settling Parties identifying and quantifying the works of Evelyn and Curry was the only credible evidence in the record upon which to make a determination. CARP Report ¶¶ 63-72. In fact, the Panel found that the Settling Parties credited Evelyn and Curry with more than their actual percentage entitlement because no adjustment was made to reflect the co-authorship or co-publication of certain works. CARP Report ¶ 63. Thus, it adopted the evidence and conclusions offered by the Settling Parties and based its determination of Evelyn's and Curry's shares of the royalty fees on the Settling Parties' methodology. The CARP did so with full knowledge that the methodology had been used in the previous DART distribution proceeding and found to be "logical and consistent" by the Librarian of Congress and reviewed with approval by the United States Court of Appeals for the District of Columbia. CARP Report ¶¶ 78-79.

b. Petitions To Modify or Set Aside the Panel's Determination

1. *Evelyn's Petition*: Section 251.55(a) of the rules provides that "[a]ny party to the proceeding may file with the Librarian of Congress a petition to modify or set aside the determination of a Copyright Arbitration Royalty Panel within 14 days of the Librarian's receipt of the panel's report of its determination." 37 CFR 251.55(a). Replies to petitions to modify are due 14 days after the filing of the petitions. 37 CFR 251.55(b).

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review

of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the * * * distribution of fees." 17 U.S.C. 802(f).

Evelyn, who appeared pro se in this proceeding on behalf of herself, filed a petition to modify. Her petition attacks the Panel's report on three basic points. First, as a threshold issue, she claims that the entities comprising the Settling Parties, particularly the performing rights organizations and Gospel Music Coalition, have not properly filed claims to the DART royalties on behalf of their members. Evelyn Petition at 1-3. Second, she argues that the Panel disregarded statements and evidence offered by herself and Curry which contested and disproved the Settling Parties' findings of fact and conclusions of law. *Id.* at 4-5, 8. And third, she lists a number of perceived procedural irregularities that she claims led to disparate treatment of the individual claimants: (1) Acceptance by the Office of the Settling Parties' direct case which she asserts was not filed in accordance with the governing regulations; (2) return of her rebuttal case which was submitted during the 45-day precontroversy discovery period; and (3) failure of the CARP to request additional information from her to substantiate her claim. *Id.* at 5-6, 8.

Curry, the other individual claimant participating in this proceeding, did not file a petition to modify.

2. *Settling Parties' Reply to Evelyn Petition to Modify*: Settling Parties oppose the Evelyn petition on both procedural and substantive grounds. They contend that the petition is substantively deficient because it does not demonstrate in what way the CARP report is either arbitrary or contrary to law—the standard of review to be used by the Librarian in his review of the Panel's report. *See* 17 U.S.C. 802(f). In making this point, the Settling Parties addresses each of the legal issues raised by Evelyn.

The Settling Parties also argue that the Librarian should reject Evelyn's petition because it fails to reference applicable sections of her proposed findings of fact and conclusions of law, as required under § 251.55(a) of title 37 of the Code of Federal Regulations. They argue that failure to correctly reference her filings shows an apparent willful disregard for

the requirements of the rule and warrants dismissal of the Petition. Settling Parties' Reply at 11-12.

3. *Sufficiency of Evelyn's Petition*: Before the Register can address the issues raised by Evelyn's petition to modify the determination of the Panel, the Register must first address the Settling Parties' argument that the petition warrants dismissal for failure to comply with § 251.55(a) of the CARP regulations. That section provides that each petition must "state the reasons for modification or reversal of the panel's determination, and shall include applicable sections of the party's proposed findings of fact and conclusions of law." 37 CFR 251.55(a).

The purpose of this requirement is to enable the Register and the Librarian to locate those portions of the testimony and filings that support a party's petition. Absent a showing of bad faith, the remedy for failure to comply with the regulation is an order from the Register, directing the offending party to amend his or her petition and include the proper citations to the relevant sections of the party's proposed findings of fact and conclusions of law. *See* 62 FR 6560 (February 12, 1997).

The Settling Parties point out that Evelyn had encountered the rule in the previous proceeding to determine the distribution of the 1992-1994 DART royalty fees and argue that her "apparent willful disregard for the requirements imposed by Rule 251.55 warrants dismissal of the Petition." Settling Parties' Reply at 12.

While it is clear that Evelyn does not provide all relevant references to her proposed findings of fact and conclusions of law, she did make a good faith effort to comply with the regulation and supplied citations to the Settling Parties' Direct Case, the CARP Report and her own proposed findings of fact and conclusions of law. *See e.g.*, Evelyn Petition at pp. 2, 5, 7. Moreover, the Library will accept a less than perfectly executed petition without amendment where the record is small, and it is reasonably easy to locate the cited information in the record. *See* 62 FR 6561 (February 12, 1997). Thus, Evelyn's petition has received full consideration.

c. The Register's Review and Recommendation

The statutory criteria to be considered when deciding how to distribute the DART royalties are set forth in section 1006(c)(2) of the Copyright Act, title 17 of the United States Code. It states that a CARP may only consider "the extent to which, during the relevant period * * * each musical work was

¹This website provides public access to a comprehensive database of information regarding recording artists, albums, and songs.

distributed in the form of digital musical recordings * * * or disseminated to the public in transmissions.” In the first proceeding to determine the distribution of DART royalties, the Panel found, and the Library agreed, that the statute does not require the application of both criteria when evidence as to only one of the criteria has been presented by the parties to the proceeding. 62 FR 6561 (February 12, 1997). This determination established a precedent for the presentation of and reliance on sales data alone for the purpose of determining each claimant’s share of the royalty fees.

Evelyn argues in her petition to modify that the first proceeding did not establish a binding precedent for all future distribution proceedings, but fails to offer an alternative approach or explain why the Panel should deviate from the methodology used in the first proceeding when the record evidence parallels the prior record in its approach. Every Petition at 7. Her assertion about the precedential effect of the first proceeding is not correct. Section 802(c) requires the Panel to “act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration Panel determinations, and rulings by the Librarian of Congress under section 801(c).”

Had Evelyn offered evidence of public performances or evidence for ascertaining the scope of record sales in a different manner, the CARP could have adopted a different methodology for making the determinations. However, an assertion that she is entitled to 1% of the royalty fees in the funds to which she filed a claim is not evidence. *See* Proposed Distribution Order, Evelyn Proposed Findings of Fact and Conclusions of Law. It is merely a statement of opinion.

Evelyn party has an opportunity to present evidence to the Panel when it files the direct case. The written direct case is the very foundation of a party’s case and as such must include testimony and exhibits which, when taken together, support and prove a party’s claim. *See* Order in Docket No. 95–1 CARP DD 92–94 (dated May 9, 1996). In Evelyn’s case, she supplied only a list of her works. *See* Evelyn Direct Case, exhibit 1a–1d; CARP Report ¶ 69. Evidently, she had thought the CARP would request additional information and evidence from her at a later date. Evelyn Petition at 8; Settling Parties’ Reply at 8. While a CARP member may, in accordance with the regulations, request additional

information from a party, he or she does so at his or her own discretion. *See* 37 CFR 251.46(d). It is not the function of the Panel to search for new evidence that favors a party’s case. This is and remains each party’s prime responsibility throughout the proceeding.

In the current proceeding, the arbitrators chose not to request any additional information, evidently finding the evidence in the record sufficient upon which to make an informed decision. Because the Settling Parties offered the same type of evidence as that adopted in the prior DART distribution proceeding and neither Evelyn or Curry made a showing of changed circumstances or presented material evidence² that would justify a rejection of the Settling Parties’ evidence, the Panel’s decision to follow the precedent is neither arbitrary nor contrary to law.

Evelyn also asserts, as a threshold matter, that the performing rights organizations had no authority to file a claim on behalf of their members. The Panel discussed this issue fully in its report and found that each of the organizations and associations that comprise the Settling Parties meet the definition of “interested copyright party” and are entitled to file a claim on behalf of its members and represents their interests in a CARP proceeding. *See, supra*, discussion in Determination of the Panel. This reasoning fully complies with the Copyright Act, and therefore, the participation of the members of the Settling Parties, including the performing rights organizations, is not arbitrary.

Evelyn also asserts that Gospel Music Coalition (“GMC”) failed to file a claim and therefore, cannot be represented by the Settling Parties. This assertion is clearly erroneous. A review of the Copyright Office records shows that GMC filed claims to the 1995, 1996, 1997 and 1998 Musical Works Funds and did so in both subfunds. *See*, claim no. 7, 1995 Publishers Subfund and claim no. 8, 1995 Writers Subfund; claim no. 9, 1996 Publishers Subfund and claim no. 7, 1996 Writers Subfund; claim no. 8, 1997 Publishers Subfund and claim no. 9, 1997 Writers Subfund; claim no. 8, 1998 Publishers Subfund and claim no. 8, 1998 Writers Subfund.

Based upon the proper filing of these claims, GMC was then free to negotiate

²Evelyn claims that an increase in the number of songs for which she is making a claim constitutes changed circumstances and should alter the outcome of the CARP’s decision. Evelyn Petition at 8. However, there is no evidence in the record documenting sales of these works during the relevant period. CARP Report ¶ 69.

a settlement agreement with the other parties who filed a claim to the same funds. 17 U.S.C. 1007(a)(2). This it did. On July 2, 1999, the Copyright Office received official notification that Gospel Music Coalition had reached an agreement to settle its claims to the 1995, 1996, 1997, and 1998 Musical Works Funds with respect to the Writers and Publishers Subfunds. *See*, Comments on the existence of controversies and notice of intent to participate of Broadcast Music, Inc., the American Society of Composers, Authors & Publishers, SESAC, Inc., The Harry Fox Agency, Inc., The Songwriters Guild of America and Copyright Management, Inc. as Settling Parties, Docket No. 99–3 CARP DD 95–98, at 3. Consequently, Evelyn’s suggestion that GMC improperly reached an agreement with the Settling Parties is incorrect.

Another point Evelyn makes in her petition is that she received disparate treatment in this proceeding because of procedural irregularities. First, she argues that the Settling parties failed to submit their direct case in accordance with the CARP regulations. Section 251.45(b)(1)(i) of the rules requires that “each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period.” In this proceeding, parties were directed to deliver copies of their direct cases to all parties on November 15, 1999. Evelyn, however, received her copy of the Settling Parties’ direct case by special messenger at 3:30 a.m. on November 16, 1999, along with three additional motions.³ Evelyn Petition at 5.

The Panel’s response to this issue was incorrect as a matter of law. It stated that the CARP rules do not require that each party receive pleadings simultaneously, citing § 251.44(f). *See* CARP Report ¶ 19 n.5. The Panel failed to recognize that § 251.45(b) of the CARP rules governs the filing of a direct case and specifically requires filing of direct cases to all parties on the same day. This misinterpretation, however, does not require that the Librarian set aside the entire decision or strike the Settling Parties’ case because Evelyn never requested relief from the Copyright Office. Had Evelyn wished to contest the filing of the Settling Parties’ direct case, she had only to file a motion with the Office seeking dismissal of the

³Meanwhile, the Settling Parties had filed its direct case with the Copyright Office on November 15, 1999, in accordance with the Office’s scheduling order.

Settling Parties' case or requesting an adjustment to the discovery schedule to make up for the lost time. She chose not to file such a motion, however, because she believed that "the Copyright Office would (not) strike the case of the Settling Parties and leave only the two individual claimants in the case." Evelyn's Proposed Findings of Fact and Conclusions of Law at 3. Consequently, the Office had no reason to address the issue because Evelyn did not request any relief from the Office at the appropriate time. Furthermore, her continued involvement in the proceeding supports the Panel's conclusion that she did not suffer any undue harm because of the delay in the delivery of the direct case.

Another procedural irregularity raised by Evelyn concerns the return of her rebuttal case. She filed it with the Copyright Office on November 24, 1999, during the 45-day precontroversy discovery period. By Order, dated November 24, 1999, the Office rejected the pleading except for a single sentence which addressed a motion for a partial distribution then under consideration. The Order stated that "[n]o provision is made in the rules or the Library's scheduling order for the filing of rebuttal cases at this stage of the proceeding. Rebuttal cases, if required at all, are filed with the CARP after consideration of the written direct cases." Evelyn refiled her rebuttal case on July 28, 2000, and it was considered by the CARP at that time. Consequently, Evelyn suffered no prejudice from the Office's decision to strike her rebuttal case when it was first filed prematurely.

Evelyn makes one additional procedural challenge in her petition. She contends that the Settling parties did not provide sworn testimony to establish a universe of sales. Evelyn Petition at 8. Specifically, she objects to the inclusion of Michael Fine's prior testimony from the 1992-1994 DART distribution proceedings on the SoundScan data. This testimony established the basis for determining total record sales and record sales for Curry and Evelyn. CARP Report ¶ 32. She states that there were problems with his testimony in the 1992-1994 DART distribution proceedings but does not discuss what these problems were or why they have a bearing on the current proceeding. In any event, no problem was identified in the last proceeding concerning this testimony; thus, under the CARP rules, the Settling Parties were free to designate a portion of past records to be included in their direct case. 37 CFR 251.43. Had the Panel not allowed the incorporation of Fine's past testimony, it would have acted contrary

to the law, unless it had reason to strike the testimony for good cause shown.

Evelyn's final challenge focuses on the Settling Parties' methodology. She, like Curry before her in the 1992-1994 DART distribution proceeding, objects to the use of a methodology that only requires a showing of the number of record sales for the individual claimants. She contends that no claim can be termed a "de minimus claim" until it is measured against the entitlement of others. Evelyn Petition at 3. In response, the Panel noted that the courts have repudiated as wasteful a requirement that all claimants in a given distribution proceeding prove their entitlement through the presentation of detailed data for every individual work. CARP Report ¶ 76. In *National Association of Broadcaster v. Copyright Royalty Tribunal*, 772 F.2d 922, 939 (D.C. Cir. 1985), the case cited by the Panel in its report, the court wisely noted that to do otherwise would effectively eliminate the likelihood of settlements because a single claimant—no matter how modest that claimant's likely share under even the most sanguine review—could choose not to settle with the other claimants and require a full hearing on all claims, even those not in controversy.

For all the reasons set forth in the prior discussion, the Register concludes that the Panel did not act arbitrarily or contrary to the provisions of the Copyright Act in determining the value of Curry's and Evelyn's DART claims and recommends that the Librarian adopt without amendment the Panel's Report and recommendation for the allocation of the 1995, 1997 and 1998 Musical Works Funds.

Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty panel concerning the distribution of the 1995, 1997 and 1998 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order announcing the allocation of the royalty fees in the 1995, 1997 and 1998 Musical Works Funds.

Wherefore, it is ordered that the royalty fees in the 1995, 1997 and 1998 Musical Works Funds shall be distributed according to the following percentages:

	1995	
	Writers (%)	Publishers (%)
Curry	0.001966	0.001966
Evelyn	0.000614	N/A
Settling parties	99.997420	99.998034
Total	100.00	100.00

	1997	
	Writers (%)	Publishers (%)
Curry	0.001027	0.001027
Evelyn	0.000130	N/A
Settling parties	99.998843	99.998973
Total	100.00	100.00

	1998	
	Writers (%)	Publishers (%)
Curry	N/A	N/A
Evelyn	0.000144	N/A
Settling parties	99.999856	100.00
Total	100.00	100.00

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

Dated: January 30, 2001.

Marybeth Peters,
Register of Copyrights.

Approved by:

James H. Billington,
The Librarian of Congress.

[FR Doc. 01-3142 Filed 2-6-01; 8:45 am]

BILLING CODE 1410-33-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Privacy Act of 1974; Transfer of Records

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of transfer of records subject to the Privacy Act to the National Archives.

SUMMARY: Records retrievable by personal identifiers which are transferred to the National Archives of the United States are exempt from most provisions of the Privacy Act of 1974 (5 U.S.C. 552a) except for publication of a notice in the **Federal Register**. NARA publishes a notice of the records newly

APPENDIX 8

NOV 9 2000

COPYRIGHT ARBITRATION ROYALTY PANEL

**GENERAL COUNSEL
OF COPYRIGHT**

In the Matter of:)
)
Distribution of DART Royalty Funds)
)
For 1995, 1996, 1997 and 1998)

Docket No. 99-3 CARP DD 95-98

THE CLAIMANTS

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

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

Alicia Carolyn Evelyn

REPORT OF THE ARBITRATION PANEL

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

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

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

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

BACKGROUND

A. The Audio Home Recording Act of 1992.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. On July 3, 2000, Mr. Curry revised the claim in his direct case to be 1% of the Writers Subfund and 1% of the Publishers Subfund of the Musical Works Fund. Mr. Curry stated: "I am claiming this percent because I am one person and believe the lowest dominator in my case is 1 (one)" *See* Revision of Claim in Direct Case of Eugene Curry in Docket No. 99-3 CARP DD 95-98 (July 3, 2000) ("Revision of Claim of E. Curry"). On July 27, 2000, Ms. Evelyn filed a rebuttal case, which consisted in large part of a document dated November 21, 1999, previously submitted to and rejected by the Office as inappropriate under Office rules. *See* Order in Docket No. 99-3 DART DD 95-98 (November 24, 1999); *see also* Rebuttal Case of Alicia Carolyn Evelyn in Docket No. 99-3 CARP DD 95-98 (July 27, 2000) ("Rebuttal Case of A. Evelyn"). In her rebuttal case, Ms. Evelyn revised the claim in her direct case to 1% of the Writers Subfund of the Musical Works Fund for the years 1995, 1996, and 1998. *See* Addendum to Rebuttal Case of A. Evelyn.

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

34. Based on his analysis of SoundScan data, Mr. Fine concluded that apart from “a relatively small number of sales” attributable to Mr. Curry and “minimal sales” attributable to Ms. Evelyn, “100% of the remaining record sales should be attributable to the hundreds of thousands of songwriters and music publishers represented by the Settling Parties.” Fine Test. at ¶8.⁸

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

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

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

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

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

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

CHART A

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

Id. at ¶8.

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

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

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

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

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

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

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

CHART B

Album Title (s) = Single	Artist	Song Title
Burnin=	P. Labelle	Somebody Loves You Baby
Burnin=	P. Labelle	Burnin=
This Christmas	P. Labelle	Born In A Manger
This Christmas	P. Labelle	O Holy Night
Patti Labelle Live	P. Labelle	Somebody Loves You Baby
Gems	P. Labelle	If I Didn't Have You
Put Love To Work	Wooten Brothers	Hasty Decisions

Smith Test. at ¶ 13.

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

CHART C

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

Smith Test. at ¶ 13.

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

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

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

CHART D

Song Title	Co-author Share	Co-publisher Share
Somebody Loves You Baby	50%	33.33%
Burnin-	50%	33.33%
Born in a Manager	25%	0%
O Holy Night	10% ¹¹	2.5%
If I Didn't Have You	50%	50%
Hasty Decision	50%	50%

Id.

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

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

CHART E

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

Id.

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

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

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

CHART F

Album Title (s) = Single	Artist	Song Title	Total Sales in Year	
			1995	1997
Somebody Loves You Baby (s)	Patti Labelle	Somebody Loves You Baby	14	-0-
Live!	Patti Labelle	Somebody Loves You Baby	25,521	18,676
Burnin-	Patti Labelle	Somebody Loves You Baby	11,105	6,300
Put Love To Work	Wooten Brothers	Hasty Decisions	108	14
Gems	Patti Labelle	If I Didn't Have You	55,282	9,703
This Christmas	Patti Labelle	Born In A Manger	9,953	13,651
This Christmas	Patti Labelle	O Holy Night	9,953	13,651
Burnin-	Patti Labelle	Burnin-	11,105	6,300
Total Sales of Titles Credited to Eugene "Lambchops" Curry			123,042	68,295

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

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

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

CHART G

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1995-----	6,257,292,898
1997-----	6,651,309,857
1998-----	7,391,404,864

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

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

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

D. The Evidence Establishes That Mr. Curry/Tajai Music and Ms. Evelyn are Entitled to No More Than 0,001966% of Both the Writers and Publishers Subfunds for 1995 and 0.001027% of Both the Writers and Publishers Subfunds for 1997.¹⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALLOCATION

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

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

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

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

Respectfully submitted,

Arbitration Panel



Cheryl I. Niro
Chairperson



John B. Farmakides
Arbitrator



Harold Himmelman
Arbitrator

Dated: November 9, 2000

APPENDIX 9

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1117

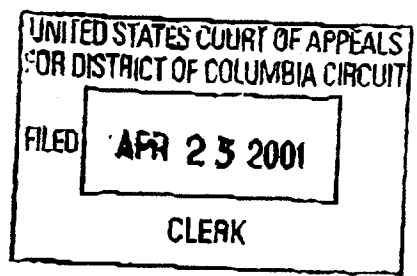
September Term, 2000

Alicia Carolyn Evelyn,
Petitioner

v.

Librarian of Congress,
Respondent

Filed On:



ORDER

Upon consideration of petitioner's motion to dismiss petition for review , it is

ORDERED that the motion be granted and this case is hereby dismissed.

The Clerk is directed to transmit forthwith to the respondent a certified copy of this order in lieu of formal mandate.

FOR THE COURT:

Mark J. Langer, Clerk

BY: *Robert A. Bonner*

Robert A. Bonner
Deputy Clerk

A True copy:

United States Court of Appeals
for the District of Columbia Circuit
By: *[Signature]* Deputy Clerk

FILE COPY


IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALICIA CAROLYN EVELYN, PETITIONER)	NO. 01-1117
v.)	PETITION FOR REVIEW OF THE ORDER FOR
THE LIBRARIAN OF CONGRESS,)	DISTRIBUTION OF 1995, 1996, 1997, AND
RESPONDENT)	1998 DIGITAL AUDIO RECORDING TECHNOLO-
)	GY ROYALTIES
)	
)	
)	

MOTION FOR VOLUNTARY DISMISSAL OF EVELYN'S PETITION FOR
REVIEW OF THE ORDER FOR DISTRIBUTION OF 1995, 1996, 1997,
AND 1998 DIGITAL AUDIO RECORDING TECHNOLOGY ROYALTIES

UNDERSIGNED CONTACTED COUNSEL FOR THE LIBRARIAN AND WAS ADVISED BY MARK W. PENNAK, ESQ., THAT THE GOVERNMENT HAS NO OPPOSITION TO HER MOTION TO DISMISS THE PETITION, WITH EACH PARTY TO BEAR ITS OWN COSTS, UNDER RULE 42. PETITIONER NOW FILES THIS MOTION REQUESTING DISMISSAL OF HER PETITION FOR REVIEW OF THE LIBRARIAN'S ORDER.

RESPECTFULLY SUBMITTED,


ALICIA CAROLYN EVELYN
PETITIONER, PRO SE
10 HIGHLAND AVENUE
BINGHAMTON, NEW YORK 13905
TEL.: (607) 797-2286

April 12, 2001

APPENDIX 10



In the Matter of

Distribution of 1999, 2000 and 2001
Digital Audio Recording Funds

Docket No. 2002-6 CARP DD 99-01

LIBRARY
OF
CONGRESS

ORDER

COPYRIGHT
OFFICE

On October 21, 2002, the Library of Congress issued a precontroversy discovery scheduling Order in the above-captioned proceeding. Order in Docket No. 2002-6 CARP DD 99-01 (October 21, 2002). The Library announced that written direct cases—the essential evidentiary filing in every CARP proceeding—must be filed on or before January 15, 2003. The Library specified that “[e]ach party in this proceeding who has filed a Notice of Intent to Participate must file a written direct case on the date prescribed above. Failure to submit a timely filed written direct case will result in dismissal of that party’s claim.” Order at 3.

Copyright
Arbitration
Royalty
Panels

Alicia Carolyn Evelyn, who filed a Notice of Intent to Participate in CARP proceedings in this docket, failed to file a written direct case. On January 21, 2003, the Library contacted Ms. Evelyn by telephone and was informed that she would not be filing a written direct case and understood the consequences of her inaction. On that same day, the Library issued an Order directing Ms. Evelyn to show cause in writing by January 24, 2003, as to why her royalty claims in this proceeding should not be dismissed. Order in Docket No. 2002-6 CARP DD 99-01 (January 21, 2003). Ms. Evelyn did not respond to the Order.

P.O. Box 70977
Southwest
Station
Washington
D.C. 20024

Wherefore, **IT IS ORDERED** that the claims of Alicia Carolyn Evelyn for royalties in the above-captioned proceeding are **DISMISSED WITH PREJUDICE**. **IT IS FURTHER ORDERED** that the precontroversy discovery schedule in this proceeding **IS VACATED** and that further CARP proceedings **ARE TERMINATED**.

SO RECOMMENDED.

Telephone:
(202)707-8380

Marybeth Peters

Marybeth Peters
Register of Copyrights

Facsimile:
(202)252-3423

SO ORDERED.

James H. Billington

Dr. James H. Billington
Librarian of Congress

DATED: January 31, 2003

APPENDIX 11

UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of }
 }
Distribution of 2002, 2003 and 2004 } Docket No. 2006-5 CRB DD 2002-2004
Digital Audio Recording Funds }
 }
_____ }

ORDER GRANTING MOTION TO DISMISS
CLAIMS OF YVONNE RENEE DAVIS

On June 8, 2009, the Copyright Royalty Judges (“Judges”) received a motion from Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., and the Harry Fox Agency (collectively, the “Settling Parties”) seeking to dismiss the claims of Yvonne Renee Davis to royalties in the above-captioned proceeding. In support of their motion, the Settling Parties submit that Ms. Davis failed to submit a written direct statement in contravention of the Order dated February 23, 2009 in this proceeding, and 37 C.F.R. § 351.4(a) of the Judges’ rules. No opposition to this motion was filed.

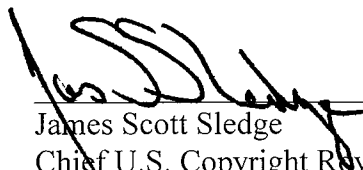
Section 351.4(a) of the Judges’ rules provides:

All parties who have filed a petition to participate in the hearing must file a written direct statement. The deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period....

37 C.F.R. § 351.4(a). By Order dated February 23, 2009, the Judges established the filing deadline for this proceeding as June 1, 2009, stating that “[w]ritten direct statements **MUST** be in the possession of the Board by 3 p.m. on Monday, June 1, 2009.” *Order Setting Deadline and Procedures for the Filing of Written Direct Statements and the Announcement of the Discovery Period*, at 1 (February 23, 2009)(emphasis in original). Written direct statements are essential to the prosecution of a rate adjustment or royalty claim, and the failure to submit one is grounds for dismissal. *See, Order* in Docket No. 2002-6 CARP DD 99-01 (January 31, 2003). As Ms. Davis has failed to submit a written direct statement, and has not offered any reasons for the failure to do so, her claims must be dismissed.

Wherefore, **IT IS ORDERED** that the royalty claims of Yvonne Renee Davis for the years set forth in the above-captioned proceeding **ARE DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED** that the schedule set forth in the February 23, 2009 order **IS VACATED.**

SO ORDERED.

A handwritten signature in black ink, appearing to read "James Scott Sledge", is written over a horizontal line.

James Scott Sledge
Chief U.S. Copyright Royalty Judge

DATED: June 24, 2009